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The Scottish independence referendum and the participatory turn in UK constitution-making: The move towards a constitutional convention

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Abstract: This article looks at the continued calls for popular participation in UK constitution-making following the 2014 Scottish independence and 2016 Brexit referendums. In particular, it discusses the prospect of a UK constitutional convention being set up to deliberate upon and make recommendations concerning constitutional reform. The article proceeds by first mapping the arguments in favour of setting up such a body in a country with little but growing experience with direct democracy. It then analyses three difficulties surrounding a UK constitutional convention: deciding on a manageable mandate, identifying the political community or communities it is to represent and the method for selecting its membership, and defining the place of such a convention within the UK's broader constitution-making mechanisms. The article highlights fundamental unknowns in need of clarification before such an instrument could be used while at the same time admitting the limitations of a constitutional convention as a panacea for all of the UK's constitutional woes. In exploring these questions, the article shows how constitutional reform debates in the UK are no less complex than were those surrounding Scottish independence and have been further compounded by Brexit.

Keywords: Brexit; constitutional conventions; participatory constitution-making; Scottish independence referendum; UK constitutional reform

This article looks at the 2014 Scottish independence referendum and its aftermath as part of a larger trend towards participatory constitution-making. It focuses on United Kingdom (UK) constitution-making and explores calls for embodying the participatory ethos in another mechanism for constitutional change, namely a constitutional convention. The article highlights fundamental unknowns in need of clarification before such an instrument could be used while at the same time admitting the limitations of a constitutional convention as a panacea for all of the UK's constitutional woes. In exploring these questions, the article shows how constitutional

reform debates in post-referendum (now both the Scottish and Brexit ones) UK are no less complex than were those surrounding Scottish independence. In so doing, it brings to the fore the myriad ways in which law and politics intersect when seeking constitutional clarity in the UK. Intersecting legal and political regimes influence options for a constitutional convention and confirm that constitutional development today cannot escape global forces, not even in a country as constitutionally distinctive as the UK.

The article proceeds by first discussing the rise of popular participation in constitution-making, both in the form of referendums and deliberative mini-publics such as constitutional conventions. Second, it maps recent calls to establish a constitutional convention in the UK, particularly in the aftermath of the highly participatory Scottish independence referendum. It looks at informal demands, such as those emerging from academic and non-governmental circles, but also formal ones such as parliamentary bills aiming to create such a convention. Third, the article examines three first-order questions which have remained unanswered within the broader debate on a UK constitutional convention: the problem of delineating an ambitious yet manageable mandate for the convention; the question of which political community is to be represented and what method of selection would adequately represent it; and the issue of integrating such a recourse to participation within the UK's political landscape. To go back to Jacques Derrida, as invoked in the Introduction to this issue, if the Scottish referendum involved a reconstitution of the people through their participation in constitutional change, a constitutional convention would similarly involve a performative act. A convention would only ever be able to approximate the people, yet its designers would have to strive to ensure it comes as close as possible to representing the political community in whose name it would act. This would be no small task, I argue, not least because of the fragmented political will behind establishing such a convention and the confusion surrounding its design. There would thus need to be serious soul-searching before a UK constitutional convention could be established if it is to deliver any clarity in a reform process long maligned by piecemeal change.

I. The rise of participation in constitution-making

The trend towards participatory constitutional change may be identified both within the UK and globally. Within the UK, there has been a marked increase in the use of referendums, which have asked voters for their views on reform of the electoral system, membership in the European Union

(EU), and, most often, devolution.[1] This trend did not abate after the 2014 Scottish referendum, with a new referendum on membership in the EU being held in 2016. This was in line with predictions that the positive experience with the Scottish referendum would likely result in calls for more direct democracy in UK constitutional change processes.[2] Now that the shock result of the Brexit vote is in, this optimism about the utility and legitimacy of referendums as decision-making devices may be revisited, at least with regard to the UK. Nevertheless, elsewhere as well, the constitutional referendum has proliferated as a means to settle thorny issues ranging from integration in supranational bodies to secession and independence.[3]

The recourse to the people has thus come to be seen as a means to make and legitimate political decisions on divisive issues, though it is by no means universally accepted. As the articles of Luis Moreno and Hung-Jen Wang in this issue aptly point out, and as highlighted by K. M. Fierke in her introductory piece, referendums, and independence referendums in particular, are also sites of deep contestation. In the UK as well, what immediately followed the 2014 referendum was the establishment of the Smith Commission (more on which below), tasked with making recommendations on the constitutional reforms brought to the fore during the referendum debate. This has been seen as a potential 'retreat from popular politics',[4] but also as a return to elite-driven deal-making or 'horse-trading' between political parties of the type 'likely to result in a constitutionally incoherent and unpredictable set of arrangements'.[5] This at least partial return to 'politics as usual' may signal a simultaneous trend away from popular participation; it is likely symptomatic of political elites' anxieties and attempts at regaining control when faced with popular claims over decision-making power. Space precludes further exploration of these points here, but it is clear that the advent of referendums in the UK has triggered its own backlash.

[1] See Select Committee on the Constitution, 12th Report of Session 2009–10, *Referendums in the United Kingdom: Report with Evidence*, HL Paper 99.

[2] S Tierney, 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum' (2015) 86(2) *The Political Quarterly* 226.

[3] See S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2012) and M Qvortrup, *Referendums around the World: The Continued Growth of Direct Democracy* (Palgrave MacMillan, Basingstoke, 2014).

[4] See (n 2) 232.

[5] C Bell, 'Separation or Sharing? The Critical Choice for the Union (and Smith)' *Scottish Constitutional Futures Forum Blog* (4 November 2014) available at <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4568/Christine-Bell-Separation-or-Sharing-The-Critical-Choice-for-the-Union-and-Smith.aspx>.

Alongside the rise of the 'age of referendums',[6] another participatory mechanism has come to be promoted in constitution-making: constitutional conventions modelled on citizen assemblies. 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',[7] such conventions represent one of over 100 types of participatory mechanisms.[8] British Columbia, The Netherlands and Ontario are prominent first examples of citizen assemblies, with British Columbia particularly groundbreaking and sparking a 'demonstration effect' in the other two[9] and, subsequently, in Iceland and Ireland.[10] Understood loosely as a 'representative body collected together to discuss constitutional change',[11] constitutional conventions of the type discussed in this article (which some have also referred to as 'people's conventions'[12]) are united by several traits, including the centrality of (quasi-)randomly selected citizens tasked with deciding important constitutional reforms in a deliberative setting.[13] Increasingly, scholarship on deliberative democracy has come to understand such experiments with deliberative mini-publics as integrated within a larger deliberative system.[14] In other words, while a constitutional convention may constitute a focal point for public debate, it is best viewed as embedded in an ecosystem of venues and institutions, which both reinforce and undermine each other and which divide

[6] S 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) available at <http://www.democraticaudit.com/2014/10/22/europe-is-entering-the-age-of-the-referendum-but-there-is-nothing-to-fear-for-european-democracy-if-referendums-are-properly-regulated/>.

[7] K Groenlund *et al*., *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPR Press, Colchester, 2014) 1.

[8] G Rowe and LJ Frewer, 'A Typology of Public Engagement Mechanisms' (2005) 30(2) *Science, Technology, & Human Values* 257.

[9] P Fournier *et al*., *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford University Press, Oxford, 2011) 28.

[10] For more on the experience of British Columbia, see ME Warren and H Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, Cambridge, 2008).

[11] House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?*, Fourth Report of Session 2012–13 (25 March 2013) 9.

[12] DM Farrell, 'The Irish Constitutional Convention: A Bold Step or a Damp Squib?' in J O'Dowd and G Ferrari (eds), *Comparative Reflections on 75 Years of the Irish Constitution* (Clarus Press, Dublin, 2013) 191–201.

[13] See generally S Suteu, 'Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland' (2015) 38(2) *Boston College International & Comparative Law Review* 251–76.

