

After the Referendum

Options For a Constitutional Convention

Alan Renwick



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*OPTIONS FOR A
CONSTITUTIONAL CONVENTION*

Alan Renwick

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About the Author

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Summary

Whatever its result, the Scottish independence referendum on 18 September 2014 will raise important constitutional questions. If Scotland votes for independence, the new country will need a new constitution and the rest of the UK will need to rethink its own internal power structures. If, as currently appears more likely, Scottish voters choose to remain in the United Kingdom, there will still be much pressure to rethink the devolution settlement: Scotland and Wales will in any case receive further powers over the coming years, and this will only heighten existing tensions within the structure of the Union. The positive case for a national conversation on how to revitalize the Union will be strong.

This paper sets out how a constitutional convention for the UK might best be designed. It is divided into four parts. *Part 1* sets out the key issues that need to be thought about when a process of constitutional design or reform is being devised. *Part 2* explores the main options through detailed case studies from the UK and around the world. *Part 3* sets out criteria by which the options ought to be judged. And *Part 4* draws out implications and offers recommendations on how a constitutional reform process in the UK might best be structured.

Part 1: Constitution-Making: The Building Blocks

Part 1 sets out six key issues that need to be thought about when a process of constitutional design or reform is being devised:

1. What is the purpose of this process? Is a wholly new constitution being devised, is the existing constitution being comprehensively reviewed, or is the review restricted to specific aspects?
2. Who is represented in this process? It should be taken as a given that the people in a democracy are sovereign and their representation is therefore essential. But who are “the people”? Are there particular groups that especially deserve or require representation? And to what extent is there a case for following the non-representative principle that expertise should count?
3. What is the basic structure of the body or set of bodies that debates the options and makes recommendations? Six possible pure structures are identified. At the least inclusive end of the spectrum are expert commissions. These are followed by negotiations among political leaders, indirectly elected assemblies, and civil society conventions. Directly elected assemblies, as their name suggests, integrate citizens more directly into the process. Citizens’ assemblies go still further by removing the intermediation of politicians. Finally, these pure models can be mixed, either by establishing constitution-making bodies with mixed memberships or by creating processes that incorporate multiple bodies of differing composition.
4. Who can influence the constitution-making body’s deliberations? In particular, who sets its agenda and with whom does it consult, on what basis, through the course of its work?
5. What are the body’s operational procedures? Most importantly, how does it make decisions: by simple majority, qualified majority, consensus, or some other principle?

6. What happens once the constitution-making body has made its recommendations? Does that body have the capacity to enact its recommendations into law itself? Does it merely recommend to parliament? Is a referendum held? Do the recommendations automatically go to a referendum or can parliament decide after the recommendations have been made?

Part 2: Constitution-Making around the World

Part 2 takes the basic structures identified in Part 1 and explores them in further detail through particular examples from the UK and around the world. The basic structures and the cases used to explore them are the following:

1. *expert commission*: the Kilbrandon Commission of 1969–73 and the more recent Richard, Calman, and Silk commissions, all tasked with exploring issues to do with devolution;
2. *negotiation among leaders*: the negotiations in Canada that led to the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992, both of which sought (unsuccessfully) to resolve the constitutional position of Quebec within the federation; and the negotiations in Northern Ireland that led to the signing of the Belfast Agreement in 1998;
3. *indirectly elected assembly*: the Convention on the Future of Europe of 2002–3, which drafted the Constitution for Europe that was rejected at referendum by voters in France and the Netherlands and subsequently abandoned (though important elements were incorporated later into the Lisbon Treaty of 2007);

4. *civil society convention*: the Scottish Constitutional Convention of 1989–95, which paved the way for the devolution settlement in Scotland (and, indirectly, in Wales) that was enacted by the Blair government following its election in 1997;
5. *directly elected constituent assembly*: Iceland’s Constitutional Council of 2011 – the only example in the world of a pure elected constituent assembly operating in parallel to the regular legislature in an existing, consolidated democratic polity;
6. *citizens’ assembly*: the assemblies in British Columbia in 2005, the Netherlands in 2006, and Ontario in 2006–7, all of which comprised ordinary citizens chosen at random (though those initially selected could choose whether to accept the invitation or not), and all of which were asked to debate possible changes to legislative electoral systems;
7. *mixed assembly*: the Australian Constitutional Convention of 1998, of whose members half were directly elected and half were appointed by the parties or the government; and Ireland’s Constitutional Convention of 2013–14, two thirds of whose members were ordinary citizens chosen on the model of the citizens’ assemblies, while one third were politicians chosen by their parties.

For each of these case studies, the basic story of the case is set out and an assessment of its operation is offered.

Part 3: How Should the Options be Judged?

Part 3 considers the most important criteria that should be used in order to judge the various options for the design of a constitution-making process. Five such criteria are proposed:

1. the process should foster a debate that is based upon *reason rather than interest or passion*: that is, it should be designed to make it more likely that participants will ground their positions in considerations of general principle rather than either vested interest or emotional reaction;
2. *this reasoning should be of high quality*: participants should have a good understanding of the options available and the strengths and weaknesses that each may reasonably be considered to have;
3. *deliberations over the constitution should be inclusive*: in a democratic society, it is essential to ensure that all parts of that society are fairly represented and that their participation should be as active as possible;
4. constitution-making processes should be designed to maximize *public legitimacy*: members of the public should have confidence in the processes that are established and the recommendations that are produced;
5. constitution-making processes should also be designed to achieve *political legitimacy*: politicians in positions of power (in both government and opposition) should feel connected to the process and bound to take the recommendations of a constitution-making body seriously.

Part 4: Designs for Constitution-Making in the UK

The final part of the paper draws together the lessons from the preceding parts for the design of a constitution-making process in the UK. It is structured around the six key aspects of such a process that were identified in Part 1.

1. It is not for this paper to recommend the basic *purposes of a constitution-making process* in the UK: that will be decided,

in the first instance, by Scottish voters in the referendum in September and, subsequently, by democratically elected politicians. In order to focus the discussion, the remainder of Part 4 concentrates on what currently appears to be the most likely referendum outcome: a vote against Scottish independence. In that scenario, the purpose of constitution-making will be to review and revivify the structure of the Union.

2. The core body that deliberates options and makes recommendations *should represent the people of the UK as a whole in proportion to population*. It should be designed to ensure that politicians feel directly included as well.
3. The *basic structure* of this body should be modelled on the recent Irish Constitutional Convention: that is, a *mixed model* should be adopted, including a majority of ordinary citizens chosen at random (though with the opportunity for those who are initially invited to choose whether to accept the invitation) and a minority of politicians chosen by their parties. The evidence that we have suggests that such a body could cope with the demands that would be put upon it in the UK context and that it would fulfil the five criteria set out in Part 3 better than any other option.
4. The *agenda* of this body should be set flexibly, so that it can consider not only what the various units of government should be within the UK and what powers they should have, but also any other aspects of the constitution that may be affected by decisions on the structure of the Union. The constitutional convention should *consult widely* in the course of its deliberations. In particular, there is a strong case for also establishing short-lived deliberative fora in particular regions that can offer guidance to the main convention.

5. The *operational procedures of the convention* should be decided so far as possible by the convention itself. Early on in its deliberations, it should seek broad internal consensus on whether its decisions will be made by simple majority or by qualified majority across regions or by less formalized procedures. A UK constitutional convention would have a complex agenda. It would need time to work through this agenda and it would need to draw on expert guidance as well as inclusive consultation. Implications for the duration of the convention, the pattern of its meetings, and the compensation given to members for their time would need to be thought through carefully.
6. The legislation establishing the convention should also *commit the government to putting the convention's proposals to a referendum*. This referendum might include one or more questions, depending on the convention's recommendations. These questions should be worded following the advice of the Electoral Commission. The decision threshold in this referendum – in particular, whether majorities should be required in the nations and regions as well as across the UK as a whole – should be determined by the constitutional convention itself.

A constitutional convention of the form proposed would be unique and there is no guarantee that it would succeed. Nevertheless, all the evidence that we have suggests it would have the best prospects of fostering a serious and inclusive discussion of the future of the Union that would engage public opinion, draw in the political establishment, revitalize the structure of the Union, and revive the health of the democratic system. These would be very considerable gains if they can be realized.

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Introduction

Scotland votes later this year on whether to break ties with the rest of the United Kingdom and become an independent country. Whether Scots vote “Yes” or “No”, the referendum will generate a need for careful thought about major constitutional questions. In the event of a “Yes” vote, Scotland will need to draft its own new constitutional structure; there will also be strong reason for the remainder of the UK to consider implications for its own governance. Even in the case of a “No” vote, the status quo will not be an option. Further powers – particularly, tax-raising powers – will devolve to Scotland in the coming years under the Scotland Act of 2012. Pressure to move further to some form of “devo-max” will be strong. Additional devolution to Wales is likely too, following the recent reports of the Silk Commission. In light of all of this, the West Lothian Question will increasingly demand an answer, with deep implications for the governance of England. The time will be opportune for encouraging a national conversation about the future form of the Union.

How should debate about such matters be structured? One approach would simply be to follow the normal legislative path, preceded by the usual green and white papers. But most would agree that such fundamental issues should be decided through more careful and more inclusive procedures. Yet there are many options here – ranging from an expert commission to a full-blown elected constituent assembly. And several polities – including two Canadian states, the Netherlands, Iceland, and Ireland – have recently experimented with innovative

institutions that bring ordinary citizens directly into the deliberative process.

This paper sets out the issues that need to be thought about in designing a process of constitutional deliberation, the options that are available, and the factors that should be taken into account when assessing the options. It is divided into four parts. The first part looks at the building blocks of a constitution-making process: what are the many aspects of such a process about which choices need to be made? The second part describes various recent cases of constitution-making in a variety of countries around the world. Part 3 considers how we should go about judging the various options: what our criteria should be and what, in general terms, will need to be taken into account when applying those criteria. Part 4 relates all of these points back to the UK: what would be the requisites of constitution-making in the UK and what do these imply about how a constitution-making process might best be designed?

The form that a constitutional convention should best take will depend on the result of the Scottish referendum. The paper develops specific proposals for the convention that should be assembled in the event of a “No” vote. It concludes that such a convention should follow in its composition the model of the recently concluded Irish Constitutional Convention: it should comprise a mixture of ordinary citizens selected at random and politicians chosen by their parties. This form engages the electorate directly and maximizes the chances that the convention’s conclusions will be unbiased by vested interests, grounded in open deliberation, and taken seriously by both voters and politicians. This convention should have a broad remit to discuss the structure of the union and its broader implications. Its deliberations should be inclusive, drawing on consultations with experts, interested groups, and ordinary citizens around

the country. Its recommendations should be put to the voters in a referendum.

We cannot know for certain how such a convention would operate or even whether it would succeed. But it does offer the possibility of giving new life and coherence to the structure of the Union and of revivifying citizens' engagement with the character of our democratic political system.

Part 1: Constitution-Making: The Building Blocks

Our first task is to identify the aspects of the constitution-making process that need to be thought about and the principal options that exist with respect to each of these aspects. Of course, the aspects we might consider are numerous and the possibilities for innovation in design almost infinite. In what follows, however, we concentrate on six key areas of choice. The first is perhaps the most fundamental: what is the purpose of instituting a constitution-making process in the first place? Four points then concentrate on the design of the body or set of bodies charged with devising constitutional proposals. The final point looks at how proposals are translated into final decisions: who is involved and what roles do they play?

1.1 What are the Purposes of the Constitution-Making Process?

Constitution-making processes can have three different sorts of purpose:

1. *Specific constitutional reform.* The purpose here is to reform some specific aspect of the constitution. The Canadian citizens' assemblies that will be described in Part 2, for example, were charged with the specific task of proposing reforms to the provincial electoral system – an aspect of the institutional structure that is often not formally constitutionalized, but that nevertheless has deep

implications for the distribution of power and the structure of governance. An ongoing Constitutional Convention in Ireland was tasked with reviewing constitutional arrangements on eight specific points.

2. *General constitutional review.* Alternatively, a constitution-making body may be asked to conduct a general review of existing constitutional arrangements and make recommendations for reform across the board. In Sweden in the 1950s, for example, the perception developed that the constitutional structure had become rather anachronistic, and a parliamentary committee was established to look into possible reforms. (In fact, the committee concluded that the country would best be served by a wholly new constitutional text, leading eventually to the new constitution of 1974.)
3. *New constitutional design.* Most fundamentally, procedures can be established to create a wholly new constitutional system. Such may occur at the founding of a new state – as, most famously, in the Constitutional Convention of the United States, established in Philadelphia in 1787 – or when an existing state undergoes major regime change – as in post-Franco Spain in the late 1970s, Brazil following the withdrawal of the military in the mid-1980s, and many post-communist states in the early 1990s.

A “Yes” vote in Scotland’s independence referendum would require constitution-making in Scotland of the third type: the Scottish Government proposes that a wholly new written constitution should be devised.¹

1 Scottish Government, *Scotland’s Future: From the Referendum to Independence and a Written Constitution*, 5 February 2013, available at www.scotland.gov.uk/Publications/2013/02/8079, accessed 5 January 2014.

In the event of a “No” vote, by contrast, the purposes of constitution-making would most likely belong to the first type: while some politicians and activists would press for a general review of the UK constitution, more likely would be a procedure focused solely on the structure of the union. Nevertheless, constitution-making processes belonging to the first type can vary widely in terms of the extent and complexity of the issues they raise. Devising a new electoral system, for example, while having some knock-on implications, is rather self-contained. By contrast, working out the distribution of power and structure of relations among the various parts of the UK would involve many more interlocking issues.

The nature of the purposes of constitution-making will have implications for the appropriate design of constitution-making processes. The deeper and wider any changes extend, the greater may be the democratic need for direct popular involvement. The greater also, however, may be the complexity of the issues in hand, leading to questions about whether the general public have the capacity to make appropriately informed decisions. Such conundrums as this will be explored further in Parts 3 and 4.

1.2 Who is Represented?

The Constitution of the United States famously starts with the words “We the People”. The democratic answer to the question of who should be represented in the process of constitutional deliberation is that the people who will live under the new or revised constitutional arrangements should be represented. And, indeed, this is a very common arrangement: many constitution-making processes are conducted by bodies that (in a variety of ways, explored in the next subsection) represent the citizens of the country or province affected.

But often the situation is a little more complex than that. Three further possibilities need to be borne in mind.

First, who are the “people”? Where a relatively homogeneous society such as Ireland debates a national issue such as the abolition of the Senate, it is reasonable that the people should be the (adult) citizenry as a whole. If, by contrast, the polity is multi-national and the purpose of constitution-making is the delineation of relations among the nations, is it more appropriate that each nation should gain its own representation? If so, in what proportions should each be represented? Should each nation be represented by an equal delegation, irrespective of the nations’ relative sizes, as are the countries of the European Union during intergovernmental negotiations? Should states be represented in proportion to population, as were the German Länder in the Parliamentary Council that wrote the Basic Law in 1948–9? Or should some middle way be pursued?

Second, while the people may hold ultimate sovereignty, greater everyday power typically lies in the hands of politicians and existing institutions, and at least the acquiescence of those politicians and institutions is likely to be required if any change is to be implemented. If only as an expedient, therefore, representation of existing power-holders may be important if any constitution-making process is to succeed. Recent experience in Canada and Iceland – explored in detail in Part 2 – suggests that politicians may be more likely to disavow reform proposals where they have been excluded from the process of devising those proposals.

Third, while few would deny today that significant constitutional reform processes should involve a large slice of popular representation, there is a good argument for saying they should also encompass an element that is not representative at all. Constitution-

making is both complex and consequential. It should therefore be shaped by relevant expertise. Indeed, many of the key bodies that have devised proposals for devolution in the UK – the Kilbrandon Commission in the 1970s and the Richard, Calman, and Silk Commissions since 2000 – have been only loosely representative bodies: their members have been chosen, in addition, for their ability to form considered judgements on the basis of large bodies of fresh evidence. Recent popular assemblies, such as those in Canada, Iceland, and Ireland, have operated alongside mechanisms designed to ensure that expert voices were heard.

1.3 What Basic Structures are Available?

Even once the issue of *who* is to be represented has been resolved, the question of *how* they should be represented has many possible answers. Six basic types of composition can be identified among constitution-making bodies, though the boundaries between these are in practice sometimes blurred. A seventh category of mixed arrangements can also be added.

1. *Expert commissions.* Most major constitutional reforms in the UK in recent decades have been preceded by detailed investigation by a commission of individuals selected, at least in part, for their expertise or their capacity to develop expertise. As noted above, the Kilbrandon, Richard, Calman, and Silk Commissions have all examined devolution proposals – though the devolved assemblies created after 1997 were not the product of such processes. Similar commissions addressing other topics have included the Jenkins Commission on electoral reform and the Wakeham Commission on the future of the House of Lords.
2. *Negotiations among political leaders.* Constitution-making sometimes occurs through bargaining between negotiating

teams from various political parties, provinces or other groupings. Such negotiations can take many forms, as can best be summed up through a number of examples.

In Eastern Europe following the collapse of communism, most especially in Poland and Hungary, new constitutional structures were devised at roundtable negotiations between representatives of the old regimes and of the dissident movements that had opposed them. These fora combined such limited popular representation as was possible before elections were held with unavoidable representation for those who still held the reins of power.

In Canada, major negotiations over the structure of the federation and the question of Quebec's continuing membership were conducted in the 1980s and early 1990s through negotiations among the provincial premiers and the federal prime minister. These premiers could claim to represent the voters who had elected them, although, inevitably, the question also frequently arose of whether in fact they also represented their own institutional and partisan interests.

In Sweden, the perceived need for constitutional review that has already been mentioned led in 1954 to the establishment of a parliamentary committee charged with devising reform proposals. In practice, the committee functioned as a forum for building consensus among the various parliamentary parties. This proved difficult and it was not until 1974 that the review process was finally concluded and the new constitution enacted.²

2 See Olof Ruin, "Sweden: The New Constitution (1974) and the Tradition of Consensual Politics", in Vernon Bogdanor (ed.), *Constitutions in Democratic Politics* (Aldershot: Ashgate, 1988), pp. 309–27.

In Northern Ireland, the Belfast Agreement of 1998 was negotiated between the British and Irish governments and the representatives of the political parties. This structure of indirect representation may have been crucial to acceptance of the proposals that were drawn up and to the broader success of the peace process.

3. *Appointed or indirectly elected political conventions.* This category includes constitution-making bodies where the emphasis (at least in theory) is more upon deliberation than upon negotiation. The Philadelphia Convention of 1787 belongs to this category: the members were (in almost all cases) elected by their respective state legislatures. Another example is the much more recent Convention on the Future of Europe, which devised a Constitution for Europe in 2002–3: this Convention was designed to move away from the structure of intergovernmental negotiations in order to widen the democratic conversation and ease resolution of differences. Most of its members were thus chosen from the parliaments, rather than the governments, of the various member states and accession states.³
4. *Civil society conventions.* Citizens can be represented by groups from civil society as well as by politicians in order to seek consensus across politically active society. This model is rarely used as the primary organizing principle of constitution-making processes. Indeed, the closest example is the unofficial Scottish Constitutional Convention of 1989–95. This body included representatives of the churches, trade unions, business, local authorities, and ethnic minorities, as well as those political parties that agreed to take part.

