

Popular Constitutional Amendment: Referendums and Constitutional Change in Canada and the United Kingdom

*Stephen Tierney**

The referendum has been sparingly used at the national level in both the United Kingdom and Canada. In these states, referendums are more common at the provincial and sub-state level, where the dramatic issue of secession has been bound up with direct democracy. This article argues that referendums on secession are, in some sense, in a category of their own in how they present the referendum as an expression of constituent power. The author compares sovereignty referendums held in Quebec, particularly that of 1995, with the 2014 Scottish independence referendum. Constitutional silence in both countries on the issue of secession has meant that the referendum enters the amendment process as a wild card, requiring the Supreme Court of Canada to confront the fundamental values of the Constitution and leading the UK Government to concede the principle of secession in relation to Scotland. The constituent nature of secession referendums also establishes a challenge to those advocating the use of such referendums to prove that they satisfy fundamental democratic credentials such as due process. Here, the Scottish independence referendum offers lessons to Canada on good practice. In a more prosaic context, the Canadian referendum experience is also instructive, with its experiments in deliberative democracy that preceded the referendums on electoral reform in British Columbia and Ontario. The article compares the benefits of these provincial citizens' assembly processes with the much more "top-down" referendum on electoral reform in the UK in 2011. In both countries, the referendum is a dramatic outlier in the constitutional amendment process. It brings citizens to the front and centre of constitutional decision making. For this reason, efforts within Canada to equip citizens with the deliberative tools necessary to make these fundamental decisions are innovative and instructive. It may be that referendums are in fact better used in issues of the most fundamental constitutional importance, but it is also in these events that the full engagement of citizens, which has been bravely attempted at the Canadian provincial level, would appear to be most acutely needed.

* Professor of Constitutional Theory, University of Edinburgh, Director of the Edinburgh Centre for Constitutional Law and Legal Adviser to the House of Lords Constitution Committee. British Academy/Leverhulme Senior Research Fellow from 2008 to 2009, and Economic and Social Research Council Senior Research Fellow from 2013 to 2014, studying the democratic credentials of the Scottish independence referendum. Served as independent adviser to the Scottish Government on the technical aspects of the independence referendum in 2012, and in January 2013 was appointed constitutional adviser to the Scottish Parliament's Referendum (Scotland) Bill Committee.

Introduction

I. The Quebec Secession Reference and the Scottish Independence Referendum: Direct Democracy as Vehicle for Constituent Power

A. Canada

B. United Kingdom

II. Facilitating Deliberation in Constituent Referendums: The UK Overcomes Canada's Problems?

A. Clear Majority in the UK: *The Dog that has Never Barked*

B. Clear Question: *Arrived at by Agreement*

III. Popular Deliberation: Canada's Experience of Citizens' Assemblies

Conclusion

Introduction

In one sense, it is odd even to talk about amendment in the context of the United Kingdom Constitution. Lacking codified form, the constitution is “amended” by way of ordinary legislation passed by the Westminster Parliament. Until 1982, this was technically how the Constitution of Canada was also amended—through modifications to the *British North America Act, 1867*¹, effected by the Westminster Parliament consequent upon an address by the federal government on behalf of both Houses of the Canadian Parliament. Not until patriation and the passage of the *Canada Act, 1982* by the UK Parliament was the amending formula brought home fully to Canada, and codified in detail in the *Constitution Act, 1982*.² The elaborate and complex amendment mechanism within the *Constitution Act, 1982* provides for a range of processes depending upon the issue at stake. This level of detail, and the fact of its entrenchment within a higher-order written constitution, moved Canada to a position in which its model of amendment now contrasts sharply with that of the UK, where the principle of parliamentary sovereignty remains the foundational rule of recognition.

The issue of constitutional amendment therefore appears to be an unlikely subject upon which to look for points of comparison between the two countries. One area which does bear useful evaluation is the way in which the referendum has emerged as a significant player in constitutional

1. (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

2. ss 38–49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

affairs—both at national and regional levels in each country—and the role it has played in offering significant constitutional change, and in engaging citizens more directly in constitutional processes. The Canadian Constitution contains no provision on referendums. This silence has been taken to permit rather than prohibit referendums. Without a codified form, the Constitution of the UK is similarly “silent” on the permissibility of referendums, but again for an omnipotent Parliament, the absence of any constitutional provision is by logic permissive. The use of the referendum in both countries has been very sparing, but it would seem that the trend, insofar as one exists, is towards a greater reliance on direct democracy in processes of constitutional change at both state and sub-state levels.

There have only been three “national” referendums in Canada: on prohibition in 1898, on conscription in 1942 and on the draft Charlottetown Accord³ in 1992. The real growth in referendum usage has been at the provincial level.⁴ Notably, a number of provinces have adopted statutes that require that amendments to the Canadian Constitution be subject to a provincial referendum.⁵

A similar pattern emerges in the UK, where there have only been two national referendums—on membership of the European Communities in 1975 and on the electoral system in 2011. The vast majority of UK referendums have involved sub-state territories, in particular over the issue of devolving powers to sub-state territories.⁶

This article explores how the referendum, for all that its use remains sporadic, enters the amendment process as something of an outlier—not quite fitting within generally accepted understandings of the representative nature of democracy within both Canada and the UK. Referendums therefore unsettle established assumptions both about how

3. Government of Canada, *Consensus Report on the Constitution: Final Text*, (Charlottetown: 28 August 1992).

4. Since the 1892 referendum on the prohibition of alcohol, there have been many provincial referendums. See e.g. Todd Donovan, “Referendums and Initiative in North America” in Mads Qvortrup, ed, *Referendums Around the World: The Continued Growth of Direct Democracy* (Basingstoke, UK: Palgrave Macmillan, 2014) 122 at 132–35.

5. See e.g. *Constitutional Amendment Approval Act*, RSBC 1996, c 67; *Constitutional Referendum Act*, RSA 2000, c 25.

6. Referendums in Northern Ireland, Wales and Scotland led to the creation of assemblies for Northern Ireland and Wales, and a Parliament for Scotland.

constitutional change should be brought about and, more particularly, about the proper role for citizens in these processes. Part I of this article argues that referendums used for the most fundamental constitutional decisions are in some sense in a category of their own. In the Canadian and UK cases, this has involved the issue of secession. In each case, we will see how the use of direct democracy to challenge the very existence of the state in its current form has proved so unsettling to established constitutional thinking. This type of referendum, which poses such a threat to the constitutional authority of the state itself, is at the level of constitutional theory categorically different from referendums that are more clearly *within* the constitution, such as those on electoral reform.

In Part II, we will explore how the constituent nature of secession referendums also establishes a challenge to those advocating the use of such referendums to prove that they satisfy fundamental democratic credentials. The referendum enjoys a bad name in political theory and a number of valid objections need to be overcome if the referendum is to be a truly valid instrument with which to effect the most fundamental forms of constitutional change. Here, the Scottish independence referendum seems to offer lessons to Canada on good practice.