[14] See J Parkinson and J Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, Cambridge, 2012).

the decision-making burden and legitimacy between them. This shift in the scholarship is echoed by views of constitutional conventions as complementary to, rather than replacing, representative institutions.[15]

As will be seen, all examples mentioned above have been invoked in the UK context, whether by Scottish authorities promising a constitutional convention to draft independent Scotland's constitution or by proponents of far-reaching constitutional change of the UK constitution. They shared the main concern of advocates of constitutional conventions before them, namely to 'inject some popular legitimacy into policymaking'[16] by way of popular participation.[17]

The 2016 Brexit referendum vote, however, has tempered this participatory enthusiasm, sending tremors through British society and its political establishment. On the one hand, Brexit seemed not to change much: the same questions remained as to how to reform the UK constitution so as to make it reflect political reality and respond adequately to twenty-first century challenges. In other words, Brexit may move the country in an unexpected direction when it comes to EU membership, but it has not fundamentally changed the need for wholesale constitutional revision that a constitutional convention might prompt. On the other hand, of course, the Brexit vote has changed everything. It has become priority number one, pushing every other large-scale policy reform plans to the side – for example, plans to revisit the status of the European Convention on Human Rights in the UK and replace the Human Rights Act 1998, the statute incorporating the Convention into UK law, with a so-called 'British Bill of Rights'.[18] Not only that, but the Brexit fallout – also catalysed by debates around the *Miller* Supreme Court case[19] – brought into stark relief virtually all the unresolved tensions at the heart of the UK constitution. These included the weakness of executive control mechanisms and of the parliamentary scrutiny process, the devolution

[15] See (n 12) 200.

[16] See (n 9) 18.

[17] For more on the existence of a global trend towards popular participation beyond mere consultation in constitution-making, see C Saunders, 'Constitution Making in the 21st Century' (2012) 4 *International Review of Law* 1–10.

[18] H Stewart, 'Ministers Put British Bill of Rights Plan on Hold until after Brexit' *The Guardian* (29 December 2016) available at <www.theguardian.com/law/2016/dec/29/ministers-put-british-bill-of-rights-plan-on-hold-until-after-brexit>.

[19] *Miller and Dos Santos v Secretary of State for Exiting the European Union* [2017] UKSC 5. The case concerned the question whether the UK Government could invoke Article 50 of the Treaty on the European Union to notify the EU of the UK's withdrawal based on royal prerogative powers or whether it needed parliamentary approval before doing so. The UK Supreme Court ruled 8–3 that Parliament needed to have a say.

(un)settlements, the uncertain status of EU and international law, and problems of fit of the doctrine of parliamentary sovereignty to modern-day British constitutional realities.

These and other issues have all, at one point or another, been considered ripe for deliberation by a constitutional convention. And, while Brexit has certainly put a question mark as to the wisdom of resorting to the people on matters of constitutional significance, not to mention on whether resources should be allocated for another potentially divisive experiment with citizen engagement, calls for a convention have not fully abated. Such a convention remains on the agenda of its supporters not only in spite of Brexit but precisely because of it, being seen as a potential solution to the political stalemate dogging the UK constitution and rendered so visible in the aftermath of the EU membership referendum.

II. Calls for a UK constitutional convention

Calls for a UK constitutional convention are not new, albeit they have gained the most traction yet following the participatory success of the Scottish independence referendum. The appeal of a constitutional convention has grown the more often the UK constitution has been referred to as being in a state of crisis.[20] The impetus behind appeals to direct citizen involvement in constitutional reform seems to come from the belief that the changes in order are too fundamental to be left to the usual political channels, and that the latter have had enough time to enact comprehensive reform but have failed to do so. In what follows, the arguments in favour or against a constitutional convention are mapped, as well as the context in which these arguments have been put forth. The source of these arguments has been varied, ranging from political parties and elected officials to civil society associations and academics.

Precursors: The Scottish Constitutional Convention and the All-Wales Convention

Before proceeding, however, it is useful to remind readers that experiments with constitutional conventions, albeit different from the ones discussed here, have taken place within two devolved units. The first, the Scottish Constitutional Convention, was established in 1989 with the goal of

[20] V Bogdanor, *The Crisis of the Constitution: The General Election and the Future of the United Kingdom* (The Constitution Society February 2015).

pressuring for devolution for Scotland. It was composed of representatives of some but not all political parties (the Conservatives refused to participate from the beginning, and the Scottish National Party (SNP) walked out when independence was not included among the options on the table), of churches, trade unions, Scottish local authorities, and an assortment of civil society organisations.[21] While the Convention did work towards a blueprint for devolution,[22] its representativeness of the wider Scottish population has rightly been called into question.[23] Moreover, one of the major UK parties, the Conservatives, and the party which would come to dominate Scottish politics in the lead-up to the independence referendum, the SNP, did not take part. This meant that the Convention was also not representative of the relevant political arena. Furthermore, the Convention's open membership let self-selection dictate which civil society groups were involved. As will be seen, such a loosely regulated model continues to loom in the imagination of those debating a UK constitutional convention today.

The second example was the All-Wales Convention set up in 2008 by the Welsh Assembly in order to assess public support for full law-making powers devolved to the Assembly and the likely result of a referendum on the matter.[24] It was led by an Executive Committee whose membership was decided by the First Minister and Deputy First Minister and included: 'four members recruited through an open competition; four members nominated by political parties; and eight members nominated by stakeholder organisations in Wales. These organisations were chosen by the First Minister and Deputy First Minister on the basis that they covered a broad representation of the people of Wales.'[25] Its report indicated support for further devolution and an 'obtainable', though not certain, yes vote in favour of this in a referendum, but also uncovered lack of knowledge on Wales's devolution arrangements among the population.[26] The Convention had its detractors, who thought it did not yield new

[21] M Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 224; and R Levy, 'The Scottish Constitutional Convention, Nationalism and the Union' (1992) 27(2) *Government and Opposition* 223–4.

[22] See the Convention's report, titled *Scotland's Parliament, Scotland's Right* (30 November 1995).

[23] One critic, a former member of the Scottish Constitutional Convention, called it an elitist, self-appointed and ultimately unrepresentative body. See C Beaton, 'Ex-MP: Scotland "in Trouble" If Lax on Constitution' *The Targe* (8 December 2013) available at <http://thetarge.co.uk/article/current-affairs/0165/ex-mp-scotland-in-trouble-if-lax-on-constitution>.

[24] See *All Wales Convention* Report (November 2009) available at <http://gov.wales/docs/awc/publications/091118thereporten.pdf> 9–10.

[25] Ibid 10.

[26] Ibid 7.

information and could have been replaced by wider-reaching opinion polls.[27] A referendum on Welsh devolution was held in March 2011 in which a majority of voters opted for extending the Welsh Assembly's law-making powers but which was marred by low turnout (35 per cent), raising questions as to whether it should have been held at all.[28] More significantly with regard to the Convention was that, albeit modelled on the Scottish Constitutional Convention, the Welsh body had had a far narrower scope: 'There was no question of altering the possible destination [a move to a model of devolution already established by Part IV of the 2006 Government of Wales Act]; the All-Wales Convention was to play some, as yet undetermined, role in helping determine the timing of the journey.'[29] The Convention's main tasks – to educate the public on its options in the event of a referendum and to gauge the likely outcome of such a referendum – render it a very different exercise than what is discussed with regard to a UK-wide convention. As will be seen, the latter is mostly invoked as an instrument to decide or make recommendations on unsettled constitutional issues precisely because these are open-ended and options are not predetermined.

Political parties' positions on a UK constitutional convention

Liberal Democrats enjoy reminding their opponents and the wider electorate that they have long called for a constitutional convention for the UK. Their calls for constitutional reform go back to the earliest party manifestos, and those for a written constitution and electoral reform date back to at least the 1992 manifesto. By the 1997 elections, they were reiterating these calls and promising greater use of referendums on constitutional issues. In 2008, discussing his terms for joining the administration in the event of a hung parliament, then-party leader Nick Clegg spoke of the possibility of setting up 'a citizens' jury of 100 people to join political parties, churches, civil society groups and others in a constitutional convention to "redesign the way Britain is governed"'.[30]

[27] See Conservative Assembly Member Jonathan Morgan cited in 'More Powers for Wales Says Report' *BBC News* (18 November 2009) available at <http://news.bbc.co.uk/1/hi/wales/wales_politics/8350333.stm>. See also DS Stirbu and L McAllister, 'An Exercise in Democratic Deliberation: The All Wales Convention's Contribution to Constitutional Change' (2011) 24(1) *Contemporary Wales* 64–85.

[28] R Wyn Jones and R Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press, Cardiff, 2012) xi.

[29] Ibid 80.

[30] A Sparrow, 'Clegg's Terms for Deal in Hung Parliament' *The Guardian* (10 March 2008) available at <http://www.theguardian.com/politics/2008/mar/10/liberaldemocrats.nickclegg>.