³ See the Laeken Declaration on the Future of the European Union, <http://european-convention.eu.int/pdf/1knen.pdf>, last accessed 26 January 2014.

The key decisions were, however, dominated by the two participating parties – Labour and the Liberal Democrats.

5. *Directly elected constituent assemblies.* Directly elected constituent assemblies are commonly used where new constitutions need to be created following independence – as in India in 1947 – or in the course of (attempted) democratic transition – as, for example, in Spain in 1977–8, Bulgaria in 1990–1, and Tunisia since 2011. Such assemblies are, however, very rarely used in existing democratic contexts: if an existing legislature is to take on constituent functions, it is likely to establish a committee to conduct the detailed work, as in the Swedish case described above, while the rest of the assembly gets on with its own regular business; and politicians may be reluctant to set up a separate constituent assembly lest it develop as a rival power centre.

In fact, the only example in an established democracy of a constituent assembly distinct from the regular legislature that was composed entirely by direct election appears to be the Constitutional Council elected in Iceland in 2010 in the wake of the banking crisis and consequent collapse of public confidence in the political system. This was a highly unusual assembly, in that only independents ran for election. The intention was to create an assembly responsive to popular concerns and free of the institutional interests of the established power elite.

6. *Citizens' assemblies.* The major innovation in constitution-making processes in recent years has been the creation of citizens' assemblies: assemblies comprising ordinary citizens selected at random from among those who responded positively to an invitation to take part. Such assemblies have been used in the Canadian provinces of British Columbia and Ontario and in the Netherlands, in

all cases to debate a possible new electoral system for their polity. Ireland's ongoing Constitutional Convention is based in part on this model and is introduced as one of the mixed models in the point below. Iceland's recent constitutional reform process also incorporated a similar – though limited – element.

7. *Mixed models.* Finally, it is possible for the various pure types that have been identified so far to be combined in a wide variety of ways. The Irish Constitutional Convention is one example, including both randomly selected citizens and politicians. Iceland provides another recent example: the elected Constitutional Council was preceded by a one-off meeting of randomly selected citizens. A third example comes from Australia: the Constitutional Convention of 1998 was half directly elected and half appointed. Furthermore, many cases combine one or more of the representative elements with an expert commission or advisory structure.

1.4 Who can Influence the Constitution-Making Body's Deliberations?

This question relates to two main issues: first, who sets the constitution-making body's agenda; second, are there mechanisms for outside actors to influence the body's deliberations in respect of these agenda items?

The question of agenda control is closely connected with that of the purposes of the constitution-making process, already discussed. Even once the basic purpose has been determined, there can be much variation in the degree of freedom that a constitution-making body is given. Criteria by which alternatives are to be judged may be specified – as they were for the Jenkins

Commission, which investigated electoral reform for the UK House of Commons in 1997–8. Areas of focus may be more or less tightly delineated: an inquiry into electoral reform, for example, may be left to range broadly, thus potentially including such matters as the size of the elected chamber, or restricted to specified aspects of electoral structure.

At the same time, designers of the constitution-making process should be aware that such a process, once initiated, may be harder to control than they expect. In Ireland, for example, the Constitutional Convention was given eight tightly specified areas of focus, but it has not always respected the boundaries set for it. It was asked, for example, to consider whether the voting age should be lowered to seventeen, but chose to recommend a reduction to sixteen.

With regard to influence over subsequent deliberations, all constitution-making bodies are likely to invite submissions and hear from expert witnesses. Such procedures can be structured in many ways and some bodies have been highly active in seeking public engagement. Iceland's proposed new constitution has sometimes been (inaccurately) labelled as “crowd-sourced” because of the Constitutional Council's extensive use of social media to stimulate debate on its preliminary ideas. South Africa's Constituent Assembly attracted two million submissions during its deliberations in the mid-1990s.⁴

1.5 What are the Constitution-Making Body's Operational Procedures?

Many aspects of operational procedure may be important. This is not the place to go into depth on such matters. We may note

⁴ Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace Special Report 107 (July 2003), p. 7.

in passing, however, such issues as how members are able to make proposals, how proposals are debated, whether the goal is that decision-making should be by consensus or majority, what voting procedures are used, and what support any body has in terms of research staff and resources to commission research or engage in field trips. Some of these matters, though seemingly technical, can be of enormous significance. Unanimous decision-making, for example, was indispensable in the success of the Northern Ireland peace process but would be inconceivable in a large elected assembly or citizens' assembly.

1.6 What Happens to the Proposals that are Made?

The final building block of the constitution-making process concerns what happens once specific proposals for new constitutional arrangements have been made. One possibility is that the proposals are simply sent to the legislature for normal processes of scrutiny and decision. Another possibility is that the legislature be required to act according to special procedures: using, for example, a two-thirds majority rule or requiring successive majorities on either side of a general election. A third is that a constituent assembly itself be given the power to pass final decisions.

It seems inconceivable in the UK that Parliament would cede law-making authority to a rival constituent assembly: indeed, no other legislature in an established democracy has ever done so. Nor is there any precedent for special parliamentary adoption procedures in the UK. The precedent that does exist, however, is that referendums should be used alongside parliamentary procedures to settle major constitutional questions. Referendums were used to decide on devolution to Scotland and Wales in 1979 and 1997; further referendums on devolution proposals have

since been held in Northern Ireland, London, the North East of England, and (again) Wales. Referendums have also been held or promised on EU membership, significant extensions of EU powers, electoral reform, and the creation of local mayors. Against this backdrop, decision by referendum appears inevitable if major reforms to the Union are proposed.

There are three principal ways in which a referendum might be used:

1. *Referendum only.* Parliament might authorize a constitution-making body to draw up proposals that would go straight to referendum without further parliamentary scrutiny and that Parliament would be obliged subsequently to implement. There are no precedents for such an arrangement in the UK, but it is the procedure that was used for the two citizens' assemblies in Canada. While Parliament may not be able legally to bind itself to observing such a procedure, ignoring it may become politically impossible once it has been established.
2. *Parliamentary deliberation followed by referendum.* A second option is that the constitution-making body might draft proposals which it would send to Parliament for further scrutiny. Only after such scrutiny would a referendum be held. This was the procedure used following the Dutch citizens' assembly, and in fact disagreements in the legislature meant that the referendum was never held. Elsewhere, by contrast, though parliamentary intercession occurred, non-implementation would have been unthinkable: there was no question, for example, that the UK Parliament might fail to legislate for the referendum than followed the Belfast Agreement in 1998.

3. *Referendum followed by parliamentary deliberation.* The final option is that a referendum may be held on the plan devised by the constitution-making body, but that a “Yes” vote is followed by further parliamentary scrutiny. Arrangements such as this have recently been avoided in the UK: in the case of the AV referendum, for example, parliament passed prior legislation implementation of which was conditional on public support. The main reason for avoiding post-referendum parliamentary intercession is clear: any (perceived) deviation by Parliament from the popular will would be fraught with political dangers. Nevertheless, such procedures have been used in some cases, sometimes to accommodate entrenched procedures for constitutional amendment. In Iceland, for example, where the constitution can be amended only through successive parliamentary majorities either side of a general election, a referendum in October 2012 on the Constitutional Council’s proposals had no formal legal standing. Remarkably, the Icelandic parliament has refused to endorse the proposed constitution that was overwhelmingly supported in the referendum.

As this survey shows, the building blocks of any constitution-making process are many and they can be combined in innumerable ways. Deeper exploration of some real-world cases will help us in identifying the options that are more or less feasible and assessing just how they have worked out in practice. The next part of this paper addresses that task.

Part 2: Constitution-Making around the World

The preceding section contained brief comments on various constitution-making processes around the world. Here we delve into some of the most pertinent examples in greater depth. Section 1.3 above identified seven basic models for the design of a constitution-making body, and the accounts in this section will follow that structure. Those models, and the examples that we will explore in order to illuminate them, are the following:

1. *expert commissions*: the Kilbrandon Commission of 1969–73 and the Richard, Calman, and Silk Commissions since 2000;
2. *negotiation among leaders*: Canada’s Meech Lake and Charlottetown Accords of 1987 and 1992, and the Northern Ireland Belfast Agreement of 1998;
3. *indirectly elected assembly*: the Convention on the Future of Europe of 2002–3;
4. *civil society convention*: the Scottish Constitutional Convention of 1989–95;
5. *elected constituent assembly*: Iceland’s Constitutional Council of 2011;
6. *citizens’ assembly*: the assemblies in British Columbia in 2005, the Netherlands in 2006, and Ontario in 2006–7;
7. *mixed assembly*: the Australian Constitutional Convention of 1998 and Ireland’s Constitutional Convention of 2013–14.

2.1 Expert Commissions: Kilbrandon, Richard, Calman, and Silk

The examples discussed in this section are four commissions that have shaped debates over devolution in the UK:

- ◆ The Kilbrandon Commission was established in 1969, originally as the Crowther Commission, under the chairmanship of the former *Economist* editor Lord Crowther. Lord Kilbrandon took over as chair following Lord Crowther's death in 1972. The Commission was tasked with considering whether changes should be made to governing structures "in relation to the several countries, nations and regions of the United Kingdom".⁵
- ◆ The Richard Commission was formed in 2002 by the Labour–Liberal Democrat coalition that then controlled the Welsh Government. Its remit was to consider whether any changes should be made to the depth and breadth of the powers of the Welsh Assembly and to the system of electing the Welsh Assembly.⁶
- ◆ The Calman Commission was established by majority vote in the Scottish Parliament in 2007 over the opposition of the SNP minority government. It was asked "to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the

5 Royal Commission on the Constitution 1969–1973, *Volume I: Report*, October 1973, Cmnd. 5460, p. 5.

6 Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Report of the Richard Commission*, spring 2004, pp. 265–6.

Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom”.⁷

- ◆ The Silk Commission was appointed in 2011 and was asked to review, in two stages, the financial and the non-financial powers of the Welsh Assembly.⁸ It published its second and final report in March 2014.

Composition and the Notion of “Expertise”

An expert commission is a small body of individuals who have relevant experience and who are chosen, at least in part, because of their capacity to deliberate effectively about the issues in hand and contribute to reasoned proposals. The bodies referred to here as expert commissions are, however, diverse in their character: the notion of “expertise” that they embody can be narrowly or widely drawn.

At the narrow end of that spectrum, the members of a commission may be independent of the existing political establishment and have specific professional expertise relevant to the matters that the commission is tasked with deciding. This model describes much of the Kilbrandon Commission: its sixteen original members (an unusually large number) included four academics, two university or college heads, two lawyers, a businessman, an industrialist, the Moderator of the General Assembly of the Church of Scotland, and the former editor of the *Economist*.⁹ In an even more striking example the five members of the New

7 Commission on Scottish Devolution [Calman Commission], *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, June 2009, p. 20.

8 Commission on Devolution in Wales [Silk Commission], *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012, p. 17.

9 Royal Commission on the Constitution 1969–1973, *Volume II: Report*, October 1973, Cmnd. 5460, p. iii; House of Commons Hansard, 3 April 1969, vol. 781, col. 176.

Zealand Royal Commission on the Electoral System of 1985–86 included a judge, a statistician, and three academics, none of whom had strong political affiliations.

But expert commissions commonly reflect a wider conception of expertise than this. Most contain political grandees who can assist in connecting principle to political reality. The Calman Commission included peers from the Labour, Conservative, and Liberal Democrat parties, while four of the seven members of the Silk Commission that investigated further devolution to Wales are representatives of the political parties. Many commissions also include representatives of civil society. The Calman Commission, for example, included such diverse members as the Director of CBI Scotland, the Scottish Secretary of the UNISON trade union, the Executive Director of a Glasgow housing cooperative, and a former Chair of the Scottish Youth Parliament. Expert commissions thus often draw, in part, on the model of the civil society convention discussed in section 2.4 below.

Operation and Outcomes

The operation of these commissions is sufficiently familiar not to require detailed description. In all cases, they invite submissions from interested bodies and individuals and members of the general public and hold oral evidence sessions; in some cases, they also commission original research papers. They draw on these resources to deliberate possible solutions to the issues they have been asked to consider and publish reports setting out their analysis and recommendations.

Commissions strive to operate consensually. The report of the Calman Commission was agreed unanimously, as were both reports of the Silk Commission. The Richard Commission's report contained a note of dissent from one member, who argued

that the case for change had not yet been made, though he did welcome the report's contribution to debate.¹⁰ The Kilbrandon Commission was less consensual: two members issued a rival report that dissented from core aspects of the majority report and proposed detailed alternatives.¹¹

The recommendations of all of these commissions have been taken seriously. The Kilbrandon report paved the way for the (failed) Scottish and Welsh devolution referendums of 1979. The Richard Commission's proposal that the Welsh Assembly should have primary legislative powers was implemented following a referendum in 2011. The Calman Commission's main proposals for further devolution to Scotland, including significant devolution of fiscal powers, were enacted by the Scotland Act of 2012.

Assessment

The experience of the Richard, Calman, and Silk Commissions shows that such expert commissions can be effective mechanisms for reviewing opinion and evidence and refining proposals relating to the detail of devolution arrangements. The debate that they arouse does, however, remain rather specialist: if what is desired is a national conversation about the future structure of the Union, they are weak instruments for achieving that. The Richard and Calman Commissions did not settle the constitutional positions of Scotland and Wales within the Union. A wider and more ambitious review of the status quo is therefore likely to require a different approach.

10 Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Report of the Richard Commission*, spring 2004, p. 305.

11 Royal Commission on the Constitution 1969–1973, *Volume II: Memorandum of Dissent by Lord Crowther-Hunt and Professor A. T. Peacock*, October 1973, Cmnd. 5460–I.

2.2 Negotiation among Leaders: Canada and Northern Ireland

Decision-making in the run-up to the Scottish independence referendum has been dominated by elite bargaining: specifically, by intergovernmental bargaining between Whitehall and Holyrood, embodied in the Edinburgh Agreement of October 2012. It makes sense, therefore, to ask whether intergovernmental bargaining could suffice to work out the details of a post-referendum constitutional settlement as well. Would it work or would it suffer unacceptable problems?

This section discusses two very different processes of important constitution-making that were dominated by elite bargaining. The first is the intergovernmental bargaining around the Meech Lake and Charlottetown Accords in Canada in the late 1980s and early 1990s. The second is the partly intergovernmental and partly interparty negotiation that preceded the Belfast Agreement of 1998. The first of these was a striking failure, the second an even more noteworthy success. Given its familiarity, the discussion of the latter case is kept brief.

Intergovernmental Bargaining in Canada

Canada did not achieve full control over its constitution until 1982: despite the Statute of Westminster of 1931, amendment of Canada's constitutional text – the British North America Act, passed by the UK parliament in 1867 – remained Westminster's prerogative. After years of complex discussions, this situation was eventually changed by the Constitution Act of 1982, passed by the Canadian parliament. This Act also introduced Canada's bill of rights – the Charter of Rights and Freedoms – and made a number of other changes.

While the Constitution Act was a major step in Canada's constitutional history, it suffered what one political scientist has (exaggeratedly) called "a fatal flaw": "it had been signed over the bitter objections of the government of Quebec".¹² Quebec had no right to veto it. Nevertheless, "For many, the exclusion of Quebec grievously undermined the legitimacy of the new constitutional order."¹³ Efforts therefore continued to bring Quebec into the fold, culminating in a meeting of the eleven provincial premiers and the federal prime minister at Meech Lake on 30 April 1987, at which the Meech Lake Accord was agreed. Quebec would be recognized as a "distinct society" and the provinces would gain new powers, including a veto power over constitutional amendments.¹⁴

But the Meech Lake Accord would come into effect only if it was ratified by all the provincial legislatures within three years. Quebec's endorsement came quickly and most other provinces followed, but passage proved impossible in Manitoba and it was clear that Newfoundland would withdraw its consent if the process were continued. The Accord therefore lapsed.

Renewed negotiations led to a second intergovernmental agreement: the Charlottetown Accord of August 1992. This time approval was sought by referendum. The Accord was supported by most of the political establishment, but the polls always suggested that gaining popular backing across the provinces would be very difficult, and as the campaign proceeded a decisive

12 Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism", *Canadian Public Policy*, vol. 14, supplement (September 1988), pp. S7-S24, at p. S8.

13 *Ibid.*, p. S8.

14 For a detailed introduction to the Meech Lake Accord and the issues it raised, see *ibid.*

majority for “No” emerged.¹⁵ In the end, the Accord was rejected by 54 per cent of voters to 46, with pro-Accord majorities in only five provinces.

Though Canada has a long tradition of “executive federalism” in which key decisions are determined through meetings of the provincial and federal premiers, many commentators attribute some of the failure of the Meech Lake and Charlottetown Accords to the excessively intergovernmental nature of the negotiations and the perception that ordinary citizens were excluded. The negotiations over the 1982 Constitution Act had been primarily intergovernmental, but openings to public participation had been made through parliamentary inquiries and the hearings of the P  pin-Robarts Task Force. In addition, governments had sought to mobilize public opinion in order to strengthen their bargaining positions.¹⁶ Furthermore, the 1982 Act – particularly the Charter of Rights and Freedoms – encouraged the view that the constitution belonged to the people, not the governments: “The Charter ... reduced the relative status of governments and strengthened that of the citizens who received constitutional encouragement to think of themselves as constitutional actors.”¹⁷

In light of this, the starkly intergovernmental nature of the Meech Lake Accord was widely criticized:

15 Richard Johnston, “An Inverted Logroll: The Charlottetown Accord and the Referendum”, *PS: Political Science and Politics*, vol. 26, no. 1 (March 1993), pp. 43–48, at pp. 46–47.

16 Alan C. Cairns, “The Politics of Constitutional Renewal in Canada”, in Keith G. Banting and Richard Simeon (eds.), *The Politics of Constitutional Change in Industrial Nations: Redesigning the State* (London: Macmillan, 1985), pp. 95–145, at pp. 112–14.

17 Alan C. Cairns, “Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake”, *Canadian Public Policy*, vol. 14, supplement (September 1988), pp. S121–45, at p. S122.

The Accord was reached in two closed meetings of a group of 11 male First Ministers, with only a few officials present at the second one. Unlike some other First Ministers' Conferences on the Constitution, there was no debate in front of television cameras. Then the Accord was placed before the country and the 11 legislatures as a fait accompli. It was a delicate, tenuous compromise. If any one legislature amended it, it would be thrown back to the First Ministers where it could quickly come apart. So legislators were told that they must vote the agreement up or down; there could be no changes, unless some 'egregious error,' obvious to all governments, was discovered. Many critics argued that this meant the legislative committee hearings and public debate were a sham, since they could have no effect on the result short of killing it outright.¹⁸

The Meech Lake failure led to efforts to increase public participation in the deliberations that followed:

One lesson of Meech seemed to be that the people at large would no longer tolerate being excluded from deliberation over what was, after all, their constitution. That it was their constitution was a novel idea encouraged by the 1982 constitution. From widespread attacks on the Meech Lake Accord as the supreme example of elite bargaining by the federal prime minister and ten provincial premiers, the federal government drew the lesson that the people must be consulted widely, if only to bore them to death.¹⁹

Still, however, after an initial public consultative phase, the final Charlottetown Accord was negotiated, as before, among the

18 Simeon, *op. cit.*, pp. S21–22.

19 Johnston, *op. cit.*, pp. 44–45.

provincial and federal premiers.²⁰ Public distrust in this process appears to be evinced again in voters' refusal to back the Accord, despite the broad consensus of the political elite.

