Developing Democracy through Citizen Engagement: The Advent of Popular Participation in the United Kingdom's Constitution-Making

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Abstract

This paper looks at citizen assembly-style constitutional conventions as a path towards revitalising representative democratic institutions. Such conventions were notoriously set up in British Columbia, The Netherlands, Ontario, Iceland and Ireland; the Scottish Government promised one for an independent Scotland, and calls for a United Kingdom-wide convention remain strong following the Scottish referendum. The assumption behind such calls has been that direct citizen engagement in constitutional revision processes will supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument goes, actualises the hitherto mythical 'people' and turns self-government into an empirical reality.

This paper seeks to test this assumption. While acknowledging the numerous potential benefits of citizen assemblies in constitution-making, it is suggested that more thought is necessary before advocating them as a one-size-fits-all solution to the woes of representative democracy. To begin with, they need to be seen as legitimate themselves. This will involve complex decisions over inclusiveness, allocated resources and how to define their success. For example, would a highly participatory process suffice even if the resulting proposals are not adopted? Furthermore, the democratic potential of constitutional conventions may be frustrated in the likely event of certain options being *a priori* taken off the table. For instance, would a United Kingdom-wide constitutional convention have been worthy of its name working under a mandate as limited as that of the Smith Commission?

Finally, one must remember that the costs of popular constitution-making, including in terms of political will and citizen interest, will unavoidably render constitutional conventions exceptional. The majority of constitutional reforms are bound to come about via more traditional channels. Thus, focusing solely on popular involvement in times of crisis may be short-sighted and ultimately detrimental. If democracy is a work in progress, it is still representative democracy that we are working towards improving, including via boosts of participatory activity.

Keywords

Participatory Democracy, Citizen Assemblies, Constitutional Conventions, Constitutional Reform, Scottish Referendum

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1 Introduction

This paper looks at the turn towards participation in constitution-making, including in the United Kingdom (UK) following the Scottish independence referendum in 2014. The highly participatory and deliberative nature of the referendum resulted in it being called a successful exercise in direct democracy,¹ with one author arguing that it 'is likely to lead to greater demand for the use of direct democracy in processes of constitutional change'.² Alongside more use of the referendum, including on European Union (EU) membership,³ the UK constitutional landscape may yet be enriched with another participatory mechanism: a citizen assembly-style constitutional convention.

Understood generically as a 'representative body collected together to discuss constitutional change',⁴ constitutional conventions have received increased scholarly and practical attention. They promise greater legitimacy and longevity of the constitutional agreement they produce, as well as democratic renewal. If a 'new model of democracy' is indeed emerging as some have argued, one that requires more from its citizens,⁵ then constitutional conventions are an embodiment of this innovation.

Cheryl Saunders has argued that 'there is now, effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned'.⁶ She has argued that we may broadly identify a trend 'towards openness, inclusivity and the active involvement of the people of a state at all stages of the process through participation, rather than mere consultation'.⁷ Others have echoed this view,⁸ even going so far as to identify a right to participate in democratic governance,

1 Stephen Tierney, 'And the Winner is... the Referendum': Scottish Independence and the Deliberative Participation of Citizens' (*I-CONnect Blog*, 26 September 2014) <www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/> accessed 10 July 2015.

2 Stephen Tierney, 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum' (2015) 86 *Pol Q* 226.

3 At least one author has also explored the case for a referendum on the repeal of the Human Rights Act as necessary given the Act's constitutional status. See Cormac Mac Amhlaigh, 'HRA Watch: Reform, Repeal, Replace? A Referendum on Repeal of the Human Rights Act? Why not?' (*UK Constitutional Law Blog*, 25 May 2015) <www.ukconstitutionallaw.org/2015/05/25/hra-watch-reform-repeal-replace-cormac-mac-amhlaigh-a-referendum-on-repeal-of-the-human-rights-act-why-not/> accessed 10 July 2015.

4 Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (HC 2012–13, 371) 9.

5 David Farrell, Eoin O'Malley and Jane Suiter, 'Deliberative Democracy in Action Irish-Style: The 2011 *We the Citizens* Pilot Citizens' Assembly' (2013) 28 *Irish Pol Studies* 99, 100, citing Russel J Dalton, *The Good Citizen: How a Younger Generation Is Reshaping American Politics* (2nd edn, Congressional QP 2009) 1.

6 Cheryl Saunders, 'Constitution Making in the 21st Century' (2012) 4 *International Review of Law* 2–3, <<http://www.qscience.com/doi/abs/10.5339/irl.2012.4>> accessed 10 July 2015.

7 *ibid* 9.

8 See Vivien Hart, 'Constitution-making and the Transformation of Conflict' (2001) 26 *Peace & Change* 153; Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 435–36.

which extends to constitution-making, in international law.⁹ Examples of this trend have included the rise in recourse to constitutional referendums—referendums which bring to the voting public questions of constitutional significance.¹⁰ Scotland and Catalonia are only the most recent and visible examples of what has been called Europe entering the ‘age of referendums’.¹¹ When it comes to experiments with deliberative mini-publics, understood as ‘forums, usually organised by policy-makers, where citizens representing different viewpoints are gathered together to deliberate on a particular issue in small-N groups’,¹² British Columbia, The Netherlands and Ontario are prominent first examples. British Columbia in particular was a ground-breaking experiment with a citizen assembly, sparking a ‘demonstration effect’ in the other two¹³ and, subsequently, in Iceland and Ireland.¹⁴ These earlier examples were all aimed at effecting electoral reform and not far-reaching constitutional change. Nevertheless, they also shared a commitment to participatory and deliberative democracy aimed at ‘inject[ing] some popular legitimacy into policymaking’.¹⁵

Participatory mechanisms of constitutional change have also been linked to the crisis of democracy generally, and of representative democracy in particular. In an age where citizens feel detached from regular politics, participatory and deliberative forms of engagement may yet resurrect their interest. Perhaps it is not unrelated that these mechanisms have been called for in the aftermath of economic crises (as in Iceland and Ireland) or of ‘once in a generation’ decisions (as in Scotland). The advantages promised by participatory and deliberative institutions—creativity, openness and consensus-based (rather than adversarial) politics among them—are that much more attractive when confronted with constitutional failure and stale institutions.

