

# Session 1

## Introductory Framing Session

Robert Hazell

# The Process of Constitutional Change in the UK

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## Recent Constitutional Changes in the UK: New Labour's first wave

- Scotland Act and Wales Act 1998
- Northern Ireland Act 1998
- Human Rights Act 1998
- House of Lords Act 1999
- Greater London Authority Act 1999

## Recent Constitutional Changes in the UK: New Labour's second wave

- Freedom of Information Act 2000
- Political Parties, Elections and Referendums Act 2000
- Regional Assemblies (Preparations) Act 2003
- Constitutional Reform Act 2005
- Government of Wales Act 2006
- Constitutional Reform and Governance Act 2010

# Recent Constitutional Changes in the UK: Coalition and Conservatives

- Fixed Term Parliaments Act 2011
- Parliamentary Voting System and Constituencies Act 2011
- Scottish Independence Referendum Act 2013
- EU Referendum Act 2015
- Wales Act 2014, 2017
- Scotland Act 2016

# Process for these Constitutional Changes 1

- All piecemeal: no overarching narrative, no attempt at coherence
- But plenty of consultation: many White Papers and Green Papers
- Expert Commissions. In Wales alone, Richard, Holtham, Jones Parry, Silk, Thomas
- Public consent through referendums: Scotland, Wales, N Ireland, London, NE England, elected mayors. AV, Scottish independence, Brexit

## Process for these Constitutional Changes 2

- Expert bodies. CSPL, Electoral Commission, ICO, EHRC, Law Commission
- Parliamentary Committees: Lords Constitution Committee, JCHR, PCRC, PASC/PACAC
- *Ad hoc* Committees: two joint Committees on Lords reform, Lords Committee on Constitutional Reform Bill 2004
- Draft Bills for pre-legislative scrutiny: FOI 1999, Constitutional Renewal Bill 2009, Lords Reform Bill 2011, Wales Bill 2015
- More consultation, deliberation and public engagement than critics allow



## Attempts to draft or advocate a written constitution

- Liberal Democrats, *For the People, By the People*, 1990
- IPPR, *A Written Constitution for the UK*, 1991
- Smith Institute, *Towards a New Constitutional Settlement*, 2007
- Gordon Brown: *The Governance of Britain*, 2007
- PCRC (Chair Graham Allen MP): *A New Magna Carta*, 2014
- PCRC: *Consulting on a new Magna Carta*, 2015

## Arguments for a codified constitution

- Enable everyone to know the rules and institutions under which they are governed
- Unwritten constitution is an anachronism, littered with hangovers from the past, like hereditary peers or prerogative powers
- Coherent and integrated, complete unfinished reforms
- Rules about core institutions of government should take form of higher law
- Entrenchment could protect the constitution against hasty amendment
- Clear structure of safeguards and controls could restore trust in the political system

# Arguments against a codified constitution

- Evolutionary and flexible, easy to amend and adapt to modern circumstances
- Less likely to become ossified and outdated
- Parliamentary sovereignty is more democratic than allowing judges to review the constitutionality of our laws
- No public interest, or demand for change: if it ain't broke, don't fix it
- No constitutional moment (revolution, defeat in war) requiring constitutional rebirth

## Difficulties in codifying a constitution

- What is the underlying principle: parliamentary sovereignty, or popular sovereignty?
- Is the exercise purely descriptive, or can it be prescriptive?
- Very difficult to codify the constitution without changing it
- Need first to resolve: the devolution settlement; Lords reform; British bill of rights
- Would require a massive investment of time and political capital

## When might we arrive at a ‘constitutional moment’?

- 2015 Labour and Lib Dems committed to a constitutional convention, mainly to tie up loose ends of devolution
- Brexit?
- Scottish independence?
- Irish re-unification following a border poll?
- After years of constitutional wrangling, will politicians or the public want further time devoted to constitution making?

## Reality check: Limitations of Consultation

- Few attempts at consultation have delivered cross-party support
- It may make government look directionless and indecisive
- It may identify and entrench opposing views
- All C20 constitutional reforms were imposed using the government's majority
- *Delivering Constitutional Reform* (1996) analysed 17 constitutional reforms in C20: very little consultation. All have endured, save for EU-related measures

## Limits of Consultation: Reform of the House of Lords

- Cross-party talks 1910, 1949, 1968. 1998, 2007, 2011
- Wakeham Royal Commission 2000
- Joint parliamentary committee report 2002
- White Paper 2007. House of Commons votes on 7 different options
- Lords reform draft Bill 2011
- Joint parliamentary Committee report 2012
- Lords Reform bill given Second Reading, but withdrawn in the Commons

## Reasons for failure of second stage Lords reform

- MPs feel threatened by more legitimate upper House
- Both major parties are split
- No consensus on elected versus appointed
- No consensus on proportions if part elected, part appointed
- Public opinion is contradictory: want Lords to be elected, but not to be like the Commons



## Written Constitutions in other countries

- Advocates have little idea what a written constitution contains
- Have seldom read constitutions from other countries
- Don't realise how high level most constitutions are, how dependent on conventions
- Don't realise how little relation many constitutions bear to the actual working of the political system

# Examples of Written Constitutions 1: Norway

Article 3      The Executive power is vested in the King ...

Article 12      The King himself chooses a Council ... This Council shall consist of a Prime Minister and at least seven other members. The King apportions the business among the members of the Council as he deems appropriate

Article 21      The King shall choose and appoint, after consultation with his Council of State, all senior civil and military officials ...

## Examples of Written Constitutions 2: Denmark

Article 12 ... the King shall have the supreme authority in all the affairs of the Realm, and he shall exercise such supreme authority through the Ministers.

Article 14 The King shall appoint and dismiss the Prime Minister and the other Ministers ...

Article 17 The body of Ministers shall form the Council of State ...  
The Council of State shall be presided over by the King ...

Article 19 The King shall act on behalf of the realm in international affairs ...

Article 22 A Bill passed by the Folketing shall become law if it receives the Royal Assent ... The King shall order the promulgation of statutes and shall see to it that they are carried into effect.