These Canadian experiences thus exemplify an important danger of constitution-making by elite negotiation: it may delegitimize the decisions that are reached in the eyes of the public, thereby jeopardizing their successful implementation.

Negotiation of the Belfast Agreement, 1998

It should not be thought, however, that all elite-dominated constitution-making processes are doomed to failure. As a counterpoint to the Canadian experience, is it worth while to mention the very different lessons that might be drawn from Northern Ireland's peace negotiations. The key negotiations – preceding the Belfast Agreement in 1998 – took place behind closed doors among the representatives of the British and Irish governments and the parties of Northern Ireland. So too did later rounds of talks, such as those culminating in the St Andrews Agreement of 2006.

The Northern Ireland talks are sufficiently familiar not to require detailed description here. What needs to be noted is simply that they succeeded. While various politicians were sometimes accused by some of their supporters of conceding too much, and while some on the political fringes continued to deny the validity of the peace process as a whole, among those who supported the peace process in principle, there was little dissent from the view that elite bargaining was the appropriate way forward. Indeed, there is every reason to think it was the only possible approach. The concessions necessary for consensus-building can often

20 *Ibid.*, p. 45.

be offered only away from the limelight. In addition, the talks represented a societal as well as a political bargain, and wherever one group bargains with another, it wants to be represented by its best possible negotiators.

Notwithstanding the Canadian experience, therefore, there are circumstances in which elite bargaining may be the only plausible path to take.

2.3 Indirectly Elected Assembly: The Convention on the Future of Europe

The most famous constitution-making body of all – the Philadelphia Convention of 1787 – was an indirectly elected assembly: its 55 members were delegates of the thirteen states chosen by their legislatures. Here, however, we concentrate on a much more recent case: the Convention on the Future of Europe, which drafted a constitution for the European Union in 2002 and 2003.

Convention on the Future of Europe: Origins and Purpose

The Convention was established by the Laeken Declaration agreed at the European Council of December 2001. The role formally assigned to the Convention was limited:

In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key

*issues arising for the Union's future development and try to identify the various possible responses.*²¹

The Convention was thus not given the task of drafting a constitution. Indeed, the idea that a Constitution for the European Union might be developed was mentioned only briefly in the Declaration, and only as a long-term aspiration:

*The question ultimately arises as to whether this simplification and reorganisation [of the EU's various treaties] might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Members States and the Union?*²²

As these quotations suggest, in establishing the Convention, European leaders sought, in part, to open up discussions around the structure of the EU beyond the traditional channel of inter-governmental negotiations. The preceding decade had seen bruising battles over the ratification of three EU treaties: those of Maastricht, Amsterdam, and Nice. The Nice Treaty, indeed, had been rejected by Irish voters just months earlier, in a referendum in June 2001. Public confidence in the EU had weakened and the perception had grown of a “democratic deficit”.²³ If the treaties were to be revised again, then a more open discussion would be needed in order to build public legitimacy and trust.

21 Laeken Declaration on the Future of the European Union, <http://european-convention.eu.int/pdf/lknen.pdf>, last accessed 26 January 2014, p. 6.

22 *Ibid.*, p. 6.

23 See, for example, Giandomenico Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards”, *European Law Journal* 4, no. 1 (March 1998), 5–28.

In addition, European leaders were concerned that inter-governmental conferences (IGCs) were increasingly characterized by division and gridlock. Indeed, Carlos Closa argues that “the Heads of State turned to the Convention method more as a device to circumvent deadlocks of IGCs” than as a means of opening up democratic dialogue.²⁴

Membership

The Convention had 105 full members:

- ◆ a Chairman – former French president Valérie Giscard d’Estaing – and two Vice-Chairmen, all appointed by the European Council;
- ◆ 28 members representing the national governments (one from each of the fifteen member states and thirteen candidate countries);
- ◆ 56 members representing the national parliaments (two from each of the member states and candidate countries);
- ◆ 16 members of the European Parliament;
- ◆ 2 representatives of the European Commission.²⁵

24 Carlos Closa, “The Convention Method and the Transformation of EU Constitutional Politics”, in Erik Oddvar Eriksen, John Erik Fossum, and Augustín José Menéndez (eds.), *Developing a Constitution for Europe* (London: Routledge, 2004), pp. 183–206, at p. 184.

25 European Convention website, <http://european-convention.eu.int/EN/organisation/organisation2352.html?lang=EN>, last accessed 31 January 2014.

In addition, all members except the Chairman and Vice-Chairmen had alternates, who were over time increasingly incorporated into the work of the Convention as though they were full members.²⁶ Selection procedures were left up to the various nominating bodies and “differed greatly in transparency”.²⁷

Mode of Operation

The Laeken Declaration gave the Convention much freedom to determine its own modes of operation. Its work would be coordinated by a Praesidium comprising the Chairman, Vice-Chairmen, and nine other Convention members. The Declaration indicated that the Convention would be able to “consult Commission officials and experts of its choice on any technical aspect which it sees fit to look into” and that it “may set up ad hoc working parties”.²⁸ It also stipulated the parallel creation of a civil society Forum:

*In order for the debate to be broadly based and involve all citizens, a Forum will be opened for organisations representing civil society (the social partners, the business world, non-governmental organisations, academia, etc.). It will take the form of a structured network of organisations receiving regular information on the Convention’s proceedings. Their contributions will serve as input into the debate. Such organisations may be heard or consulted on specific topics in accordance with arrangements to be established by the Praesidium.*²⁹

26 Closa, *op. cit.*, p. 189.

27 *Ibid.*, p. 189.

28 Laeken Declaration, *op. cit.*, p. 7.

29 *Ibid.*, p. 7.

In practice, it appears that the Forum had only a limited role: over 500 groups participated in it, but there is no evidence that they had any influence over the decisions that the Convention made.³⁰

Rather, two features of the Convention's mode of operation are particularly noteworthy: first, it chose to interpret its terms of reference broadly; second, it sought to conduct its affairs consensually – and largely succeeded in doing so.

The goal of recommending a single constitutional text was already apparent in the Chair's introductory speech during the Convention's inaugural session:

The Laeken Declaration leaves the Convention free to choose between submitting options or making a single recommendation. It would be contrary to the logic of our approach to choose now. However, there is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present. If we were to reach consensus on this point, we would thus open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us agree now to call it: a 'constitutional treaty for Europe'.³¹

As Paul Magonette notes, “Within the Convention, a large majority soon emerged to promote an ambitious interpretation of the

30 See Emanuela Lombardo, “The Participation of Civil Society in the European Constitution-Making Process”, paper prepared for the CIDEL Workshop *Constitution Making and Democratic Legitimacy in the EU*, London, 12–13 November 2004.

31 “Introductory Speech by President V. Giscard d’Estaing to the Convention on the Future of Europe”, 26 February 2002, <http://european-convention.eu.int/docs/speeches/1.pdf>, last accessed 31 January 2014.

Laeken Declaration.”³² And it was a “Draft Treaty Establishing a Constitution for Europe” that the Convention agreed in the summer of 2003.

The quotation above from Giscard d’Estaing’s remarks at the Convention’s inaugural session also expresses the desire for consensual operation and decision-making by “broad consensus” rather than by formal voting. Giscard made clear that by “broad consensus” he did not imply a need for unanimity: small minorities would not be allowed to veto decisions. Quite what “broad consensus” did mean was kept vague.³³

Detailed analyses of the work of the Convention suggest that it did indeed succeed in approximating the ideal of a deliberative forum far more closely than do either inter-governmental negotiations or regular legislatures. Magnette, for example, finds that:

*The members often adopted a deliberative approach. The social norm of impartiality, combined with a sincere willingness of many members to reach an integrative agreement, led them to resort, in many instances, to a ‘practical’ style of problem-solving. The members often tried to reduce dissonance by mutual explanation; they proposed ad hoc solutions to many issues; and based their arguments on pragmatic or empiricist grounds that could be understood by the other members.*³⁴

Such operation was facilitated by the Convention’s structure. Its members had multiple loyalties, meaning that shifting coalitions – rather than monolithic blocs – could form: “As a

32 Paul Magnette, *Coping with Constitutional Incompatibilities: Bargains and Rhetoric in the Convention on the Future of Europe*, Jean Monnet Working Paper 14/03 (New York: NYU School of Law, 2003), p. 7.

33 *Ibid.*, p. 9.

34 *Ibid.*, p. 21.

British Labour MEP, [for example,] you could be joining forces with the EP-delegation, with the parliamentary delegation (including representatives from national parliaments), the social democratic delegation or with the other British representatives.”³⁵ Furthermore, many of the members were open to discussion and persuasion: they did “not carry ‘baggage’ from previous negotiations”.³⁶ And the openness of the discussions – in contrast to the closed negotiations of an inter-governmental conference – required participants to couch their arguments in terms of general principles rather than narrow interests.³⁷

What was sometimes called the “Convention spirit” was maintained throughout its operations. The aspiration to agree a single recommendation by “broad consensus” was realized.³⁸

Assessment

In many respects the Convention was therefore clearly a great success. Its deliberations were of high quality and it far exceeded initial expectations by producing a full draft text for an EU constitution. In Hoffmann’s view, “in many respects the Convention can be considered to be an ideal mix of politics, law and citizen participation, which might be the key to future constitutional changes in an EU with a political, economic, and possibly even military framework”.³⁹

35 Lars Hoffmann, *The Convention on the Future of Europe: Thoughts on the Convention-Model*, Jean Monnet Working Paper 11/02 (New York: NYU School of Law, 2002), p. 7.

36 *Ibid.*, p. 17.

37 *Ibid.*, p. 17.

38 “Report from the Presidency of the Convention to the President of the European Council” (CONV 851/03), <http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00851.en03.pdf>, last accessed 31 January 2014, p. 4.

39 Hoffmann, *op. cit.*, p. 17.

Nevertheless, it also had limitations. Even at the time, concerns were expressed that, while the Convention developed deep shared understanding among its own members, it did not succeed in engaging a wider public. For Closa, “the Convention lacked a direct mandate and, hence, it was imbued with indirect and derived legitimacy”. He continues:

*The Convention has failed to engage European civil society in a constitutional debate, even though the constitutional dialogue has been greater than ever before. So far, the Convention has failed to produce the kind of mass civic mobilization required for a constitutional moment to materialize.*⁴⁰

He concludes, “If the EU aims towards some sort of constitution, then the legitimacy of this should be more firmly grounded on direct citizens’ input.”⁴¹

These words, published in 2004, were prescient. After the Convention sent its draft constitution to the European Council, contentious inter-governmental negotiations followed, leading to the signing of a Treaty Establishing a Constitution for Europe in June 2004. At the ratification stage, however, the project ran into the ground. Referendums were planned in nine countries, and two of these – Spain and Luxembourg – supported ratification. But voters in France and the Netherlands rejected the treaty in May and June 2005 respectively, and the referendums in the remaining five countries – including the UK – were abandoned. Lack of public consent ensured that Europe’s new constitution remained an aspiration only – though more limited changes to the EU’s governing structures were eventually made through the Lisbon Treaty of 2007.

40 Closa, *op. cit.*, p. 203.

41 *Ibid.*, p. 204.

2.4 Civil Society Convention: the Scottish Constitutional Convention

A civil society convention, like an indirectly elected assembly, provides for indirect representation of the people. In this case, however, the people are represented not only by those whom they have chosen in public elections, but also by leading figures from organized civil society. A number of bodies that broadly fit this description can be found from around the world. For example, the roundtable negotiations during transition from communism in Hungary in 1989 included the government, the emerging opposition parties, and a range of “third parties” that included trade unions and women’s organizations. The best example, however, is also the closest to home: the Scottish Constitutional Convention of 1989–95.

Origins of the Scottish Constitutional Convention

Uniquely among the constitution-making bodies discussed here, the Scottish Constitutional Convention was an unofficial organ: the initiative came not from the state, but from the Campaign for a Scottish Assembly (CSA), a cross-party pressure group formed in 1979 in the wake of defeat in the devolution referendum of that year.⁴² Following the 1987 general election, the CSA established a Constitutional Steering Committee, which it described as “a committee of prominent Scots, representing all sections of Scottish society (but not including prominent politicians)”.⁴³ The Committee was asked to report on “all aspects of the case for reinforcing Parliamentary action by setting up a Scottish

42 Scottish Constitutional Convention, *Towards Scotland’s Parliament: A Report to the Scottish People by the Scottish Constitutional Convention* (Edinburgh, November 1990), p. 4.

43 *Ibid.*, p. 4.

Constitutional Convention for the express purpose of securing the creation of a Scottish Assembly.”⁴⁴

Thus, despite the CSA’s claim that the Committee represented all of Scottish society, in fact it was a body constituted to favour some form of assembly or parliament for Scotland.⁴⁵ Its report – which, according to one excitable commentator at the time, “is now widely acknowledged as one of the important documents of contemporary British history”⁴⁶ – asserted that “The United Kingdom is a political artefact put together at English insistence.”⁴⁷ It characterized the British constitution as a solely “English constitution”, which sustained only the “illusion of democracy”.⁴⁸ It began its analysis with a resolute assertion of Scottish nationhood.⁴⁹

The Committee considered three possible models for a Scottish constitutional convention: a directly elected assembly; an assembly of existing elected representatives; and what it called a “delegate convention” – what is here referred to as a civil society convention. It left no doubt that, in an ideal world, the best option would be the first:

44 Constitutional Steering Committee: *A Claim of Right for Scotland: Report of the Constitutional Steering Committee, Presented to the Campaign for a Scottish Assembly* (Edinburgh, July 1988), p. 29.

45 James Mitchell, *Constitutional Conventions and the Scottish National Movement: Origins, Agendas and Outcomes*, Strathclyde Papers on Government and Politics (Glasgow: Department of Government, University of Strathclyde, 1991), p. 25.

46 Iain Macwhirter, “After Doomsday...: The Convention and Scotland’s Constitutional Crisis”, in Alice Brown and Richard Parry (eds.), *The Scottish Government Yearbook 1990* (Edinburgh: Department of Politics, University of Edinburgh, 1990), pp. 21–34, at p. 24.

47 Constitutional Steering Committee, *op. cit.*, p. 6.

48 *Ibid.*, p. 4.

49 *Ibid.*, p. 1.

*The creation by Government of a directly elected Scottish Constitutional Convention, with the task of preparing an Assembly scheme for consideration and adoption by Government, is the most obvious and suitable way of resolving the Scottish problem.*⁵⁰

It recognized, however, that holding elections for such a convention would be impracticable without central government support, which, at the time, was very unlikely to be forthcoming. It therefore explored the second and third options as more realistic paths forward:

- ◆ An indirectly elected chamber would consist of MPs and local councillors. There would be difficulties in this: MPs might find it difficult to take time from their existing duties; and the electoral system used to elect MPs and local councillors would mean that representation was, in the eyes of many, distorted. The former problem might be tackled by establishing a system of alternates, while the Committee suggested that the latter should be addressed by adding supplementary members from the underrepresented parties.⁵¹
- ◆ A “delegate convention” could be established on the model of the Scottish Economic Summit Conference of 1986, which comprised “individuals from local authorities, trade unions, the Scottish Council (Development and Industry), Chambers of Commerce, CBI (Scotland), the churches and all Scottish political parties”.⁵² The Committee did worry, however, that such a convention could lack legitimacy:

50 *Ibid.*, p. 14.

51 *Ibid.*, pp. 15–16.

52 *Ibid.*, p. 17.

*A body of this type could have little authority to act as a Constitutional Convention unless it comprised not merely individuals from a wide range of organisations, but delegates carrying with them the full authority and wholehearted support of these organisations. A substantial degree of local authority support would be important. Even then, the authority of the Convention would depend heavily on the range of other organisations represented and there would be room for debate about the support they commanded.*⁵³

The Committee concluded that, if a convention were to be established on this basis, MPs would need to be included as well: “If the MPs collectively, and with them the Parties they represent, do not give clear support to a Convention, it will operate under serious difficulties.”⁵⁴

The Committee’s report was followed by cross-party discussions. Labour was initially sceptical, but by the autumn of 1988 came round to the idea of a convention. The Conservative Party indicated from the beginning that it had no intention of participating. The Liberal Democrats were always in favour. The Scottish National Party joined the talks initially, but its preconditions for participation in the convention were unacceptable to the other parties (perhaps deliberately so) and it therefore withdrew.⁵⁵ Labour and the Liberal Democrats were thus the main partisan players that brought the convention proposals to fruition.

53 *Ibid.*, p. 17.

54 *Ibid.*, p. 17.

55 Macwhirter, *op. cit.*, pp. 25–30; Susan Deacon, “Adopting Conventional Wisdom: Labour’s Response to the National Question”, in Alice Brown and Richard Parry (eds.), *The Scottish Government Yearbook 1990* (Edinburgh: Department of Politics, University of Edinburgh, 1990), pp. 62–75, at pp. 67–70; Mitchell, *op. cit.*, p. 27.

Composition of the Convention

The Convention as established in 1989 included 159 members:

- ◆ 55 of Scotland's MPs (from Labour and the Liberal Democrats);
- ◆ 7 of Scotland's 8 MEPs (all from Labour);
- ◆ representatives of all 12 regional and island councils;
- ◆ representatives of 47 of Scotland's 53 district councils;
- ◆ 7 political party representatives (one each from Labour, the Liberal Democrats, and five minor parties)
- ◆ 15 additional representatives from Labour (5 members) and the Liberal Democrats (10 members)
- ◆ 16 representatives of the Scottish Trades Union Congress, the National Federation of Self-Employed and Small Business (Scottish Section), the churches, the Scottish Convention on Women, Gaelic-speakers' organizations, and ethnic minorities (plus three further members with observer status).⁵⁶

As is apparent from this listing, elected politicians dominated. Nevertheless, the character of the Convention as a gathering of the Scottish nation was strongly emphasized. The Chair of the Convention's Executive Committee – and the most prominent public representative of the Convention as a body – was Canon Kenyon Wright, the General Secretary of the Scottish Council of Churches. At the Convention's inaugural meeting, in March 1989, he claimed that the Convention, including as it did more than 80 per cent of Scotland's MPs, almost all its local authorities, and a range of other voices, was “much more representative of Scotland

⁵⁶ Scottish Constitutional Convention, *op. cit.*, pp. 19–20.

than the Westminster Parliament is of the UK”⁵⁷ That same meeting issued “A Claim of Right for Scotland”, which stated:

*We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs, and do hereby declare and pledge that in all our actions and deliberations their interests shall be paramount.*⁵⁸

Operation and Outputs

The life of the Scottish Constitutional Convention can be divided into two phases. The first began with the Convention’s inaugural meeting in March 1989 and ended with the adoption and publication of its first report, *Towards Scotland’s Parliament*, in November 1990. During this period, the Convention met in public, plenary session seven times.⁵⁹ Most of the detailed work was, however, done in committee.⁶⁰ Indeed, according to James Kellas, “The Convention’s *Report to the Scottish People* was the result of eighteen months’ negotiation between the delegates who comprised the Executive Committee (the plenum merely endorsed without a vote).”⁶¹

The 1990 report set out the broad framework for a new Scottish parliament, establishing principles regarding the parliament’s powers and responsibilities, the financing of its spending, and

57 Macwhirter, *op. cit.*, p. 31.

58 Scottish Constitutional Convention, *op. cit.*, p. 1.

59 James G. Kellas, “The Scottish Constitutional Convention”, in Lindsay Paterson and David McCrone (eds.), *The Scottish Government Yearbook 1992* (Edinburgh: Department of Politics, University of Edinburgh, 1992), pp. 50–58, at p. 50.