The Liberal Democrats' 2010 manifesto further specified their wish to set up a citizens' convention tasked with drafting a written constitution for the whole of the UK, to be approved in a referendum,[31] as well as to 'address England's status within a federal Britain'.[32] As will be seen shortly, this stance was reiterated and further specified by the party during the 2015 elections, and the issue was to find its way into almost all parties' manifestos. The trigger for this was in large part the Scottish independence referendum.

In the run-up to the 2014 referendum, the Scottish Government pledged to set up a constitutional convention tasked with drafting a constitution for an independent Scotland. It set out these plans in both the November 2013 White Paper and the June 2014 draft Scottish Independence Bill and invoked as models the citizen assemblies in British Columbia, The Netherlands, Ontario, Iceland, and Ireland.[33] The impetus behind establishing such a body in the aftermath of May 2016, the date of the first Scottish elections, was laid out by then-First Minister Alex Salmond:

> The reason for this is that Scotland's constitution should enshrine the people's sovereignty and affirm the values and rights of the people, of the community of the realm of Scotland. Since no single party or individual has a monopoly on good ideas; all parties, and all individuals, will be encouraged to contribute.[34]

Quite how this was to be reconciled with promises that certain substantive provisions would necessarily be included in the permanent constitution, such as the entrenchment of the European Convention of Human Rights, was not clear. At the very least, this constitutionalisation of rights would have had to be made clear to citizens, as it represented a radical transformation of previous institutional arrangements.[35]

The run-up to the May 2015 elections saw most political parties embracing the idea of a constitutional convention, whether for the whole

[31] Liberal Democrat Manifesto 2010 available at <http://www.politicsresources.net/area/uk/ge10/man/parties/libdem_manifesto_2010.pdf> 88.

[32] Ibid 93.

[33] See The Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (26 November 2013) 22; and The Scottish Government, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* (June 2014) 61.

[34] Cited in S Carrell, 'Alex Salmond Entices Left and Lawyers with Promise of New Rights in a Written Constitution' *The Guardian* (17 January 2013) available at <http://www.theguardian.com/politics/scottish-independence-blog/2013/jan/17/scottish-constitution-alexsalmond>.

[35] See discussion in K Boyle and S Tierney, 'Human Rights in Transition: The Proposed Interim Constitution for Scotland' *UK Constitutional Law Association Blog* (1 August 2014) available at <http://ukconstitutionallaw.org/2014/08/01/katie-boyle-and-stephen-tierney-human-rights-in-transition-the-proposed-interim-constitution-for-scotland/>.

of the UK or for some of its units. Ed Miliband at the Labour conference in September 2014 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.[36]

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.[37] 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 'If 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.'[38] Even Nigel Farage called for a convention 'to be rapidly established to put in place a plan for a Federal UK'.[39] All parties maintained these stances in their election manifestos.[40]

Notably missing among these were Conservative voices.[41] This is perhaps less surprising when considering the Government's response to the Political and Constitutional Reform Committee's report on the matter (see below) had been to reject the timeliness of setting up a constitutional convention due to competing economic priorities and the lack of public appetite.[42] David Cameron's post-referendum speech mentioned the need for 'wider

[36] 'Ed Miliband's Speech to the Labour Conference: Full Text' *New Statesman* (23 September 2014).

[37] Nick Clegg, 'This Opportunity Cannot Be Hijacked' Liberal Democrats (22 September 2014).

[38] The Green Party, 'Democracy for Everyone: The UK after the Scottish Referendum' (September 2014).

[39] Nigel Farage, 'A Voice for England' UKIP website (19 September 2014).

[40] See 'Policy Guide: Where the Parties Stand' (*BBC News*, April 2015) available at <http://www.bbc.co.uk/news/election/2015/manifesto-guide>. 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).' See All-Party Parliamentary Group, '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).

[41] There were some exceptions, however. See P Goodman, 'A New Model for the Constitution. A New Model for Conservative Leadership' (*Conservative Home*, 19 September 2014) available at <http://www.conservativehome.com/thetorydiary/2014/09/a-new-model-for-the-constitution-a-new-model-for-conservative-leadership-2.html>.

[42] *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) sections 1.3, 2.1, 3.18, 4.1.

civic engagement' but made no direct reference to a convention; he instead brought up the need to deal with the 'English votes for English laws' (EVEL) question as central to any constitutional reform.[43] The same concern was at the core of a December 2014 policy paper addressing devolution in England.[44] 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.[45] But whereas the Liberal Democrats had 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',[46] the Conservative stance remained non-committal.[47]

Following their win in the May 2015 election, the Conservative Party stance on popular participation in constitution-making was made clear by the path chosen to enact both promises of further devolution and other constitutional changes. Both the Scotland Bill 2015 and the Draft Wales Bill 2015, meant to deliver further devolution to the two units, showcased the Government's reluctance to let go of the levers of law-making on devolution. Similarly and despite warnings from opposition that it threatened the very fabric of the Union, the issue of EVEL was dealt with by amending the Standing Orders of the House of Commons, without any broader debate.[48] These and other moves (including on local devolution) lowered hopes for a constitutional convention being set up under the stewardship of the post-2015 Government. Opposition parties continued to push for one, however. Several candidates for the leadership of the Labour party following the elections, including the eventual winner Jeremy Corbyn, expressed support for a convention.[49] A Liberal Democrat private member's bill in the House of Lords (discussed

[43] 'In Full: David Cameron Statement on the UK's Future' *BBC News* (19 September 2014) available at <http://www.bbc.co.uk/news/uk-politics-29271765>.

[44] First Secretary of State and Leader of the House of Commons, *Implications of Devolution for England*, Policy Paper, December 2014.

[45] Ibid 21.

[46] Ibid 32.

[47] Ibid 27.

[48] For opposition criticism, see 'English Vote Plan to Become Law Despite Objections' (*BBC News*, 22 October 2015) available at <http://www.bbc.co.uk/news/uk-politics-34599998>. For an analysis of the constitutional issues raised by this solution, see P Reid, '"English Votes on English Law": Just Another Running Repair' *UK Constitutional Law Association Blog* (28 October 2015) available at <http://ukconstitutionallaw.org/2015/10/28/paul-reid-english-votes-on-english-law-just-another-running-repair/>.

[49] See A Barnett, 'The Labour Leader Candidates and the Constitution' *OpenDemocracyUK* (12 August 2015) available at https://www.opendemocracy.net/ourkingdom/anthony-barnett/labour-leader-candidates-and-constitution>. Jeremy Corbyn is also one of the MPs supporting the Constitutional Convention Bill in the House of Commons, on which see below.

at the end of this section) united opposition efforts to institute such a body and reignited hope.[50]

Parliamentary work on a UK constitutional convention

The prospect of a constitutional convention was addressed directly in a March 2013 Report of the Political and Constitutional Reform Committee of the UK Parliament titled *Do We Need a Constitutional Convention for the UK?*.[51] 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 Question[52] 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',[53] and by 2015 more confidently declared that: 'Perhaps the "constitutional moment", which in quieter times some believed was a prerequisite for change, is now close at hand.'[54] Finally, in March 2015, the same Committee recommended a constitutional convention as the mechanism to help examine what recent proposals for change mean for the Union as a whole; it also found that 'a Convention for England, with broad popular representation from the public and civil society, could examine the relationship between England and the United Kingdom and develop a process for further agreed devolution from the centre to regions and localities'.[55] The Committee was abolished in the post-2015 Parliament but its chairman, Graham Allen MP, would be among the initiators of a House of Commons bill to bring about a UK constitutional convention.

[50] J Stone, 'Lib Dem and Labour Peers Could Work Together to Push for a Constitutional Convention' *Independent* (1 June 2015) available at <http://www.independent.co.uk/news/uk/politics/lib-dem-and-labour-peers-could-work-together-to-push-for-a-constitutional-convention-10289602.html>.

[51] See (n 11).

[52] 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'. Ibid, section 68.

[53] House of Commons Political and Constitutional Reform Committee, *A New Magna Carta*, Second Report of Session 2014–15 (3 July 2014).

[54] House of Commons Political and Constitutional Reform Committee, *Consultation on A New Magna Carta?*, Seventh Report of Session 2014–15 (3 March 2015) 12.

[55] House of Commons Political and Constitutional Reform Committee, *The Future of Devolution after the Scottish Referendum*, Eleventh Report of Session 2014–15 (23 March 2015) 3.