## Examples of Written Constitutions 3: Belgium

Article 37      The federal executive power, as regulated by the Constitution, belongs to the King.

Article 96      The King appoints and dismisses his ministers.

Article 106     No act of the King can take effect without the countersignature of a minister, who, in doing so, assumes responsibility for it.

Article 108     The King makes decrees and regulations required for the execution of laws

Article 109     The King sanctions and promulgates laws

Article 110     The King has the right to remit or to reduce sentences passed by judges ...

## Conclusions

- Other countries rely equally upon conventions to interpret their constitutions
- Prerogative powers feature strongly in other European constitutions
- Constitutions offer only a limited guide to the nature of the political system
- Other countries live with antiquated constitutions and make them work
- There is no necessary connection between the quality of a country's constitution and the quality of its democracy

Stuart White

# **Remaking the UK constitution: a philosophical remake, not just an institutional one?**

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# The traditional constitutional model

Government acts properly on the basis of law and the sole ultimate authority in law-making is the Crown-in-Parliament.

**A.V. Dicey: ‘...Parliament means...the King, the House of Lords, and the House of Commons....The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English [UK] constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’** (Dicey, *The Law of the Constitution*, Quoted in McLean, 2010, 19.)



# Two key aspects of the traditional model

- (1) Parliament is *sovereign*: Parliament is not subject to/constrained by any codified, higher law; Parliament cannot bind itself; no law is 'entrenched'.
- (2) *Parliament* is sovereign: Sovereignty lies with Parliament which has a complex and indirect relationship to the public (to 'We the people', see McLean 2010, 223-283), e.g., non-democratic elements of Crown-in-Parliament – monarchy, Lords.

# An alternative model: ‘republican democracy’

Many democratic nations base their political systems on a different philosophy which we may term republican democracy. (Using ‘republican’ in sense that needn’t imply anti-monarchical agenda.) This philosophy has two key elements (Ackerman 1991):

- (1) ‘Normal politics’: representative governments make laws and policy within the framework/constraints of a codified, entrenched constitution (which covers the core political process and individual rights).
- (2) ‘Constitutional politics’: ‘We the people’ create (and have power to amend) the codified, entrenched constitution.

Tom Paine: **‘A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government.’** (Paine 1987 [1792], p.220.)

‘Entrenchment’: a law is entrenched when it cannot be changed through the processes adequate to law-making under ‘normal politics’, e.g., through simple majority vote in the elected assembly/parliament.

# **Republican democracy and the traditional constitution**

In contrast to the traditional model, republican democracy holds that Parliamentary government ought to be properly subject to/constrained by a codified, entrenched higher law (concerning the core political process and also, perhaps, individual rights).

In contrast to the traditional model, republican democracy locates sovereignty fundamentally with 'We the people', not with Parliament; this sovereignty applies (at least) at the constitutional level (of making entrenched, higher law).

# A crisis with the traditional model?

One way to approach the UK's constitutional crisis is to focus on what is allegedly wrong with the institutions, e.g., the nature of the second chamber or electoral systems to the Commons.

Another complementary approach is to explore whether there is also a *crisis at the level of constitutional philosophy itself*. I think there is such a crisis due to the fact that the traditional and republican democratic models are both operative in elite and popular conceptions of the constitution (White and Barnett 2018).

- (1) There has been over recent decades a shift towards operative notions of higher law and (even, aspirationally) entrenchment (King 2007, 115-149). Example (ongoing): aspiration to entrenchment in recent 'devolution' legislation:

## Scotland Act 2016: **"PART 2A Permanence of the Scottish Parliament and Scottish Government 63A Permanence of the Scottish Parliament and Scottish Government**

- (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
- (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
- (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."

# A crisis with the traditional model (ctd.)?

(2) There has been over recent decades a shift towards operative notions of popular sovereignty at the constitutional level - through use of referendums which has given rise to the ideas that (a) on certain issues, the UK Parliament (or other relevant agency) is morally obliged to call a referendum and (b) having done so, the UK Parliament is morally obliged to respect the outcome of the referendum.

(3) There are some links between (1) and (2) – popular sovereignty and quasi-entrenchment feed off/support one another, at least with regard to changes to political process.

(4) But neither shift is complete or consistent in practice and the traditional model also retains some operative force. The adoption of republican democratic ideas has been incomplete and uneven – not universally accepted or consistently applied by UK political elite; not applied to same extent or in same way to all constitutional issues; not accepted to same extent across all nations of UK.

# Referendums in the UK

- 1973 - N. Ireland; status of N. Ireland within the UK
- 1975 – UK-wide; continued membership of EEC
- 1979 – Scotland, Wales; creation of devolved assemblies
- 1997 – Scotland, Wales; creation of devolved Parliament, assembly
- 1998 - N. Ireland; ‘Good Friday Agreement’; London; establishment of GLA and Mayor
- 2004 – North East; creation of devolved assembly
- 2011 – Wales; new powers to Welsh assembly
- 2011 – UK-wide; change electoral system to House of Commons to Alternative Vote
- 2014 – Scotland; independence referendum
- 2016 – UK-wide; continued membership of EU

Note emerging expectation of referendums: e.g., use of ‘community polls’ in Barnsley and Doncaster, December 2017, to give independent view on local government reform.

Doncaster – 85% (of 20% turnout) voted for ‘whole Yorkshire’ devolution versus ‘Sheffield City region’

Barnsley – 85% (of 21% turnout) voted for ‘whole Yorkshire’ devolution versus ‘Sheffield City region’

<https://www.theguardian.com/uk-news/2017/dec/21/barnsley-and-doncaster-vote-for-one-yorkshire-devolution-deal>

# **Scotland and the republican democratic model**

1988 Claim of Right for Scotland:

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

**We further declare and pledge that our actions and deliberations shall be directed to the following ends:**

- To agree a scheme for an Assembly or Parliament for Scotland;**
- To mobilise Scottish opinion and ensure the approval of the Scottish people for that scheme; and**
- To assert the right of the Scottish people to secure implementation of that scheme.’**

# Refounding the UK (post-UK?) as a republican democratic polity (polities)?

Given the crisis with the traditional model, is a 'remaking' of the UK constitution not only a remaking of institutions, but *a choice of the philosophy underpinning them*, of basic constitutional self-understanding?