More broadly, whether posing constituent or more prosaic constitutional questions, the referendum challenges us to think about the role of the citizen both as a bearer of constitutional authority and as a feasible and informed author of constitutional change—able to engage in a deliberative way in processes of fundamental and even complex constitutional change. In this light, in Part III, we will turn to the constituent assembly processes in British Columbia and Ontario, exploring these innovative projects which sought to inject direct popular authorship into the provincial constitutional amendment process. Electoral reform is a far less fundamental issue than secession, and as such it can be much harder to gain public interest in the issue, develop public knowledge and mobilise participation. Here, we will contrast the relative success of the Canadian experience with the UK referendum on electoral reform held in 2011, which is generally agreed to have failed entirely to stimulate public engagement. This is the challenge for direct democracy in Canada and the UK—to produce the level of citizen interest and engagement upon which its legitimacy depends.

I. The Quebec Secession Reference and the Scottish Independence Referendum: Direct Democracy as Vehicle for Constituent Power

A. Canada

The most dramatic examples in Canadian history of referendums as conduits of constituent power were those held in Quebec in 1980 and 1995. It was in relation to these events that the Canadian Constitution's silence on the role of the referendum raised the deeply unsettling question: Could secession be effected by way of a provincial referendum, perhaps even supplanting the amendment process set out in the written Constitution of Canada? The authority of provinces to stage referendums was well established in Canadian constitutional law.⁷ Therefore, when the federal government brought a reference before the Supreme Court of Canada (SCC) after the 1995 referendum, the key focus of the questions asked was not to the lawfulness of a referendum per se, even on the issue of secession, but the effect of such a referendum in domestic and international law.⁸

The three questions asked are of course very familiar.⁹ In answering the second question, the Court took the view that international law on

7. See Donovan, *supra* note 4 at 132–35.

8. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

9. The three questions were:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Ibid at 228.

secession did not apply to the situation in Quebec because international law “does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‘parent’ state”.¹⁰ This also rendered the third question—on the hierarchy of domestic and international law in the event of a conflict between the two—redundant. The Court therefore focused upon the first question: whether or not Quebec could secede from Canada unilaterally under the Constitution of Canada. In the end, this led to a subtle and complex opinion by the Court which has indirectly helped to articulate the role that a referendum on secession can play in instigating the process of constitutional amendment and on the limitations of the formal amendment process itself.¹¹

The Court took the view that there is no unilateral right for Quebec to secede from Canada. This could have been the end of the matter. It had been widely assumed that sections 38 to 49 of the *Constitution Act, 1982*¹² set out a conclusive statement of the processes by which constitutional change can be instigated and effected. The Court seemed to support this when it confirmed that even in the event of a Quebec referendum resulting in a clear vote for secession, the regular amendment process must be followed: “The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation.”¹³ In this context, “an expression of the democratic will of the people of a province” would confer legitimacy on the province’s efforts “to initiate the Constitution’s amendment process in order to secede by constitutional means”.¹⁴

It would appear from these passages that a vote for secession which met the other criteria the Court laid down (“free of ambiguity both in terms of the question asked and in terms of the support it achieves”) would simply give Quebec the right to initiate the amendment process.¹⁵ By logic, it would then be open to the other provinces not to agree to such an amendment, thereby refusing to sanction the secession of Quebec by way of formal constitutional amendment.

10. *Ibid* at 277.

11. For an extensive list of literature on the *Secession Reference*, see David Haljan, *Constitutionalising Secession* (Oxford: Hart Publishing, 2014) at 300, n 3.

12. *Supra* note 2.

13. *Secession Reference*, *supra* note 8 at 263.

14. *Ibid* at 265.

15. *Ibid*.

It is notable that the Court did not stop here. Instead, it proceeded to qualify in crucial ways what at first seemed to be an affirmation of constitutional orthodoxy. The way in which the Court envisaged the referendum interacting with the constitutional amendment process is intriguing. The Court began by suggesting that in the event of an unambiguous vote for secession, Quebec's partners in Confederation would have an obligation "to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed".¹⁶ In other words, it is not simply the case that Quebec would request negotiations towards a constitutional amendment and the other provinces could flatly refuse to negotiate. Instead, the Court arrived at a duty on the part of Quebec's partners in Confederation to negotiate in order to respect the will of the majority of Quebecers to secede. This does not mean that secession is a *fait accompli*, flowing simply from a "Yes" vote on secession. As the Court stated: "No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution."¹⁷ On the other hand, the Court could not accept either that

a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform *the amendment process*, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.¹⁸

This is a remarkable statement. It does not expressly state that Quebec has the right to secede from Canada, but this is at the very least a plausible implication of what it does say. To effect secession, Quebec would

16. *Ibid* at 266.

17. *Ibid* at 267.

18. *Ibid* [underlining in original, emphasis added].

need to negotiate in good faith and conclude the process by way of a constitutional amendment, but it is arguably a right to secede nonetheless; Quebec's partners in Confederation have a legal duty to negotiate in good faith towards this outcome.

There is nothing stated in the text of the *Constitution Act, 1982* that tells the federal government or the provinces that they have any of these legal duties. Instead, this is a judicially constructed constitutional innovation. To make this move, the Court looked beyond the text of the written constitution and gave considerable importance to "unwritten" or underlying principles that "infuse our Constitution and breathe life into it".¹⁹ In the Court's view, there are four "fundamental and organizing principles of the Constitution" that are relevant to the question of secession: "federalism; democracy; constitutionalism and the rule of law; and respect for minorities".²⁰ These "defining" principles operate in symbiosis: "No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."²¹ And in normative terms these principles are ascribed considerable significance. They are of interpretive value,²² as they are in many constitutions, but could also be used to fill gaps "in the express terms of the constitutional text".²³ Elaborating upon this conclusion, the Court tells us that these principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based".²⁴

It is in this context that the Court takes its most dramatic step, by declaring that these principles "are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments".²⁵ In turn, these principles must "inform our overall appreciation of the constitutional rights and obligations that would

19. *Ibid* at 248.

20. *Ibid* at 240.

21. *Ibid* at 248.

22. *Ibid*.

23. *Ibid* at 249 citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 158 Nfld & PEIR 1 [cited to SCR] (the preamble to the Constitution "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text" at 12).

24. *Secession Reference*, *supra* note 8 at 247.

25. *Ibid* at 249.

come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession”.²⁶ The obligation to negotiate stems from the unwritten principles of the Constitution, which fill the gaps in the Constitution’s text “with a powerful normative force” that has the power to bind governments.²⁷

It seems in the end that the referendum’s particular symbolic resonance as a democratic event is crucial to this expansive interpretation of the Constitution and inspires the Court to take abstract constitutional principles, imbibe them with legally binding force and transubstantiate them into a concrete duty to negotiate towards the secession of part of the state. It is significant that the Court justified this development by declaring that the “Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada”.²⁸ It is highly unlikely that the Court would have come to this conclusion based, for example, upon a declaration by the National Assembly of Quebec of an intention on the part of the province to secede. Rather, it is the moral force of direct democracy, of the constituent power of citizens speaking directly, that seems crucial to the Court’s attitude. And while the Court insisted that none of the four principles trumps the others, it is the principle of democracy that, in reference to the referendum, forces the hand of the other provinces. This does not entirely usurp the established pathways of constitutional amendment, which the Court expects to be used to effect secession. However, it seems that the principle of democracy requires the amendment process to give effect to the clearly expressed popular will of Quebecers if the other conditions it sets—absence of ambiguity “in terms of the question asked and in terms of the support it achieves”—are met.²⁹

26. *Ibid* at 292.