Civil society calls for a UK constitutional convention

Certain civil society organisations have also publicly backed establishing a constitutional convention after the Scottish independence referendum.[56] The most prominent of these are the Electoral Reform Society and Unlock Democracy. Both have endorsed the establishment of a constitutional convention as a way to achieve an inclusive debate on holistic rather than piecemeal reform of the UK constitution, and as a means to ensure public confidence in the results.[57] They subsequently joined forces with academics and ran two pilot citizen assemblies, in Sheffield and Southampton, as a testing ground for deliberative approaches to constitutional reform.[58] They indicated having drawn on previous such experiments, notably the Canadian citizen assemblies, Iceland, Ireland and also the Scottish Convention. Other examples include a crowdsourcing initiative run by the Institute of Welsh Affairs which asked for popular input on further devolution for Wales following the recommendations made by the Silk Commission, as well as the role of the union as a whole; participants also repeatedly called for a UK-wide constitutional convention.[59]

Academic debates around a UK constitutional convention

Academics have also responded to calls for a constitutional convention with analyses of whether a convention should be established and why, what should go into its design, and what comparative models should be relied upon when setting it up.[60] Scholarly opinion has not been unanimous

[56] For a list of civil society initiatives predating the Scottish referendum, see (n 53) 376.

[57] See Unlock Democracy, 'Guide to a Constitutional Convention' (October 2014) and fn 7 at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07143>; and Electoral Reform Society, 'Time for a Convention' at <http://www.electoral-reform.org.uk/constitutional-convention>.

[58] See the website of the two pilot assemblies, available at <http://citizensassembly.co.uk/>.

[59] The Institute for Welsh Affairs, 'Constitutional Convention Report' (April 2015) available at <http://iwa.wales/wp-content/uploads/2016/01/IWA_ConCon_report6.pdf>.

[60] See, among others, A Renwick, 'After the Referendum Options: For a Constitutional Convention' *The Constitution Society* (May 2014); C Mac Amhlaigh, 'For a Constitutional Convention for the United Kingdom' *UK Constitutional Law Association Blog* (22 September 2014); A Renwick, 'How to Design a Constitutional Convention for the UK' *Our Kingdom* 2(2 September 2014); R Hazell, 'You Want a Constitutional Convention? This Is What You Need to Think Through First' *The Constitution Unit Blog* (8 October 2014); D Farrell, 'The Irish Constitutional Convention Offers a Potential Route-map for Renewing UK Democracy' *Democratic Audit* (15 October 2014); C Harris, 'The UK Has Much to Learn from the Irish Constitutional Convention' *LSE British Politics and Policy* (17 November 2014); A Renwick, 'A British Constitutional Convention?' (2015) 6(2) *Political Insight* 8–11. See also statement by academics of The Constitution Society and The Constitution Unit, University College London, 'What a Constitutional Convention Needs to Succeed' (30 April 2015) available at <www.ucl.ac.uk/constitution-unit/news/what_a_constitutional_convention_needs_to_succeed_apr15>.

on whether a constitutional convention should be set up, even while most commentators agree that sweeping constitutional change is necessary in the aftermath of the Scottish independence referendum. 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.[61] Others, however, have preferred alternative bodies similarly tasked, assuming public apathy and governmental resource shortage.[62] Even those taking the constitutional convention option seriously point to past failures in UK constitutional renovation as cause for pessimism.[63] Experiments such as the above-mentioned pilot citizens' assemblies, as well as the LSE-run *Crowdsourcing the UK Constitution* project,[64] confirmed their initiators' confidence in the value of asking the input of ordinary citizens. Lessons from all of these will surely be useful in the event that a UK constitutional convention is established. Whether these initiatives have also helped persuade any of those sceptical of the value of popular participation in constitution-making, however, is less clear.

The Constitutional Convention bills 2015

Rather than die out following the 2015 general election, political interest in a UK constitutional convention was renewed by a private member's bill introduced in the House of Lords in June 2015 calling for its establishment. The Constitutional Convention Bill called for a convention to be set up 'to consider and make recommendations on the constitution of the United Kingdom' no later than 31 December 2016.[65] (An identical bill was later introduced in the House of Commons.[66]) The initiator of the bill, Lord Purvis, expressed his intention to have a convention overcome the piecemeal approach to constitutional reform in the past:

> We need to abolish the make do and mend approach to reform that has let the SNP move the devolution goalposts time and again in a way that might work for them, but not for Scotland or the rest of the UK. A constitutional convention will help us reach a settlement that protects

[61] See (n 20) 36–7.

[62] See R Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36(1) *Statute Law Review* 21.

[63] See A Evans, 'Back to the Future? Warnings from History for a Future UK Constitutional Convention' (2015) 86(1) *The Political Quarterly* 24–32.

[64] See ConstitutionUK, LSE Institute of Public Affairs, available at <http://blogs.lse.ac.uk/constitutionuk/>.

[65] Constitutional Convention Bill (HL Bill 10) 2015–16, arts 1(1) and 1(3).

[66] Constitutional Convention (No. 2) Bill (Bill 61) 2015–16.

> the future of the UK and delivers communities the powers they need to thrive.[67]

The bills were subject to parliamentary debates which showed how the prospect of a convention continues to divide and confuse lawmakers. References to specific provisions in the bills, as well as to reactions they triggered among peers and MPs, will be made throughout the analysis below. I use these debates as lenses which help focus the analysis and which illustrate long-standing paradigms in British constitutional thinking. The bills' ultimate failure, however, coupled with their near-invisibility in broader public debates call for caution when assessing their likely impact. This article proceeds to unpack the unknowns of a UK constitutional convention by looking at, among others, the debates surrounding these bills. However, the latter serve to illustrate the complex issues at play rather than act as the single frame for discussion.

The 2016 Brexit vote and the uncertain fate of a UK constitutional convention

Post-Brexit vote, a constitutional convention has understandably not been foremost on politicians' minds. Nevertheless, previous supporters have retained their enthusiasm for such a mechanism and perceive Brexit as a catalyst for greater constitutional reform. Former Labour Prime Minister Gordon Brown, for example, found there to be 'an overwhelming case for a UK-wide people's constitutional convention'.[68] His stance, which echoed his interest in a people's convention dating back to his time in office,[69] was not so much about extolling the virtues of a constitutional convention and explaining how it might actually work. Instead, Brown's imagining of the convention is inextricably linked to certain outcomes: resolving the devolution question, repatriating powers from Brussels to the regions instead of to London, placing bottom-up economic power in the hands of regional authorities, and reforming the House of Lords into a Senate of Nations and Regions – in short, 'setting a roadmap towards a more federal constitution that empowers all of the nations and regions'.[70] Calls in the Labour Party (especially from Scottish Labour) for a 'people's convention'

[67] Cited in (n 49).

[68] The Office of Gordon and Sarah Brown, 'Gordon Brown Proposes UK People's Constitutional Convention' (3 November 2016) available at <http://gordonandsarahbrown.com/2016/11/gordon-brown-proposes-uk-peoples-constitutional-convention/>.

[69] See A Barker, 'Brown Flags Constitutional Convention' *Financial Times* (21 May 2009) available at https://www.ft.com/content/41183a02-459a-11de-b6c8-00144feabdc0>.

[70] See (n 68).

to be established by summer 2017 to consider federalisation built on similar considerations and aimed to provide an alternative to Scottish independence.[71] Given their long-standing commitment to similar aims, the Liberal Democrats may end up endorsing such a course of action; the Scottish Lib Dems have in fact already made it clear they remain committed to federalism, also as a way to stave off 'the siren sounds of nationalism and independence'.[72] Of course, in the absence of support from the ruling Conservative Party, these initiatives may not have far-reaching impact, at least in the near future.

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 (an aim tempered now by the Brexit experience); fixing the perceived inadequacy of current mechanisms to achieve such change; correlating the type of mechanism used 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, proponents of a convention have often seen it as a vehicle to deliver their own long-standing agenda on UK reform, such as federalism, a written constitution, rights entrenchment, or sweeping regional or local devolution. In other words, some of its advocates seem to assume a convention will deliver particular substantive outcomes rather than accepting that, for such a body to fulfil its deliberative promise, the outcome of its proceedings would not be predetermined. Anything else risks instrumentalising the mechanism of the constitutional convention, and popular participation more broadly.

In the next section, I proceed to explore three essential questions still in need of answers before more concrete plans for a UK constitutional convention should proceed. My aim will not be to debate whether a constitutional convention is adequate for UK constitutional 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.

[71] S Carrell, 'Labour Expected to Consider Possibility of Federal UK' *The Guardian* (24 February 2017) available at <https://www.theguardian.com/uk-news/2017/feb/24/labour-constitutional-reforms-federal-uk-scotland>.