When thinking about process for changing the institutions, we have to think about the implications of the process we are proposing for the underlying philosophical choice(s).

My normatively preferred response to this crisis is a republican democratic one: adopt a process to create – or which has the potential to create - a codified and entrenched constitution for the UK, where this process itself embodies the ideal of popular sovereignty (White 2017).

What challenges does this imply? To answer this, we need to take a step back and consider further what 'popular sovereignty' is.



# What is popular sovereignty?

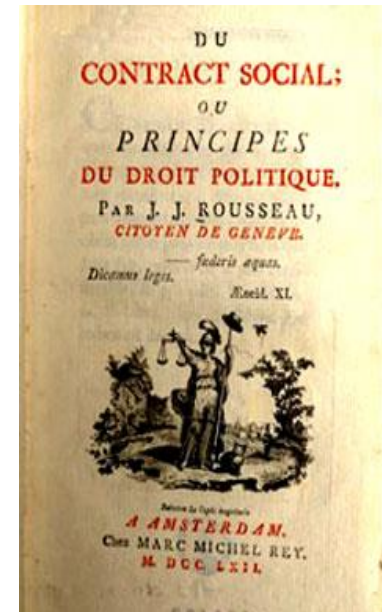
Rousseauian ideal: create a political system in which ‘We the people’ authorise the laws we are required to obey – ‘freedom is a law one gives to oneself’. (On Rousseau’s political theory, see Cohen 2010a, de Dijn 2015, Tuck 2016.)

Note: Rousseau’s ‘laws’ arguably roughly = what we’d term constitutional laws (Tuck 2016).

This brings us to the idea of the ‘general will’ which has both a procedural and a substantive dimension.

Procedural: the people must have the opportunity to make the ‘laws’ they have to obey: *the ‘laws’ must come from all*.

Substantive: the ‘laws’ must be genuinely acceptable to all by virtue of serving shared basic interests in things like life, liberty and economic opportunity, and secure the rights implicit in the procedural dimension of the general will: *the ‘laws’ must serve the good of all*.



# The place of deliberation in popular sovereignty

So Rousseau's presentation links popular sovereignty to the pursuit of the *common good*.

I think (note: whatever Rousseau thought!) that this links popular sovereignty to ideas of *deliberative democracy*, where *deliberation* is (roughly) political debate properly oriented to determining what political and basic socio-economic arrangements best serve the common good. (For discussions of deliberation, including important criticisms of the concept, see Young 2002, Allen 2006, Cohen 2010b.)

Thus, republican democracy is about the *sovereignty of the deliberating people*, not about mere assertions of popular (majority) will.

# Some of the challenges...

## *(1) How to make popular sovereignty effective?*

Constitutional convention or conventions: elected from the people? Or a descriptively representative cross-section of the people? (See also Owen 2014.)

Control of convention agenda?

Necessary role for referendums?

Engaging wider public with convention's work (Landemore 2015, Suteu 2015)?

## *(2) How to make the exercise of popular sovereignty properly deliberative?*

Role for Citizens' Assemblies (Lang 2007, Farrell 2014, Suteu 2015)?

Integrate referendums and CAs (Irish model)?

How can we make referendums (more) deliberative (Tierney 2012)?

## *(3) How to respect the fact of 'We, the peoples'?*

How to structure the process so that the multiple nations and regions within the UK get appropriate power over their own futures (which I think must include a right to independence/leave the UK)?

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# Contemporary Constitution-Making in Stable Democracies

Remaking the UK Constitution: Politics and Process  
Oxford, 22 February 2019

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How do contemporary  
democracies develop  
proposals for major  
constitutional reform?

# Why does this question matter?

the content of constitutions matters

proposal development strongly shapes final outcomes

who is involved may matter more in constitution-making than in normal policy-making