Similar arguments have been made in the UK context. Calls for a UK constitutional convention have gained momentum in the aftermath of the Scottish independence referendum and seem closer than ever to gaining political traction. A careful analysis of what employing such a mechanism to achieve constitutional reform in Britain would entail is thus essential. This paper proceeds by, first, outlining the types of proposals

⁹ Vivien Hart, ‘Democratic Constitution Making’ (United States Institute of Peace Special Report 107, July 2003) 1 <www.usip.org/sites/default/files/resources/sr107.pdf> accessed 10 July 2015.

¹⁰ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 11.

¹¹ Stephen Tierney, ‘Europe Is Entering the “Age of the Referendum”, but there Is Nothing to Fear for European Democracy if Referendums Are Properly Regulated’ (*Democratic Audit*, 22 October 2014) <www.democraticaudit.com/?p=8777> accessed 10 July 2015.

¹² Kimmo Grönlund, André Bächtiger and Maija Setälä, ‘Introduction’ in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPR Press 2014) 1.

¹³ Patrick Fournier and others, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (OUP 2011) 28.

¹⁴ For more on the experience of British Columbia, see the various contributions in Mark E Warren and Hilary Pearce (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (CUP 2008).

¹⁵ Fournier and others (n 13) 18.

hitherto on the table. It then explores three potentially controversial areas which require delineation before such a convention can be set up: ensuring its legitimacy, explored here from the point of view of its capacity to represent the relevant political community; entrusting it with a clear substantive mandate; and avoiding the alienation of political institutions. While these three aspects are here labelled as ‘challenges’, my aim is not to negate the potential benefits of constitutional conventions. Nor am I putting forth a defence of representative democracy in the face of participatory challenges. Instead, I wish to raise key questions which need to be asked before a participatory instrument is set up in the UK. In doing so, I apply a comparative lens to arguments in favour of a UK constitutional convention, which helps illustrate that much more thought needs to be given before taking such a step.

2 Calls for a UK constitutional convention

At the same time as the British constitution has been said to be in crisis,¹⁶ calls for one or more constitutional convention(s) in the UK have grown louder. Such calls are not new,¹⁷ but they have been reinvigorated in recent years. The issue was discussed in a March 2013 Report of the Political and Constitutional Reform Committee of the UK Parliament entitled ‘Do We Need a Constitutional Convention for the UK?’.¹⁸ The Report recommended that the government consider establishing a constitutional convention with a clear remit, popular participation, involvement of politicians and a timetable of one to two years. However, its recommendations were not unanimous and the resolution of the English Question¹⁹ featured as the priority, preceding any such wider convention. Models considered were the Philadelphia Convention, the Scottish Constitutional Convention, Iceland, and British Columbia. In 2014, the Committee again considered a constitutional convention as one of the institutional options available to draft ‘a new Magna Carta’,²⁰ and by 2015 more confidently declared that ‘[p]erhaps the “constitutional moment”, which in quieter times some believed was a prerequisite for change, is now close at hand’.²¹

¹⁶ Vernon Bogdanor, ‘The Crisis of the Constitution: The General Election and the Future of the United Kingdom’ (*The Constitution Society*, February 2015) <http://www.consoc.org.uk/wp-content/uploads/2015/02/COSJ2947_The-Crisis-of-the-Constitution_WEB_FINAL.pdf> accessed 10 July 2015.

¹⁷ For a discussion of debates predating the Scottish referendum, see Owain Roberts, ‘Towards a UK Constitutional Convention?’ (2012) National Assembly for Wales Commission Paper No 12/023, 4–5 <<http://www.assembly.wales/Research%20Documents/Towards%20a%20UK%20Constitutional%20Convention%20-%20Research%20paper-21052012-234096/12-023-English.pdf>> accessed 12 September 2015.

¹⁸ Political and Constitutional Reform Committee (n 4).

¹⁹ The report defined it as ‘the issue that the people of England, outside of London, are governed by Westminster, with little authority to propose local solutions that benefit their own communities’: Political and Constitutional Reform Committee (n 4) para 68.

²⁰ Political and Constitutional Reform Committee, *A New Magna Carta?* (HC 2014–15, 463).

²¹ Political and Constitutional Reform Committee, *Consultation on a New Magna Carta?* (HC 2014–15, 599).

Talk of a constitutional convention was prominent in the run-up to the Scottish referendum, with the Scottish Government pledging one tasked with the aim of drafting a constitution for an independent Scotland. Both the November 2013 White Paper²² and the June 2014 draft Scottish Independence Bill²³ detailed these plans, with models invoked therein being British Columbia, The Netherlands, Ontario, Iceland, and Ireland.

In fact, the Scottish referendum created a veritable participatory momentum, with all but one of the major political parties coming out in favour of holding a constitutional convention. The Green Party called for a 'People's Constitutional Convention' to 'map out a new settlement for the rest of the United Kingdom', stating that '[i]f it is possible to negotiate Scottish Independence in less than two years it need not take decades to agree a new settlement for the rest of the United Kingdom'.²⁴ Ed Miliband at the Labour Conference in September 2014 also stated:

If the problem is Westminster we can't have a quick fix, a stitch up in Westminster. We've got to mobilise and harness the energy of people all across the country. That's why only a constitutional convention will do. And giving voice to everyone in Britain is also about who we are.²⁵

Nick Clegg welcomed 'Labour's decision to embrace the longstanding Liberal Democrat call for a constitutional convention', but indicated the need to seize the moment, set it up with a clear mandate which would include House of Lords reform, and have citizens at its heart.²⁶ Even Nigel Farage called for a convention 'to be rapidly established to put in place a plan for a Federal UK'.²⁷ Most parties maintained these stances in their manifestos for the 2015 general election.²⁸ The All-Party Parliamentary Group for Reform had in fact called on parties to adopt a common platform on this issue, believing that '[a] constitutional convention is an accepted method of securing broad agreement (and is tried and tested, in differing forms, in the Scottish and Welsh contexts as well as internationally)'.²⁹

²² Government of Scotland, 'Scotland's Future: Your Guide to an Independent Scotland' (26 November 2013) 22 <<http://www.gov.scot/resource/0043/00439021.pdf>> accessed 10 July 2015.

²³ *ibid* 61.

²⁴ Green Party, 'Democracy for Everyone: The UK after the Scottish Referendum' (September 2014) <www.greenparty.org.uk/assets/files/democracy_for_everyone.pdf> accessed 10 July 2015.