[72] Scottish Liberal Democrats, 'Scot Lib Dems Launch Federalism Drive' (5 March 2017) available at <http://www.scotlibdems.org.uk/scot_lib_dems_launch_federalism_drive>.

III. A UK constitutional convention: three questions

The previous section mapped the different voices in the debate on a UK constitutional convention, both predating and following the 2014 Scottish and 2016 Brexit referendums. What emerged was a rich web of arguments in favour and against this mechanism: while its proponents invoked notions of increased democratic legitimacy and the complexity of holistic constitutional reform, its opponents wondered whether this was the best instrument to deal with such difficult matters and whether the time was right to attempt to find out. Paradoxically, the difficulty and magnitude of the changes to the UK constitution were thus invoked both as justification for setting up a constitutional convention and as arguments against doing so. The causes for this contradiction likely reside in misunderstanding: what a constitutional convention could do; who it would be comprised of; and how its work would be integrated within the regular constitutional process. In this section, I propose to explore precisely these three questions. My aim will be to shed light on the questions themselves and highlight the implications of possible answers rather than to prescribe a single course of action. More clarity on these core issues is necessary if the debate on a UK constitutional convention is to advance to the next level: that of concrete legislation and design.

1) The 'what' question: demarcating a clear mandate. Before asking what the mandate of a UK constitutional convention would look like, it is important to consider what such an instrument can be used for. Based on comparative experience, the options appear to include: to produce a written constitution, to make recommendations on a concrete list of issues, or to address a single issue. The first was the task of the Icelandic convention, which delivered a full new draft of the country's constitution which was later submitted to a referendum. The second option is based on the Irish convention model, where the convention had an initial list of issues for consideration, to which it later added others. The third option, based on citizen assemblies only tasked with considering electoral reform in British Columbia, The Netherlands, and Ontario, would mean assigning a single issue to the convention on which to deliberate and make recommendations. This list indicates such conventions could be assigned complex tasks, albeit in neither of these were conventions considering multi-level territorial reallocation of powers.

Of the three, the second has been the model most often invoked in UK debates, without much consideration given to whether it would result in the same type of piecemeal reform advocates of a convention wish to depart from. This has been the main fear of proponents of constitutional

change in the UK: that whatever change occurs will be just as fragmentary as before and will come via the usual elitist channels. One of the criticisms levied against the Smith Commission process set up in the aftermath of the Scottish referendum was precisely that its limited remit meant it could not adequately address the need for a coherent territorial constitution.[73] 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 Smith was not an adequate process to achieve it.[74] (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'.[75]) If it is to avoid such criticism, therefore, a constitutional convention would have 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.

Whatever the choice of model, it is imperative that a UK constitutional convention have very clear terms of reference from the outset. The scope of its remit would need to be plainly set out in legislation before the convention started its work so as to ensure the process is seen as legitimate and the 'rules of the game' 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'.[76] Others have echoed this need for codification irrespective of the type of process or set of procedures resorted to for constitutional change.[77] 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

[73] House of Lords Select Committee on the Constitution, *Proposals for the Devolution of Further Powers to Scotland*, 10th Report of Session 2014–15 (24 March 2015) section 23. On the complexities of speaking of, and reforming, the 'territorial constitution', see N Walker, 'The Territorial Constitution and the Future of Scotland' in A McHarg *et al.* (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press, Oxford, 2016).

[74] See (n 5).

[75] C Jeffrey, 'Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change' (2009) 39(2) *Publius: The Journal of Federalism* 289.

[76] P Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution' in R Rawlings *et al.* (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, Oxford, 2013) 163.

[77] R Blackburn, 'Constitutional Amendment in the United Kingdom' in X Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, Abingdon, 2013) 380.

process, with greater constraints on the government being exercised not only by Parliament and the courts, but also by the people'.[78] 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.

This need for clarity of mandate seems to have been heeded by the initiators of the bills on a UK constitutional convention. Under Article 2, the bills stipulated the convention's terms of reference as follows:

> Its terms of reference stipulate the issues such a body must consider:
>
> The convention must consider the following terms of reference –
> (a) the devolution of legislative and fiscal competence to and within Scotland, England, Wales and Northern Ireland,
> (b) the devolution of legislative and fiscal competence to local authorities within the United Kingdom,
> (c) the reform of the electoral system,
> (d) the reform of the House of Lords,
> (e) constitutional matters to be considered in further conventions, and
> (f) procedures to govern the consideration and implementation of any future constitutional reforms.

The first four items have preoccupied constitutionalists in the country for many years and reflect the desideratum that a convention would finally settle these issues. The fifth interestingly left the door open for future conventions, in the same way that the mandate of the Irish convention had allowed it to expand the list of issues it had been mandated to consider.[79] The final item appeared aimed at filling the legislative gap on procedures for constitutional reform such as the convention itself.

The list may appear clear, but the items listed were criticised as too general and ambitious. During committee sitting on the House of Lords bill, the mention of reform of the electoral system, for instance, was pointed to as an illustration of 'the problem with the Bill, that unless there

[78] P Oliver and A Tomkins, 'Constitutional Change in the United Kingdom' in M Andenas (ed), *The Creation and Amendment of Constitutional Norms* (The British Institute of International and Comparative Law, London, 2000) 357.

[79] The Irish convention's terms of reference stipulated that it could consider and report on 'such other relevant constitutional amendments that may be recommended by it', provided it had already considered its initial list of eight. See Constitutional Convention Terms of Reference, Resolution of the Houses of the Oireachtas (July 2012) available at <https://www.constitution.ie/Documents/Terms_of_Reference.pdf>. The convention did make use of this provision and added two more items to its list.

is clarity and a better definition of precisely what the convention is going to look at, the scope for endless debate and discussion is pretty limitless'.[80] Another indictment was that having one year to address all these issues was 'ridiculous' considering they had remained unresolved despite more than 100 years of constitutional debates.[81] Individual items were also scrutinised, with voices calling for removal of mention of reform of the House of Lords and/or of local devolution, as well as those questioning the reference to a single electoral system given that multiple ones are in use at various levels. Others agreed that 'the case for the convention gets stronger every day',[82] but there was a sense of fundamental disagreements on its particulars, to the point of almost needing 'a convention about the convention' in order to decide them.[83]

The answer to objections as to the feasibility of this mandate to a large extent depends on the time and resources allocated to the convention. The twelve months stipulated in the bills' Article 3 for the convention to make its recommendations, with six months after that for the Government to respond, may or may not have proven inadequate, depending on a host of other factors. The period is comparable to those allocated to conventions elsewhere.[84] The success of such micro-deliberative exercises, however, has depended on them being allocated sufficient learning time – the time necessary for their members to learn about the issues on which they are to deliberate. I return to this issue in section III.3 below, in which I discuss assumptions about the public's expertise and capacity to deliberate on complex issues.

Also interesting to note was the rejection of an amendment to the House of Lords bill, which would have added a clause after the terms of reference, stating: 'The convention shall produce a draft written constitution on the powers and functions of the House of Commons and the House of Lords.'[85] The amendment ultimately failed, but the committee debate on this reflected the lack of unanimity with regard to the need for a UK written constitution in general.[86] While the fervour of writings on a constitutional

[80] Lord Gorcott, Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

[81] Lord Forsyth of Drumlean, Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

[82] Lord Kerr of Kinlochard, Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

[83] The Parliamentary Secretary, Cabinet Office (Lord Bridges of Headley), Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

[84] See Table in Hazell (n 60).

[85] Constitutional Convention Bill [HL], Amendment to be moved in Committee, HL Bill 10(a).

[86] See (n 62) and (n 53).

convention for the UK would seem to indicate agreement on this issue, there are still prominent voices which hold such a development to not be essential.[87] The Lords debate also followed the by-now typical division between those who believe in a written constitution precisely so as to clarify contested issues and render future change more predictable, and those who wanted to preserve the flexibility of current arrangements. From the point of view of setting up a constitutional convention, such disagreements are relevant to the broader question of the type of document it would be tasked to prepare. One would assume 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'.[88]

Had the Constitutional Convention Bills been adopted by Parliament, there would have been more clarity as to the mandate of the convention. As of yet, however, there is no agreement on even the level of generality of the issues it should tackle – whether it should entertain an itemised list as included in the bills or whether it should, instead, consider only fundamental principles of the union. Comparative experience, notably Ireland's, would seem to indicate that the more concrete the issues up for deliberation, the more likely a convention is to deliver on its mandate on time. Iceland's convention delivered a full constitutional draft; however, it did so having the benefit of a previous codified constitution on which to draw, an advantage a UK convention would not share. Highlighting these difficulties is not meant to imply they are insurmountable. It may mean that a UK constitutional convention would have to strike a different balance than its predecessors between the need for urgent comprehensive constitutional reform and the time and resources allocated to its functioning. As will be seen in the next section, the complications of the mandate also have a bearing on the convention's membership.