how they are involved may also matter more

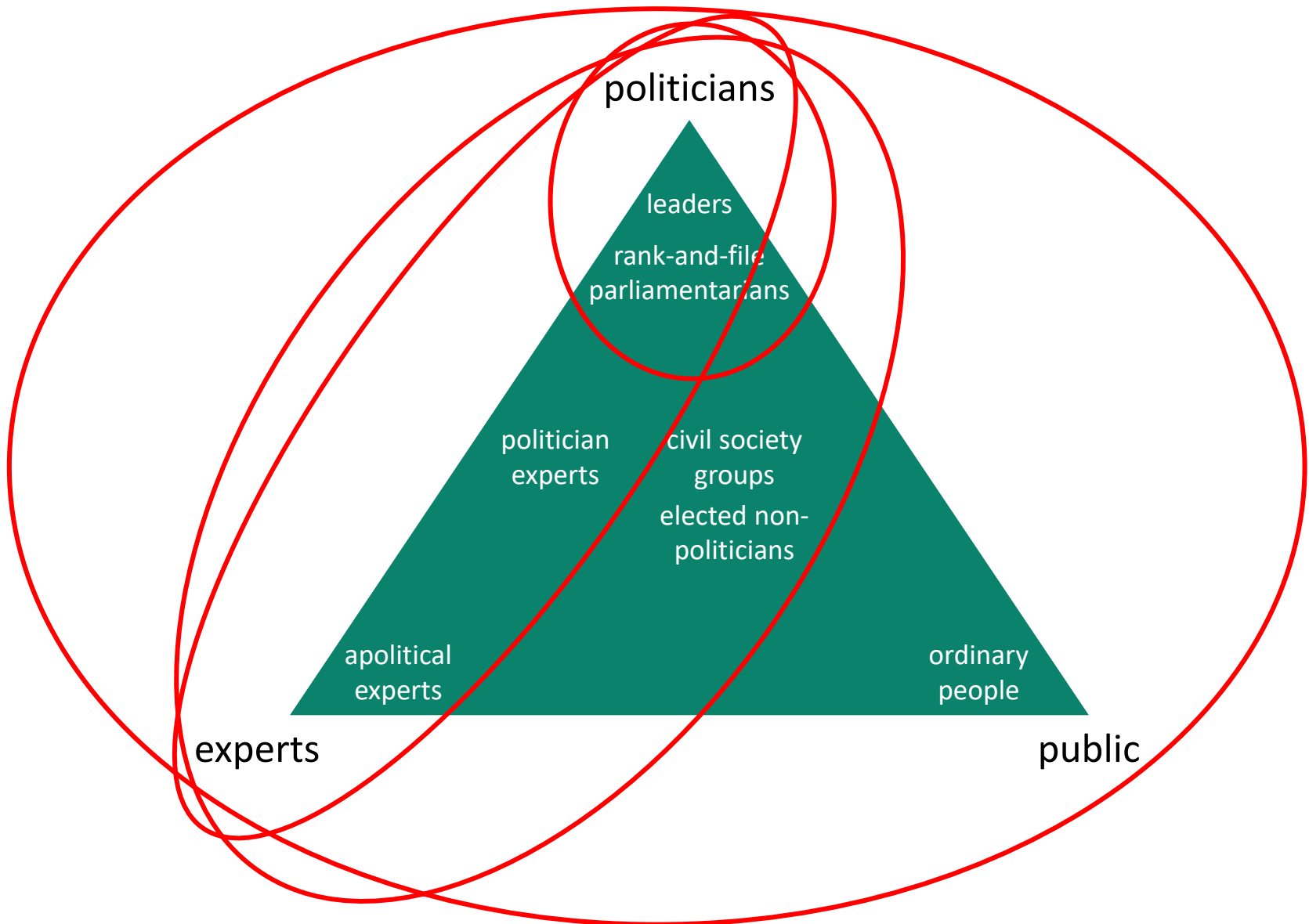
this is a very under-explored topic



# Cases

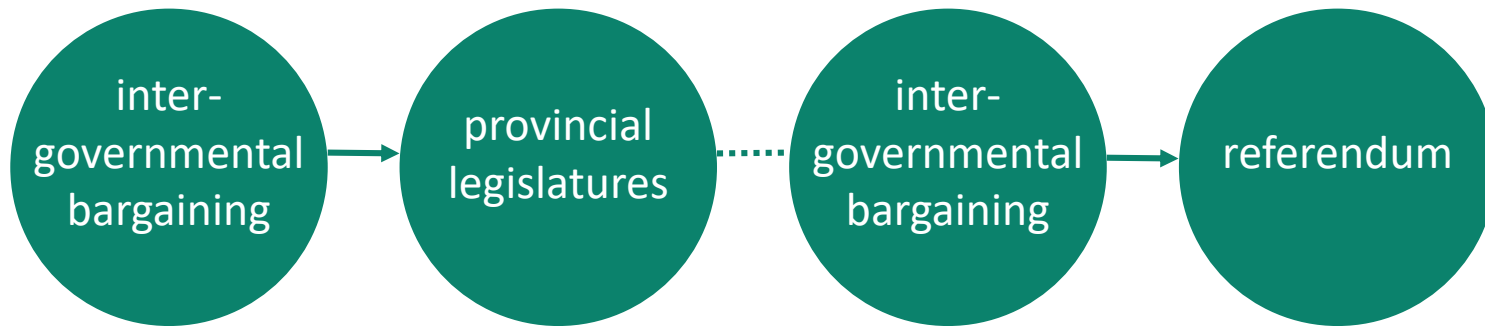
Australia 1998	Ireland 2013
Austria 2007	Ireland 2012–15
Belgium 2010–12	Ireland 2016–18
Canada 1982–92	Luxembourg 2005–present
Canada (BC and Ont) 2005–07	Netherlands 2006
European Union 2002–03	Norway 2014–15
Finland 1999	Sweden 2009–11
France 2008	Switzerland 1999
Iceland 2010–12	UK devolution since 1970