²⁵ Ed Miliband, 'Speech to the Labour Conference: Full Text' (*New Statesman*, 23 September 2014) <www.newstatesman.com/politics/2014/09/ed-miliband-s-speech-labour-conference-full-text> accessed 10 July 2015.

²⁶ Nick Clegg, 'This Opportunity cannot be Hijacked' (Liberal Democrats, 22 September 2014) <www.libdems.org.uk/nick_clegg_this_opportunity_cannot_be_hijacked> accessed 10 July 2015.

²⁷ Nigel Farage, 'A Voice for England' (United Kingdom Independence Party, 19 September 2014) <www.ukip.org/nigel_farage_a_voice_for_england> accessed 10 July 2015.

²⁸ See 'Policy Guide: Where the Parties Stand' (*BBC News*, April 2015) <www.bbc.co.uk/news/election/2015/manifesto-guide> accessed 10 July 2015.

²⁹ Jeremy Purvis and Andrew Blick, 'A Parliament for Reform 2015–2020: Legacy Paper of the All-Party Parliamentary Group for Reform, Decentralisation and Devolution in the United Kingdom' (March 2015) <www.local.gov.uk/documents/10180/6917361/L15-79+APPG+for+reform+Devolution/891e0442-8692-4153-bf35-f12e61207508> accessed 10 July 2015.

Notably missing among these were Conservative voices. This is perhaps less surprising when considering that the Government's response to the Political and Constitutional Reform Committee's report on the matter had been to reject the timeliness of setting up a constitutional convention due to competing economic priorities and the lack of public appetite.³⁰ David Cameron's post-referendum speech mentioned the need for 'wider civic engagement' but made no direct reference to a convention. Instead, he brought up the need to deal with the 'English votes for English laws' as central to any constitutional reform.³¹ The same concern was at the core of the December 2014 policy paper addressing devolution in England.³² The latter also briefly touched on the prospect of a constitutional convention, emphasising the need for decisions on its terms of reference and scope; its composition; timescales; and how it would interact with parallel changes taking place, notably devolution in Scotland.³³ But whereas the Liberal Democrats reiterated their desire that such a body 'should be legislated on at the earliest possible opportunity so its work can start as soon as possible',³⁴ the Conservative stance remained non-committal.³⁵

A similar momentum has been growing in civil society³⁶ and academic circles,³⁷ and was particularly strong around the time of the Scottish independence referendum. Academic discussions have revolved around whether a constitutional convention is opportune; the various types of conventions one could opt for; the best model to emulate; and the issues it should be entrusted with.³⁸ Scholarly opinion is split on whether a

³⁰ Deputy Prime Minister, 'Government Response to the House of Commons Political and Constitutional Reform Committee Fourth Report of Session 2012–13: Do We Need a Constitutional Convention for the UK?' (November 2013) paras 1.3, 2.1, 3.18, 4.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264086/8749.pdf> accessed 13 September 2015.

³¹ See 'In Full: David Cameron Statement on the UK's Future' (*BBC News*, 19 September 2014) <www.bbc.co.uk/news/uk-politics-29271765> accessed 10 July 2015.

³² First Secretary of State and Leader of the House of Commons, 'Implications of Devolution for England' (December 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/387598/implications_of_devolution_for_england_accessible.pdf> accessed 10 July 2015.

³³ *ibid* 21.

³⁴ *ibid* 32.

³⁵ *ibid* 27.

³⁶ For a list of civil society initiatives predating the Scottish referendum, see Political and Constitutional Reform Committee, *A New Magna Carta?* (n 20) 376.

³⁷ See LSE Institute of Public Affairs, 'Crowdsourcing a New UK Constitution' (*LSE Constitution UK Blog*, 8 October 2013) <<http://blogs.lse.ac.uk/constitutionuk/2013/10/16/video-crowdsourcing-a-new-uk-constitution/>> accessed 13 September 2015.

³⁸ See, among others, Alan Renwick, 'After the Referendum Options: For a Constitutional Convention' (*The Constitution Society*, May 2014) <www.consoc.org.uk/wp-content/uploads/2014/05/J1847_Constitution_Society_Report_Cover_WEB.pdf> accessed 10 July 2015; Cormac Mac Amhlaigh, 'For a Constitutional Convention for the United Kingdom' (*UK Constitutional Law Blog*, 22 September 2014) <<http://ukconstitutionallaw.org/2014/09/22/cormac-mac-amhlaigh-for-a-constitutional-convention-for-the-united-kingdom/>> accessed 10 July 2015; Alan Renwick, 'How to Design a Constitutional Convention for the UK' (*Our Kingdom*, 22 September 2014) <www.opendemocracy.net/ourkingdom/alan-renwick/how-to-design-constitutional-convention-for-uk> accessed 10 July 2015; Robert Hazell, 'You Want a Constitutional Convention? This is what You Need to Think through First' (*Constitution Unit Blog*, 8 October 2014) <<http://constitution-unit.com/2014/10/08/you-want-a-constitutional-convention-this-is-what-you-need->

constitutional convention would be the best way to achieve the constitutional reform most agree is needed. Some have pointed to 'the accumulation of unresolved constitutional problems' as creating a strong case for a convention with popular participation and tasked with considering the constitution as a whole.³⁹ Others, however, have preferred alternative bodies similarly tasked, assuming public apathy and governmental resource shortage.⁴⁰ Even those taking the constitutional convention option seriously point to past failures in pan-UK constitutional renovation as cause for pessimism.⁴¹

What emerges, thus, is a mixed picture. While few would dispute the need for serious thought on Britain's constitution in light of recent changes, the process by which this is to be achieved has been more controversial. Even the aims attached to this process have varied. They have included: seizing the referendum moment, with a desire to channel popular energy into concrete change; fixing the perceived inadequacy of current mechanisms to achieve such change; correlating the type of mechanism to the scale and holistic nature of the constitutional overhaul; as well as the desire for genuine democratic innovation and a willingness to experiment in order to achieve it. However, there is a real risk of instrumentalisation, with the convention being manipulated by political parties wishing to see their own agendas reflected in its mandate and outcomes. Moreover, occasionally arguments for a UK constitutional convention have been combined with those for a written constitution for the country, which unhelpfully mixes two very different avenues of constitutional debate.