27. *Ibid* at 249.

28. *Ibid* at 267.

29. *Ibid* at 265.

B. United Kingdom

The referendum has also proved to be disquieting for the UK in both constitutional and political terms. In January 2012, when the Scottish government announced its intention to hold a referendum on independence,³⁰ a dispute immediately erupted over whether or not the Scottish Government and Scottish Parliament had the authority to hold a referendum at all.³¹ This was a more fundamental disagreement than the one that had prevailed in Canada in 1995.

Devolution was established for Scotland by the *Scotland Act 1998*.³² This Act created the Scottish government and Scottish Parliament, but—like the *Constitution Act, 1982* for Canada—it remained silent on the issue of referendums and the power of the Scottish institutions to organize direct democracy. One important feature of the *Scotland Act 1998*, however, is that it embodies a “retaining model” of devolution.³³ Therefore, powers reserved to the Westminster Parliament are expressly articulated within the Act, with all other powers falling within the lawmaking competence of the Scottish Parliament,³⁴ subject to a general reservation declaring that this devolution of legislative authority does not affect the power of the UK Parliament to make laws for Scotland.³⁵ By virtue of the retaining model, it is widely accepted that the power to hold referendums is not reserved and is on this basis devolved to the Scottish Parliament.

But this power is only uncontroversial in relation to referendums on devolved matters. The principal contention of the UK government, which emerged in January 2012 and was supported by a number of commentators, was that the Scottish Parliament has no power to hold referendums,

30. UK, The Scottish Government, *Your Scotland, Your Referendum* (Consultation Paper) (Edinburgh: The Scottish Government, 2012), online: <www.gov.scot/Resource/0038/00386122.pdf> [*Your Scotland*].

31. See UK, HC, “Scotland’s Constitutional Future: A Consultation on Facilitating a Legal, Fair and Decisive Referendum on Whether Scotland Should Leave the United Kingdom”, Cm 8203 in *Sessional Papers* (2012), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf>.

32. (UK), c 46, s 28 [*Scotland Act*].

33. Stephen Tierney, “Giving with One Hand: Scottish Devolution Within a Unitary State” (2007) 5:4 *Intl J Constitutional L* 730 at 740.

34. *Scotland Act*, *supra* note 30, s 28.

35. *Ibid.*, s 28(7).

even of a non-binding or advisory nature, on reserved matters.³⁶ The reasoning for this is based on section 29 of the *Scotland Act* which provides, *inter alia*, that proposed legislation is outside the competence of the Scottish Parliament so far as it “relates to reserved matters”.³⁷ Within a list of protected areas of the Constitution, “the Union of the Kingdoms of Scotland and England” is reserved and therefore, the argument goes, no referendum relating to the Union can lawfully be organized by the Scottish Parliament.³⁸

This seems fairly straightforward, but as in the *Quebec Secession Reference*, the argument did not end with what seemed to be straightforward constitutional orthodoxy. Section 29 of the *Scotland Act* qualifies what is meant by “relates to reserved matters” as follows: “[T]he question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined . . . having regard (among other things) to its effect in all the circumstances”.³⁹ The Scottish government⁴⁰ and others⁴¹ responded to the UK government’s position by arguing that a plausible case could be made, based upon section 29(3), that the Scottish Parliament has the competence to stage a referendum that is clearly intended to be of an advisory or consultative nature only, and that does not purport to give the referendum legally binding effect. In other words, an advisory referendum would not “relate to” a reserved matter when, looking at its effect in all the circumstances, it is clear that

36. See Aidan O’Neill, “We Need to Talk About the Referendum . . .” (4 November 2011), *UKSC Blog*, online: <ukscblog.com/we-need-to-talk-about-the-referendum/>; Adam Tomkins, “The Scottish Parliament and the Independence Referendum” (12 January 2012), *UK Constitutional Law Association* (blog), online: <ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>.

37. *Supra* note 32, s 29(2)(b).

38. *Ibid*, s 30, Schedule 5, Part 1.

39. *Ibid*, s 29(3).

40. See Andy Bloxham, “David Cameron Accused of Interfering in Scottish Independence Vote”, *The Telegraph* (9 January 2012), online: <www.telegraph.co.uk>.

41. See Gavin Anderson et al, “The Independence Referendum, Legality and the Contested Constitution: Widening the Debate” (31 January 2012), *UK Constitutional Law Association* (blog), online <ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>.

it would not “effect” secession by itself. To support this argument, the Scottish government declared that the aim of the referendum was to seek “the views of people in Scotland on a proposal about the way Scotland is governed”—a clear attempt to position the proposed bill as advisory only and hence within its competence.⁴²

For a time, it appeared that the UK Government would bring to the UK Supreme Court a challenge on the validity of any referendum bill introduced into the Scottish Parliament. But in the end, and to the surprise of many, the two governments reached a deal known as the *Edinburgh Agreement* on October 15, 2012.⁴³ This provided that the UK Parliament would formally authorize the Scottish Parliament to legislate to hold a referendum, thereby avoiding the section 29(3) issue altogether. This Agreement, and the accompanying “memorandum of agreement”, provided that the referendum be organized and held by the Scottish Parliament by the end of 2014 and “conducted so as to command the confidence and people”.⁴⁴

On its face, this is a remarkable concession. In effect, the UK Government was permitting a referendum to go ahead, which could lead to the break up of the country. It did so despite having a strong legal position with which the lawfulness of the referendum could well have been resisted. The referendum here enters constitutional thinking in a novel way. In fundamental constitutional referendums, which involve instantiations of constituent power, the political claim being advanced is that “the people” intervene directly to “produce” sovereign decisions, affirming that legitimate democratic authority emanates from popular consent rather than the institutions of state. In other words, these processes of direct democracy, although originating within a particular legal order, unsettle its assumption of sovereign authority by encapsulating a real world manifestation of the notion of the people as the ultimate source of legitimate power.⁴⁵ This calls to mind Andreas Kalyvas’ distinction

42. “Draft Referendum (Scotland) Bill” in *Your Scotland*, *supra* note 30, ch 7 at 1.

43. *Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland*, 15 October 2012, (entered into force 15 October 2012), online: < www.gov.scot/Resource/0040/00404789.pdf > [*Edinburgh Agreement*].

44. This was ratified by secondary legislation: *Scotland Act 1998 (Modification of Schedule 5) Order 2013*, SI 2013/242, s 3.

45. See Stephen Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72:3 *Mod L Rev* 360 at 364.

between “command sovereignty” and “constituent sovereignty”.⁴⁶ The latter, unlike the command sovereign idea of sovereignty as the final word, is concerned not with “coercive power” but rather “constituting power”, pointing at “the collective, intersubjective, and impersonal attributes of sovereignty, at its cooperative, public dimension”.⁴⁷ The UK Government’s concession of a referendum—and its understanding that in political terms the legitimacy of the referendum could not be resisted—is in some sense a recognition of this constituent model of sovereignty and its capacity to pluralize the popular sources of sovereignty in a pluralist state.⁴⁸ The UK government may have had command sovereignty on its side, but it took the view that in political terms the constituent sovereignty of the Scottish people had to be allowed expression by way of a referendum, presumably because a nationalist government had been elected to the Scottish Parliament with a clear manifesto commitment to stage such a process.