# Actors

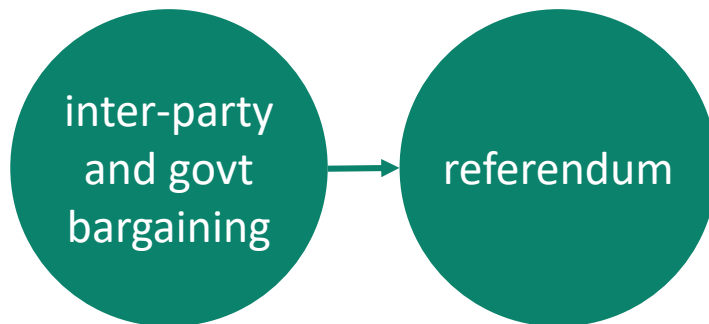


# Politicians Dominate

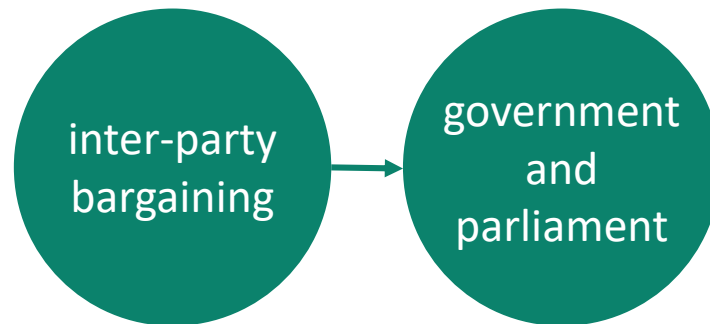
## Canada 1982–92



## Northern Ireland 1998

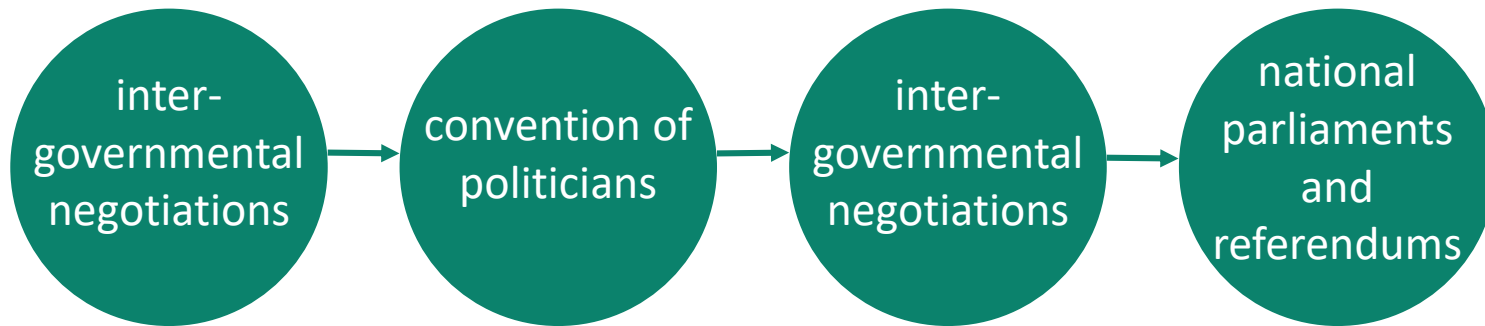


## Belgium 2010–12



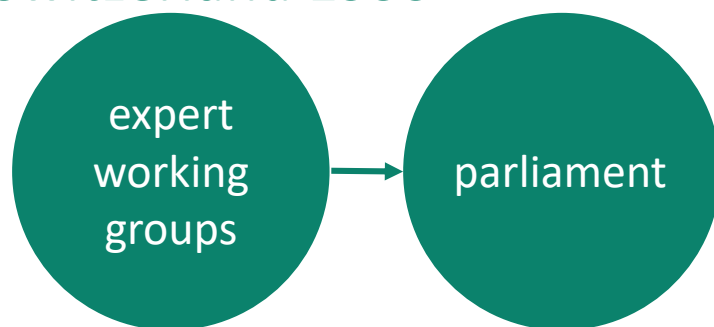
# Politicians Dominate

European Union 2002–03

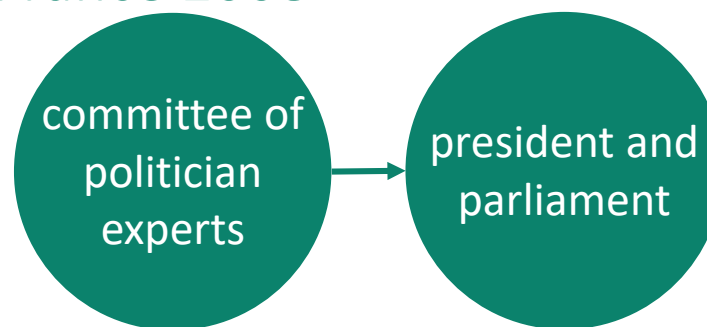


# Politicians and Experts Work Together

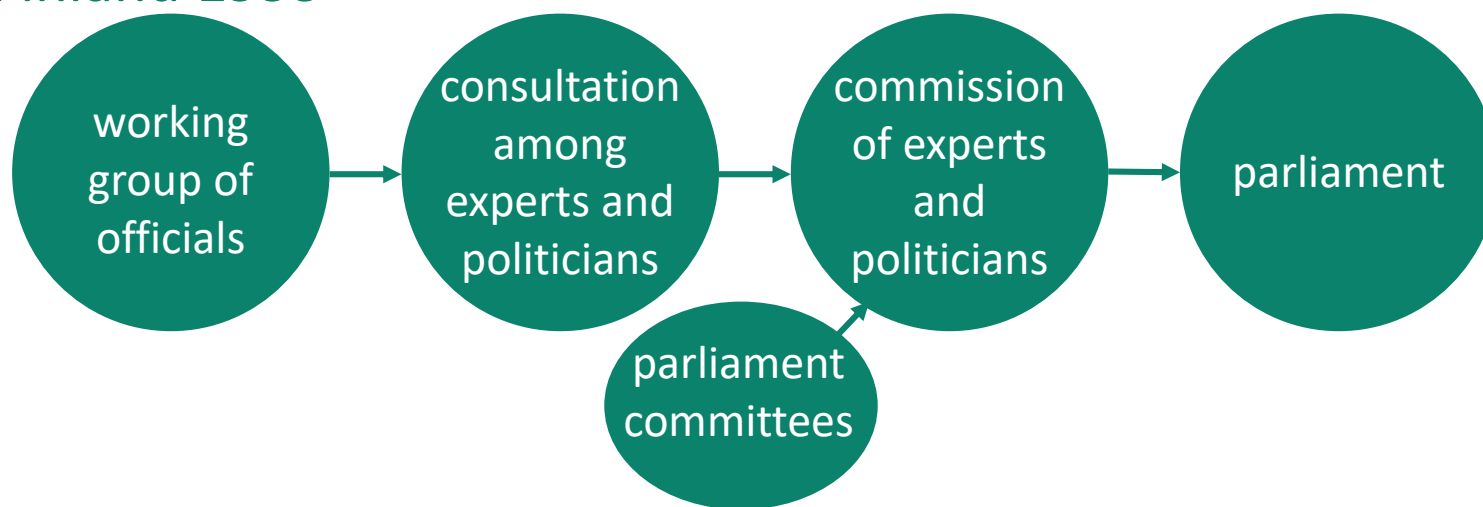
## Switzerland 1999



## France 2008

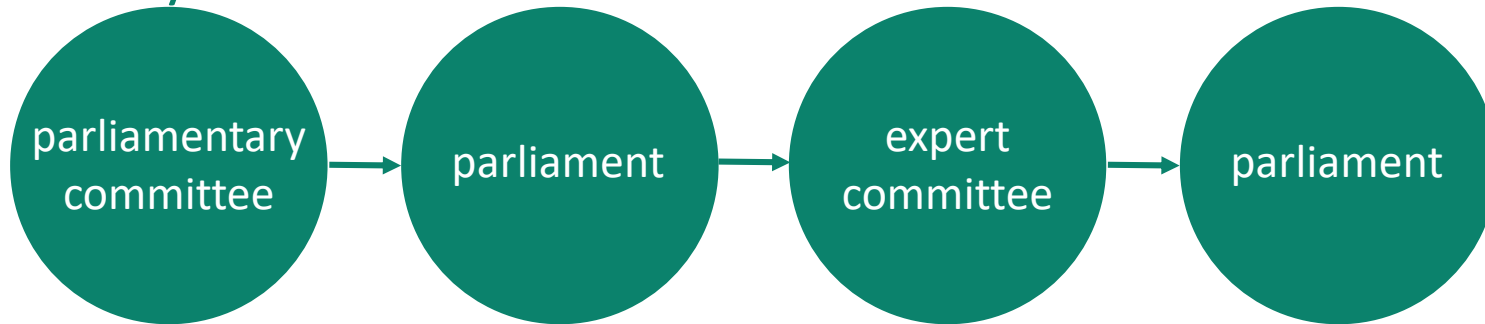