Constitutional conventions have been discussed as one possible mechanism for effectuating the needed change, with their advocates believing such a convention to be the only way to achieve both comprehensive constitutional change and democratic legitimacy. The normative assumption behind such arguments has been that direct citizen engagement in constitutional revision processes can supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument would go, actualises the hitherto mythical 'people' and turns self-government into an empirical reality. In what follows, I scrutinise this assumption with reference to the UK context in comparative perspective. My aim will not be to debate whether a constitutional convention is adequate for UK constitutional

to-think-through-first/> accessed 10 July 2015; David Farrell, 'The Irish Constitutional Convention Offers a Potential Route-map for Renewing UK Democracy' (*Democratic Audit*, 15 October 2014) <www.democraticaudit.com/?p=8625> accessed 10 July 2015; Clodagh Harris, 'The UK has Much to Learn from the Irish Constitutional Convention' (*LSE British Politics and Policy*, 17 November 2014) <<http://blogs.lse.ac.uk/constitutionuk/2014/11/17/the-uk-has-much-to-learn-from-the-irish-constitutional-convention/>> accessed 10 July 2015. More recently, see statement by academics of Constitution Society and Constitution Unit, 'What a Constitutional Convention Needs to Succeed' (*UCL Constitution Unit Blog*, 30 April 2015) <www.ucl.ac.uk/constitution-unit/news/what_a_constitutional_convention_needs_to_succeed_apr15> accessed 10 July 2015.

³⁹ Bogdanor (n 16) 36–37.

⁴⁰ See Robert Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36 *Statute L Rev* 1, 21.

⁴¹ See Adam Evans, 'Back to the Future? Warnings from History for a Future UK Constitutional Convention' (2015) 86 *Pol Q* 24.

reform today or not. Rather, I am interested in the UK case as a potential testing ground for participatory democracy and in the distinct challenges it poses to the promise of constitutional conventions more specifically.

3 A UK constitutional convention: Three challenges

Fundamental constitutional change needs to be, or at least to be perceived as, legitimate if it is to take root. This is even truer in the UK considering the scale and scope of the reforms said to be needed in order to give coherence to the British constitution. Several authors have discussed the prospect of a UK constitutional convention as needing to ‘command[] such legitimacy that it would be able to create a new “rule of recognition” supplanting notions of parliamentary “sovereignty”’.⁴² The notion that ‘[f]or the outcome to be legitimate so must be the process’⁴³ is widespread in constitution-making scholarship today. To quote Saunders again:

Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instil a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.⁴⁴

In other words, there is an educational element involved in having a constitution-making process perceived as legitimate, as it can serve as model for subsequent political interactions. There is also a link to public ownership and increased vigilance: an informed public will know when the constitution has been transgressed and demand accountability.⁴⁵

I have suggested elsewhere five principles of participatory constitution-making good practice, on the basis of lessons drawn comparatively (mainly from Iceland and Ireland).⁴⁶ These five principles were: (1) inclusiveness, aimed at ensuring the process is representative and responsive at all stages; (2) clarity of process, achieved via advance notice of the steps of the process and its outcome; (3) the involvement of all relevant actors, so as to avoid alienation and to ensure public and political ownership of the process (I discuss this in greater detail below); (4) equality as parity of esteem, referring to responsive and transparent decision-making procedures; and (5) consensus-

⁴² Andrew Blick, ‘Entrenchment and the United Kingdom Constitution’ (Constitution Society, 16 December 2014) 6 <www.consoc.org.uk/2014/12/%E2%80%98entrenchment-and-the-united-kingdom-constitution%E2%80%99%E2%80%93new-discussion-paper/> accessed 10 July 2015. See also Bogdanor (n 16) 39.

⁴³ Richard Simeon, ‘Constitutional Design and Change in Federal Systems: Issues and Questions’ (2009) 39 *Publius* 241, 251.

⁴⁴ Saunders (n 6) 3.

⁴⁵ See Jennifer Widner, ‘Constitution-Writing in Post-Conflict Settings: An Overview’ (2008) 49 *William & Mary L Rev* 1513, 1519.

⁴⁶ See Silvia Suteu, ‘Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland’ (2015) 38 *Boston College Intl & Comp L Rev* 251.

based decision-making, aimed at avoiding the mere aggregation of preferences and at facilitating true deliberation.⁴⁷ These types of considerations would be equally relevant to a UK constitutional convention, which would, like its predecessors, also face complex decisions over inclusiveness, clarity of mandate, allocated resources, working methods and how to define its success. Of these, I will focus on inclusiveness in the first section below and on mandate in the following section. My choice relates to the centrality of these two questions for the legitimacy of any participatory body set up to effect constitutional change, but also to their elusiveness in the literature on a British constitutional convention. Moreover, while other aspects such as budgets, timeframes or terms of reference may be resolved at the stroke of a governmental pen, the inclusiveness and mandate questions pose fundamental problems which require more careful theoretical consideration.

3.1 The inclusiveness challenge

When discussing the need for a UK constitutional convention to be inclusive, the question immediately arises: what is the relevant political community which this convention would be tasked with representing? Those writing on this topic, whether academics or politicians, have given rather different answers and have discussed a convention for the UK as a whole, Scotland only, the rest of the UK minus Scotland, or even England alone. These disagreements are not inconsequential: path dependence theory tells us that subsequent decisions will be constrained by initial ones.⁴⁸ Thus, whether an English pre-convention is to be established, as the current government has at various times suggested, is a decision the outcome of which could influence the parameters of a wider convention, if the latter would still be held at all.

Moreover, we must remember that a UK constitutional convention would be concerned with constitutional change, including in the form of further devolution of powers from the centre to a unit, in the context of a multi-level, plurinational, asymmetrical system.⁴⁹ Thus, whatever lessons are sought from comparative work need to be measured against and adapted to the UK's distinct context. As noted above, the comparators most often invoked have consistently been small countries, or sub-units of a federal state, and most have relatively homogenous populations. Thus, achieving inclusiveness may have been difficult but manageable in places like Iceland or Ireland, but would certainly prove even more complex in the UK. The latter would at the very least add another, territorial, layer to considerations of representativeness. As of yet, there are no adequate comparators for the accommodation of such territorial diversity in the composition of a citizen assembly-style constitutional convention. While there

⁴⁷ *ibid* 275–76.

⁴⁸ Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System' (2001) 86 *Iowa L Rev* 101, 106.