60 Macwhirter, *op. cit.*, p. 31.

61 Kellas, *op. cit.*, p. 55.

the representative structure of the parliament itself.⁶² At twenty pages, however, it was a short document, and it did not provide much detail. In particular, it accommodated disagreement among the Convention's members in various areas through imprecision. Most notable in this respect was the electoral system, on which the positions of Labour and the Liberal Democrats had been sharply divided. The report stated that "The present 'first-past-the-post' electoral system is not acceptable for Scotland's Parliament"; but it offered only a set of principles to guide the shaping of an alternative – principles that it would not be straightforward to reconcile – and the promise of further discussion.⁶³

The 1990 report was followed by a period of limited activity. Indeed, it was not uncommon at the time to refer to the meeting and report of November 1990 as "final".⁶⁴ Solutions to the disagreements among the Convention's key players were not readily apparent. Nevertheless, solutions would be needed if the aspiration to create a Scottish Parliament was to be realized. In 1993, therefore, the second phase of activity was ushered in with the creation of an expert Scottish Constitutional Commission tasked with finding such solutions. The Commission was asked to make proposals in three areas: "the electoral system for a Scottish parliament, the issue of gender and ethnic minority representation and the relationship between a Scottish parliament and the UK constitution".⁶⁵ It duly reported in 1994. The Convention then produced its final report, building on the Commission's recommendations, in 1995.⁶⁶

62 Scottish Constitutional Convention, *op. cit.*

63 *Ibid.*, p. 17.

64 E.g., Kellas, *op. cit.*, p. 57.

65 Peter Lynch, "The Scottish Constitutional Convention 1992–5", *Scottish Affairs* 15 (spring 1996).

66 Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (Edinburgh: Scottish Constitutional Convention, 1995).

Assessment

In important respects, the Scottish Constitutional Convention was clearly a great success. It brought together a broad range of representatives of Scottish opinion. It secured agreement between two important political parties – Labour and the Liberal Democrats – that had shared the desire to establish a Scottish assembly but had disagreed sharply as to the form that that assembly should take. The Convention produced two major reports that became the basis for one of the most significant constitutional changes in the UK in the twentieth century. The great majority of the Convention's proposals – including on the contentious matter of the electoral system – were subsequently implemented by the Labour government after its election in 1997. Thus, in contrast to the Canadian and EU examples discussed above, the Scottish Constitutional Convention was instrumental in delivering actual constitutional change. That may have reflected, at least in part, its combination of top-down and bottom-up participation.

Yet the Convention has been criticized on at least two fronts. First, it was far less inclusive than at first it might have appeared. Civil society presence was skewed towards the left: the business community was only marginally represented, and even then only by a “small business pressure group which has been a frequent critic of the Conservative Government”.⁶⁷ More importantly, despite the presence of Canon Kenyon Wright as Chair of the Executive Committee, the Convention was in practice dominated by the politicians and, specifically, by the significant political parties that opted to take part: Labour and the Liberal Democrats. Lynch offers four interpretations of the Convention, all of which

⁶⁷ Mitchell, *op. cit.*, p. 16.

view these parties as the core participants.⁶⁸ Kellas characterizes the Convention as providing a process whereby the competing Labour and Liberal Democrat visions of Scotland's future were reconciled:

*Until 1989, when the Convention commenced, devolution proposals were to be found in the programmes of the Labour and Liberal/SDP Alliance parties. There were obvious differences between these programmes, notably in the federalist nature of the Liberal proposals, and in the more devolutionist approach of the Labour Party. By the time the Convention reported at the end of November 1990, the Labour proposals had merged with those of the Liberals.*⁶⁹

Second, even if the Convention had gathered representatives of the full spectrum political and civil society, its model of representation may be viewed as elitist. Writing of all Scotland's constitutional conventions during the twentieth century, Mitchell argues that they "have always been elite affairs where a disdainful attitude towards the Scottish people, in whose name the demand for self-government is always made, is evident. There has never been any serious attempt to bring the Scottish public into the decision-making process."⁷⁰ As we saw above, the Constitutional Steering Committee had itself seen the model of indirect representation that the Convention embodied as no more than second best: it recognized that a system of direct representation would have been better.

Indeed, serious democratic doubts can be raised about any attempt to represent the public through civil society. Who is

68 Lynch, *op. cit.*

69 Kellas, *op. cit.*, p. 54.

70 Mitchell, *op. cit.*, p. 40.

to decide which groups should be represented? Are they to be weighted by their membership or the size of population that they purport to speak for, or by some other criterion? What if group leaders are not as representative as they claim to be? The civil society model demands a mode of representation in which those who chose the representatives are not always those who are supposedly represented. Whether such a model can be justified where models involving direct popular representation are available must be seriously doubted.

We turn now to the first of those directly representative models – the directly elected assembly – in the form of the Icelandic Constitutional Council of 2011.

2.5 Iceland's Elected Constitutional Council

The economic crisis that erupted in 2008 has had widely differing implications for constitutional politics in different countries. In some countries, such as the UK, economic recession has made life harder for advocates of political reform: supporters of the status quo can easily argue that now is not the time to be tinkering with voting systems or parliamentary structures. In other countries, the opposite has occurred: the economic crisis has fed the perception that the political system is broken and that politicians will be extracted from the pockets of privileged economic elites only through fundamental political reform. The two countries where this response has gone furthest are Iceland – discussed here – and Ireland, discussed in section 2.8 below.

As one Icelandic political scientist and participant in Iceland's constitutional reform debates has put it:

The crisis opened up the public debate with a flood of ideas for recovery pouring through almost all outlets for public discussions; in media, open forum meetings and on the internet. New associations were being formed challenging the ruling class and the whole political system. Serious discussions followed on creating a new Icelandic republic, French style – in data-science lingo, updating the system to Iceland 2.0.⁷¹

In particular, critics argued that power in Iceland was too concentrated in the hands of the prime minister and his acolytes, who exerted considerable control over the judiciary and media as well as the legislature, allowing policy to serve the interests of a narrow elite rather than the wider population.⁷²

Following the collapse of Iceland's ruling government in early 2009 and fresh elections a few months later, the new government established a process for constitutional renewal comprising three institutions: a National Forum of randomly selected citizens; a Constitutional Committee of experts; and a directly elected Constitutional Assembly, which later morphed into a Constitutional Council.

National Forum

Recent constitutional and political reform processes have increasingly included direct participation of ordinary citizens chosen randomly rather than by election: institutions including ordinary citizens have lain at the heart of the processes in Canada,

71 Eirikur Bergmann, "Reconstituting Iceland – From an Economic Collapse to a New 'Post-Revolutionary', 'Crowd-Sourced' Constitution", paper presented at the conference *Political Legitimacy and the Paradox of Regulation*, Leiden University, Netherlands, 24–25 January 2013, p. 2.

72 Thorvaldur Gylfason, "From Collapse to Constitution: The Case of Iceland", CESIFO Working Paper no. 3770 (March 2012), pp. 8–9.

the Netherlands, and Ireland outlined below. Iceland followed this trend too, convening a National Forum of 950 randomly selected citizens, who met in October 2010 to discuss the themes that they wanted to see reflected in a revised constitution.⁷³

Iceland's National Forum was, however, rather marginal in the overall constitutional reform process. It met for just one day and produced only general aspirations for the revised constitution. The Constitutional Assembly was expected to take its conclusions into account, but was not formally bound by them.

Constitutional Committee

The Constitutional Committee was a seven-member advisory panel appointed by parliament.

The committee produced a 700-page report with detailed ideas concerning the composition of the new constitution, including suggestive examples of the text of individual articles as well as a thorough, clause-by-clause analysis of the constitution from 1944 and of specific issues, including the electoral system used in parliamentary elections and the management and ownership of natural resources. The committee also used its website to facilitate access to foreign constitutions and related literature.⁷⁴

The Constitutional Council drew on the guidance of the Committee throughout its deliberations, but, again, was not bound to follow its advice.

73 Details are available at the National Forum's website: <http://thjodfundur2010.is/heim/>, last accessed 8 January 2014.

74 Gylfason, *op cit.*, p. 12.

Constitutional Assembly/Council

The core institution in Iceland's constitution-making process was what was initially called the Constitutional Assembly. This was a directly elected body of 25 individuals – making Iceland unique among established democracies in having formed a fully elected constituent assembly distinct from its regular legislature.

The elections were held not under Iceland's usual electoral rules, but using the single-transferable vote (STV) electoral system used in both Ireland and Northern Ireland. This allows voters to rank candidates in order of preference, thus placing greater emphasis on individual candidates rather than political parties. Indeed, Iceland's parties chose not to nominate candidates, with the result that all candidates were independents (though some did have partisan backgrounds). 523 candidates stood in total, in a single nationwide ballot, and voters were allowed to rank up to 25 candidates. The election was held in November 2010 and secured turnout of just 37 per cent (compared to 85 per cent in the preceding general election).⁷⁵ Those elected included “doctors, lawyers, priests, professors, company board members, a farmer, a fighter for the rights of handicapped persons, mathematicians, media people, erstwhile MPs, a nurse, a philosopher, poets and artists, political scientists, a theatre director and a labour union leader”⁷⁶.

The legality of the election was subsequently contested by several individuals. Remarkably, Iceland's Supreme Court agreed with their complaint and nullified the election result, despite indicating that the violations were technical and had not

75 Ibid., pp. 12–13; Statistics Iceland, election statistics, www.statice.is/Pages/1149, last accessed 8 January 2014.

76 Bergmann, *op. cit.*, p. 6.

affected the outcome.⁷⁷ In response, the government replaced the Constitutional Assembly with a Constitutional Council with very similar functions, comprising the 25 leading candidates from the Assembly elections.

Operation of the Constitutional Council

The parliamentary resolution that established the Constitutional Council listed specific aspects of the constitution that it should investigate. These were, however, broad, including, for example, “the foundation of the Icelandic Constitution and its basic concepts” and the “organisation of the legislative and executive powers and their limits”. Furthermore, the resolution added that, “The Constitutional Council may decide to discuss more topics than those mentioned above.”⁷⁸ In fact, the Council members decided early on not to propose revisions to the existing constitution, but, rather, to draft a wholly new text.

Having agreed basic principles, the Council members organized themselves into three working parties responsible for drafting particular elements of the new constitution. Eirikur Bergmann, political scientist and Council member, describes the procedure that the Council followed:

Rather than developing the document in a traditional linear fashion the Council decided to use the agile method often used in software development, gradually completing a holistic document in several rounds. Each committee would work on their part in a joint online master document (google docs) which all the members could follow and intervene in at any time. Each week, the

77 *Ibid.*, p. 6.

78 “The Role of the Constitutional Council”, Constitutional Council website, www.stjornlagathing.is/english/, last accessed 8 January 2014.

Council posted on its website new provisional articles for perusal by the public. Two to three weeks later, after receiving comments and suggestions from the public as well as from experts, the Council posted revised versions of those articles on the website. In this manner the document was gradually filled in several rounds and the final version of the bill prepared and completed. In a final round, proposals for changes in the document as a whole were debated and voted upon article by article. At the end of the last round, each article was approved in separate voting.⁷⁹

The Council's use of Facebook and Twitter to publicize their drafts and encourage debate led some at the time to hail the world's first "crowd-sourced" constitution.⁸⁰ Bergmann, however, offers a more sober view: though thousands of posts were made through social media, "the Council was not able to systematically plough through all the extensive input as it only had four months to complete its task".⁸¹ Finnur Magnússon, the Council's Chief Technology Officer, suggests that "at least 4 out of 100 articles in the constitutional draft were directly influenced by the online conversations, for example, on open data and rights of children".⁸²

Though they were a disparate group of 25 individuals, the Council members managed to agree their proposed constitutional text unanimously, and they did so within the four-month window they had been allowed. This reflected near consensus among the

79 Bergmann, *op. cit.*, pp. 8–9.

80 For example, Haroon Siddique, "Mob Rule: Iceland Crowdsources Its Next Constitution", *Guardian*, 9 June 2011; Elizabeth Flock, "Iceland Crowdsources Its Next Constitution", *Washington Post*, 10 June 2011.

81 Bergmann, *op. cit.*, p. 8.

82 Iveta Kažoka, "Crowdsourcing the Icelandic Constitution: Myth or Reality?", <http://blog.openingparliament.org/post/45227421464/crowdsourcing-the-icelandic-constitution-myth-or>, 12 March 2013, last accessed 8 January 2014.

individuals whom voters had chosen to elect on many of the key issues,⁸³ as well as a belief that unanimity was “vital in order to appear as a unified front against expected political resistance.”⁸⁴

Referendum

The Constitutional Council presented its bill for a new constitution to parliament in July 2011. Parliament did not receive it with particularly welcoming arms but did, after much contention, submit it to a referendum held in October 2012. The main question asked, “Do you wish the Constitution Council’s proposals to form the basis of a new draft Constitution?” Five further questions asked about specific elements of the Council’s plan.⁸⁵ The proposals as a whole were backed by 67 per cent of those casting a valid vote, and voters also supported the Council on four of the five specific points. Turnout was 49 per cent.⁸⁶

This result was, however, no more than advisory: the existing constitution requires that amendments be passed by parliament in two successive votes either side of a general election. It was thus for parliament to take the final steps.

A Spectacular Case of Non-Implementation

In yet another remarkable turn, however, parliament has not enacted the constitution and there appears little chance now that it will do so. A combination of filibustering from opposition parties

83 See Gylfason, *op. cit.*, pp. 16–17 on the policy positions stated by the Council members immediately before their election.

84 Bergmann, *op. cit.*, p. 9.

85 English translations of the questions are on the government’s referendum website: www.thjodaratkvaedi.is/2012/en/referendum/the-ballot.html, last accessed 8 January 2014.

86 Statistics Iceland, www.statice.is/Pages/1149, last accessed 8 January 2014.

that fiercely opposed aspects of the constitutional proposals and lack of enthusiasm from many on the government side meant that no vote on the constitution took place in parliament before the general election of April 2013. That election brought the opposition parties – Iceland’s ruling parties before 2009 – back to power. It would appear, therefore, that an overwhelming statement of popular will for change has been ignored.

Assessment

During the period of its operation, Iceland’s Constitutional Council appeared to offer an impressive model for a new type of constitution-making: democratic, freed from the leaden constraints of old party politics, crowd-sourced, modern. Today, however, Iceland’s experience appears to be one of conspicuous failure: however meritorious the process might have been, it has not delivered any result.

The description of Iceland’s experience given above draws on accounts from two social scientists who were also Constitutional Council members: Eiríkur Bergmann and Þorvaldur Gylfason. They are, unsurprisingly, positive about the work that the Council did. Another account offered by a social scientist non-member – Jón Ólafsson – is more critical. Ólafsson suggests that parliament’s failure since October 2012 to enact the new constitution can be blamed, at least in part, on the Constitutional Council’s failure to engage with politicians and parliament and ensure they were kept on board. He observes:

Council members emphasized their detachment from political elites and resolved to write the constitution without being influenced by considerations about how the draft would be received. The council emphasized consensus, on the assumption, expressed by some of the

more prominent members, that consensus in the Council would make it difficult for the parliament to dismiss it. It seems however that such consensus has limited significance since a large number of MP's feel alienated from the draft and are doubtful about some of the important novelties introduced. A lack of enthusiasm among the political elite severely reduces the chances of success, since a new constitution needs to be approved twice in the parliament.⁸⁷

The potential implications of this argument for the UK will be explored in further detail in parts 3 and 4, below.

Various further questions can be raised about the process itself. Given low turnout in both the Constitutional Assembly elections and the referendum, to what extent can it truly be said that this process engaged the wider Icelandic public? While Iceland succeeded in organizing a non-political election, would it be harder in a larger polity for ordinary members of the public to gain sufficient votes to secure election? Even in Iceland, many of those elected were already well known to the public,⁸⁸ so how representative of broader society could they claim to be? Is talk of crowd-sourcing always likely to be more puff than reality?

Many of these difficulties might be dissolved if elections are eschewed in favour of random selection of citizens for the key constitution-making body. On the other hand, they may simply be replaced by new problems. The next section explores experience in Canada and the Netherlands to assess how such models work in practice.

87 Jón Ólafsson, "An Experiment in Iceland: Crowdsourcing a Constitution?", draft paper, available at www.yale.edu/polisci/conferences/epistemic_democracy/jOlafsson.pdf, last accessed 8 January 2014.

88 "Iceland Election Results Announced", Iceland Review Online, 1 December 2010, http://icelandreview.com/icelandreview/search/news/Default.asp?ew_0_a_id=370813, last accessed 8 January 2014.

2.6 Citizens' Assemblies in Canada and the Netherlands

Perhaps the most inclusive political reform processes to date have been three citizens' assemblies held in Canada and the Netherlands: in British Columbia in 2005, the Netherlands in 2006, and Ontario in 2006–7. All three focused on the legislative electoral system. In most respects the three assemblies were very similar to each other, so they are described together in the following subsections.

Composition

Each assembly consisted of ordinary members of the public plus one chairperson appointed by the government. Besides the chair, there were 160 members in British Columbia, 140 in the Netherlands, and 104 in Ontario. In each case, large numbers of citizens were randomly selected and invited to express an interest in taking part – just over 23,000 in British Columbia, and 50,000 in the Netherlands.⁸⁹ Those who expressed an interest – 1715 in British Columbia, 4000 in the Netherlands⁹⁰ – were invited to attend one of a series of meetings, where the work involved in membership was further described and participants were invited to indicate whether they would be happy for their names to go forward. Assembly members were then selected by lot from among those willing to participate.

In each case, the final selection was arranged to ensure equal membership for men and women and also a proportional geographical spread of members: in British Columbia, one

89 British Columbia Citizen's Assembly on Electoral Reform (BC CAER), *Making Every Vote Count: The Case for Electoral Reform in British Columbia* (December 2004), p. 10; Dutch Civic Forum (CF), *Process Report of the Electoral System Civic Forum* (2006), p. 9.

90 BC CAER, *op. cit.*, p. 10; Dutch CF, *op. cit.*, p. 10.

man and one woman were selected from each electoral district; in Ontario, there was one member from each district; in the Netherlands, the provinces were represented in proportion to population. In addition, there was a requirement in Ontario that at least one member should be Aboriginal. Similarly, when it was found in British Columbia that the 158 members initially selected included no one from the aboriginal community, two additional members from that community were added.