2) The 'who' question: determining the relevant political community. Directly correlated to the question of what a UK constitutional convention would be tasked with deliberating upon is who the deliberators should be. In other words, the relevant political community to be represented in the

[87] J Melton *et al.*, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes* The Constitution Unit (March 2015).

[88] See (n 62) 20.

constitutional convention would be determined by the aims and scope of this body. In the case of the constitutional convention promised by the Scottish Government in the event of a yes vote in the referendum, this question would have had a more straightforward answer: that convention would have had to represent the body politic of the new independent state, presumably based on citizenship. The 'inclusive model of citizenship' announced by the Scottish Government included as bases for Scottish citizenship prior British citizenship, ancestry, and residence, and would have applied to more individuals than the referendum franchise did, based as the latter was on residency alone.[89] Whatever potential problems may have arisen from this citizenship model, the fundamental question of who the people were in whose name a Scottish constitution was to be drafted would have had a reasonably clear starting answer. To return to Derrida, the case he was discussing was that of the United States, whose people only came into constitutional existence once declared as the collective author of the country's basic law.[90] Similarly, the Scottish people would have begun their new constitutional existence once a fundamental law was adopted, having previously reconstituted themselves in various iterations during the participatory constitution-making process – first during the referendum, and subsequently during the constitutional convention's deliberations.

A UK constitutional convention raises a more complex challenge in this regard. While all its advocates have paid lip service to the need for the convention to be inclusive and at the same time representative, they have not been able to specify what this would mean in the UK's multi-level, asymmetrical system.[91] Thus, politicians, civil society members, and academics have put forth rather different models and have discussed conventions for the UK as a whole, Scotland only, the rest of the UK minus Scotland, or England alone. The debate in Parliament had settled on the notion of a UK-wide convention, but this does not automatically simplify the question of its composition.

The Constitutional Convention Bills as introduced in Parliament did not, and perhaps could not, go beyond the same call to ensure that the composition of the convention would be inclusive. The bills stated, under Article 4:

> (1) The convention must be composed of representatives of the following –
>
> (a) registered political parties within the United Kingdom,

[89] See (n 33) 271–73 and Scottish Independence Referendum (Franchise) act 2013, art 2.

[90] J Derrida, 'Declarations' in E Rottenberg (ed), *Negotiations: Interventions and Interviews 1971–2001* (Stanford University Press, Palo Alto, CA, 2002) 49.

[91] Also noting the added difficulties of the UK's multinational nature for a constitutional convention is (n 63) 29.

(b) local authorities,
(c) the nations and regions of the United Kingdom.

(2) At least 50% of the members of the convention must not be employed in a role which can reasonably be considered to be political.

Article 4(2) was undoubtedly aimed at ensuring that 'regular' citizens do not become a minority voice in the convention, although it is interesting to note that this proposal departed from other models. The Irish convention, the only predecessor to have included politicians among its ranks, capped their presence to a third of the 100-strong body. The UK proposal, therefore, allowed for greater politician involvement, a move which would mean the convention departed even farther from the purely citizen-based model of the citizen assembly. The formulation of Article 4(1)(a) was called into question, given that 'there are about 600 registered political parties in the United Kingdom'.[92] In Ireland, political parties invited to send representatives were chosen according to their strengths in Parliament, with Northern Irish parties also invited to send one representative each. By comparison, the formula as stipulated in the UK bills remained ambiguous. The inclusion of representatives of local authorities in Article 4(1)(b) was clearly tied to the specification of local devolution among items on the convention's mandate. Such a general reference, however, becomes problematic in light of the lack of fundamental agreement over whether, as one peer noted during committee debates on the bill, 'there should be absolutely standardised devolution to local authorities across the kingdom as a whole'.[93] Finally, the reference to representatives of 'the nations and regions of the United Kingdom' in Article 4(1)(c) was probably meant to mirror the convention's task of deliberating on further devolution to the territorial units. As formulated, however, it was even more ambiguous than references to political parties or local authorities. This is where comparative insights are less helpful.

The multi-level nature of the UK constitutional relations means the constitutional convention models invoked so far may only elucidate so much. Given that all prior conventions were held in either unitary and homogenous countries (The Netherlands, Iceland and Ireland) or in federal sub-units (British Columbia and Ontario), their designers did not have to deal with questions of how to ensure the representativeness of separate devolved units in the same way the UK would. With devolution arrangements at the heart of the reform agenda, the units' representation

[92] Lord Forsyth of Drumlean, Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

[93] Lord Kerr of Kinlochard, Constitutional Convention Bill [HL] Committee: 1st sitting (Minutes of Proceedings): House of Lords (11 December 2015).

qua units may become necessary, particularly in a UK-wide convention. Thus, whether elected (as in Iceland) or randomly selected but weighed according to certain characteristics such as gender, age, and geography (as in the other cases), much thought will need to go into how to ensure the representation of the units and how to balance it with the rest of the membership.

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 is some evidence that small-scale deliberative mechanisms can be scaled up in federal systems,[94] there remain many unanswered questions as to their suitability to one constitutional context or another. In the case of constitutional referendums, Stephen Tierney has shown that these can function to destabilise multi-level states 'by bringing to the surface the existence of multiple political communities within the state, and by giving each of these the capacity to make constitutional demands by way of a direct voting process which can also at the same time build national sentiment at the sub-state level'; referendums can also help build such multi-level states, as was the case in Spain and in the UK in the 1970s and 1990s, but the stability of these arrangements remains doubtful.[95] A micro-deliberative forum such as a UK constitutional convention would have to give voice to existing sub-state political communities and is therefore by definition exposed to the risk of never overcoming fragmented interests. The promise of deliberative theories – that deliberators can reach consensus by relying on public reason and mutual respect – underlies experimentation with constitutional conventions.[96] Whether that promise would extend to a potentially volatile situation such as a country's territorial division of power has yet to be proven.

Even were the issue of the relevant political community 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 should 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, in which citizens represented a two-thirds majority and were selected

[94] See T Pogrebinschi, 'The Squared Circle of Participatory Democracy: Scaling up Deliberation to the National Level' (2013) 7(3) *Critical Policy Studies* 219–41.

[95] S Tierney, 'The Referendum in Multi-level States: Fracturing or Fostering Federal Models of Government?' (13 March 2014) *L'Idée fédérale* 3.

[96] See discussion in E Carolan, 'Ireland's Constitutional Convention: Behind the Hype about Citizen-led Constitutional Change' (2015) 13(3) *International Journal of Constitutional Law* 735–6.

quasi-randomly, i.e. 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 (though invited to submit proposals, they were not directly represented in the convention itself).[97] The more important fear related to statistical notions of representativeness is that, in their attempt to mirror society at large, they might fail 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. The citizen assembly in British Columbia represents an instructive tale, as its random selection process failed initially to yield aboriginal representatives; the assembly's chair later used his powers to select two additional aboriginal members.[98] Thus, while the mixed model used in Ireland may thus far have shown itself to be 'probably the best option', serious unknowns remain as to how it would operate in the UK context.[99]

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 both 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), and the Brexit referendum, with its similarly high turnout, divisive campaign, and even more hotly disputed result. Some have suggested that what ensued after the 2014 referendum was 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'.[100] 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'[101] – even that not entirely certain, as the Conclusion below discusses – but it is not the same as it would have been without that referendum. Expectations differ because our

[97] See Irish Council for Civil Liberties, 'Developing a Model for Best Practice for Public Participation in Constitutional Reform' (2012). See also discussion in Carolan (n 96) 740.

[98] Warren and Pearse, 'Introduction: Democratic Renewal and Deliberative Democracy' (n 10) 10.

[99] Renwick (n 60) 11.

[100] C Jeffrey, 'Constitutional Change–Without End?' (2015) 86(2) *The Political Quarterly* 275.