⁴⁹ Also noting the added difficulties of the UK's multinational nature for a constitutional convention is Evans (n 41) 29.

is some evidence that participatory mechanisms can be scaled up in federal systems,⁵⁰ there remain many unanswered questions as to their suitability to one constitutional context or another. Given that the most recurrent theme in criticism of the Smith Commission process has had to do with precisely achieving a coherent reform of the territorial constitution, this is not an issue to be cast aside lightly.

Even if the issue of the relevant political community were to be resolved, the inclusiveness requirement would still need to be addressed at the level of individual convention member selection. Proponents of a UK constitutional convention have tended to agree that it would comprise representatives of civil society, political actors, and individual members of the public, whether directly elected or randomly selected. Again, comparisons here have tended to focus on Ireland in particular, which included citizens as well as politicians in equal proportion (civil society organisations, though invited to submit proposals, were not directly represented in the convention itself), selected quasi-randomly, ie adjusted for gender, geography and age. While that model could be emulated in the British case, it bears noting that it was itself contested in the Irish context. Civil society organisations in particular lamented their exclusion from actual deliberations.⁵¹ The fear related to statistical notions of representativeness is that, in its attempt to mirror society at large, it fails to ensure that minority voices are also included. In a constitution-making context, where majoritarian usurpation could have dire consequences, silencing minorities via non-inclusion in the body drafting the constitution might bear a heavy price.

A separate point concerns timing. It may seem a trivial observation, but a UK constitutional convention would come in the aftermath of (and possibly spurred by) the Scottish independence referendum, with its high turnout, closer than anticipated result and distorted meaning of the ‘no’ vote (to mean more devolution rather than closure). Some have suggested that what has ensued has been a ‘chain reaction (...) which has transformed the seemingly straightforward “yes/no” of the Scottish referendum into something more complex and unpredictable that spills over across the UK’s internal boundaries’.⁵² Interpreting a relatively narrow ‘no’ vote is difficult and potentially speculative, but it is not meaningless. It is true that ‘the constitutional debate looks completely different once the threat of independence drops out of the equation’,⁵³ but it is not the same as it would have been without that referendum. There is work

⁵⁰ See Thamy Pogrebinschi, ‘The Squared Circle of Participatory Democracy: Scaling Up Deliberation to the National Level’ (2013) 7 *Critical Policy Studies* 219.

⁵¹ See Irish Council for Civil Liberties, ‘Developing a Model for Best Practice for Public Participation in Constitutional Reform’ (7 June 2012) <www.iccl.ie/attachments/download/260/ICCL_%20Best%20Practice%20for%20Constitutional%20Reform%2020%20June%202012%20FINAL.pdf> accessed 10 July 2015.

⁵² Charlie Jeffrey, ‘Constitutional Change—Without End?’ (2015) 86 *Pol Q* 275.

⁵³ Scott Hames, ‘No Face Paint beyond this Point: Pro-Independence Politics after No’ (*Scottish Constitutional Futures Forum Blog*, 29 September 2014) <www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4330/Scott-Hames-No-Face-Paint-Beyond-This-Point-Pro-Independence-Politics-After-No.aspx> accessed 10 July 2015.

suggesting that even constitutional amendments which fail at the ratification stage may, by providing evidence of growing national consensus, amount to *de facto* constitutional change.⁵⁴ Expectations differ because our constitutional imagination has been enriched. What this means for the inclusiveness requirement of a UK constitutional convention is that what would have seemed legitimate before may now no longer suffice. Who sits at the table is determined by who wields influence, and the Scottish referendum may have tilted the scale in this regard irreversibly. Similarly, the results of the 2015 general election have redrawn the parameters of any future decision to set up a constitutional convention, with Scotland's voice now even more difficult to ignore in the process of UK-wide constitutional reform.

3.2 The mandate challenge

No less controversial may prove to be the question of what mandate a UK constitutional convention would have. The scope of its remit would need to be clearly set out before the convention started its work so as to ensure that the process was seen as legitimate and the 'rules of the game' were known to all. Such clarity would also help prevent abuse or the later delegitimising of the convention's work. Similar calls have been made with reference to the increased use of referendums in the UK, whose 'lack of regulation has opened up the potential for [their] manipulation'.⁵⁵ Others have echoed this need for codification irrespective of the type of process or set of procedures resorted to for constitutional change.⁵⁶ Indeed, we may be witnessing the realisation of a perceptive observation made almost two decades ago, namely, that it may be 'that in the future, constitutional amendment will become a more controlled process, with greater constraints on the government being exercised not only by Parliament and the courts, but also by the people'.⁵⁷ The need for a clear mandate for a constitutional convention would be part of that increased control, but also a logical requirement: an unclear process would be unlikely to achieve clarification of the UK constitution.

More contentious would be to set out the content of a UK convention's mandate. As already noted, one of the criticisms levied against the Smith Commission process was that its limited remit meant it could not adequately address the need for a coherent

⁵⁴ See discussion of the failed 1972 Equal Rights Amendment to the US Constitution in Rosalind Dixon, 'Amending Constitutional Identity' (2012) 33 Cardozo L Rev 1847.

⁵⁵ Peter Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 163.

⁵⁶ Robert Blackburn, 'Constitutional Amendment in the United Kingdom' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 380.

⁵⁷ Peter Oliver and Adam Tomkins, 'Constitutional Change in the United Kingdom' in Mads Andenas (ed), *The Creation and Amendment of Constitutional Norms* (BIICL 2000) 357.

territorial constitution.⁵⁸ There was a sense, after the Scottish referendum, that a more profound (re)thinking of the substantive content of the UK constitution was needed, and that the Smith Commission was not adequate to achieve it.⁵⁹ (Such fundamental rethinking of the UK constitution had been demanded for some time, with authors warning that the centrifugal dynamics of devolution required a 'sustained attempt to review and renew the purposes of union'.)⁶⁰ If it is to avoid such criticism, therefore, a constitutional convention would need to have a mandate that was not only clear and manageable, but also sufficiently ambitious so as to provide the answers the Smith Commission could not and to warrant the investment in its work.