Thus, in most respects, the selection was random. Nevertheless, an important element of self-selection was involved too: citizens could choose whether or not to accept the invitation to participate. Indeed, in the Netherlands, those who attended the information meetings were asked to self-assess against a number of criteria relating to their availability, interest, and ability.⁹¹ Given these features, it is reasonable to suppose that the assembly members were more politically literate than the population as a whole. And, indeed, studies conducted in all three cases found that that was the case: the proportion of assembly members professing interest in politics above the mid-point of a 0–10 scale was 75 per cent in British Columbia, 61 per cent in the Netherlands, and 83 per cent in Ontario, compared to 51 per cent, 51 per cent, and 55 per cent in the respective general populations.⁹²

Task and Process

In each case, the assembly was asked to consider whether any changes should be made to the existing electoral system and, if so, recommend what those changes should be. This mandate was

91 Dutch CF, *op. cit.*, p. 11.

92 Patrick Fournier, Henk van der Kolk, R. Kenneth Carty, André Blais, and Jonathan Rose, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011), p. 57.

relatively tightly drawn: in British Columbia, for example, the terms of reference said:

The Citizens' Assembly must assess models for electing Members of the Legislative Assembly and issue a report recommending whether the current model for these elections should be retained or another model should be adopted.

and then added that this assessment must “be limited to the manner by which voters’ ballots are translated into elected members”.⁹³

Each assembly followed a very similar process: Ontario and the Netherlands copied much of the original BC design. Thus, the work of each assembly was divided into three phases, called, in British Columbia, the Learning, Public Hearings, and Deliberation phases:

- ◆ During the *Learning Phase*, assembly members received lectures given or organized by an academic director on various electoral systems and on issues to be borne in mind when designing an electoral system. Assembly members also divided into discussion groups, convened by trained facilitators, to clarify their understanding and work through their initial ideas. In addition, training was provided on working together in a constructive manner.
- ◆ During the *Public Hearings Phase*, public meetings were held around the province or country at which members of the public were able to express their views. Some members of the assembly were present at each meeting. The public were also able to make written submissions and in some cases interactive online fora were developed.

93 BC CAER, *op. cit.*, p. 14.

- ◆ Finally, during the *Deliberation Phase*, assembly members reflected on all that they had heard, defined and prioritized core values that they believed the electoral system should fulfil, considered alternatives, and reached decisions. In both British Columbia and Ontario, the assemblies narrowed the field of possibilities to two alternatives to the status quo, worked on each of these alternatives, selected one of them, and then compared that alternative in detail to the status quo, before finally deciding on whether to recommend a change. In the Netherlands, a range of possible adjustments to the existing system were proposed, debated, and voted on. As previously, all the assemblies worked through a mix of plenary and small-group sessions in order to facilitate participation by all.

The Learning and Deliberation phases were conducted over a series of weekends: there were between ten and twelve plenary weekends in each case.⁹⁴ Assembly members were reimbursed for travel expenses and paid a small allowance: in Ontario, for example, this amounted to \$150 per meeting day.⁹⁵

Reports

The citizens' assemblies in British Columbia and Ontario both recommended major reforms from first past the post to (differing) forms of proportional representation. The final vote to make this recommendation was passed by 146 votes to 7 in British Columbia

94 Fournier, *et al.*, *op. cit.*, p. 6.

95 Ontario Citizens' Assembly on Electoral Reform website, "Frequently Asked Questions", www.citizensassembly.gov.on.ca/en-CA/About/faq.html, last accessed 25 January 2014.

and by 94 votes to 8 in Ontario.⁹⁶ In each case, the assembly's final report set out the case for reform in detail. The Dutch Civic Forum, having earlier decided against major reforms, agreed a relatively limited adjustment to the existing system by 114 votes to 16.⁹⁷ As in the Canadian cases, the Civic Forum's final report set out the case for the changes that it proposed.⁹⁸

Subsequent Steps: Formal Processes

The only major difference between the processes in Canada and the Netherlands concerned what happened after the citizens' assemblies had submitted their reports. In both British Columbia and Ontario, the provincial government committed itself in advance to holding a binding referendum on the assembly's recommendations (in the event that it recommended changes); in the Netherlands, no further procedure was specified.

More precisely, the British Columbia Electoral Reform Referendum Act 2004 said:

*If the Citizens' Assembly on Electoral Reform recommends, in its final report, a model for electing Members of the Legislative Assembly that is different from the current model, a referendum respecting the recommended model must be held in conjunction with the general election required under the Constitution Act to be held in May 2005.*⁹⁹

96 BC CAER, *op. cit.*, p. 13; Ontario Citizens' Assembly on Electoral Reform, *One Ballot, Two Votes: A New Way to Vote in Ontario: Recommendation of the Ontario Citizens' Assembly on Electoral Reform* (15 May 2007), p. 19.

97 Dutch CF, *op. cit.*, p. 23.

98 Dutch Civic Forum, *The Electoral System Civic Forum's Recommendations*, www.burgerforumkiesstelsel.nl, last accessed 9 August 2007.

99 Electoral Reform Referendum Act 2004, www.leg.bc.ca/37th5th/3rd_read/gov52-3.htm, last accessed 9 January 2014, section 1.

It continued by binding the government to follow the result, but only if two high thresholds were met:

The results of a referendum under section 1 are binding on the government only if

(a) at least 60% of the validly cast ballots vote the same way on the question that is stated for the referendum, and

(b) in at least 48 of the 79 electoral districts, more than 50% of the validly cast ballots vote that same way on the question.¹⁰⁰

Almost identical provision was made in Ontario through the Electoral System Referendum Act 2007.¹⁰¹ This was passed just one month before the citizens' assembly issued its final recommendations, though the government had earlier committed itself politically to passing such legislation.

In the Netherlands, however, "The government decided that any recommendations from the assembly should simply be submitted to the government. There was no intention to present it to the public in a referendum".¹⁰²

Subsequent Steps: Actual Events

The process that followed the Dutch Civic Forum can be very simply described: nothing happened. The government collapsed while the Civic Forum was sitting and fresh elections were held. The party that had been pushing for electoral reform did not join the new coalition. As the major book on the citizens'

¹⁰⁰ *Ibid.*, section 3(2).

¹⁰¹ Electoral System Referendum Act 2007, www.e-laws.gov.on.ca/html/source/statutes/english/2007/elaws_src_s07001_e.htm, last accessed 9 January 2014.

¹⁰² Fournier, *et al.*, *op. cit.*, p. 26.

assemblies concludes, “Given the structure of partisan and coalition interests, there was no prospect for electoral reform in the Netherlands, even of the modest sort proposed by the *Burgerforum*.”¹⁰³

In Canada, the promised referendums took place, but did not lead to reform. In British Columbia in May 2005, 58 per cent of those voting supported the reform, falling just short of the 60 per cent threshold for the results to be binding.¹⁰⁴ The government felt, given the closeness of the result, that a second chance should be allowed, and so another referendum on the same proposal was held in May 2009. By this time, however, the wind was no longer in the sails of reform, and just 39 per cent of those voting backed the change.¹⁰⁵ Similarly, the Ontario referendum of 2007 secured just 37 per cent support.¹⁰⁶

Assessment

The details above reveal one key point about these three citizens’ assemblies: all succeeded in working harmoniously towards a precise conclusion, with final recommendations endorsed by the large majority of assembly members. In addition, a major study of the assemblies has analysed the effectiveness of their operation in great detail. Its key findings include the following:

- ◆ Assembly members learnt a great deal about the options available during the course of the discussions.¹⁰⁷

103 *Ibid.*, p. 50.

104 Elections BC, Results of the electoral reform referendum of 17 May 2005, www.elections.bc.ca, last accessed 30 July 2007.

105 Elections BC, *Statement of Votes: Referendum on Electoral Reform, May 12 2009*, www.elections.bc.ca, last accessed 9 January 2014, p. 17.

106 Elections Ontario, Results of the electoral reform referendum, 10 October 2007, www3.elections.on.ca, last accessed 7 November 2007.

107 Fournier *et al.*, *op. cit.*, pp. 37–9.

- ◆ Assembly members' opinions did not change chaotically. Rather their views "developed gradually as they were acquiring information about the various options".¹⁰⁸
- ◆ The decisions that the assembly members reached were consistent with the principles that they said mattered to them: "the electoral system reforms put forth by the citizen assemblies were consistent with their respective aggregate goals and values, leading us to believe that their collective decisions were reasonable".¹⁰⁹

The study concludes, "Citizen political decision-making proved to be of a remarkably high quality".¹¹⁰ It should be acknowledged that the authors of this study include the academic directors of each of the three assemblies, who invested much time, energy, and emotion in the assemblies' success. Their objectivity could therefore be questioned. Yet each of the findings noted above is based upon extensive and robust empirical evidence: the confidence we can have in the conclusions is therefore high.

Nevertheless, whatever the merits of the process, none of the assemblies delivered any actual change. Perhaps this was because there was little need for change. But another possibility is that the process was better suited to warm discussion than to concrete action: as in Iceland, we might be concerned that politicians, because they were excluded from the process, felt little connection to the reform proposals and therefore did not work for their enactment.

108 *Ibid.*, p. 78.

109 *Ibid.*, p. 92.

110 *Ibid.*, p. 150.

2.7 Mixed Case One: The Australian Constitutional Convention of 1998

Australia has a rich history of constitutional conventions, which have taken a wide variety of forms. The National Australasian Convention of 1891 comprised delegates chosen by the state legislatures, while the Australasian Federal Convention of 1897–8 was directly elected. Between 1973 and 1985, a Constitutional Convention consisting again of delegates from the state and federal legislatures met intermittently. An expert Constitutional Commission was established in 1985 and made reform proposals in its final report of 1988.

Here, however, we focus on the Constitutional Convention of February 1998, which met for ten days to debate specifically the issue of whether Australia should become a republic and, if so, what form of republicanism it should adopt. The membership of the Convention was mixed: half of the 152 members were elected directly; the remaining half were appointed, either from the federal and state legislatures or from wider society.

Origins

The long-standing debate over whether Australia should retain the Queen as its Head of State grew in prominence in the early 1990s. An Australian Republican Movement (ARM) was established in 1991. In opposition to this, Australians for Constitutional Monarchy (ACM) formed the following year. In 1993, Labor prime minister Paul Keating created a committee – the Republic Advisory Committee (RAC) – to formulate recommendations on establishing a republic. The RAC was chaired by Malcolm Turnbull, who was also chair of the ARM (and who would later become leader of the Liberal Party).

In 1995, following the RAC's report, Keating proposed that Australia should become a republic, with a president chosen by a two-thirds majority in a joint sitting of the federal House of Representatives and Senate.

The Liberal Leader of the Opposition, Alexander Downer, argued that change should come only by "building a national consensus" through a "people's convention". This idea was further advanced by John Howard after he succeeded Downer as Liberal leader in 1995. And the Liberal–National government pursued it following its election in 1996.¹¹¹

Composition

The Convention had 152 members. Half of these – 76 – were directly elected, state-by-state, using a slightly modified form of the Single Transferable Vote (STV) electoral system familiar to Australians from Senate elections. The states would be represented in proportion to their numbers of representatives in the federal House of Representatives and Senate, thus giving some over-representation to the smaller states. Uniquely among Australian elections, voting was optional rather than compulsory. All voting took place by post in November and December 1997 and the results were declared just before Christmas 1997.¹¹²

111 This summary is based on Australian Constitutional Convention, *The Final Report of the Convention*, vol. 1, chapter 3, available at <http://pandora.nla.gov.au/nph-wb/19981111130000/www.dpmc.gov.au/convention/report.html>, last accessed 1 February 2014; Iain McAllister, "Elections without Cues: The 1999 Australian Republic Referendum", *Australian Journal of Political Science* 36, no. 2 (2001), 247–69, at pp. 248–50.

112 The electoral process is set out in detail in Australian Electoral Commission, *1997 Constitutional Convention Election Report and Statistics* (Canberra: Australian Electoral Commission, 1998).

A total of 609 candidates ran in the elections. Of these, 176 were independent (or “ungrouped”) candidates, while 433 ran in a total of 80 different groups.¹¹³ No significant party ran candidates under its own label. Rather, the major groups were defined by their attitude to the republican question. The vote shares of the five largest groups were as shown in Table 1.

Table 1. Results of the Australian Constitutional Convention Election, 1997

Group	Vote Share (%)	Seats won
Australian Republican Movement	30.3	27
No Republic – Australians for Constitutional Democracy	22.5	19
Ted Mack	4.0	2
Clem Jones Queensland Republican Team	3.4	3
Real Republic	3.1	2

Sources: Australian Constitutional Convention, *op. cit.*, volume 1, chapter 4; Australian Electoral Commission, *op. cit.*, pp. 33–34.

In total, declared republicans won 46 of the 76 elected seats, declared monarchists won 27, and uncommitted candidates won three.¹¹⁴

Members of the federal or state parliaments were not allowed to run in these elections.¹¹⁵ Nevertheless, many of the successful candidates were prominent politicians who had formerly been parliamentary members. Some, such as Malcolm Turnbull, would later rise to the highest levels of elected office. Others were

¹¹³ *Ibid.*, p. 9.

¹¹⁴ McAllister, *op. cit.*, p. 250.

¹¹⁵ Australian Electoral Commission, *op. cit.*, p. 9.

prominent in the media, business, and other worlds. Almost all were members of a wider organization, though six of those elected were ungrouped.¹¹⁶

Of the 76 members of the Constitutional Convention who were not directly elected, meanwhile, 20 were chosen from the Commonwealth Parliament and 20 from the state legislatures, while 36 were non-parliamentary appointees. According to the Convention's final report, "The make-up of the 20 Commonwealth parliamentary appointees broadly reflected the balance of representation of the parties across both Houses of the Commonwealth Parliament"; these representatives were chosen by their party leaders. The states had three representatives each – "the Premier, the Opposition Leader and a third parliamentarian nominated by the Premier" – while the two territories were represented by their chief ministers.¹¹⁷

With regard, finally, to the non-parliamentary appointees, the Convention's final report says:

*The Government was concerned to ensure that a wide diversity of skills and experience was represented and that groups which might not have been adequately represented in election outcomes were afforded the opportunity to participate. The appointments included representation of Aboriginal and Torres Strait Islanders. Gender balance was also important, and 18 women were among the 36 appointees. Appointments were spread across all of the States and Territories, and at least one delegate from each was a young person aged between 18 and 25.*¹¹⁸

116 *Ibid.*, pp. 33–34.

117 Australian Constitutional Convention, *op. cit.*, volume 1, chapter 4.

118 *Ibid.*, volume 1, chapter 4.

Operation and Outputs

The government asked the Constitutional Convention to consider three questions:

- ◆ “whether Australia should become a republic”;
- ◆ “which republic model should be put to the electorate to consider against the status quo”;
- ◆ “in what time frame and under what circumstances might any change be considered”.¹¹⁹

It also gave the Convention just ten sitting days – from 2 to 13 February 1998 – to conduct its debates. Thus, the Convention did not have the extended time for consultation and reflection that has been enjoyed by most of the constitution-making bodies described so far.

Indeed, in contrast to the citizens’ assemblies in Canada and the Netherlands, the Australian Constitutional Convention was not a deliberative body: it was not based on the idea that members should keep their minds open, listen to the debate, and seek shared understanding. Rather, as we have seen, most members were tied from the start to a particular conclusion, and the debates that ensued were “fractious”.¹²⁰ Much of the time was spent not in debate, but in speechifying: all Convention members were allowed to make a “general address”, and 132 of the 152 chose to do so.¹²¹ Working parties were established, but these were not designed to reconcile alternative viewpoints: rather, they

119 *Ibid.*, volume 1, chapter 1.

120 John Higley and Rhonda Evans Case, “Australia: The Politics of Becoming a Republic”, *Journal of Democracy* vol. 11, no. 3 (July 2000), pp. 136–50, at p. 144.

121 Australian Constitutional Convention, *op. cit.*, volume 1, chapter 5.

were opportunities for members with particular viewpoints to work up precise proposals.¹²²

The Convention had a pro-republican majority. The main debate therefore focused on the form of republicanism that should be put to the electorate. Following preliminary debates, Convention members were invited on the eighth sitting day to put forward proposals. Those attracting the support of at least ten members went forward to a vote on the ninth sitting day. Four proposals met this hurdle, each named after its main proposer:

- ◆ the Gallop model: the public would nominate candidates for head of state; at least three of these would then be selected by a joint sitting of the Commonwealth Parliament; these nominees would then go forward to election by the public;
- ◆ the Hayden model: any candidate nominated by at least 1 per cent of voters would go forward for direct public election;
- ◆ the McGarvie model: anyone would be able to nominate a candidate to the prime minister, who would choose a nominee; this selection would be ratified by a specially formed Constitutional Council;
- ◆ the Turnbull model (or the “Bi-partisan Appointment of the President” model): a broadly based “Community Consultation Committee” would report to the prime minister and the leader of the opposition, who would jointly propose one nominee; this nominee would then require two-thirds support at a joint sitting of the Commonwealth Parliament.¹²³

122 See the outlines of the working groups’ activities in *ibid.*, volume 1, chapter 6 and volume 2, appendix 4.

123 *Ibid.*, volume 1, chapter 6, day 9; McAllister, *op. cit.*, pp. 250–51.

The choice among these options was made by “exhaustive vote”, analogous to the Alternative Vote electoral system: Convention members voted for their favoured option; the option with fewest votes was eliminated and the vote repeated until one option secured a majority. The Hayden model was eliminated in the first round (having secured just four votes) and the Gallop model (on 30 votes) was eliminated in the second round. In the final round, the Turnbull model secured 73 votes compared with 32 for the McGarvie model; 43 votes were cast for “no model” and there were three abstentions.¹²⁴

On the following, final day of the Convention, the members voted again on the specific motion “That this Convention supports the adoption of a republican system of government on the Bipartisan Appointment of the President model in preference to there being no change to the Constitution”. This passed by 73 votes to 57, with 22 abstentions.¹²⁵ Thus, though the Convention agreed a final resolution, this was supported by fewer than half the members.

Referendum

In his speech on the Convention’s opening day, John Howard had said:

If clear support for a particular republican model emerges from this Convention my government will, if returned at the next election, put that model to a referendum of the Australian people before the end of 1999. If the people then decide to change our present Constitution, the new arrangements will be in place for the centenary of the inauguration of the Australian

124 Australian Constitutional Convention, *op. cit.*, volume 1, chapter 6, day 9.

125 *Ibid.*, volume 1, chapter 6, day 10.

*nation and the opening of the new millennium on 1 January 2001.*¹²⁶

The monarchist Howard might have argued that clear support for a particular model had not emerged and that the referendum, therefore, should not be held. But he did not do that. The referendum went ahead on 6 November 1999. 45.1 per cent of voters voted for the republican model on offer, while 54.9 per cent opted to retain the status quo.¹²⁷

As is well known, this outcome did not reflect a monarchist majority in the country: the detailed Australian Constitutional Referendum Study found at the time that 76 per cent of respondents favoured a republic and only 24 per cent wanted to keep the queen. But the majority of the public – 55 per cent – wanted a directly elected president, compared to only 21 per cent who wanted a president chosen by Parliament. And almost half of those preferring direct election opted to retain the status quo rather than have a president chosen by politicians.¹²⁸ In the short term, this result was highly controversial. But the republican debate in Australia has now substantially died down, and there is no significant prospect of change in the near future.

Assessment

Perhaps the Constitutional Convention's most notable success was that it roused considerable public debate. Higley and Case write of the "glare of media publicity" that surrounded the

126 *Ibid.*, volume 1, chapter 3.