II. Facilitating Deliberation in Constituent Referendums: The UK Overcomes Canada’s Problems?

The referendum was implicitly recognized both by the SCC and by the UK government as a legitimate conduit for the expression of popular sovereignty of sub-state peoples. But this poses a challenge to the referendum itself to meet the democratic demands that come with such constitutional power. Elsewhere I have argued that there are three main objections to the referendum in democratic terms.⁴⁹ The first is the “elite control syndrome”.

46. Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12:2 *Constellations* 223.

47. *Ibid* at 225, 236.

48. See generally Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004) at 109–17 (for discussion of pluralist conceptions of constitutional sovereignty).

49. See Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 23.

Referendums offer the veneer of popular self-determination, but in reality they lend themselves by definition to elite control and hence manipulation by the organizers of the referendum. The second criticism is the “deliberation deficit”, or namely that there is a built-in tendency of the referendum process merely to aggregate preformed opinions rather than to foster meaningful deliberation. In other words, in referendums, voters tend to engage unreflectively without real deliberation or collective discussion of the issues. A third criticism of referendums, which we can call “the majoritarian danger”, is that referendums represent a model of majoritarian decision making that imperils the interests of dissenting individuals and minorities. For many, this is the main complaint about referendums: Not only are they a poor way of making decisions, but they can be deeply dangerous. Referendums usually involve a simple fifty percent plus one majoritarian model, leading to a winner-take-all outcome. In the end, a majority may simply vote to harm a minority.⁵⁰

Despite the force of these criticisms, I have argued first that it is important in levelling such criticisms that a markedly different standard is not applied to direct democracy than that accorded to representative democracy, which can itself be a crude device for representing a plurality of interests.⁵¹ Second, I have argued that it is feasible that these concerns with referendums can be overcome, but only by way of good process design.⁵²

But process remains a central source of contention when it comes to constitutional referendums, and this is particularly problematic when the stakes are so high, as they are in constitutive or secession referendums. Despite the success of the *Secession Reference* in addressing the constituent power issue in a balanced and nuanced way, the issue of secession from Canada is still deeply contested, particularly with regard to the proper process by which Quebec’s expression of the will to secede can and should be articulated in any future referendum. Notably, the Court was not willing to offer a detailed view on how a referendum ought to be organized and what the process should be.⁵³

50. *Ibid* at 39–42.

51. *Ibid* at 40–41.

52. *Ibid* at 285–303.

53. *Secession Reference*, *supra* note 8 (“it will be for the political actors to determine what constitutes ‘a clear majority on a clear question’ in the circumstances under which a future referendum vote may be taken” at 294).

This led to competing responses by Parliament and the National Assembly of Quebec, each seeking to assert process rules for any future referendum.⁵⁴

The issues that remain to be settled include the nature of the question being asked and the nature of a “clear majority”, and, just as importantly, who has the authority to determine these issues definitively. Notably, at the national level there is no general law in Canada governing the use of referendums. In this regard, the 2014 Scottish-UK process is instructive on how the legitimacy of a referendum—when empowered to play a determining role in such a fundamental constitutional process—depends greatly upon broad agreement by all sides as to the process that ought to be followed.

A. Clear Majority in the UK: The Dog that has Never Barked

Through the *Edinburgh Agreement*, consensus was reached on a number of the key process issues that had proven so divisive in Canada in 1995. Interestingly, the issue of the size of majority required to validate a referendum vote for independence was never a topic of dispute and was in fact not even mentioned in the *Edinburgh Agreement*; it was implicitly accepted that fifty percent plus one of those voting would decide the referendum.

This follows an established pattern that any referendum in the UK will be settled by a simple majority of those voting. The only deviations from this norm came with the referendums on devolution held in Scotland and Wales in 1979. The legislation at that time provided that if fewer than forty percent of the total electorate voted “Yes” in the referendum, the measure would not pass.⁵⁵ The result in the Scottish devolution process was 51.6%

54. See *Clarity Act*, SC 2000, c 26; Bill 99, *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, 1st Sess, 36th Leg, Quebec, 1999 (assented to 13 December 2000), CQLR, c E-20.2.

55. *Scotland Act 1978* (UK), c 51, s 85(2), as repealed by *Scotland Act 1978 (Repeal) Order 1979*, SI 1979/928, s 2; *Wales Act 1978* (UK), c 52, s 80(2), as repealed by *Wales Act 1978 (Repeal) Order 1979*, SI 1979/933, s 2.

support for the proposal, but with a turnout of 63% this represented only 32.5% of those registered to vote.⁵⁶ The measure therefore failed and became a source of political grievance among nationalists during the 1980s and 1990s. Thus, when the Labour Party came into government in 1997 with a fresh set of devolution proposals, the super-majority issue was not raised again and subsequent referendums—held in 1998 in Scotland, Wales and Northern Ireland about varying the models of devolved government—were passed by simple majority. Nor was there any threshold rule for the national referendums on continuing membership of the European Communities in 1975 or on the electoral system in 2011. Therefore, it is perhaps not surprising that the size of the required majority was never seriously discussed as an issue for the independence referendum.

And yet, to a Canadian audience, it may well seem odd that the UK Government agreed to a process that could have, in effect, broken up the country by way of one simple majority vote. This was a concern for the SCC in the *Secession Reference*, where one of the constitutional principles to which it referred was “respect for minority rights”.⁵⁷ The Court also made clear that the interests of minorities would be very important to the constitutional permissibility of any secession process.⁵⁸

The contrast with the UK on the issue of majority size does not appear to be mainly one of constitutional principle, but rather a consequence of very different demographics. Quebec is a francophone province but one that is home to a long-established anglophone minority and many Indigenous peoples. It is in defending the interests of these people that the *Secession Reference* seems primarily to be concerned, rather than with the more general minority of voters who find themselves on the losing side. Scotland, by contrast, does not have territorial minorities in the same sense.

56. See UK, House of Commons Library, Social and General Statistics Section, *Results of Devolution Referendums (1979 & 1997)* (Research Paper No 97/113) by Richard Dewdney (London: November 1997) at 11.

57. *Supra* note 8 at 248.

58. *Ibid* at 260, 262, 265–68.

There are of course cultural minorities—immigrants and their descendants—but such groups can be distinguished from territorial minorities, particularly because they sought to assimilate into Scottish society as they have in Canada and Quebec, and have generally been successful in doing so.⁵⁹ That said, there is also a divergence on the point of constitutional principle as to whether or not fundamental constitutional decisions should be made by way of simple majority. This is less of an issue in the UK, where Parliament can change the constitution by way of ordinary legislation. But it is no surprise that a super majority argument emerged in the Quebec referendum, in a country where widespread provincial consent is needed for constitutional change. It should, however, be borne in mind that according to the SCC, a “Yes” vote to secession in Quebec would still require a constitutional amendment to effect secession. To this end, it seems that unanimous provincial consent to the outcome of the negotiation process would be needed, thereby necessitating very wide pan-Canadian agreement to a secessionist event.