Options for the scope of the convention's mandate include for it to produce a written constitution or merely to make recommendations on discrete issues. The latter may result in the same type of piecemeal constitutional reform that advocates of a constitutional convention have deplored in the past. Nevertheless, it is precisely what the Irish constitutional convention, the model most often invoked in the UK context, was entrusted to do. In Ireland, the convention was called on to make recommendations on seven issues, to which it added two more based on public input. In fact, the Irish process' relative success, and avoidance of any blockages, has been attributed by some to precisely this sequencing of its work.⁶¹ Most of the other instances of constitutional conventions invoked as models (British Columbia, The Netherlands and Ontario) similarly dealt with isolated issues of electoral reform. The sole exception was Iceland, whose convention had a full constitutional project to deliver. This list shows some promise for far-reaching reform being possible via constitutional convention, but there is still no direct model for the type of territorial reallocation of powers the UK would seek.

A last observation here refers to the lack of unanimity with regard to the need for a written constitution in the UK.⁶² While the fervour of writings on a constitutional convention for the UK would seem to indicate agreement on this issue, there are still prominent voices which hold such a development not to be essential.⁶³ Such disagreements raise the broader question of the type of document the constitutional convention would

⁵⁸ Select Committee on the Constitution, *Proposals for the Devolution of Further Powers to Scotland* (HL 2014–15, 145) para 23.

⁵⁹ See Christine Bell, 'Separation or Sharing? The Critical Choice for the Union (and Smith)' (*Scottish Constitutional Futures Forum Blog*, 4 November 2014) <<http://www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4568/Christine-Bell-Separation-or-Sharing-The-Critical-Choice-for-the-Union-and-Smith.aspx>> accessed 13 August 2015.

⁶⁰ Charlie Jeffrey, 'Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change' (2009) 39 *Publius* 289, 289.

⁶¹ See 'Constitutional Reform in Ireland: Legal Memorandum' (Public International Law and Policy Group, 17 February 2014) 27 <www.mreza-mira.net/wp-content/uploads/Constitutional-Reform-in-Ireland-Feb-2014.pdf> accessed 10 July 2015.

⁶² See Blackburn, 'Enacting a Written Constitution for the United Kingdom' (n 40) and 'Political and Constitutional Reform Committee, *A New Magna Carta?*' (n 20).

⁶³ James Melton, Christine Stuart and Daniel Helen, 'To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes' (*Constitution Unit*, March 2015) <www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/162.pdf> accessed 10 July 2015.

be tasked to prepare. I have been writing on the assumption that it would be a substantive identification and reimagining of core constitutional tenets and not a purely technical exercise in codifying existing rules. As others have noted, such a technical endeavour would be better suited for professionals; a 'written constitution proper' would instead 'be more intensive and complex than a non-legal Code or Consolidation Bill, as it would symbolically become *the* Constitution in the state, providing the basic law and primary source of authority in the United Kingdom'.⁶⁴

3.3 The exceptionality challenge

Finally, one must remember that the high costs of popular constitution-making, including in terms of political will and citizen interest, will unavoidably render constitutional conventions exceptional. The majority of constitutional reforms are bound to come about via more traditional channels. This is especially true of the UK, where almost all major constitutional change 'needs to be formulated and presented to Parliament by the government of the day'.⁶⁵ Thus, focusing solely on popular involvement in times of crisis may be short-sighted and ultimately detrimental. If democracy is a work in progress, it is still representative democracy that we are working towards improving, including via boosts of participatory activity. The question then becomes how best to balance, or integrate, the two types of processes—the participatory and the representative democratic—in such a way as to have them reinforce each other's strengths. How to do this in the British context where, as Dawn Oliver has observed, democracy 'is a slippery term, and one about which UK politicians are rather coy',⁶⁶ may prove even more challenging.

Paradoxically, the UK has had experience with both a highly participatory event, the Scottish independence referendum, and a more conventionally political one, the Smith Commission, within the same year. While the former was lauded as ultimately a good example of a participatory process,⁶⁷ the latter was received with much unease. The procedurally problematic aspects of the Smith Commission were in fact commented upon soon after it was set up.⁶⁸ They included the fact that the Smith Commission process was distinctly elite-driven, having been initiated by political elites but also because,

⁶⁴ Blackburn, 'Enacting a Written Constitution for the United Kingdom' (n 40) 20 (emphasis in original).

⁶⁵ Blackburn, 'Constitutional Amendment in the United Kingdom' (n 56) 369.

⁶⁶ Dawn Oliver, 'The United Kingdom' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 353.

⁶⁷ Tierney, 'And the Winner is... the Referendum' (n 1). See also Tierney, 'Reclaiming Politics' (n 2).

⁶⁸ See Stephen Tierney, 'Solomon Grundy does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament' (*UK Constitutional Law Association Blog*, 31 October 2014) <<http://ukconstitutionallaw.org/2014/10/31/stephen-tierney-solomon-grundy-does-constitutional-change-the-smith-commission-timetable-to-transform-the-scottish-parliament/>> accessed 10 July 2015. See also Tom Mullen, 'Further Devolution: Evaluating the Parties' Proposals' (*Scottish Constitutional Futures Forum Blog*, 30 October 2014) <www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4518/Tom-Mullen-Further-Devolution-Evaluating-the-

outside of a month-long period during which it gathered proposals from citizens and civil society, it was only open to political parties. Unsurprisingly, the parties' submissions to the Commission largely reflected previously expressed positions.⁶⁹ However, the Commission's broader outreach efforts were not insignificant: despite the tight timeline, it received 407 submissions from civic institutions, organisations and groups, and 18,381 from members of the public.⁷⁰ And, while its final report has been criticised for failing—due to the Commission's limited remit rather than anything else—to consider the wider and longer term impact of its proposals for the Union as a whole,⁷¹ the Smith Commission process itself was more in line with UK constitutional practice than the independence referendum had been.

To this descriptive point—that British constitutional tradition favours piecemeal reform through political channels rather than revolutionary change through participatory processes—I wish to add two further points, which build on comparative insights. One is that it is not at all clear that all constitutional crises are best resolved via recourse to the people. Jon Elster, for instance, has advocated for constitution-making processes to contain both elements of secrecy and of publicity due to their disparate strengths and drawbacks, as '[w]ith total secrecy partisan interests and logrolling come to the forefront, whereas full publicity encourages grandstanding and rhetorical overbidding'.⁷² To uncritically advocate for popular involvement in constitutional change is thus to take for granted that anything imbued with the participatory aura will be better and more legitimate than politically-negotiated products. Concerns over popular expertise and interest are relevant here, alongside the shortcomings of publicity when seeking delicate compromise.