127 McAllister, *op. cit.*, p. 253.

128 McAllister, *op. cit.*, p. 256.

Convention.¹²⁹ John Uhr argues that the Convention “generated greater public interest and participation than traditional referendum triggers”, and continues:

*The 1998 Constitutional Convention strengthened public interest in sustained community deliberation over a republic, perhaps making it that much more difficult for referendum activists on both sides to get away with the simplifications of past referendum practice.*¹³⁰

Yet the Convention conspicuously failed to devise a proposal that could command majority support. Helen Irving sums this up well:

*Although the 1998 Convention appeared at the time much more hopeful, partly because half its members had been directly elected and this appeared to lend it a legitimacy the previous ‘Conventions’ (other than that of 1897–98) lacked, and partly because of the high level of publicity it attracted, it now joins all the others in having no direct issue.*¹³¹

Depending on the view one takes of the constitutional alternatives, the Convention might better either have reflected the popular desire for direct election or have elevated the debate to a level where broad public opinion understood the benefits of indirect election. But it did neither of these things. The outcome reflected the fear among most members of Australia’s political elite that a directly elected president could become a rival and

129 Higley and Case, *op. cit.*, p. 144.

130 John Uhr, “Testing Deliberative Democracy: The 1999 Australian Republic Referendum”, *Government and Opposition* vol. 35, no. 2 (April 2000), pp. 189–210, at p. 207.

131 Helen Irving, “The Republic Referendum of 6 November 1999”, *Australian Journal of Political Science* 35, no. 1 (2000), pp. 111–15, at p. 114.

unpredictable power centre. Public opinion neither led nor was led by the convention process, and the resulting disjuncture generated the referendum failure.

Of course, there is a legitimate question as to whether any alternative process could have done any better. Irving suggests that “a reconstituted, lengthy Convention where real constitutional work (rather than political negotiation) is done” would do better.¹³² These words point to the short duration of the Convention as a factor contributing to its weakness. But its composition was also a hindrance. The issue the Convention was asked to resolve divided Australians, so it was inevitable that an election would reproduce and, indeed, accentuate that division among the Convention members. Once the dividing lines had been drawn, any search for deliberation and reconciliation would be almost impossible.

2.8 Mixed Case Two: Ireland’s Constitutional Convention

As in Iceland, economic collapse in Ireland following the 2008 banking crisis spurred a wave of interest in constitutional reform: the political system was perceived as having failed and so reforms were discussed as a way of responding to that. Much of this talk, particularly in the early days, was anti-political: newspapers carried frequent calls for reducing the number of politicians as well as their pay. Other ideas sought more directly to tackle the perceived sources of governance failure: a strand of Irish opinion has long contended, for example, that the highly personalized single-transferable vote (STV) electoral system presses members of the legislature (TDs) to focus too much on local concerns and too little on national issues such as the regulation of the banks; calls to change this system were

¹³² *Ibid.*, p. 114.

therefore widespread. All of the significant parties' manifestos for the 2011 general election, in marked contrast to those of earlier years, contained detailed commitments on a range of constitutional reforms.¹³³

One specific proposal was for the establishment of some form of constitutional convention. Fine Gael proposed "a *Citizens Assembly*, along the lines of similar assemblies which have been used in Canada and in the Netherlands to consider political and electoral reform".¹³⁴ This assembly would "consider what changes should be made to Ireland's political and government system over and above the specific changes that Fine Gael proposes to make" and "make recommendations on how the electoral system might be reformed".¹³⁵ Labour also cited the Canadian and Dutch examples in its proposals, but argued for a mixed convention comprising thirty members of the Oireachtas (the Irish parliament), thirty members "from representative associations and organisations, [and] community bodies" as well as "academic and legal experts", and thirty "members of the general public randomly selected from the electoral register".¹³⁶ Fine Gael emerged from the 2011 election as the largest party and formed a governing coalition with Labour. The promised citizens' assembly was slow to emerge, but eventually a body close to what the parties had proposed was created.

133 Alan Renwick, "How Is the Democratic Reform Agenda Changing?", paper prepared for presentation at the Annual Meeting of the American Political Science Association, New Orleans, 30 August – 2 September 2012, pp. 5–7.

134 Fine Gael, *New Politics*, www.finegael.org/upload/NewPolitics.pdf, last accessed 2011.

135 *Ibid.*

136 Irish Labour Party, *Labour's Plan for a New Constitution*, www.labour.ie/download/pdf/laboursplanforanewconstitution.pdf, last accessed 2011.

Composition

What was eventually established was a hybrid comprising 100 members:

- ◆ 66 ordinary members of the public, chosen randomly;
- ◆ 33 politicians: one from each of the parties in the Northern Ireland Assembly parties that wished to participate, plus members of the Irish parliament (Oireachtas) in proportion to party strengths;
- ◆ the chair, appointed by the government.

The procedure used to select ordinary members of the public was slightly different from that used in Canada and the Netherlands: a “stratified” sample was sought, guaranteeing representation in terms of region, sex, age, class, and work status in proportion to shares in the wider population. A market research company was employed to achieve this: its interviewers visited randomly selected addresses, explaining the constitutional convention process and asking residents whether they would like to take part; they continued to knock on randomly selected doors until all parts of the representative sample had been obtained.¹³⁷

Terms of Reference

The Constitutional Convention’s terms of reference gave the body eight specific issues to consider:

1. “reducing the Presidential term of office to five years and aligning it with the local and European elections;

¹³⁷ See the document “Constitutional Convention – Members of the Public Recruitment Process”, available on the Constitutional Convention’s website, www.constitution.ie/Documents/BehaviourAndAttitudes.pdf, last accessed 5 January 2014.

2. reducing the voting age to 17;
3. review of the Dáil electoral system;
4. giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;
5. provision for same-sex marriage;
6. amending the clause on the role of women in the home and encouraging greater participation of women in public life;
7. increasing the participation of women in politics;
8. removal of the offence of blasphemy from the Constitution¹³⁸

As is apparent, this is an eclectic list of topics, some very narrow, others somewhat broader. It was determined by a range of political expediencies: the government had already decided it wanted to proceed with some bigger changes, such as abolition of the Senate; the topics that remained were, in some cases, those that the coalition partners could not agree on.¹³⁹

The terms of reference contained one further point: once it had reported on the eight issues listed above, the Constitutional Convention could propose “such other relevant constitutional amendments that may be recommended by it”.¹⁴⁰ Quite what “relevant” might mean was not specified. This clause did appear to offer the Constitutional Convention considerable scope to extend its focus. Nevertheless, a time limit of one year on its activities would also constrain how far it could take this.

138 Resolution of the Houses of the Oireachtas, July 2012, www.constitution.ie/Documents/Terms_of_Reference.pdf, accessed 5 January 2014.

139 David M. Farrell, “The Irish Constitutional Convention of 2013–14”, unpublished manuscript, February 2014, pp. 2–3.

140 Resolution of the Houses of the Oireachtas, *op. cit.*

The Constitutional Convention was to make its decisions by majority vote. It would submit reports on the matters within its remit to the government. As the resolution establishing the Convention concluded, “the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum”¹⁴¹.

Thus, the government gave itself the right to block or modify any proposal that the Convention produced. The Irish constitution can be amended only by referendum, but there was no guarantee that a referendum would in fact be held on any of the recommendations that the Convention made.

Operation

The Convention held its inaugural meeting on 1st December 2012. The first plenary meeting discussing items from the terms of reference – the presidential term and the voting age – was held on the weekend of 26 and 27 January 2013. Another weekend was devoted to the two agenda items relating to the role of women. Same-sex marriage, the casting of votes outside Ireland, and blasphemy received one weekend each, while the Dáil electoral system received two. The timetable for the year and the agendas for each of the meetings were agreed in Convention discussions. Each weekend involved a mixture of academic presentations coordinated by an advisory Academic and Legal Support Group, presentations by advocacy organizations, roundtable discussions during which Convention members broke into small groups to work through the issues, and plenary discussions where emerging themes were reported and further considered. In the

141 *Ibid.*

course of these discussions, particular questions to be decided by vote among the Convention members were identified. Voting took place towards the end of the second day each weekend and the results formed the cornerstone of each subsequent report from the Convention to the government.¹⁴²

At each stage, the Convention also invited submissions from members of the public, and over 2000 such submissions were received. Of the eight specified items on the Convention's agenda, six attracted fewer than one hundred submissions each. The issue of the right to vote outside Ireland attracted 137. By far the most contentious issue was same-sex marriage, on which there were 1099 submissions. Finally, 790 submissions addressed other issues besides those specified in the Convention's terms of reference. All of these submissions were published on the Convention's website.¹⁴³ They were also summarized for Convention members to assist their inclusion in the deliberations.

Towards the end of 2013, the Convention devoted considerable attention to the "other relevant constitutional amendments" aspect of its terms of reference. Besides seeking and receiving large numbers of public submissions and hearing from academics and legal experts, it held a series of public meetings in regional centres, inviting the public to "give your views on Constitutional issues for consideration in the next phase of the Convention's agenda".¹⁴⁴ It considered debating many issues, including political reforms, morality, economic, social, and cultural rights,

142 The agendas of and reports from all of the meetings are available on the Constitutional Convention's website at www.constitution.ie/Meetings.aspx (last accessed 28 February 2014).

143 The submissions are available at www.constitution.ie/Submissions.aspx, last accessed 28 February 2014.

144 These words come from the public notices used to advertise the meetings, available on the Convention's website at www.constitution.ie/Meetings.aspx, last accessed 8 January 2014.

and the environment.¹⁴⁵ It chose to focus on two areas – Dáil reform and economic, social, and cultural rights – which were discussed at the Convention’s final meetings in February 2014. The Convention’s Chairman, Tom Arnold, commented:

*Unfortunately, the Convention only has two remaining meetings and due to the time constraints it would be impossible to give every topic the attention that they obviously deserve. We will, however, consider how best to proceed with those other issues which remain a significant priority for a number of our members.*¹⁴⁶

Reports and Government Responses

The Convention published reports on each of the eight specific issues in its terms of reference.¹⁴⁷ By the time of writing in late February 2014, it had also published the voting results on the extra issues that it added – Dáil reform and economic, social, and cultural rights – though the detailed reports on these matters remained pending.¹⁴⁸

145 “Convention on the Constitution Recommends that the Offence of Blasphemy in the Constitution Should Be Replaced”, press release, 3 November 2013, available at www.constitution.ie/AttachmentDownload.ashx?mid=b7d9c660-a044-e311-8571-005056a32ee4, last accessed 8 January 2014.

146 “Convention on the Constitution chooses (i) Dáil Reform and (ii) Economic, Social and Cultural rights for discussion at their final two meetings in February 2014”, press release, 17 December 2013, available at www.constitution.ie/AttachmentDownload.ashx?mid=922d30df-2067-e311-877e-005056a32ee4, last accessed 8 January 2014.

147 See the Convention’s website at www.constitution.ie/Meetings.aspx, last accessed 28 February 2014.

148 “Ballot Results Dáil Reform”, 2 February 2014, and “Press Release: The Convention on the Constitution has voted to afford greater constitutional protection to Economic, Social and Cultural (ESC) rights”, 23 February 2014, both available at www.constitution.ie/Convention.aspx#documents, last accessed 28 February 2014.

By the same time, the government had formally responded to the Convention's first three reports, which cover the voting age, the presidential term, the two agenda items relating to the position of women, and same-sex marriage. It fully accepted the Convention's recommendations that the voting age should be reduced to sixteen, that the presidential term should not be changed, that the minimum age for presidential candidates should be reduced, and that same-sex marriage should be introduced. It committed to holding referendums on the voting age, the age of presidential candidacy, and same-sex marriage by 2015.¹⁴⁹ On the other hand, while agreeing with the spirit of the Convention's recommendations on enshrining gender neutrality and equality within the constitution, the government said that further consideration of the practical implications of such changes would be needed. It did not therefore commit to a referendum by any particular date on these points.¹⁵⁰ Similarly, the government submitted to a parliamentary committee for further debate a recommendation that citizens should be

149 "Report of the Convention on the Constitution: Statements", Dáil Éireann Debate *Vol. 812 No. 2*, 18 July 2013, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013071800021>, last accessed 8 January 2014; "Speech by Alan Shatter TD, Minister for Justice, Equality and Defence in the Dáil Debate on the Response to the Third Report of the Constitutional Convention", 17 December 2013, Department of Justice and Equality, www.justice.ie/en/JELR/Pages/SP13000433, last accessed 8 January 2014.

150 "Statement by the Minister for Justice, Equality and Defence, Alan Shatter, TD, to the Dáil – Second Report of the Constitutional Convention on Role of Women – Government's Response", 10 October 2013, Irish Government News Service, www.merriionstreet.ie/index.php/2013/10/statement-by-the-minister-for-justice-equality-and-defence-alan-shatter-td-to-the-dail-second-report-of-the-constitutional-convention-on-role-of-women-governments-response/, last accessed 8 January 2014.

able to participate directly in the nomination of presidential candidates.¹⁵¹

Assessment

The sittings of the Irish Constitutional Convention have only just ended at the time of writing and the question of whether any of its proposed constitutional amendments will actually be passed remains open. The time for a full assessment of its work therefore remains some way off. Nevertheless, several points can be made.

First, the Convention has succeeded in delivering precise recommendations on the issues that were assigned to it within the allotted time.

Second, while concerns were initially expressed on the narrowness of the issues that were put before the Convention, in fact Convention members have interpreted their remit expansively. For example, though asked to consider a reduction of the voting age to seventeen, the Convention in fact proposed a reduction to sixteen. In reviewing the Dáil electoral system, the Convention also proposed significant reforms to the system of parliamentary government: that it should be possible to appoint non-parliamentarians to government and that Dáil members should resign their seats if appointed to government.¹⁵²

151 "Report of the Convention on the Constitution: Statements", Dáil Éireann Debate Vol. 812 No. 2, 18 July 2013, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013071800021>, last accessed 8 January 2014

152 "Fourth Report of the Convention on the Constitution: Dáil Electoral System", August 2013, available at www.constitution.ie/AttachmentDownload.ashx?mid=fd70670-030f-e311-a203-005056a32ee4, last accessed 8 January 2014. See also David M. Farrell, "The Irish Constitutional Convention of 2013–14", unpublished manuscript, February 2014, pp. 4–5.

Third, the Convention's deliberations appear to have been inclusive. One fear was that the politicians would dominate the proceedings, while the ordinary members would have little real voice. But Professor David Farrell, a leading political scientist and the Convention's Research Director, argues this has not occurred:

A point of detail that many of the critics may not have picked up on is the modus operandi that surrounds deliberative processes such as this, namely the practice of having the members distributed in tables of 7–8 persons, each with a trained facilitator whose role is to ensure that all members are given an equal right to participate in the discussions in an atmosphere of mutual respect. Moreover, the politician members have made every effort not to steal the limelight, particularly in the plenary discussions (as can be seen from the streamed video feed of these discussions).¹⁵³

Finally, the government has been responsive to the Convention's recommendations. As noted above, it has so far committed to holding referendums on three issues by 2015 and it has established processes for investigating all other recommendations further; the government has rejected no recommendation to date, even where the Convention has strayed beyond its initial brief. David Farrell suggests that this responsiveness may partly reflect the Convention's composition: "A further advantage of having politicians among the ranks of the members is that it has proven useful in helping to minimize the risks of a 'disconnect' between the Convention and the political class". He finds that "the politician

153 David M. Farrell, "The Irish Constitutional Convention: Giving Citizens a Voice in Constitutional Debates", Making Electoral Democracy Work blog, 17 December 2013, <http://electoraldemocracy.com/irish-constitutional-convention-giving-citizens-voice-constitutional-debates-1169>, last accessed 8 January 2014.

members are acting as ‘cheerleaders’ for the process” when the Convention’s recommendations are debated in parliament.¹⁵⁴ At the same time, the meaningfulness of these responses is still to be tested: the establishment of further inquiries might be a way of kicking the can down the road; and the referendum results will be influenced by how the various parties campaign.

Overall, then, there is much reason to view the experience of Ireland’s Constitutional Convention positively, but it is too early to reach final conclusions.

154 Farrell, “The Irish Constitutional Convention of 2013–14”, *op. cit.*, p. 6.

Part 3: How Should the Options be Judged?

Having set out in Part 1 the aspects of the constitutional design process that need to be thought about and examined particular examples in detail in Part 2, this section examines the criteria that should be used for selecting among the options in the UK. Perhaps surprisingly, there is no substantial body of existing scholarship from which criteria can be straightforwardly extracted. Speaking in 1993, the American political scientist Harry Eckstein said, “Surprisingly little has been written about the general subject of constitution-writing”.¹⁵⁵ The last two decades have seen the emergence of rather more analysis. Still, however, there is no settled list of criteria of evaluation.

The sections that follow propose five core criteria. All of these have at least some basis in the existing literature as well as in the debates around the cases that were presented in Part 2. First, constitution-making should, as Jon Elster has argued, be based on reason rather than interest or passion. Second, the reasoning should be of good quality. Third, inclusivity is an intrinsically desirable feature of any constitution-making process. Fourth popular legitimacy is needed if the constitutional order is to

155 Harry Eckstein, “Notes on the Design of Constitutions”, paper prepared for the Conference on the Design of Constitutions, University of California, Irvine, 10–12 June 1993. This paper itself was never published. The reference is from Rein Taagepera, “Estonia’s Constitutional Assembly, 1991–1992”, *Journal of Baltic Studies* 25, no. 3 (fall 1995), 211–32, at p. 211. For a similar view, see also Jon Elster, “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal* 45, no. 2 (November 1995), 364–96, at p. 364.

succeed. Fifth, political legitimacy – that is, legitimacy among the existing power elite – is also required if change is actually to happen in a non-revolutionary context.

3.1 Reason over Interest and Passion

The primary scholar of constitution-making over the last two decades has been the Norwegian social theorist Jon Elster. Elster identifies three basic motivations in political action: reason, interest, and passion. “Reason” refers to “any impartial motivation, disinterested as well as dispassionate, typically based on a conception of justice or fairness”. “Interest” involves “the pursuit of individual, group or institutional advantage”. Passion is “any emotional impulse or prejudice that ... is capable of inducing the individual to act against his or her interest”.¹⁵⁶ When it comes to constitution-making, Elster argues, it is reason that ought to dominate: “the intrinsic importance of constitution-making requires that procedures be based on rational, impartial argument”.¹⁵⁷

The predominance of reason can be fostered by selecting for membership of constitution-making bodies “impartial and well-informed individuals” rather than “interested, passionate, or biased individuals” or by designing such bodies to “foster or be responsive to” the former qualities, while weakening or limiting vulnerability to the latter.¹⁵⁸

156 Jon Elster, “Reason, Interest and Passion in the East European Transitions”, *Social Science Information* 38, no. 4 (December 1999), pp. 499–519, at pp. 500–501.

157 Jon Elster, “Forces and Mechanisms”, *op. cit.*, p. 394.

158 Jon Elster, “Clearing and Strengthening the Channels of Constitution Making”, in Tom Ginsburg, *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), pp. 15–30, at p. 16.