B. Clear Question: Arrived at by Agreement

Another significant issue in both Canadian referendums was the nature of the question. The questions asked in both 1980 and 1995 were considered by the federal government to be at best obscure and at worst misleading, encouraging people to think that they were voting

59. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) (for his famous distinction between minority nations and polyethnic groups).

for an outcome, association⁶⁰ or partnership⁶¹ with Canada, when in fact Quebecers were voting for independent statehood with no guarantee of any such future relationship with Canada. By contrast, although for a time it did appear that the question would be a source of disagreement, the Scottish referendum arrived at a broad consensus over the nature and wording of the issue to be put to voters. There are various reasons for this: the preparedness of both sides to enter into the *Edinburgh Agreement* and trade gains and losses; the existence within UK law of a detailed system of independent oversight of referendums which enjoys legitimacy throughout the UK; and the political calculation of the Scottish government that it was better to ask a short, clear question which would allow it to focus on the substantive content of the independence proposal.

For over a decade, UK referendums have operated on the basis of a dedicated referendum law—the *Political Parties, Elections and Referendums Act 2000 (PPERA)*.⁶² *PPERA* is a very detailed statute covering many aspects of electoral law. One innovation in *PPERA* was the creation of an independent Electoral Commission vested with a detailed oversight role in UK referendums, including the duty to assess and comment upon the “intelligibility” of proposed referendum questions.⁶³ Notably, the

60. See Anne Griffin, *Quebec: the Challenge of Independence* (Cranbury, NJ: Associated University Presses, 1984). The question posed in 1980 was:

The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada an economic association including a common currency; no change in political status resulting from these negotiations will be effected without approval by the people through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

Ibid at 70.

61. The question posed in 1995 was: “Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?” Nancy Ford et al, “Legislative Reports” (1995) 18:4 *Can Parliamentary Rev* 33 at 33 (the reference to two external documents was arguably confusing for voters).

62. (UK), c 41.

63. *Ibid*, s 104(2).

Electoral Commission goes about this task by convening focus groups to test the question empirically, assessing how well it is understood by people.⁶⁴

One outcome of the *Edinburgh Agreement* was the extension of the *PPERA* rules to the Scottish process.⁶⁵ The *PPERA* rules applied not simply to the question, but to a range of other important process issues including information for voters, advertising and the franchise for the referendum. In this way, the existing UK legal regime acted as a benchmark for the Scottish government in drafting the legislation that would eventually provide the legal basis for the referendum: the *Scottish Independence Referendum (Franchise) Act 2013 (Scottish Franchise Act)* and the *Scottish Independence Referendum Act 2013 (Scottish Referendum Act)*.⁶⁶

In relation to the question itself, the *Edinburgh Agreement* also provided: “Both governments agree that the referendum question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence.”⁶⁷ The Electoral Commission took on its usual role.⁶⁸

64. See UK, *Referendum on the UK Parliamentary Voting System: Report of Views of the Electoral Commission on the Proposed Referendum Question* (Report) (London: The Electoral Commission, 2010), online: <www.electoralcommission.org.uk/__data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf>; UK, *Referendum on Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question* (Report) (London: The Electoral Commission, 2013), online: <www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-scotland-our-advice-on-referendum-question.pdf> [*Advice of the Electoral Commission on the Proposed Referendum Question*].

65. *Edinburgh Agreement*, *supra* note 43 at para 2. The Agreement provides that:

Both governments agree that the principles underpinning the existing framework for referendums held under Acts of the UK Parliament—which aim to guarantee fairness—should apply to the Scottish independence referendum. Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA) 2, provides a framework for referendums delivered through Acts of Parliament, including rules about campaign finance, referendum regulation, oversight and conduct.

Ibid.

66. *Scottish Independence Referendum (Franchise) Act*, ASP 2013, c 13 [*Scottish Franchise Act*]; *Scottish Independence Referendum Act*, ASP 2013, c 14 [*Scottish Referendum Act*].

67. *Edinburgh Agreement*, *supra* note 43 at para 5.

68. See *ibid* at para 8.

The Scottish government sent its proposed question for “intelligibility” review by the Electoral Commission. The initial formulation was: “Do you agree that Scotland should be an independent country? Yes/No.”⁶⁹ The Electoral Commission took the view that “based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase ‘Do you agree . . .?’ could lead people towards voting ‘yes’”.⁷⁰ It therefore recommended the following alternative question: “Should Scotland be an independent country? Yes/No.”⁷¹ This was accepted by the Scottish government and was the question included in the *Scottish Referendum Act* and ultimately put to the voters.⁷²

The contrast with the two Quebec referendums is clear. In neither 1980 nor 1995 was there a federal regime of referendum regulation that could have applied to the process, nor was there any agreement on oversight by a mutually acceptable independent national regulator who would have the role of reviewing the wording of the question or of regulating and overseeing the fairness of the process more broadly. One advantage of the *Edinburgh Agreement* process is that it also serves to legitimize the referendum outcome. In the Scottish-UK process, the quid pro quo to the Scottish government’s acceptance of this regulatory model was a concession that the UK government would accept the result of the referendum. The Agreement ended with this paragraph on cooperation:

The United Kingdom and Scottish Governments are committed, through the Memorandum of Understanding between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.⁷³

69. *Advice of the Electoral Commission on the Proposed Referendum Question*, *supra* note 64.

70. *Ibid.*

71. *Ibid.*

72. *Scottish Referendum Act*, *supra* note 66, s 1(2). See also Andrew Black, “Scottish Independence: SNP Accepts Call to Change Referendum Question”, *BBC News* (30 January 2013), online: < www.bbc.co.uk >.

73. *Edinburgh Agreement*, *supra* note 43 at para 30.

Again, this stage was not reached in Canada either in 1980 or in 1995, a point made clear by the circumstances surrounding the *Secession Reference* itself, the very premise of which was the federal government's refusal to countenance Quebec's right to secede.

In the end, the independence referendum in Scotland passed off smoothly with no disputes over any of the key process issues, including the funding and spending rules which were also established by the *Edinburgh Agreement*.⁷⁴ The upshot was that both sides in the referendum campaign, and therefore citizens themselves, were able to focus upon the substantive issues at stake without being distracted by whether or not the referendum was lawful or whether the UK Government would accept the result of a majority "Yes" vote. This was fundamentally important to the process and a key condition that allowed the Scottish process to be seen as a genuine moment of citizen deliberation.

The Scottish referendum has indeed been lauded on this basis.⁷⁵ The turnout of 84.65% was the highest for any UK electoral event since the introduction of universal suffrage, and compares very well to the 65.1% who voted in the 2010 UK general election and the 50.6% who turned out for the 2011 Scottish Parliamentary elections. Another feature of the referendum was that the Scottish Parliament extended the franchise to those aged sixteen and seventeen.⁷⁶ This was a radical departure; never before have people under the age of eighteen been entitled to vote in a major British election or referendum.⁷⁷ This makes the turnout even more remarkable when we consider the significant logistical task involved

74. *Ibid* at paras 24–28.

75. See Stephen Tierney, "‘And the Winner is . . . the Referendum’: Scottish Independence and the Deliberative Participation of Citizens" (26 September 2014), *I-CONnect* (blog), online: <www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/>.

76. *Scottish Franchise Act*, *supra* note 66, s 2(1)(a).