## Finland 1999

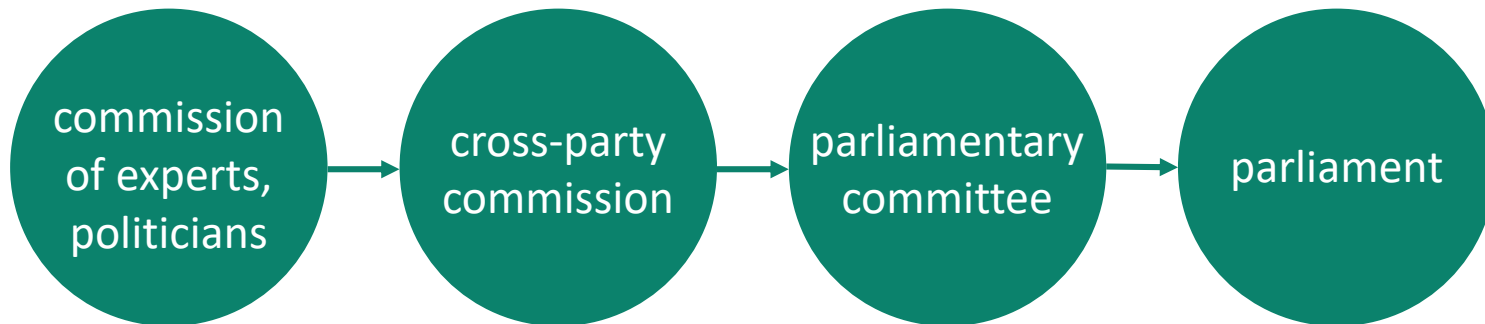


# Politicians and Experts Work Together

Norway 2014–15

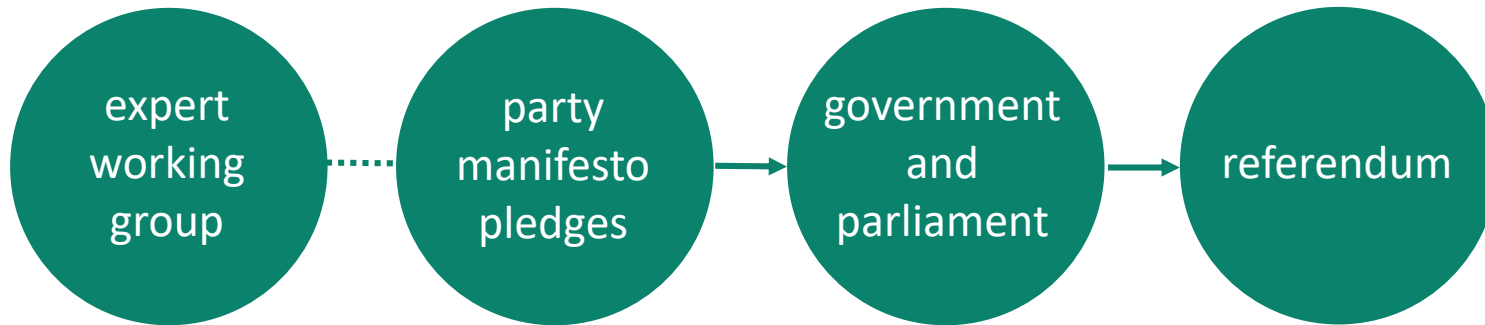


Sweden 2009–11



# Politicians and Experts Work Together

## Ireland 2013 – Senate abolition

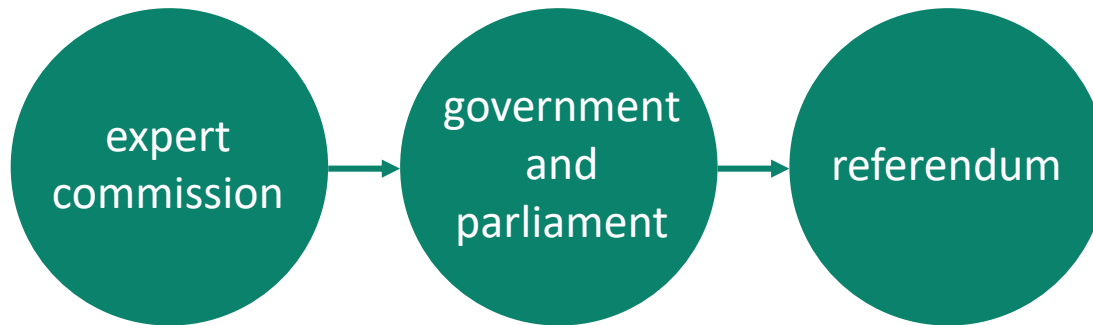


## Ireland 2013 – Court of Appeal



# Politicians and Experts Work Together

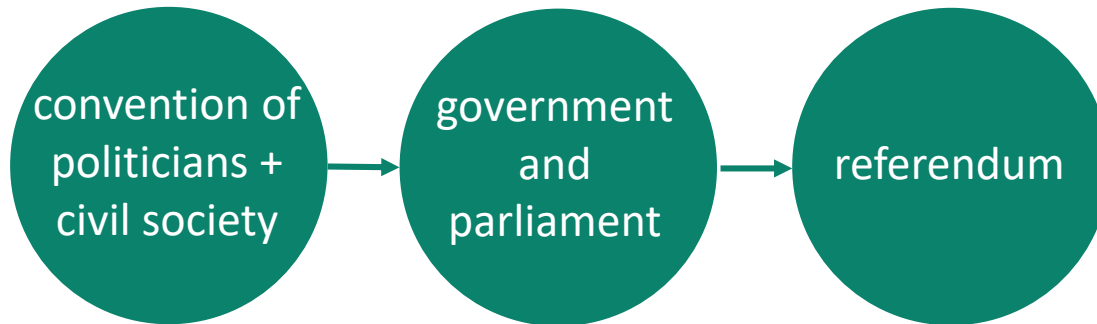
UK – extensions of devolution since 1999