Elster argues that the need for impartiality implies that constitution-making should not be done by the regular legislature, for then the interests of the legislature and its members will dominate. Rather, the task of constitution drafting should be given to a specially elected constituent assembly.¹⁵⁹ Furthermore, that assembly should be elected by proportional representation: “Whatever the advantages of the majority system in creating ordinary legislatures, a constituent assembly ought to be broadly representative.”¹⁶⁰ (Elster does not consider options for direct involvement of ordinary citizens, so offers no view on the comparative value of a directly elected constituent assembly or a citizens’ assembly.)

No one in the emerging literature on constitution-making challenges the value of impartiality. Nevertheless, as section 3.5 below suggests, there may often be good reason to temper its implications in order to achieve actual reform.

3.2 The Quality of Reasoning

Implicit in Elster’s advocacy of reason over interest and passion is the idea that that reasoning should be of high quality: it should be based on solid understanding of the options and of the implications that adopting each of those options would have. This may seem to imply an important role for experts: people who do understand (or who are readily able to understand) the issues. Indeed, the dominant mode of constitutional deliberation in the UK to date – the royal (or independent) commission – enshrines the centrality of expertise. It may also lead to concerns over the inclusion of ordinary citizens, the vast majority of whom manifestly lack any deep constitutional expertise.

159 Elster, “Forces and Mechanisms”, *op. cit.*, p. 395.

160 *Ibid.*, p. 395.

Even in his early writings, however, Elster cast doubt on the idea that experts should be favoured. Reflecting the concerns about popular and political legitimacy discussed in sections 3.4 and 3.5 below, Elster argued that “The role of experts should be kept to a minimum because solutions tend to be more stable if dictated by political rather than technical considerations. Lawyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus.”¹⁶¹

The opposite concern – that ordinary citizens cannot be trusted with major constitutional decisions – is also sometimes voiced. For example, Matthew Mendelsohn, reviewed debates in Canada following the failure of the 1992 referendum on the Charlottetown Accord over whether voters were able to make such a decision.¹⁶² Yet the Canadian and Dutch experiences outlined in Part 2, above, suggest that such fears may be greatly exaggerated. The conclusions of the citizens’ assemblies in each case were clearly reasoned and based on sound understanding of the options.

3.3 Inclusivity as a Good in Itself

A constitution is a set of rules governing the operation of a polity. In a democracy, the polity is constituted by the people and sovereignty rests with the people. A constitution can therefore be democratic only if it is devised in a way that includes the people. Thus, as already noted above, the Constitution of the United States begins with the words “We the People”. As John Alexander Jameson, one of the earliest analysts of constitution-making bodies, wrote in 1887, it is a leading principle of the

161 *Ibid.*, p. 395.

162 Matthew Mendelsohn, “Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics”, *Canadian Journal of Political Science* 33, no. 2 (June 2000), 245–72.

American system of government that “laws and Constitutions can be rightfully formed and established only by the people over whom they are to be put in force”.¹⁶³ The principle of inclusivity is now generally recognized. Indeed, Vivien Hart argues that “a specific right to participate in constitution making” now exists in international law as a result of decisions by the United Nations Committee on Human Rights.¹⁶⁴

What is more, what “inclusion” means has tended to expand over time. The people of the North American states were no more than indirectly represented at the Philadelphia Convention and were again only indirectly involved through their representatives in the process of ratification. In 1920, no constitution in force had been ratified by referendum.¹⁶⁵ Today, by contrast, around 40 per cent of the constitutions in force explicitly require a referendum for ratification.¹⁶⁶ Many constitution-making processes have recently involved detailed public consultation.¹⁶⁷ As we have seen, some countries have over the last decade included ordinary citizens in detailed decision-making through citizens’ assemblies.

These international developments mirror, of course, changes in the UK, as seen, for example, in the increased use of referendums and the introduction of e-petitions as a means of triggering parliamentary debates.

163 John Alexander Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding*, 4th ed. (Chicago: Callaghan and Co., 1887), p. 1.

164 Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace Special Report 107 (July 2003), pp. 5–7.

165 Justin Blount, Zachary Elkins, and Tom Ginsburg, “Does the Process of Constitution-Making Matter?”, in Tom Ginsburg, *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), pp. 31–65, at pp. 37–8.

166 *Ibid.*, pp. 37–8.

167 Hart, *op. cit.*, pp. 7–10.

Thus, inclusivity is an accepted basic principle. It requires that all parts of society should be represented fairly. It is increasingly seen also as requiring opportunities for participation by the public that are direct and that extend to the stage of proposal-writing as well as that of ratification.

3.4 Public Legitimacy

Public participation is also often seen as desirable for the more instrumental reason that it may strengthen public confidence in the constitutional structure. Almost all established democracies in the world today are suffering from a crisis of public confidence. The disengagement that this engenders leaves parts of society under-represented. It also harms the quality of democratic discourse and democratic decision-making as politicians play to a gallery that is only half listening. A vicious circle develops, as politicians' clawing for attention at the individual level only turns citizens off even more at the system level. Measures that might strengthen citizens' sense of connection to the democratic polity are therefore badly needed.

As the cases discussed in Part 2 suggest, this has increasingly led to the conclusion that constitution-making should – for instrumental as well as intrinsic reasons – be as inclusive as possible. The failure of the Meech Lake and Charlottetown Accords in Canada led to a search for new forms of decision-making at the local level,¹⁶⁸ contributing to the emergence of the citizens' assembly model just a few years later. Similarly, Australia moved from the remote constitutional conventions of the 1970s and 1980s to the partially directly elected Constitutional Convention of 1998. Evidence from the referendums in British Columbia and Ontario shows that, indeed, voters who knew that

168 See Mendelsohn, *op. cit.*

the proposals had been devised by citizens' assemblies were more likely to support them.¹⁶⁹

Moving from particular cases to general patterns, Stefan Voigt offers the hypothesis that "Inclusive participation in constitution-making enhances the legitimacy of a constitution."¹⁷⁰ And John Carey finds evidence that this is correct: in a study of constitution-making around the world, Carey finds that "the inclusiveness of constitutional moments contributes to higher levels of subsequent democracy, greater constraints on government authority, and constitutional stability."¹⁷¹ Greater stability, he posits, is related to greater public acceptance of the system.

Nevertheless, it is not necessarily the case that greater inclusivity promotes greater public legitimacy. Ghai and Galli point out that "some of the most successful constitutions (and enjoying considerable legitimacy) since the middle of the last century (those of Germany, Japan, India and Spain) were not made with any degree of public participation", while "there are examples of participatory processes that produced constitutions that were never implemented (Eritrea) or quickly modified (Uganda)

169 Patrick Fournier, Henk van der Kolk, R. Kenneth Carty, André Blais, and Jonathan Rose, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011), pp. 130–32.

170 Stefan Voigt, "The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis", in Anne van Aaken, Christian List, and Christoph Luetge (eds.), *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy* (Aldershot, Ashgate, 2004), pp. 199–229, at p. 221.

171 John M. Carey, "Does It Matter How a Constitution Is Created?", in Zoltan Barany and Robert G. Moser (eds.), *Is Democracy Exportable?* (Cambridge: Cambridge University Press, 2009), pp. 155–77, at p. 175.

or frustrated in key respects (Ethiopia)¹⁷². They argue that participatory processes can raise expectations that it is impossible to fulfil and that, by allowing many voices to the table, they can make consensus-building difficult.¹⁷³

In addition, the example of Northern Ireland suggests that, where constitution-making is widely seen as a negotiation between groups in society, acceptance of the outcome may require acknowledgement within each group that its side is represented by the strongest possible negotiators. Inclusion of ordinary members of the public in such a context may be counterproductive.

Thus, while the criterion of public legitimacy is a general one, quite what it implies for the design of constitution-making institutions can be determined only case by case. The general tendency favours direct inclusion of ordinary citizens, but that will not be the dominant consideration in all cases.

3.5 Political Legitimacy

As was outlined above, constitution-making should, in principle, serve the interests of the polity as a whole, not those of the political elite or the part of that elite in power at any given time. Nevertheless, principle needs also to accommodate reality. Political elites are powerful. What is more, they are particularly powerful when it comes to constitutional politics. On the one hand, most voters most of the time are not much interested in constitutional matters: they focus their attention, rather, on the

172 Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (Stockholm: International IDEA, 2006); available at www.idea.int/publications/cbp_democratization/; accessed 4.i.14, p. 14.

173 *Ibid.*, p. 15.

bread-and-butter issues that directly affect their daily lives. On the other hand, politicians' personal interests are deeply affected by many of the constitutional decisions that might be made. As a result, most of the time, politicians know what they want from the constitution and there is little pushback from public opinion. There can be exceptions when a crisis of confidence grips the system, but such crises happen rarely. Most of the time, politicians need to accommodate public opinion only at the margin.¹⁷⁴

Thus, an inclusive constitutional drafting process can be devised, producing a text that reflects the best democratic values. But if politicians do not like the proposal, they have many ways of defeating it: they may defeat it at referendum by dominating or stifling the debate, as in Ontario; they may kill it off through special referendum thresholds that public opinion is too weak to oppose, as in British Columbia; they may (if the rules are on their side) ignore the referendum result, as in Iceland; they may (if they have got away with not promising too much in the first place) decide not to hold a referendum at all (as in the Netherlands).

All such outcomes are less likely if the politicians have more connection to the reform proposals. The politicians may in that case feel a sense of ownership over those proposals. They may also fear losing face if proposals that they have backed are subsequently defeated. Thus, while the desire to minimize bias may lead to a preference for excluding the politicians, the desire

174 The general underlying logic of this analysis is set out by James Q. Wilson in "The Politics of Regulation", in James Q. Wilson (ed.), *The Politics of Regulation* (New York: Basic Books, 1980), pp. 357–94, at pp. 370–72. For an application to constitutional politics, see Alan Renwick, *The Politics of Electoral Reform: Changing the Rules of Democracy* (Cambridge: Cambridge University Press, 2010).

for reasoned reforms actually to be implemented may require that principle to be moderated.¹⁷⁵

It is noteworthy that, of the four reform processes described in Part 2 that entirely excluded politicians from direct participation at the drafting stage – in British Columbia, Ontario, the Netherlands, and Iceland – not one generated any actual reform. In the first three of those cases, it could legitimately be said that public pressure for change was minimal. But that is not true in Iceland. The failure of the political elite there to enact a new constitution that was supported in a referendum by two thirds of voters is as exceptional as the process through which that constitution was written. This is thus a significant case.

Still, however, one case does not – even four cases do not – prove a general law. To the extent that public pressure is strong or to the extent that the general public and the political elite are broadly agreed as to the best path forward, then constitution-making processes that exclude politicians might well be successful. None has succeeded yet, but that does not mean they will not succeed in the future.

175 Jon Elster himself moderates his insistence on the dominance of reason in his more recent writings. See, for example, Jon Elster, “Clearing and Strengthening the Channels of Constitution Making”, *op. cit.*

Part 4: Designs for Constitution-Making in the UK

The pieces are now all in place for us to consider what recent scholarly work and experience around the world tells us about how to design a constitution-making process for the UK. The following subsections mirror those of Part 1. The first thus considers why a constitution-making process might be initiated in the UK in the first place. Four subsections deal with aspects of the design of a body or set of bodies intended to debate options and propose solutions. The final section considers what process should be followed once that body has made its recommendations.

4.1 Purposes

It is not the place of this paper to recommend what the purposes of any process of constitution-making in the UK should be: that will, quite appropriately, be decided by politics.

The first step in that decision is the referendum to be held in Scotland on 18 September 2014. If Scotland's voters opt for independence, then two separate constitution-making processes will be required: one to devise a new constitution for Scotland; the other to consider what consequential changes may be needed to the constitution of what remains of the UK. These processes will follow on from negotiations between the Scottish and UK governments regarding the form of the divorce settlement and

are therefore unlikely to take place before 2016 at the earliest. If, by contrast, Scotland's voters choose to remain within the UK, then there will be very strong reason to establish a process for considering the future structure of the Union as a whole. And there will be a strong case for establishing that process early in order to build upon the discussions during the referendum campaign.

A second step concerns the scope of any such review. Constitution-making for an independent Scotland would clearly be comprehensive, though there would be differing views on the degree to which it should simply codify existing practice or craft new structures. There is greater choice for any review affecting the rest of the UK in the case of a "Yes" vote or the UK as it stands in the case of a "No" vote. At one pole will be those who think any review should be restricted solely to considering the appropriate powers of each existing unit of government. At the other pole, some will argue that this is an opportunity to rethink the whole of the governing system. Between these poles, many will see a need to consider not only the powers allocated to each existing unit of government, but also a set of other questions relating specifically to the structure of the Union whether it includes Scotland or not.

Depending on what the purposes of a constitution-making process are, the appropriate design of such a process will vary. In order to keep things simple, the following subsections therefore make some assumptions. First, the polls and the general dynamics of referendum campaigns suggest that a "No" vote is more likely than a "Yes" vote in the Scottish independence referendum.¹⁷⁶ The more likely scenario is therefore that, following the referendum, some process will be established to reflect upon the structure of

176 Alan Renwick, "Scotland's Independence Referendum: Do We Already Know the Result?", *Reading Politics* blog, 15 January 2014, <http://blogs.reading.ac.uk/readingpolitics/2014/01/15/scotlands-independence-referendum-do-we-already-know-the-result/>, last accessed 25 January 2014.

the Union as a whole, including Scotland. So this is the scenario that the following discussion develops. Second, I assume that such reflection will be restricted to the structure of the Union itself – it will not be a general review of the constitution as a whole – but that this will be interpreted flexibly to include a range of questions, not just the narrow question of the allocation of powers. Thus, I envisage a constitution-making process that is wide-ranging, but not all-encompassing.

4.2 Who Should be Represented?

As the preceding discussions indicate, it should be taken as a given in a democratic polity that the people are sovereign and, therefore, that the first goal in deciding the composition of a constitution-making body should be the best possible representation of the people. The result of Scotland's independence referendum will decide who "the people" are: under the assumption of a "No" vote, they will be the people of the UK as a whole, who should therefore be represented in a process designed to reflect upon the structure of the Union as a whole.

Nevertheless, three questions will remain. First, while the referendum will decide who the people are, it will not decide the nature of "the people": identities within the UK will remain multi-layered and individuals will continue to relate to different identities in different ways. Some might prefer a constitution-making body to be constituted as representing the UK as a whole in an undifferentiated way, as does the House of Commons today. At the other extreme, some might want a confederal arrangement: a set of separate constitutional deliberation bodies representing the various nations and regions, which would come together from time to time to agree their inter-relations. Between these poles, many intermediate options may be devised.

Except in revolutionary times, the constitution-making process should always start with the status quo. Thus, a confederal arrangement would not be appropriate: that would presuppose a radical shift from the status quo. Rather, a constitution-making body should be designed to ensure proportional representation of the UK as a whole. Thereafter, it should be for the constitution-making body itself to decide how the multi-layered character of British identities should be reflected in its procedures. This is discussed further in section 4.5 below.

The second question concerns the representation of the existing political elite. However the people may be represented, the evidence laid out in Part 2 suggests that direct representation of the existing political elite should be a deliberate part of the design of the constitution-making process. Otherwise, the danger is that changes, whatever their merits, may be blocked or interfered with. But such political representation should not dominate over popular representation: it should be introduced instrumentally, to the extent that it is needed; it is not a good in itself.

The third question concerns the role of expertise. I tackle that question in the section that follows, on the basic structure that a constitution-making body might take.

4.3 Basic Structures

Section 1.3 set out seven basic structures for a body charged with debating possible constitutional options and making recommendations on those that should be chosen: an expert commission; negotiation among leaders; an appointed or indirectly elected convention; a civil society convention; an elected constituent assembly; a citizens' assembly; or a mixed body. The following paragraphs consider the merits of each of these in turn for the particular kind of constitutional review

that is likely to be needed in the UK in the near future. Some of these options can be dismissed very quickly, while others require much more careful examination.

Expert Commission

As has been noted already, expert commissions – small bodies comprising individuals chosen in significant part for their existing expertise or their capacity to develop relevant expertise – have been the dominant mode of constitutional deliberation in the UK for many decades. They have important advantages. They can be designed to favour reason over interest and passion and to ensure that the quality of reasoning is high. They can be accompanied by extensive consultations, so that a wide range of views can be heard. Through publicity for such consultations, they can even engender wide public debate and develop a sense of public participation. They can talk behind the scenes with politicians to gauge the reactions that different recommendations are likely to receive. For all these reasons, another expert commission is a viable option for the UK in the coming years.

But it is not the best option. The Richard, Calman, and Silk commissions in recent years have done nothing to settle the issue of how the nations should relate to the UK as a whole. The consultations they have launched have spurred some debate, but this has nevertheless remained marginal. Furthermore, if the purpose of the constitution-making process is not the amendment of relatively technical details, but the reconsideration of the structure of the Union, then the case for expertise weakens and the case for direct public engagement strengthens. The question of how the multiple identities of the people of the UK should be reflected in the structure of the democratic polity

is not one that admits an expert answer: rather, it depends on how the people themselves experience those identities. And the deeper are the changes to the structure of the polity that are being contemplated, the more imperative it is that the process should be representative and open.

That is not to say, of course, that expert advice should be banished from the process: constitutional arrangements are complex and can have multiple remote effects. But experts should serve and guide more representative institutions; they should not be the people who decide on the recommendations that will be put forward.

Negotiation Among Leaders

As Part 2 showed, Canada's attempts in the late 1980s and early 1990s to restructure the federation through intergovernmental negotiations failed spectacularly. By contrast, negotiations among political leaders have delivered great progress in Northern Ireland.

The case for decision by negotiation in the UK would be that the governments of Scotland, Wales, and Northern Ireland ought to be able to negotiate with the government of the UK just as do foreign governments: that they have the same right to be taken seriously as interlocutors. In the case of a "Yes" vote in the referendum, it is clear that most aspects of the divorce settlement between Scotland and the rest of the UK will be agreed through inter-governmental negotiations.

Under the assumption of a "No" vote, however, there is little reason to support this option for the kinds of constitutional deliberation that would then ensue. First, it would not be impartial: negotiations among governments would favour governments,

not the interests of the democratic polity as a whole. Second, such an arrangement would preclude consideration of whether the current set of units of government is the best one: it would not, for example, facilitate consideration of whether some English regions might wish devolved powers. Third, it would not be inclusive. Fourth, there is no reason to think it would advance the public legitimacy of the decisions reached along the lines described above in Northern Ireland: if Scots vote “No” in the independence referendum, they will have opted to stay within the Union; there is no reason to think they would see constitution-making as a process of hard bargaining requiring representation by the toughest negotiators.

This option can therefore be ruled out as the primary mechanism of constitution-making. Nevertheless, whatever constitution-making body is devised should preferably be created with the support of all mainstream parties and all governments in the UK. Intergovernmental and interparty negotiations will inevitably be needed to secure this.

Appointed or Indirectly Elected Convention

The most plausible model falling under this heading would be a convention comprising members of the various parliaments, assemblies, and local councils of the UK. But such a model has little to recommend it. It would fail Elster’s impartiality test, in that the interests of the institutions represented would tend to dominate. It would also differentially represent areas of the country with and without devolved government. Its members might be able to devote little time to the process alongside their existing, main roles. Consisting of politicians, it would provide no clear basis for popular legitimacy – just as the Convention on the Future of Europe lacked weight among citizens. If it

comprised backbench parliamentarians and local councils, it is also not clear that it would command much respect from the top political elite. This option can therefore speedily be rejected.