77. *Representation of the People Act 1983* (UK), c 2, s 1(1)(c).

in registering new voters and in mobilising so many young people to engage with an electoral campaign for the first time.⁷⁸

But turnout is only part of the picture. Evidence has emerged of the extent to which people sought out information about the issue at stake and engaged vociferously with one another at home, in the workplace and other public spaces, and, to an unprecedented degree in British politics, on social media.⁷⁹ Despite the degree of popular participation in the Scottish process, it is still notable that while citizens played a full role in the referendum campaign itself and voted in high numbers, their role prior to this was largely passive. The decision to hold a referendum was taken by the Scottish government, while the *Edinburgh Agreement* determined that the referendum could be held only on the issue of independence and not on any other model of constitutional change.

This raises a serious democratic concern about the overall process. In 2012 it became clear that a substantial majority of citizens in Scotland were in favour of constitutional change, but not of full independence. The Scottish government tapped into this sentiment and revived an earlier suggestion of a third option on the ballot—some formulation

78. *Scottish Franchise Act*, *supra* note 66, s 9. Although the extension of the vote to younger voters can be seen as a strategic move by the Scottish National Party Government (SNP) to enfranchise those who might prove to be independence supporters, it should also be noted that such a move has long been SNP policy and that the referendum was the first opportunity the SNP government had to make such a change. It now has the power to change the franchise for the 2016 Scottish parliamentary elections and is indeed seeking to extend the vote to young people for this process. See SP Bill 66, *Scottish Elections (Reduction of Voting Age) Act*, sess 4, 2015, s 1. It is also the case that the UK government accepted the former franchise extension in the *Edinburgh Agreement* and therefore extended the Scottish Parliament the power to introduce a general extension for Scottish Parliament elections. See *The Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc) Order 2015*, SI 2015/692.

79. See Mark Shephard & Stephen Quinlan, “Independence Referendum: Social Media Project Update” (21 February 2014), *Applied Quantitative Methods Network* (blog), online: <www.aqmen.ac.uk/node/1062>. See also Centre on Constitutional Change, “Risks and Attitudes to Constitutional Change”, by Ailsa Henderson, Liam Delaney & Robert Liñeira (2014), online: <http://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/Risk%20and%20Constitutional%20Attitudes%20Full%20Survey%2014%20Aug_0.pdf>.

of further devolution.⁸⁰ The UK government reacted strongly to this. Its key political goal in consenting to the *Edinburgh Agreement* was to ensure that the referendum would contain only two options— independence and the status quo—since it was confident that it could defeat the independence proposal. To that end, the Agreement, while enabling the Scottish Parliament to legislate for a referendum, made clear that it could do so only “with one question on independence”.⁸¹ While the *Edinburgh Agreement* was a positive step in avoiding hostility between the two campaigns over the process, it was also an elite deal that constrained the options presented to voters. In short, it was a trade-off between the political goals of the Scottish National Party (SNP) on the one hand—to acquire the legal authority to manage the process rules—and, on the other hand, a political calculation made by the UK government that it could win a referendum on independence but would probably lose a referendum which promised more—and potentially open-ended—powers to the Scottish Parliament.

What was missing from the referendum design process, therefore, was a step that would ensure that citizens were in fact able to vote for the most popular constitutional option. This is not to single out the Scottish referendum as particularly deficient. The typical story of referendums is one in which elites are able to set the agenda. The process rules, the length of a campaign and the question that is set are typically in the hands of the executive, albeit subject to Parliamentary approval; constitutionally guaranteed opportunities for citizens or other deliberative bodies to influence the process are invariably lacking.

III. Popular Deliberation: Canada’s Experience of Citizens’ Assemblies

There are, therefore, further lessons that can be learned about the use of the referendum in processes of constitutional change, in particular, how to best give ordinary citizens a meaningful role as a way of overcoming the elite control syndrome that we saw in relation to the Scottish referendum (where elite control was at least dispersed between

80. UK, *Scottish Government, Scotland’s Future: Draft Referendum (Scotland) Bill* (Consultation Paper) (Edinburgh: The Scottish Government, 2010) at 11–15.

81. *Edinburgh Agreement*, *supra* note 43 at para 6.

the two governments) and in the Quebec referendums—in 1980 where the processes were organized by the Quebec government or, in the 1995 process, by an alliance of Quebec nationalist parties.⁸² A meaningful role for citizens can also serve as a way of surmounting the deliberation deficit. For these lessons, it is instructive to return again to Canada.

The idea of deliberative democracy is something of a recent turn in democratic theory, to some extent traceable to the work of John Rawls in the early 1970s.⁸³ However, it has had a sustained push in the past ten to fifteen years in a number of directions, particularly among those who want to see a greater role for the citizen in democratic decision making. By now, the work on deliberative democracy is a broad church, and there are many areas of disagreement among theorists as to the key values of deliberative democracy.⁸⁴ But a common commitment is that political decisions should be preceded by “authentic deliberation”, or what John Rawls calls “public reason”.⁸⁵ By this principle, people engaged in decision making should reflect authentically and honestly before they act, and should engage publicly with others, prepared to defend their views while open to being persuaded by the arguments of others. This has led to a move to combine this approach with popular participation, seeking ways to engage citizens in constitution-making processes, and finding avenues whereby citizens can engage openly and deliberatively in a meaningful context.⁸⁶ One way to do this is in the process leading to a referendum. The referendum is itself the archetypal forum for citizen participation, but a key goal has to be to maximize the deliberative quality of that engagement.

The experiments in direct democracy undertaken at the provincial level in Canada in the 2000s—although not without their flaws—are potentially important as templates for citizen engagement at the issue-framing and question-setting stages of a referendum process: replacing

82. See Tierney, *Constitutional Law and National Pluralism*, *supra* note 48 at 293–99.

83. For his later thoughts, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

84. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, *supra* note 49 at 42–44.

85. Rawls, *supra* note 83 at 446–47.

86. See e.g. James S Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991); John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000).

political elites with citizens and facilitating a process by which these citizens make decisions which is open, informed and deliberative. In particular, the British Columbia Citizens' Assembly on Electoral Reform (BCCA) in 2004 was a highly innovative citizen-led process that resulted in a referendum on electoral reform held in 2005. The BCCA was comprised solely of ordinary citizens who had a controlling role in determining both how the issue of electoral reform ought to be put to voters and setting the very question itself: "Should British Columbia change to the BC-STV electoral system as recommended by the Citizens' Assembly on Electoral Reform?"⁸⁷ This model was repeated in Ontario,⁸⁸ and although its problems have been well documented, it offers an example for other countries in how ordinary citizens can be offered a pivotal role not only in voting upon, but also in setting the terms for, constitutional change.⁸⁹

The BCCA deliberated throughout most of 2004. It was composed of ordinary citizens "in order to avoid electioneering and politicizing of the Assembly".⁹⁰ Members were chosen randomly from the voter roll, which thereby avoided self-selection by particularly keen citizens. Despite an initial proposal of one member from each riding, at the recommendation of the chair of the Committee, this was doubled to ensure gender

87. Archon Fong, "British Columbia Citizens' Assembly on Electoral Reform" (27 September 2013), *Participedia* (blog), online: <<http://participedia.net/en/cases/british-columbia-citizens-assembly-electoral-reform>>. STV refers to the single transferable vote form of election. This ended in defeat for the proposal. A threshold was set: In order to pass, the referendum had to receive 60% of the province-wide popular vote and a simple majority in 60% (48 of 79) of the electoral districts. The measure failed narrowly on the former criterion with 57.7% of the popular vote in favour. A second referendum held in 2009 on the same issue also failed, this time more decisively. *Ibid.* .