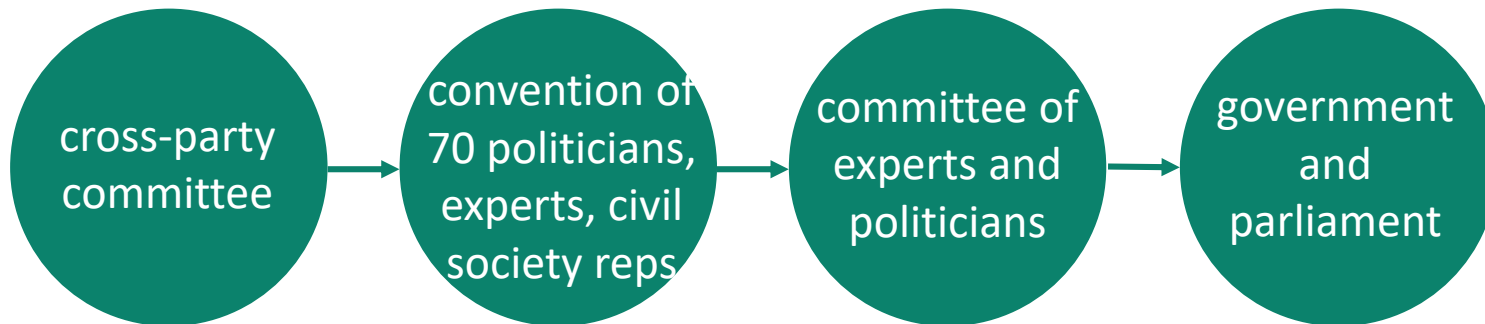


# Engaging Intermediate Actors

## Scottish devolution

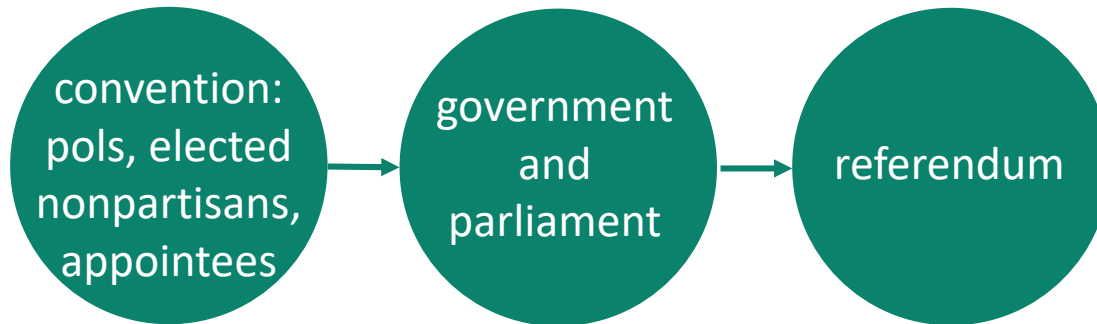


## Austria 2007

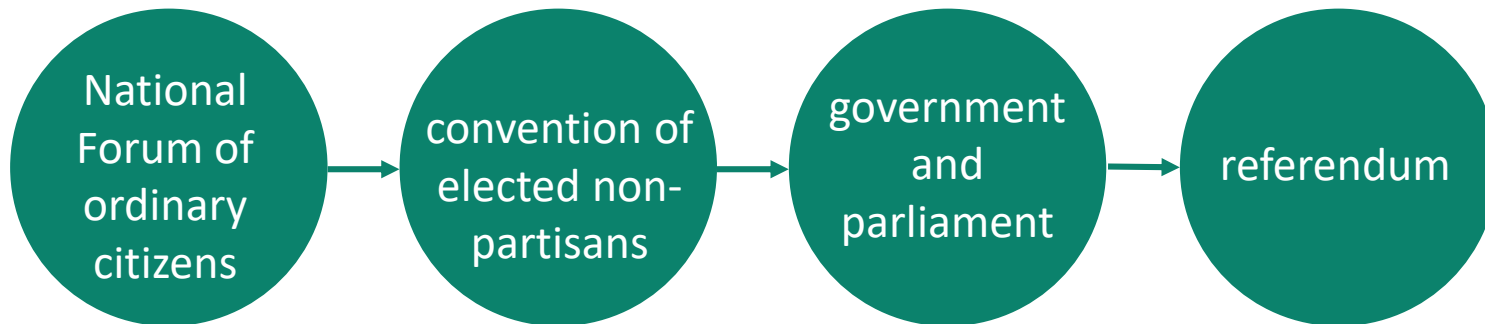


# Engaging Intermediate Actors

## Australia 1998

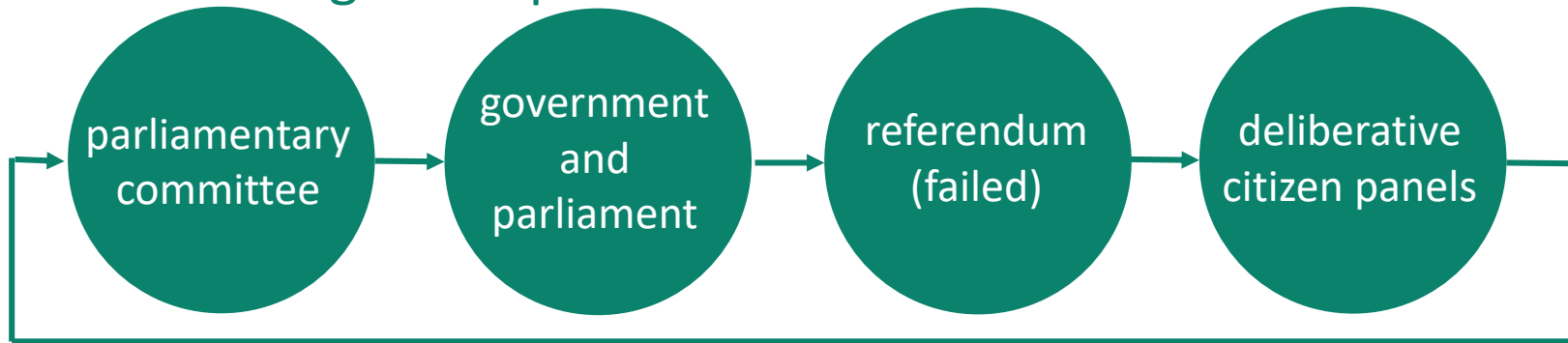


## Iceland 2010–12

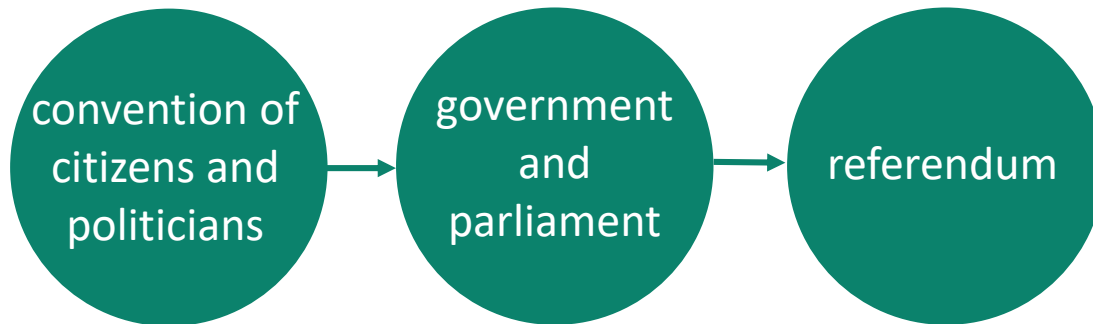


# Engaging Ordinary Citizens

Luxembourg 2005–present

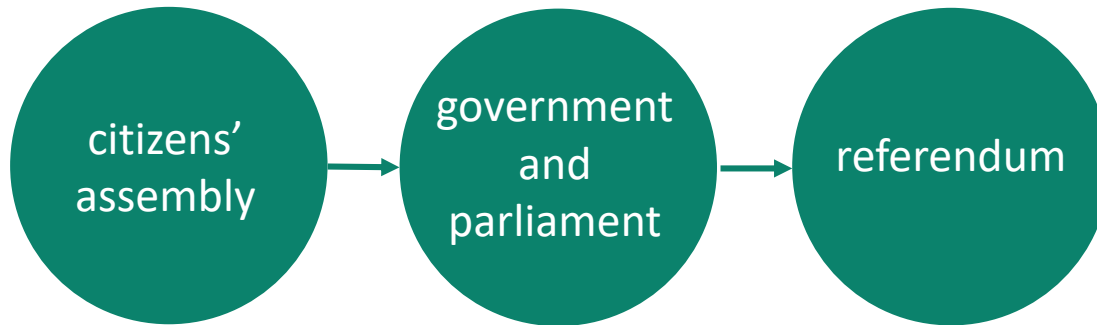


Ireland 2012–15

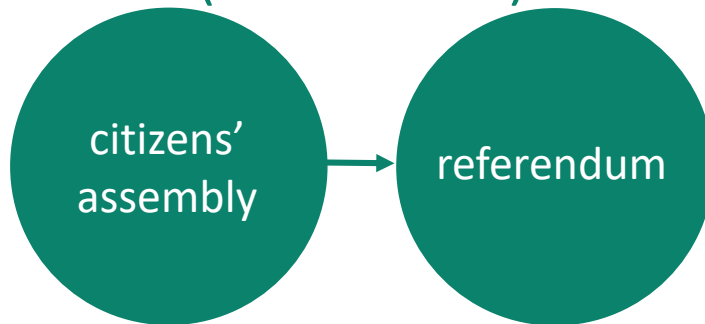