Civil Society Convention

The option of a civil society convention – at least as a pure model – should also be dismissed. First, it creates the practical problem that groups have to be selected, and there is no clear set of criteria for such selection. While some groups, such as leading businesses and trade unions, might be obvious candidates, where the boundaries should be drawn is far from clear. Second, if it is intended that the members of the convention should represent specifically these groups, it is not clear why groups should be represented at all rather than the population as a whole. Third, and conversely, if the intention is that society as a whole should be represented through groups, then it appears inevitable that this intention will not be met: some members of society are deeply involved in civil society groups, others are only loosely involved, and others still are not involved at all. Fourth, group-based representation may lead to the inclusion of many group-related provisions in the constitution that have little value or that are mutually inconsistent: Voigt, for example, expresses the concern that “single issue participation”, where members of the convention seek concessions for their own group without paying much attention to the rest of the document “increases the changes that the constitution will [contain] contradictory provisions”.¹⁷⁷ Finally, in an era when citizens increasingly demand direct

177 Stefan Voigt, “The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis”, in Anne van Aaken, Christian List, and Christoph Luetge (eds.), *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy* (Aldershot, Ashgate, 2004), pp. 199–229, at p. 219.

control over the decisions that affect them, representation through members of civil society groups may fail to confer public legitimacy on the process.

There may be a case for including some civil society representatives in a mixed body (discussed below). But the civil society convention is not viable as a pure model. Indeed, we should remember that the committee that recommended the creation of the recent example that comes closest to fitting this model – the Scottish Constitutional Convention of 1989–95 – itself saw that model is no more than second best, a necessary expedient where more direct representation was impossible.

Elected Constituent Assembly

The option of creating a directly elected constituent assembly independent of parliament deserves more serious consideration than the alternatives considered so far. Australia's experience of a half-elected convention has little to recommend it. But Iceland's recent example suggests that, at least if the circumstances are right, such as assembly can deliberate very effectively, make clear, reasoned decisions, and carry strong public support.

Nevertheless, three significant doubts about this model do need to be raised. First, Iceland's Constitutional Council completed its work so successfully in part because it was non-partisan. Its members were individuals motivated to reason together in pursuit of an agreed outcome. In a partisan assembly – or in an assembly where, as in Australia, members were pre-aligned to groups organized around the key constitutional questions – impartiality and the quality of reasoning would likely to be impaired. In addition, Iceland's Council members could claim to be ordinary citizens or, at least, point out that they were not politicians, thereby enhancing the popular legitimacy of their

decisions. A partisan assembly might be perceived as no more legitimate than the regular parliament – indeed, perhaps less so, if it seen is just another political institution containing yet more politicians.

But while Iceland succeeded in holding a non-partisan election, it is not clear that the UK could follow suit. Iceland is a small nation of fewer than 250,000 eligible voters; the UK, by contrast, has over 45 million. It is much easier for an independent candidate to gain name recognition in a small polity than a large one. The UK would, unlike Iceland, certainly use districts to elect a constituent assembly. But then independent candidates could become known only through the local media, which are generally too weak to perform the function effectively. The experience of electing Police and Crime Commissioners need not be exactly repeated, but it nevertheless highlights the dangers.

Second, it should be remembered, as was discussed in Part 2, that, whatever the merits of the Icelandic Constitutional Council's internal deliberations, its recommendations have not been implemented, despite popular support, because most politicians oppose them in part or whole. By taking the process out of the hands of politicians, it weakened political legitimacy.

Third, Iceland's government was willing to establish a directly elected constituent assembly only because the country faced a severe economic and political crisis. The new prime minister, Jóhanna Sigurðardóttir, was a long-term political dissident who could not have come to power in more normal times, and she was personally committed to experimentation with new political forms. In the absence of an equivalent crisis, it seems very unlikely that the UK's politicians would agree to the establishment of a parallel constituent assembly that might rival Parliament in legitimacy and prestige.

The option of an elected constituent assembly therefore looks difficult. Even if it were created, the danger is that it would function either as a chamber of unknown independents and minor celebrities with little public or political legitimacy or as a partisan chamber whose public legitimacy might be lower still. Such outcomes are not inevitable, but they do cast serious doubt on the desirability of this model.

Citizens' Assembly

The idea of a citizens' assembly, there can be no doubt, fits the Zeitgeist. Voters distrust politicians. Increasingly, mechanisms have been created to allow voters to participate directly in the decisions that affect them – through referendums at national and local levels, e-petitions, enhanced transparency, and the transformation of the model of the state from monolithic provision to customer service and choice. Furthermore, experience in Canada and the Netherlands suggests that citizens' assemblies can operate with great success: members understood the issues, deliberated together effectively, and produced well reasoned conclusions. Though none of the reform proposals that the citizens' assemblies produced were ultimately implemented, there is evidence that the existence of these assemblies did enhance public legitimacy: in both British Columbia and Ontario, those voters who knew about the citizens' assemblies were more likely to support those assemblies' recommendations in the subsequent referendums.¹⁷⁸ If the UK wants to join the most innovative trends in constitution-making practice, then it would be well advised to establish a citizens' assembly.

178 Patrick Fournier, Henk van der Kolk, R. Kenneth Carty, André Blais, and Jonathan Rose, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011), pp. 130–32.

Before making this a recommendation, however, three important questions need to be answered.

First, could a citizens' assembly deal with an issue agenda as complex as the one that the UK is likely to need to confront following the Scottish referendum? All three citizens' assemblies to date have looked solely at the electoral system. They have been presented during the "learning" phase of their deliberations with a standard set of existing electoral systems to choose from¹⁷⁹ and have been offered the insights of the vast political science literature on the effects that those various systems may have. A UK assembly would likely have a much more diffuse agenda containing many elements. And many of these agenda items are likely to be linked, such that the decision on one issue depends on the decisions relating to others. Could a citizens' assembly cope with these two forms of complexity?

In fact, there is good reason to think that it could. Experience in Ireland – where two thirds of the Constitutional Assembly members are ordinary citizens – suggests that an agenda with many elements is not in itself problematic: the Assembly has simply moved from one agenda item to another over successive weekends.

That has been possible because the issues on the agenda in Ireland are largely independent of each other. Even where issues are connected, however, complexity is manageable if they can be decided upon in sequence: if it is possible to agree on which are the fundamental points to be decided first and which are the consequent points that can be taken later. The deliberations of the citizens' assemblies to date suggest that they are able to engage in such prioritization: they were able, for example, to

179 In fact, all three assemblies used as their basic text David M. Farrell's *Electoral Systems: A Comparative Introduction* (Basingstoke: Palgrave, 2001).

decide basic principles, then formulate the core institutional choices that they considered most important, then work up detailed alternative models, then go back to basics and reflect again on whether they had adequately addressed the principles, before finally making decisions. A similar process would be needed in the UK: basic parameters for the future structure of the Union would need to be sketched before exploring the implications of these in detail; if problematic implications were found, the parameters could be revisited until a satisfactory package had been developed.

Complexity in the agenda does not therefore appear to be an insuperable barrier to the effective operation of a citizens' assembly in the UK. More time would be required than in Canada or the Netherlands and expert advice would need to be provided across a wider range of issues. That advice might need to be more flexible to the evolution of the assembly's thinking. But these are challenges that it should be possible to address.

The second question concerns the size of any citizens' assembly. The Canadian and Dutch assemblies had between 104 and 160 members. For two reasons, there would be good reason to make a UK citizens' assembly larger. First, the UK's population (63 million) is greater than that of British Columbia (4.4 million), Ontario (13.5 million), or the Netherlands (16.8 million). Second, the task of the UK assembly would, in part, be to consider the roles of the nations and regions in the structure of the polity, so solid representation for each part of the UK would be desirable. If, for example, eight members were to be guaranteed to the smallest of the standard UK regions – Northern Ireland – then the assembly as a whole would, on 2011 census figures, need 279 members to preserve proportionality. Could a citizens' assembly of such size operate effectively?

Again, while this question is reasonable, there is adequate evidence to say that it can be answered positively. Most of the deliberative work of the citizens' assemblies in Canada and the Netherlands was conducted not in plenary session, but in small-group discussions aided by trained facilitators. This helped members to speak without feeling intimidated. This small-group format could be preserved in a larger assembly without too much difficulty by increasing the number of groups. Clearly it is harder for the members of a larger group to bond effectively, but that would be offset in the UK by the fact that the assembly would need to operate for longer. Thus, while size should not be allowed to multiply too far, an assembly of up to perhaps 300 members ought to be manageable.

The third question returns to the issue of political legitimacy that has been mentioned several times already. None of the citizens' assemblies in Canada or the Netherlands has yet led to reform, and it is not unreasonable to think that part of the blame lies in the exclusion of politicians from the drafting process. Could a different outcome be expected for the UK?

There is good reason to think that, in fact, the outcome might be different. In British Columbia, Ontario, and the Netherlands, the political class was already largely hostile to the reform idea when the citizens' assemblies presented their reports. In the UK, by contrast, there is wide consensus that further devolution to Scotland and Wales will take place; many politicians also acknowledge that the further devolution goes, the stronger grows the need for an overarching review of the structure of the Union. Thus, a UK citizens' assembly might meet a more welcoming audience of politicians than have the past cases.

Nevertheless, acceptance of the idea of change in principle is not the same as acceptance of any specific change proposals. The need

for any constitution-making body to carry support among the political elite will remain strong and that will be harder to achieve if politicians are excluded from the constitution-making process. For this reason, the citizens' assembly model, in pure form, is risky.

All six of the pure models for a constitution-making body have now been considered and all six have been found either to be untenable for the constitution-making process that is likely to be needed in the UK or to carry high risks. A mixed model may, however, offer more promise.

Mixed Body

The chief conundrum that is thrown up by the preceding discussion is the need to secure both popular and political legitimacy: legitimacy among both the public in general and the existing political elite. If the public deeply cared about constitutional reform, the first of these forms of legitimacy would subsume the second: public opinion would be strong and politicians would feel the need to follow it. If, conversely, the public in general trusted politicians, then the second form of legitimacy might subsume the first: voters would take their cue from the politicians in forming their opinions. In fact, however, neither of these conditions holds: citizens are unlikely to be satisfied with constitutional settlements brokered by politicians; politicians are unlikely to feel bound to follow shallow public opinion. Thus, popular and political legitimacy both need to be secured separately.

Citizen-dominated processes may increase popular legitimacy, but will struggle to gain political legitimacy. Politician-dominated processes can secure political legitimacy, but will lack popular legitimacy. The obvious path to a solution lies in seeking to balance the two. We have seen that the Australian model was

problematic: direct election makes it difficult to construct a deliberative forum that will be a focus for open discussion and debate. But Ireland's Constitutional Convention – two thirds citizens' assembly, one third indirectly elected convention of politicians – offers a plausible model.

As the discussion in Part 2 showed, the evidence so far from Ireland on the operation of this model is positive. The Convention has apparently deliberated successfully and politicians have not dominated. Thus, the benefits of the citizens' assembly model appear to have been successfully carried over. Clear decisions have been reached, sometimes by substantial majorities.¹⁸⁰ Furthermore, the government has, at least in these early stages, accepted all of the recommendations in principle and agreed to put several forward to referendum.

Evidence from a single case can never satisfy entirely, particularly when that case is itself as yet incomplete, and there can be no guarantee that the Irish mixed model would lead to success in the UK. Nevertheless, the evidence from the Irish Constitutional Convention fits the logic that has been emerging over the preceding pages and suggests that a mixed assembly, comprising a majority of citizens randomly (and then self-)selected and a minority of politicians, offers the most promising way of designing a constitution-making process that meets the demands of impartiality, quality reasoning, inclusivity, popular legitimacy, and political legitimacy.

180 Full details of all the votes in the Convention are available in the reports section of its website: www.constitution.ie/Meetings.aspx#minutes, last accessed 26 January 2014.

4.4 Agenda and Influence

Constitution-making bodies are generally given one of two types of agenda in their terms of reference: some are tightly restricted to a specified set of points, as in British Columbia; others are prescribed a series of points, but also allowed to add further items to their agenda if they see fit, as in Iceland and Ireland.

For the UK case, there is little doubt that the latter approach would be preferable. Ideas for reforming the structure of the Union may have implications for many parts of the political and legal system, and it would be prudent to allow a constitutional convention to consider these freely. To tie the convention down to a specified set of issues may leave it unable to address the aspects of the Union that it considers most deserve attention.

It is also easy to agree that, in the course of its deliberations, a constitutional convention should draw on expert advice and engage in extensive consultations with interested groups and the general public. A wide range of fora, ranging from traditional meetings around the country to social media discussions should be employed.

A constitutional convention designed to consider the structure of the Union should take particular care in ensuring that it understands opinion throughout the UK. Polling and local consultations should be conducted. Regional conventions might be formed that would mirror in their structure the UK-wide convention and that would deliberate for shorter periods on specific questions – perhaps questions formulated by the UK-wide convention – and thereby inform debate. If devolution within England is to be considered, for example, are the standard regions used for government statistics and European Parliament constituencies appropriate or would different regions better

reflect local ties? Would Cornwall want to go it alone or be part of a larger South West? Such matters could not be decided by the members of a constitutional convention on the basis of their own whims: the handful of Cornish members, for example, would be too few in number reliably to represent Cornish opinion. Rather, the convention should decide such matters on the basis of detailed consultations.

4.5 Operational Procedures

Two procedural models are offered by the cases discussed in Part 2. A UK constitutional convention could follow the Canadian and Dutch model of distinct learning, consultation, and deliberation phases. Or it could adopt the Irish model of short, discrete sessions on individual topics. Or, of course, a combined or alternative approach could be devised. The complexity of the issues that a UK convention would consider and their centrality to the democratic polity as a whole suggests that something akin to the former approach, infused with elements of the second, should be used. During an initial learning phase, members would hear about the various issues that they might consider and the options available. They would then engage in detailed consultations. Deliberations would follow, but would need to be interspersed with renewed periods of learning and consultation as the various issues on the agenda were opened and closed.

A key aspect in the design of any UK constitutional convention would be its method of decision-making. The citizens' assemblies in Canada and the Netherlands and the Constitutional Convention in Ireland have all made decisions by simple majority vote. In the UK, given that the focus of debate would be upon the structure of the Union, there may be a case for using qualified majorities: for example, by requiring a certain level of support

to be achieved in each region. Or the convention might seek – as did the Convention on the Future of Europe – to operate by “broad consensus” without always voting.

This is a matter, however, that would be better not decided in advance: developing an understanding of how the multi-layered identities in the UK should be reflected in decision-making processes should be one of the aims of the convention and should not therefore be predetermined for it. Thus, after a period of working together during the learning and consultation phases, the convention members should begin the deliberation phase by considering how they would like to make decisions. They should seek to resolve this matter through broad consensus. Thereafter, a search for consensus should continue to characterize its deliberations to the greatest extent possible. Similarly, the convention should be free to evolve its own structures of deliberation: for example, through the development of regional discussion groups.

As noted above, a UK constitutional convention would, because of the complexity of its agenda, need more time than its precursors in Canada, the Netherlands, and Ireland, which could be achieved either by increasing the frequency of meetings or by extending the duration of the convention. This has implications for how convention members would be compensated for their time. In the existing cases, members have been paid only travel expenses and a limited allowance; despite this, drop-out rates have been very low and attendance levels very high. In the UK, greater compensation might be needed and the likelihood of more drop-outs might be accommodated by the selection of substitute members.

4.6 From Proposals to Decisions

The norm is now more or less established in the UK that major constitutional amendments should be enacted only with a referendum following parliamentary approval. At the same time as establishing a constitutional convention, the government should therefore commit itself in law to putting the convention's recommendations before the people in a referendum, using one question or several questions following wording recommended by the Electoral Commission. It is always possible, of course, to repeal such a legal commitment, but in most circumstances this would be politically difficult.

The decision threshold for such a referendum – whether, in particular, majorities should be required in the nations and regions as well as across the UK as a whole – is a matter that should be determined by the constitutional convention.

Conclusion

Whatever the outcome of the Scottish referendum in September, careful thought about constitutional structures will be required. In the event of a “Yes” vote, Scotland will need a new, written constitution and the remainder of the UK will need to consider the appropriate structure for its future. It currently appears more likely that Scotland’s voters will vote against independence. “Better Together” campaigners have already indicated that voting “No” does not just mean voting for the status quo: they promise that Scotland’s relationship with the rest of the UK will be improved. As further devolution takes place to Scotland and Wales, the need to think again about the structure of the Union as a whole will strengthen.

The requirements of such a constitutional review process will be unusually demanding. The issues under consideration will be complex. They will need both expert input and serious engagement with what people around the UK want. Both political and public legitimacy will need to be secured. Designing such a process will therefore not be straightforward.

This paper has explored the major models of constitution-making by gathering evidence and assessing implications for the kinds of constitutional decision that will need to be made in the UK. The evidence available does not permit certainty as to what constitutional design process would be best: the number of cases for each model is always low and no past case perfectly fits the

UK's circumstances. Nevertheless, the evidence does tend rather powerfully to favour one particular model.

That is the model of a mixed convention comprising ordinary citizens chosen randomly (though with voluntary acceptance or rejection of the invitation to participate) and politicians chosen by their parties. The existing case that comes closest to this model is the Irish Constitutional Convention that has worked since February 2013, two thirds of whose members are ordinary citizens, one third politicians. Such a convention has the best chance of achieving both political and public legitimacy. It could also be constructed so as to foster high quality, impartial deliberation. And it would be highly inclusive.

Not all aspects of the Irish practice should be followed. For example, the complex issues under consideration in the UK would require longer periods of learning and consultation than in Ireland. Something closer to the processes used by the citizens' assemblies in British Columbia and elsewhere would offer a better starting point for designing the convention's operating procedures. Consultations would require extensive engagement with voices across the UK and might include the creation of miniature conventions in some or all regions operating as advisors to the main convention. Decision-making should, so far as possible, occur through broad consensus. It should be for the convention to develop the details of its procedures itself.

Such a convention has the potential to be a powerful forum not only for recreating the Union in a manner that fits the realities of devolution and the complexities of governing in the twenty-first century, but also for stimulating public discussion of and engagement with questions of how politics works and how it might be made to work better. Claims should not be exaggerated.

No constitution-making process can generate a democratic utopia of active, thoughtful citizens. But a convention along the lines proposed here would be a major event, attracting interest and engagement among politicians, the media, relevant scholars, and the wider public. There is no guarantee that it would succeed. But it would certainly be worth while to attempt it.

After the Referendum

Options For a Constitutional Convention

Alan Renwick

Whatever the result of Scotland's independence referendum, careful constitutional thinking will be needed. If Scots vote Yes, Scotland will need a new constitution and the rest of the UK will have to rethink its governing structures. Even in the event of a No vote, everyone agrees that the shape of the Union will need to change over the coming years. This paper examines how such constitution-making should take place. It sets out the options, gathers evidence from around the world on how those options might work, and weighs the advantages and disadvantages of each alternative. It concludes that constitutional proposals in the UK should best be developed by a convention comprising a mixture of ordinary members of the public and politicians; these proposals should be put to a referendum. This approach, the paper argues, offers the best route to high-quality debate, stronger democratic engagement, and, ultimately, deeper legitimacy for our governing structures.



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