With regard to the assumed lack of the public's expertise, sceptics would do well to consider the British Columbia, Ontario and Netherlands citizen assemblies tasked with the complex and technical matter of electoral reform. In spite of this technical nature of their mandate, those involved succeeded not only in understanding the various options available to them, but also in deliberating upon the best alternative for their polity. However, these assemblies only worked in the context of ample time allocated for learning and deliberation (for example, a full year for the learning phase in British Columbia, and another year for its deliberative work). All three of their proposals

Parties-Proposals.aspx> accessed 10 July 2015, which raises questions about the appropriateness of the Smith Commission process, its outcome and aftermath.

⁶⁹ See Political Party Proposals, Smith Commission website <www.smith-commission.scot/resources/political-party-proposals/> accessed 10 July 2015.

⁷⁰ Smith Commission, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament' (27 November 2014) para 11 <www.smith-commission.scot/smith-commission-report/> accessed 10 July 2015.

⁷¹ Select Committee on the Constitution (n 58).

⁷² Jon Elster, 'Ways of Constitution-Making' in Axel Hadenius (ed), *Democracy's Victory and Crisis* (CUP 1997) 138. See also discussion in Fernando Mendez and Jonathan Wheatley, 'The Constitution-Making Process: An Analytical Framework' in Jonathan Wheatley and Fernando Mendez (eds), *Patterns of Constitutional Design* (Ashgate 2013) 12–13.

eventually failed due to a lack of popular interest, the two Canadian ones via popular referendums which did not meet the necessary thresholds, and the Dutch due to political changes which deprived the assembly of its support.⁷³

In the context of the UK, we may well wonder whether the kind of complicated financial and monetary policy arrangements which came under the remit of the Smith Commission were ever really going to be decided otherwise than via political negotiations. Even commentators critical of the Smith Commission process have contrasted the further devolution debates to the buoyant independence referendum ones, calling the former ‘deadly dull’;⁷⁴ ‘a long trudge through closed committees and impenetrable reports’;⁷⁵ and something to at best ‘muddl[e] through.’⁷⁶ This is not to say public input and oversight was not desirable in the process, but that the minutiae of negotiation were likely never truly going to escape elite hands.

Of course, this only addresses the problem of technical constitutional change and its public palatability. Most advocates of a constitutional convention for the UK link it to a need to (re)consider fundamental values and principles of the British constitution, the scale of which only a broad public debate can achieve. My answer to this is to caution against alienating political elites, which bears a heavy price in any process of constitutional change. Here, again, comparative insights may suggest that we temper our optimism for a participatory approach.

Iceland’s experiment with a constitutional convention in the aftermath of the country’s economic collapse in 2008 may serve as a warning tale. Despite the clamour with which the draft constitution produced by the convention was received, and notwithstanding a successful referendum which approved it, the text never came into force. The Parliament failed to discuss the bill a third and necessary time in 2013, and the new constitution dropped from amidst priorities in the general election that same year. A new procedure to amend the existing constitution by 2017 was instead proposed, and thus the ‘world’s first crowdsourced constitution (...) ultimately fell at the final hurdle.’⁷⁷ Iceland’s failure to adopt the popularly produced constitutional draft had a lot to do with the late involvement of political elites, which as a consequence felt alienated from the process.⁷⁸

⁷³ On the causes of their failure, see Fournier and others (n 13) 126–44.

⁷⁴ Hames (n 53).

⁷⁵ *ibid.*

⁷⁶ Aileen McHarg, ‘What Does the Union Need to Do to Survive?’ (*Scottish Constitutional Futures Forum Blog*, 25 September 2014) <www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4325/Aileen-McHarg-What-Does-the-Union-Need-to-Do-to-Survive.aspx> accessed 10 July 2015.

⁷⁷ Hélène Landemore, ‘Iceland’s “Crowd-sourced” Constitution may Have Stalled, but the Experience Offers Lessons for Constitutional Reform in Other States’ (*LSE EUROPP Blog*, 24 July 2014) <<http://blogs.lse.ac.uk/europpblog/2014/07/24/icelands-crowd-sourced-constitution-may-have-stalled-but-the-experience-offers-lessons-for-constitutional-reform-in-other-states/>> accessed 10 July 2015.

⁷⁸ Baldvin T Bergsson and Paul Blokker, ‘The Constitutional Experiment in Iceland’ in Ellen Bos and Kálmán Pócsa (eds), *Verfassungsgebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* (Nomos 2014) 171.

Indeed, Ireland's constitutional convention success has been partly attributed to maintaining political actors engaged with the constitutional convention's work.⁷⁹ In fact, the process itself was initiated by the Irish executive, which also clearly indicated its response to the outcome of deliberations. This, together with its seeming success, may help explain the support which the Irish model has seemed to elicit in the UK.⁸⁰ Nevertheless, that very success of the Irish constitutional convention has more recently come to be questioned.⁸¹ It was neither a lack of interest from citizens, nor poor quality work which have doomed the Irish convention to futility, these critics have argued; instead, it was the ability of the government to only partially acquit itself of its obligation to respond to the convention's reports and its choice to put only the most frivolous matters to referendum votes.⁸² Thus, the Irish constitutional convention 'brand' has been said to be in jeopardy due to the government's attempts to sideline the reform project.⁸³

This brief comparative excursion yields contradictory results: involving politicians in the deliberations of a constitutional convention seems both to help increase its effectiveness and not to guarantee eventual success. Nevertheless, the limited comparative evidence that does exist suggests the exclusion of political elites is more prone to doom the work of a popular constitutional convention to irrelevance than keeping them invested in, and thus protective of, the constitutional change process. I admit that this may be a strategic consideration more so than a principled one, though not entirely. Given that it is political representatives who will then have to implement and work with new constitutional tools, there is value in attempting to have participatory democracy enhance, rather than supplant or alienate, representative institutions. And to the fear of elite control—of political actors exploiting their role for narrow political advantage⁸⁴—the Irish constitutional convention's success in avoiding this problem suggests hope.⁸⁵

Although reverting to an elite-driven process in the aftermath of the Scottish referendum was decried as 'disappointing'⁸⁶ and called 'deeply ironic' given that the impetus for it was the referendum itself,⁸⁷ the political process is in fact the typical arena

⁷⁹ See David Farrell, 'The Irish Constitutional Convention: A Bold Step or a Damp Squib?' in John O'Dowd and Giuseppe Franco Ferrari (eds), *Comparative Reflections on 75 Years of the Irish Constitution* (Clarus Press 2013) 198.