88. See Citizens' Assembly on Electoral Reform, "About the Citizens' Assembly", (2007) online: <www.citizensassembly.gov.on.ca/en-CA/About.html> .

89. Patrick Fournier et al, *When Citizens Die: Lessons from the Citizens' Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011); Laura B Stephenson & Brian Tanguay, "Ontario's Referendum on Proportional Representation: Why Citizens Said No" (2009) *IRPP Choices* 15:10 (September 2009) 2 at 3-4; Michael Pal, "The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions and the Law of Democracy" (2012) 38:1 *Queen's LJ* 259.

90. RS Ratner, "British Columbia's Citizens' Assembly: The Learning Phase" (2004) 27:2 *Can Parliamentary Rev* 20 at 21.

equality—leading to 158 rather than 79 members, supplemented by two members from Aboriginal communities to give a total of 160.⁹¹

The remit of the BCCA was to assess models for electing Members of the Legislative Assembly of BC and to issue a report recommending whether the current model should be retained or another model adopted. This issue was to be put to the people of the province in a referendum. The BCCA's work took place in three phases. First, there was an educational phase every second weekend for two months until March 2004, where the BCCA learned about different models of electoral systems with case studies from around the world. This led to a "preliminary statement"—a form of interim report—to the people of BC. The next two months were taken up with public hearings, this time on rotation across the province, to take the views of diverse groups. In this way, an opportunity was given to the broader public to participate and be heard. Following a summer break, the BCCA reconvened for three months from September to November for a final period of deliberation, ending with a final report issued in December 2004.

It is clear that the BC model is a high-water mark for relatively unmediated popular power in micro-level decision making.⁹² However, there are at least two questions concerning process design. The first is that the BCCA was focused very much upon the micro-level, issue-forming and question-framing stage without devoting a lot of effort to engage with the public more broadly concerning their interest in, and preferences for, electoral reform. For all the energy put into the micro process of the BCCA, there was far less success in fostering deliberation when the process moved to the referendum campaign.⁹³ Ian Ward has cited one poll carried out in February before the May referendum where "only half . . . of British Columbians say they [had] read, seen or heard anything

91. The term "near-random" selection may be more appropriate. See Mark E Warren & Hilary Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (New York: Cambridge University Press, 2008) at 6.

92. See Pal, *supra* note 89; Amy Lang, "But Is It For Real?: The British Columbia Citizens' Assembly as a Model of State-Sponsored Citizen Empowerment" (2007) 35:1 *Pol & Soc'y* 35.

93. See Dennis Pilon, "The 2005 and 2009 Referenda on Voting System Change in British Columbia" (2010) 4:2-3 *Can Pol Sc Rev* 73; Lang, *supra* note 92; Robert E Goodin & John S Dryzek, "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics" (2006) 34:2 *Pol & Soc'y* 219.

about the British Columbia Citizens' Assembly on Electoral Reform".⁹⁴ Shortly before the referendum, nearly two thirds of British Columbians still knew "very little" (39%) or "nothing" (25%) about the electoral system being proposed.⁹⁵ It seems that in this process, and in the similar one in Ontario in 2007,⁹⁶ far more energy and resources were expended on the small group process than in providing information, education and in fostering deliberation across the citizenry as a whole.⁹⁷ Ward concludes that this "is a gap that will need to be closed if indeed citizens' assemblies are to be used in the future to counter the democratic deficit".⁹⁸

A second question concerns the political realism of a process that is entirely in the hands of randomly selected citizens. It is important not to forget that direct democracy and active citizen participation do not take place in a vacuum, but in close symbiosis with institutions of representative democracy. It can be argued that any micro-process should properly have a representative element if it is to meet the goal of allowing those affected by a decision to have a say in making it. Arguably, the absence of the main political parties from the process was unwise, since they are crucial stakeholders in any decision about electoral reform.

94. Ian Ward, "An Experiment in Political Communication: The British Columbia Citizen's Assembly on Electoral Reform" (2008) 43:2 *Australian J Political Science* 301 at 313.

95. *Ibid.*

96. See Karen Howlett, "Referendum? Now What Referendum Would That Be?", *The Globe and Mail* (24 September 2007), online: <www.theglobeandmail.com>; Lawrence LeDuc, "Electoral Reform and Direct Democracy in Canada: When Citizens Become Involved" (2011) 34:3 *West European Politics* 551.

97. The late Richard Simeon was critical of both the BC and Ontario processes on this basis. One problem he pointed to is that a model that excludes the government, parties, etc. can be undermined by them at the macro stage by a lack of publicity, funding, etc. See Richard Simeon, "The Referendum Experience in Canada" (Lecture delivered at the Referendums and Deliberative Democracy Workshop, University of Edinburgh, 8 May 2009) [unpublished]. Lawrence LeDuc also comments on the Ontario process: "The small amount of media coverage that the Citizens' Assembly received over the eight months of its deliberations meant that the public was largely unaware of its existence, or even that a debate on electoral reform had been taking place." LeDuc, *supra* note 96 at 556. He cites polling results to justify this conclusion and also observes: "Voters were poorly informed both because of the one-sided media coverage and an inadequate public information campaign run by Elections: Ontario." at 560.

98. Ward, *supra* note 94 at 313.

In light of this, the exclusive role offered to citizens is perhaps unrealistic. The decision of the BCCA was final and the alternative model of electoral reform it produced—the single transferable vote—was one that the government was obliged to put to a referendum. This proposed a very radical form of change compared to the “alternative vote” model favoured by many in the political classes. The focus of much of the BCCA’s deliberations was on the impact of different systems on groups defined by gender, ethnicity and culture, and much less upon how they would affect political parties and the political system itself, as well as class-based interests around which party systems have tended to evolve. There are therefore serious questions to be asked about excluding party voices and interests from an issue that is so central to electoral politics in a representative system.⁹⁹ In short, a commitment to popular participation in constitutional decision making is not necessarily a commitment to *exclusively popular models* of decision making.

The BCCA and Ontario Citizens’ Assembly models may have flaws, but they did constitute serious engagements with citizens. This contrasts sharply with the referendum on electoral reform held in the UK in 2011, which clearly failed the deliberative test. In terms of elite control, the decision to hold the Alternate Vote (AV) referendum was a bargain born of political expediency. It was in effect a bargaining chip offered by the Conservative Party to the Liberal Democrats (who favoured a move to some form of proportional representation) in 2010 as part of the deal that formed the coalition government. The model offered was a very modest form of electoral reform that partly appeased Conservative members of parliament, who were mostly opposed to such change. The process was criticized by a number of people giving evidence to a House of Lords inquiry on referendums, both for the unsuitability of the model to be

99. This has caused commentators to ask whether the final model, which might be characterized as “anti-party”, was a result of the exclusion of any party representation from the proceedings: “[T]here was no consistent presence in the assembly able to counter the negative sentiments about political parties with real personal experience”. Henry Milner, “Electoral Reform and Deliberative Democracy in British Columbia” (2005) 94:1 Nat Civ Rev 3 at 8.

presented in the referendum and for the process by which it was arrived at.¹⁰⁰ The consequence was that citizens, or indeed broader civil society, had no say in either issue framing or question formation.