[101] S Hames, 'No Face Paint Beyond This Point: Pro-Independence Politics after No' *Scottish Constitutional Futures Forum Blog* (29 September 2014).

constitutional imagination has been enriched. Indeed, whether the question of independence has been mooted has itself become less clear.[102]

What does all this mean for the inclusiveness requirement of a UK constitutional convention? In broad terms, what would have seemed legitimate before the 2014 referendum, and before the 2015 and 2017 general elections, may no longer suffice. Consider two aspects of the convention's membership which these events have influenced. First, the distribution of representatives from political parties would likely be different now. Although the Constitutional Convention Bills did not tie it to parliamentary performance, it is likely that some formula involving actual political influence wielded by parties would be resorted to before inviting them to nominate representatives. The close result of the referendum together with an unprecedented showing in the 2015 general election meant that the SNP would have expected and likely be given more seats at the table than they would have before these events. Also, the 2015 and 2017 general elections brought further reshuffling of political power among Labour and Liberal Democrats, as did the May 2016 elections in the devolved units.

A second aspect refers to eligibility for individual membership in the convention. Following the success of extending the franchise to 16- and 17-year-olds in the Scottish referendum, later made applicable to future Scottish elections as well,[103] there have been numerous calls to extend it for other UK referendums, notably the referendum on membership in the EU.[104] The EU Referendum Act 2015 limited the franchise only to those entitled to vote in parliamentary elections (with some exceptions) (Article 2), thus excluding categories which had previously participated in decision-making: long-term UK citizens resident abroad; EU citizens entitled to vote in local and European elections; and 16- and 17-year-olds.[105] What franchise would be used as the basis for selecting or electing members of a UK constitutional convention is therefore hard to predict. Who is eligible for convention membership, and also to make recommendations to the body, may influence deliberations. In Ireland, for example, submissions were

[102] J Stone, 'Second Scottish Independence Referendum Is Inevitable, Says Nicola Sturgeon' *Independent* (12 October 2015) available at <http://www.independent.co.uk/news/uk/politics/another-scottish-independence-referendum-is-inevitable-says-nicola-sturgeon-a6690586.html>.

[103] See Scottish Elections (Reduction of Voting Age) Bill (2015) available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/88272.aspx#sthash.4DWouOxi.dpuf>.

[104] The House of Lords had even passed an amendment to the EU Referendum Bill to do precisely that, but the House of Commons rejected the extension of the franchise. See HL Bill 36 2015–16.

[105] J Shaw, 'The EU Referendum: Who Should Vote?' *British Influence* (25 May 2015) available at <http://www.research.ed.ac.uk/portal/files/19658319/Shaw_British_Influence_EU_Referendum.pdf>.

also invited from members of the diaspora,[106] an especially significant step considering one of the issues debated by the convention was whether to extend voting rights in presidential elections to Irish citizens living abroad. Presumably underlying this move was an acceptance that all those affected by a particular constitutional reform should have a voice in decision-making. In the case of a UK convention, due consideration would have to be given to whether this should include younger voters, particularly given that they enjoy voting rights in parliamentary elections in Scotland and may soon also do so in Wales.[107] The inclusion of other categories such as EU citizens residing in the UK and citizens who are long-term residents abroad may also merit consideration, especially if their interests are affected by the convention's mandate and if the process is to be as inclusive as possible.

3) The 'how' question: fitting a constitutional convention within UK constitution-making. The third unknown to be discussed here concerns how a UK constitutional convention would be integrated within existing constitution-making in the country. As noted in the introduction to this article, constitutional conventions (and all deliberative mini-publics) are best understood as part of a system of institutions and spaces for deliberation which share deliberative capacity, with the legislature as the most prominent such site.[108] These myriad bodies can both complement and work to displace or weaken each other.[109] In the case of past experiments with constitutional conventions, their tense relationship with the legislature and/or the executive has resulted in competing legitimacy claims (such as Iceland's parliament refusing ultimately to adopt the 'crowdsourced' constitution and viewing it as no longer a priority). Considering how and where recourse to the people is to sit in the broader institutional system could thus help clarify the relationship between a micro-deliberative forum such as a constitutional convention and the other institutions of the political system.

Debates on establishing a UK convention have evinced either disregard for this question or acute confusion as to how to answer it. The confusion has been deepened by the fact that parallel law-making processes saw the bills on establishing a convention being discussed in Parliament in the

[106] The Convention on the Constitution, 'Message from the Chairman' available at <https://www.constitution.ie/>.

[107] I White, 'Voting Age', House of Commons Library Briefing Paper No 1747 (24 November 2015) 15.

[108] See (n 14) 1.

[109] Ibid 3.

immediate aftermath of passing legislation to reform some of the very issues likely to be included in its mandate (see the Scotland Act 2016 and the Wales Act 2017, amending the Standing Orders of the House of Commons to address the English votes for English laws problem, and the Cities and Local Government Devolution Act 2016). In other words, at the same time as there was a serious effort to legislate for a constitutional convention, some of the topics it was meant to deliberate upon were being legislated upon, without much if any reflection on how these would interact. More broadly, even were a constitutional convention to come into being once, the question of whether it would be an exceptional occurrence or become a regular feature of UK constitution-making would remain.

One obvious answer to this conundrum would be codification. Thus, legislation could be passed to regulate when to resort to a constitutional convention, likely needing to set out criteria for determining what qualifies as fundamental constitutional changes which would require popular involvement, but also how often such a mechanism could be established. Such legislation could not only distinguish between cases of constitutional reform which could be pursued by ordinary law-making and those when popular involvement is required, but also the type of popular participation mechanism to be resorted to. After all, constitutional conventions are only one such mechanism and the UK has had more experience with another: the referendum. The two may both pursue increased popular legitimacy in constitution-making, but they are very different instruments, with distinct strengths and weaknesses.[110] Finally, codification could also spell out what happens to the outcome of deliberations in constitutional conventions, such as a governmental duty to respond within a certain fixed time frame and any requirement to submit recommendations to a popular vote.

The latter has proven an especially challenging aspect of constitutional conventions elsewhere. In Iceland, the draft constitution produced by the constitutional convention never came into force, despite a successful referendum.[111] Ireland's case, though initially heralded as a success because of a codified duty for the government to respond to the convention's recommendations, has similarly come to be re-evaluated. There had been no obligation to automatically submit the Irish convention's

[110] For more on the similarities and differences between exercises in micro-deliberation and referendums, see S Suteu and S Tierney, 'Participation Is Not Deliberation: Disentangling Principles of Constitution-making Good Practice' in R Levy *et al*. (eds), *Deliberative Constitutionalism* (Cambridge University Press, Cambridge, forthcoming).

[111] 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.

recommendations to a referendum and to date, only two such referendums have been held.[112] More significantly, the Irish Government has accepted seven of forty-one convention recommendations, rejected an equal number, ignored or provided an ambiguous response to nine recommendations, and 'parked' the remaining seventeen.[113] This has prompted Irish observers to demand guarantees that any future convention would be treated with more respect by the Government.[114] Similar concerns should animate designers of a UK constitutional convention from its founding, with a view to avoiding the body's work being rendered inconsequential by political apathy.

Codification can only solve technical aspects, however. Preceding them is the fundamental question of whether and to what extent popular participation is to become a regular staple of UK constitution-making, beyond the immediate impetus of the Scottish and Brexit referendums. Not only is it a costly endeavour in terms of time and resources, but participation is also distinctly alien to UK constitutional reform, which has almost exclusively come about via more traditional parliamentary channels.[115] While in times of constitutional crisis, governments may turn to popular involvement to reach and legitimate decisions on fundamental reform, this openness to participation may wane once this sense of urgency fades. The question therefore 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',[116] may prove even more challenging.

Typical objections raised against more direct democracy in the UK context but also elsewhere included the public's purported inexperience in constitution-making, its time-consuming nature and unpredictable outcomes, and the danger of citizen apathy. These are also relevant to constitutional conventions and as such deserve to be addressed briefly.

[112] The two referendums were held in May 2015 and dealt with reducing the age for candidacy for president and with the legalisation of same-sex marriage. See also (n 96) 745, explaining it would be unfair to describe this as a failure of the constitutional convention itself, given that the Irish Government had maintained a veto on submitting its recommendations to a popular vote ever since agreeing to establish the convention.

[113] D Farrell, 'Final Report Card on the Government's Reactions to the Irish Constitutional Convention' (23 January 2016) available at <http://politicalreform.ie/2016/01/23/final-report-card-on-the-governments-reactions-to-the-irish-constitutional-convention/>.

[114] Ibid.

[115] See Blackburn (n 77) 369.

[116] D Oliver, 'The United Kingdom' in D Oliver and C Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing, London, 2011) 353.