# Engaging Ordinary Citizens

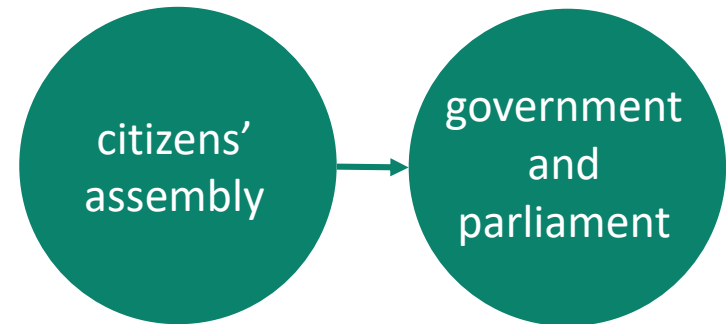
## Ireland 2016–18



## Canada (BC and Ont) 2005–07



## Netherlands 2006



# Distribution of Types

Belgium 2010–12

Canada 1982–92

European Union 2002–03

Northern Ireland 1998

Finland 1999

France 2008

Ireland 2013

Norway 2014–15

Sweden 2009–11

Switzerland 1999

UK devolution since 1999

Australia 1998

Austria 2007

Iceland 2010–12

Scotland 1989–97

Canada (BC and Ont) 2005–07

Ireland 2012–15

Ireland 2016–18

Luxembourg 2005–present

Netherlands 2006