⁸⁰ See sources listed above at n 38.

⁸¹ Fintan O'Toole, 'How Hopes Raised by the Constitutional Convention were Dashed' (*The Irish Times*, 3 March 2015) <www.irishtimes.com/opinion/fintan-o-toole-how-hopes-raised-by-the-constitutional-convention-were-dashed-1.2123435> accessed 10 July 2015.

⁸² *ibid.*

⁸³ David Farrell, 'Constitutional Convention "Brand" is in Jeopardy' (*The Irish Times*, 17 March 2015) <www.irishtimes.com/opinion/david-farrell-constitutional-convention-brand-is-in-jeopardy-1.2142826> accessed 10 July 2015.

⁸⁴ Tierney (n 10) 23.

⁸⁵ Jane Suiter and others, 'It's Good to Talk: Citizen-Politician Deliberations in Ireland's Constitutional Convention of 2012–14' (ECPR General Conference, Glasgow, 3–6 September 2014).

⁸⁶ McHarg (n 76).

⁸⁷ Tierney (n 68).

for effecting constitutional change, at least in the UK. Recent experiments with popular mechanisms such as constitutional conventions are exceptional. Their success, partial at best, has had much to do with the degree to which political actors were engaged in the process alongside the citizenry. Thus, while a trend towards more direct democracy may be afoot, including in the UK, it would be a mistake to embrace the participatory promise at the expense of, rather than alongside, representative institutions.

4 Conclusion

The choice of mechanism to decide on and enact constitutional change is nowhere an easy one. The recent turn in constitution-making scholarship in favour of participatory approaches, including advocacy for mechanisms such as constitutional conventions which involve the citizens directly in deliberations, has much persuasive force. Indeed, who could resist the promise of better decisions taken in a more legitimate manner and resulting in a long-lasting constitutional settlement? As I have tried to show in this paper, however, the evidence for the success of such mechanisms is still incomplete. Their promise of increased legitimacy for and greater public ownership over constitutional reform coexists with the risk that ‘politics as usual’ will take over before participatory constitution-making can deliver.

Comparative work inspires cautious hope, however. Despite their failings, the Icelandic and Irish processes in particular have shown that expanding constitution-making beyond elites can yield workable results. These same cases also serve as cautionary tales on the importance of clear and thorough planning and implementation of constitutional change initiatives. Nevertheless, these two experiments indicate that, under the right conditions, the public can fruitfully be at the centre of a constitutional reform process. Some of these conditions, such as economic crises as triggers for constitutional overhaul, cannot easily be replicated elsewhere. Others—such as growing dissatisfaction with the current constitutional settlement, a sense of the inadequacy of traditional reform channels, and a genuine willingness to bring the people closer to their constitution—are more familiar, including to a UK audience.

As I have argued throughout this article, UK political and academic debates took just such a pro-participatory turn around the time of the Scottish independence referendum. Constitutional conventions inspired by comparative experiences were soon discussed as an option, having both strong advocates and also detractors. At the very least, I have argued, policy makers and academics in the UK who support such an instrument must answer the three challenges raised above. Any UK constitutional convention would need to have from the outset: legitimacy in the form of inclusiveness, both at the level of individual members and of the territorial unit(s) represented; a clear mandate, likely to go beyond the merely technical codification of existing constitutional rules and into substantive rethinking of the constitution; and a link to the political process to ensure

that representative institutions are not alienated but support, and are thus likely to endorse, its work.

Perhaps the most important prerequisite to establishing a UK constitutional convention is widespread support from all major political players, both for its establishment and for the implementation of its proposals. As this article has indicated, however, such cross-cutting commitment to participatory constitutional change has been lacking. Moreover, the Conservative success in the May 2015 general election may have significantly diminished the momentum towards participatory constitution-making in the country. Constitutional convention advocates may still hold onto a glimmer of hope, however, after the introduction of a private member's bill in the House of Lords calling for the establishment of such a body.⁸⁸ Its initiator still saw a constitutional convention as what 'will help us reach a settlement that protects the future of the UK and delivers communities the powers they need to thrive'.⁸⁹ As of the time of writing, the bill had yet to have its second reading. Furthermore, the Government's plans to go forward with 'English votes for English laws' reform by way of amendment to the Standing Orders of the House of Commons sparked criticism that such an issue would be best resolved via a constitutional convention instead.⁹⁰

While this paper has raised more questions than it has provided answers, the comparative lessons invoked throughout are a first step in finding the best solution for the UK context. Given that a constitutional convention is at least nominally still on the table, such lessons are important to avoid misusing this mechanism and merely displacing the country's 'constitutional unsettlement'.⁹¹ What is clear is that the choice of constitutional change instrument should not be made casually for, in the words of Edward McWhinney, '[w]hat looks like a simple, technical machinery choice may in fact predetermine or influence the final substantive recommendations as to the content and direction of a new, or "renewed," constitutional system'.⁹² Given the significance of the constitutional moment in which the UK may find itself, this forewarning has never been more pertinent.

⁸⁸ See Constitutional Convention HL Bill (2015–16) 10.

⁸⁹ Although Lord Purvis of Tweed explained that '[a] constitutional convention will help us reach a settlement that protects the future of the UK and delivers communities the powers they need to thrive'. See 'Lord Purvis Launches Constitutional Convention Bill' (*BBC News*, 1 June 2015) <www.bbc.co.uk/news/uk-scotland-scotland-politics-32953249> accessed 10 July 2015.

⁹⁰ See 'EVEL—The Leader of the House and the Prime Minister should not be so Reckless with the Future of the United Kingdom—Angela Eagle' (*Labour Press*, 3 July 2015) <<http://press.labour.org.uk/post/123027179179/evel-the-leader-of-the-house-and-the-prime>> accessed 10 July 2015. See also Katie Boyle, 'The Government's New EVEL Timeline Still isn't Sufficient to Facilitate the Necessary Debate and Deliberation' (*Democratic Audit*, 10 July 2015) <www.democraticaudit.com/?p=14436> accessed 10 July 2015.

⁹¹ Neil Walker, 'Our Constitutional Unsettlement' [2014] PL 529.

⁹² Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (U Toronto P 1981) 27.