The first is an objection on the grounds of citizens' lack of expertise on constitutional matters. In this regard, sceptics would do well to consider the British Columbia, Ontario and Netherlands citizen assemblies tasked with the complex matter of electoral reform. In spite of the 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 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 one due to political changes which deprived the assembly of its support.[117] Thus, while ample resources were allocated to the learning and deliberation phases of these processes, the same could not be said about the phase after the conventions had concluded their work, which left the wider population ill-informed about the proposals before them and doomed the subsequent referendums.

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 Smith have contrasted the further devolution debates to the buoyant independence referendum ones, calling the former 'deadly dull',[118] 'a long trudge through closed committees and impenetrable reports',[119] and something to at best 'muddle[] through'.[120] This is not to say public input and oversight was not desirable in the process, but 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. The answer may be to involve politicians in the process, including as members of the constitutional convention, so as to avoid alienating them and to ensure they have a stake in the outcome of the body's work. This compromise, which had been embraced by the drafters of the

[117] On the causes of their failure, see (n 9) 126–44.

[118] See (n 101).

[119] Ibid.

[120] A McHarg, 'What Does the Union Need to Do to Survive?' *Scottish Constitutional Futures Forum Blog* (25 September 2014).

Constitutional Convention Bills, had been promoted by commentators on the Irish convention and its absence decried by those writing on the failure of the Icelandic experiment.[121] More evidence is needed before confidently proclaiming politicians' involvement in a constitutional convention does not result in them taking over the deliberations, though preliminary observations from Ireland have been optimistic.[122] Certainly, architects of a future constitutional convention will have to find creative ways to prevent both *ex ante* elite control of deliberations and *ex post* takeover in the form of derailment of the outcomes of such participatory bodies.

The second concern identified above referred to time. Constitutional conventions as they have been used so far have required relatively lengthy periods to conduct their work, with the average around one year or more.[123] The Constitutional Convention Bills in the UK Parliament stipulated one year as the duration of the body's work. Given the complexity and breadth of its likely agenda, as well as the need for prior preparation, limiting the operation of a UK constitutional convention to one year would likely prove overly ambitious. The Irish convention needed to expand its operation by four months following delays in beginning its work and the expanded list of issues it was considering. This shows that the timeline for the operation of such an assembly must be adequate, or at the very least should include a flexibility mechanism to mitigate any setbacks. Sufficient time is absolutely necessary if such conventions are to fulfil their deliberative promise: good deliberation requires ample time allocated to learning and discussion in order to reach consensus. Moreover, the careful design and member selection necessary before any convention could begin its work would further prolong the process. Whatever recommendations made, these would have to be debated and decided upon by lawmakers and possibly also submitted to a referendum for final approval. A constitutional convention is thus not suitable as a mechanism for finding fast answers on urgent matters. It appears specifically designed to tackle controversial questions which require extensive reflection.

Finally, a third concern raised above referred to the threat of 'participation fatigue' if citizens are asked too often to become involved in constitution-making. This is similar to 'referendum fatigue', which refers to the dangers of holding multiple referendums in close succession given people's limited

[121] See, respectively, (n 12) 198; and BT Bergsson and P Blokker, 'The Constitutional Experiment in Iceland' in E Bos and K Pocza (eds), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* (Nomos Verlag, Baden-Baden, 2014) 171.

[122] J Suiter *et al*., 'It's Good to Talk: Citizen-politician Deliberations in Ireland's Constitutional Convention of 2012–14', Paper presented at ECPR General Conference, Glasgow (3–6 September 2014).

[123] See Table in Hazell (n 60).

time and interest.[124] One should be cautious of facile comparisons between micro-deliberative exercises and referendums, however. Unlike in the latter, where the extent of general participation determines the success of the referendum, a convention's achievements are assessed based on the depth of deliberation and the quality of engagement by its participants. Past experience has shown that citizen participation in constitutional conventions, always voluntary, has been very high – between 90 and 100 per cent.[125] The risk that ordinary citizens will not want to volunteer their time to deliberate on significant constitutional change in their polity therefore appears overstated.

Should UK lawmakers wish to decide to hold a constitutional convention, they would thus have to consider how it would interact with other political institutions and processes. They would have to ponder whether codifying the recourse to a convention would offer the solution to the need for clarity and predictability in constitutional change. Beyond determining the technical aspects of resorting to constitutional conventions, however, lawmakers would do well to reflect on the place for popular participation more generally in UK constitution-making. The resources required by a convention and the nature of its work mean it will be suited to some but not all instances where reform is required. Luckily, UK lawmakers have comparative evidence to guide their decisions in this regard.

IV. Conclusion

Calls to establish a UK constitutional convention intensified in the aftermath of the 2014 Scottish referendum and were again thrown into uncertainty following the 2016 Brexit vote. They have not been restricted to the realm of academia and civil society but were also debated as part of the legislative scrutiny process of bills introduced in both houses of Parliament. While neither of these bills was successful, the parliamentary debates surrounding them highlighted just how much lack of clarity there is in this area.

This article has sought to, first, map and analyse the nature of arguments in favour and against resorting to such a mechanism. Second, it has highlighted a number of misunderstandings related to a convention's promise and limits in bringing about constitutional change, calling for further reflection on a number of key aspects: the mandate of a UK convention, which would have to be clear yet sufficiently ambitious so as

[124] See (n 3) 295.
[125] Renwick (n 60) 11.

to satisfy its proponents' push for comprehensive reform; the nature of the political community to be represented in the convention and the method of member selection; and the relationship between a convention and traditional constitution-making processes, which would also require clarification, likely by codification. Ignoring or postponing asking these questions risks undermining the legitimacy and efficacy of any constitutional convention which would be set up, as well as its prospects of facilitating any long-lasting constitutional settlement. Comparative evidence is mounting from countries which have experimented with similar mechanisms in their own pursuit of participatory constitutional change. This article has argued that such comparative insights offer guidance with respect to some though not all of the unknowns of a UK convention.

Whether a constitutional convention could provide answers to complex long-standing constitutional questions in the manner its champions wish it to will depend on its careful design and its function as more than an instrument to which to pass the responsibility for divisive decisions.[126] The choice of instrument for bringing about constitutional change is not to be made lightly, for '[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'.[127] Were UK lawmakers to resort to a constitutional convention in order to achieve the holistic reform most agree is necessary, they should do so with eyes wide open to its potential and pitfalls.

A constitutional convention may channel the popular energies awakened by the 2014 Scottish independence referendum. It may even, as some proponents have suggested, provide a new mechanism for deliberating on Scottish independence short of a referendum. The March 2017 move by the Scottish First Minister to push for a second independence referendum was directly premised on the disparate Brexit result in Scotland, which together with Northern Ireland voted in favour of remaining in the EU.[128] This, she argued, amounted to a material change in the terms on which the Scottish people had voted in 2014 – it had been, in other words, a vote for two unions, the United Kingdom as part of the European Union.

[126] The latter has been an accusation levied against the Irish constitutional convention, see E Carolan, 'Some Lessons from Ireland's Marriage Referendum?' *UK Constitutional Law Association Blog* (8 December 2015) available at <http://ukconstitutionallaw.org/2015/12/08/eoin-carolan-some-lessons-from-irelands-marriage-referendum/>.

[127] E McWhinney, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press, Toronto, 1981) 27.

[128] 'Nicola Sturgeon Announces Second Scottish Referendum' *Independent* (13 March 2017) available at <http://www.independent.co.uk/news/uk/politics/second-scottish-independence-live-referendum-nicola-sturgeon-brexit-speech-second-indy-ref-2-uk-eu-a7626746.html>.

However, this development raised more not fewer legal and political questions.[129] The results of the 2017 snap election, less favourable to the SNP, rendered a second Scottish independence referendum rather unlikely. Even so, the independence question may prove difficult to silence. This yet again highlights just how intertwined sovereignty is in today's world, not just with domestic and supranational legal and political regimes, but also in iterative participatory processes which build on each other.

[129] S Tierney, 'A Second Independence Referendum in Scotland: The Legal Issues', *UK Constitutional Law Blog*, 13 March 2017, available at <https://ukconstitutionallaw.org/2017/03/13/stephen-tierney-a-second-independence-referendum-in-scotland-the-legal-issues/> and E Smith and A Young, "That's How It Worked in 2014, and How It Would Have to Work Again", *UK Constitutional Law Blog*, 15 March 2017, available at <https://ukconstitutionallaw.org/2017/03/15/ewan-smith-and-alison-young-thats-how-it-worked-in-2014-and-how-it-would-have-to-work-again/>.