It is no surprise, therefore, that it was very difficult to mobilize much public interest in the process. It is clear from the turnout and result in 2011 that many people did not view the AV proposition as an important issue (turnout of 42.2%; 68% voted “No” and 32% voted “Yes”).¹⁰¹ But even the far more deliberative processes of BC and Ontario, where we also saw a lack of wider public engagement, suggests that this is a broader problem for referendums on electoral reform. This issue clearly stimulates far less citizen interest than does secession. This raises the question of when it is appropriate to use referendums at all as part of the constitutional amendment process. If an elite has complete discretion over the issues put to referendum and when to do so, people may be led into a referendum that many of them do not want or do not see the point of. This highlights how regulation of the different components of a referendum process need to be linked together. No matter how well regulated the procedural components are, if the referendum topic itself is irrelevant to many citizens then meaningful deliberation across the polity is scarcely possible. One of the recommendations of the House of Lords inquiry was to legally regulate the types of issues that should be the subjects of referendums and how and when issues might be brought before the people.¹⁰²

Conclusion

In many ways, the UK method of constitutional change through parliamentary legislation has, over the past twenty years, been advantageous. It allowed devolution to be created quickly in 1998 and,

100. See UK, “Referendums in the United Kingdom”, HL 99 in *Sessional Papers* (2009–10) 1 at Minutes of Evidence.

101. See UK, “Voter Engagement in the UK”, HC 232, in *Sessional Papers* (2014–15) 1 at 5.

102. See “Referendums in the United Kingdom”, *supra* note 100 at 49. This is an important recommendation and is of more general applicability. It is indeed imperative that states intending to use referendums ought to provide as explicitly as possible within the constitution for when and how referendums are to be used. This has the added advantage of offering a meaningful oversight role to the courts.

in incremental and heavily asymmetrical ways, for each of the three devolved territories, without the need for an overarching constitutional settlement for which there was little political appetite. In other words, devolution was achievable, meeting the specific needs and desires of each of the territories without abandoning Britain's unwritten constitution and without judicializing a political constitution that has worked well for centuries. Furthermore, the flexibility in the UK system has allowed for further constitutional change from time to time, responding to evolving demands or correcting what seem to be anomalies or outdated features of devolution.

But a disadvantage in the system is that there are ultimately no procedural checks. The UK Government can initiate any constitutional change it wishes and it can do so by any procedure; in practice Parliament can become little more than a rubber stamp. Canada is no stranger to elite-driven processes of constitutional change. Following the patriation of the Constitution, the country embarked upon a tortuous period that led to the Meech Lake Accord and the draft Charlottetown process, each of which resulted in failure. The outcome was constitutional stasis and a general popular disenchantment with the constitutional amendment process. Arguably it was the very failure of these processes, and of the amendment process that requires such a high threshold of provincial consent, which created the conditions for the 1995 Quebec referendum itself.

What Meech Lake and Charlottetown did have in their favour, however, was the emergence of a genuinely national conversation, taking account of the interests of all of the provinces and of the people within them in all their diversity. There may not have been final agreement, but there is something to be said for a process that takes place over a long period of time and requires broad agreement across the country. As Peter Hogg says about the failed Charlottetown referendum: “[N]o amount of public consultation guarantees the success of proposals to amend the Constitution. However, it is probably safe to say that an absence of public consultation does guarantee failure.”¹⁰³

103. Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Scarborough, Ont: Carswell 1997) at 99.

From this mix the referendum has emerged as an important player in constitutional change in both countries, and given the *ad hoc* nature of the referendum, it is hard to predict what its role may be in the future. In Canada, it was necessary that the Charlottetown Accord be ratified by referendum, a decision taken largely because citizens felt so excluded from the Meech Lake deliberations. One imagines that any similar pan-Canadian attempt to radically reform the Constitution would also require the final endorsement of the people speaking directly.

The referendum is also a growing feature of constitutional change in the UK—not only in relation to Scotland. The *Government of Wales Act 2006*¹⁰⁴ confirmed the need for a referendum on further devolution for Wales, resulting in a referendum in 2011. The *Wales Act 2014*¹⁰⁵ also provides for a referendum on whether its income tax provisions ought to come into force. Similarly, the *Northern Ireland Act 1998* confirms that “Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland” voting in a referendum.¹⁰⁶ In 2011, the UK held only its second national referendum, on electoral reform, while another important initiative is the *European Union Act 2011*, which requires that a referendum be held on any significant amendments to the European Union treaties.¹⁰⁷ The UK is also set for a referendum on membership in the EU following the success of the Conservative Party in the 2015 general election.¹⁰⁸

But the referendum by itself does not guarantee a significant popular role beyond an opportunity to reflect upon and discuss the issue during the campaign and of course the important power to vote for or against the proposition put to voters. In particular, it does not guarantee citizens a role in formulating the issue upon which they are to decide. It therefore seems that the way forward, from the perspective of deliberative popular democracy, is to try to build structures of popular participation into the constitutional amendment process in a more thorough way. In this light, the citizens’ assembly initiatives in BC and Ontario are instructive.

104. (UK), c 32, s 4.

105. ANAW, c 29, s 12.

106. (UK), c 47, s 1(1).

107. (UK), c 12, s 4.

108. See UK, HL, “European Union (Referendum) Bill”, 4th Report in *Sessional Papers* (2015–16) 1 at 3.

Although they failed to translate the enthusiasm of the small group to the level of full macro-engagement of citizens, this may be due in no small part to the lack of interest voters often show in the issue of electoral reform. The UK referendum in 2011 also had a very low turnout on this issue. By contrast, the Scottish referendum and the 1995 referendum in Quebec show just how mobilized people can be when confronted with an issue that is of great significance to their lives. It is surely the case that each of these referendums on the massive issue of secession would have benefitted from pre-referendum processes similar to the citizens' assemblies of BC and Ontario, which sought to determine the people's constitutional preferences and meaningfully feed them into the framing of the question. It seems clear from polls taken in Scotland from 2012 to 2014 that this may well have led to a very different referendum question in Scotland than the question on independence the people faced. Perhaps the two lessons we can take from merging the experiences of both countries is that referendums are best preserved for major constitutional issues in which the public is genuinely engaged, but that these should be preceded by a popular role in issue framing and an ongoing attempt to maintain popular engagement at the micro-level throughout the referendum campaign.

The Constitutions of Canada and the UK are very different, particularly since 1982 when Canada acquired a detailed and formalized amending formula that is so different from Britain's process of using ordinary legislation to bring about constitutional change. However, it is also the case that each country has faced similar challenges in the rise of the referendum as a feature of constitutional politics—namely how to manage direct democracy within a parliamentary system, which is modelled upon representative government, and how to fit the referendum into established patterns and procedures of constitutional amendment. If the referendum is set to remain a significant player in both Canada and the UK, it seems that each country has much to learn from the other on how best to use direct democracy to effect constitutional change that is legitimate, democratic and meaningful to citizens.