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\n[/[toc](#)]\n \nReferenda and the United Kingdom's Evolving Constitution

Jay Crush

Aims

To provide a comprehensive and contemporary account of the use of referenda in the UK. To use this account to develop a modern theory of the use and place of British referenda which fits into the process of constitutional reform, in particular the Government's localism agenda.

Background and Motivation

The literature review traced the development in political and constitutional thought regarding referenda in the UK. Until the 1970s the prevailing view was that referenda would erode British representative democracy and so could not be reconciled with the unique British constitution and its focus on the sovereignty of Parliament. This view changed after the 1975 EC referendum which was considered to supplement, not erode, representative democracy thereby empowering citizens. The literature now focuses not on whether referenda should be held at all, but specifically when and under <https://assignbuster.com/the-united-kingdoms-evolving-constitution-law-constitutional-administrative-essay/>

what circumstances referenda are best utilised. This is where this dissertation will be placed, but it will be wider in scope than most accounts of referenda so far, taking advantage of the two gaps identified by the literature review; namely the lack of analysis of both the use of referenda by politicians and of local level referenda. Furthermore the British constitution has undergone a major process of gradual and piecemeal change since 1997. However, these changes have had a minimal impact on political and academic understanding of referenda. These reforms can be summed up as being modernising and aiming to create a more codified, understandable and entrenched constitution, moving away from (but nowhere near eliminating yet) the reliance on convention and precedent (Bogdanor 2009; Jowell & Oliver, 2011; Wilks-Heeg, Blick, & Crone, 2012). Examples of this are the entrenchment of human rights in British law (Human Rights Act 1998) and the creation of the Supreme Court (Constitutional Reform Act 2005). In addition to this there has been significant devolution in Scotland, Wales and Northern Ireland, and the Coalition government is pressing ahead with its localism agenda, all of which are aimed at empowering local communities and people (Leigh, 2011). This is an appropriate time to conduct research which develops an updated, holistic and more accurate account of the use of referenda by exploiting the gaps identified by the literature review. The significance of these gaps and the lack of political discourse linking referenda and constitutional reform mean that the current understanding of referenda is outdated, at a time when the referendum is more significant in British politics than ever, due to the novel nature of coalition government in the UK. The reliance on an outdated conception of the referendum which is

dependent upon convention and is subject to politicisation will ultimately damage the public's view of and engagement with referenda, and therefore damage their ultimate utility. This dissertation is motivated by the desire to create a more accurate and modernised theory of the place and use of referenda in the UK in order to stop this from occurring. This will include specific policy suggestions informed by case study research and an interview with an MP, giving the theory a practical application. Just as political thought regarding referenda in the UK shifted in the 1970s, it is time that it shifted again to reflect the changes in the constitution.

Research Question and Argument

The research question will be: What place and use do referenda have in British politics and the evolving constitution? This covers the aims of finding how referenda operate at present, and creating a modern theory of when and under what circumstances referenda should be utilised. The first section will detail the actual use of referenda in the UK, with the first substantive chapter giving an overview of the use of referenda on constitutional issues, a topic which dominates the literature (Bogdanor 1996, 1997, 2009). It will be noted that in the UK there is no division between constitutional laws and other laws. Despite this it will be shown constitutional issues can be clearly identified as those relating to the fundamental relationship between the citizen and the state; such as leaving the EU, abolishing a House of Parliament or the monarchy, or a change in electoral system (House of Lords, 2010). All eleven of the national referenda held by central government in the UK were for a fundamental constitutional change of this sort, which has led to the conclusion that the British constitutional convention is that such issues

should be subject to referenda (Bogdanor, 2009; House of Lords, 2010).

Although a clearly important element worthy of discussion, this is the limit of the analysis of modern British referenda found in the current literature, as shown in the literature review. This dissertation will go further, exploiting the gaps found in the literature; namely the lack of analysis of the politicisation of referenda as political threats and bargains, and of local referenda. Thus the next chapter will look at the politicisation of referenda, showing that recently ulterior political factors have become more important than constitutional convention in deciding when referenda are and are not held. Referenda will only take place if it is in accordance with the self-interest of the governing political party. This could ultimately damage the concept of the referendum with the public not engaging with them as they only reflect political aims, and not the chance for the electorate to have a direct say. This point is not examined in the literature as a flawed sample is drawn upon; only the fact the referenda were actually held is considered, not the political discussion around these and other potential referenda. This chapter will argue that a convention that referenda should be held for constitutional change is meaningless without the political impetus for it. This will be shown by drawing upon the AV referendum which was used instrumentally as a bargaining tool in the coalition negotiations (Bogdanor, 2011; Qvortrup, 2012), the constant debates over an EU referendum which is advocated generally by Euro-sceptics and opposed by EU supporters (Hansard, 2011). Finally, despite a referendum being held over the alternative vote, one was not proposed for potential House of Lords reform in order to ease Coalition tensions (UCL Constitution Unit, 2012). The next chapter will examine

intensively local referenda and the various statutory mechanisms for their use. Parishioners can legally require a local authority to hold a referendum in a parish under the Local Government Act 1972; this can be on any issue but is non-binding. Under the Local Government Act 2003 advisory referenda can be held by a local authority on anything linked with its powers (House of Commons Library, 2012). Finally the Localism Act 2011 provides for local referenda if council tax is increased excessively (Leigh, 2011). In this chapter the Dover Town poll on the future of the port will be examined in-depth (Dover Town Council, 2011), as well as the transport referenda in Edinburgh and Manchester (BBC News, 2005; Manchester Evening News, 2008). Having created a full account of the use of referenda, the dissertation will move onto developing a theory of in which circumstances referenda are best utilised in the UK, in a way which fits in with constitutional developments. Thus the section will begin by tracing British constitutional reform since 1997 which was summarised in the introduction of this proposal. The following chapters will draw upon these constitutional changes and the empirical findings in the first section to develop a theory of the best utilisation of referenda in the modern constitution. Referenda, both in the literature and in political discourse have largely been untouched in this process of constitutional reform, and this section will create a modern theory of the referendum which fits these changes. It will be argued that national referenda should be held on fundamental constitutional issues, as per the consensus in the literature, for the reason that the people should ultimately decide if their relationship with the state is to change. However, in order to avoid the demonstrated politicisation of referenda which ultimately damages the concept and to

ensure referenda develop with the evolving constitution, the circumstances in which a referendum is triggered should be codified in law. Codification of this sort was rejected by the House of Lords Select Committee as being too difficult and incompatible with parliamentary sovereignty (2010); however the European Union Act 2011 and Localism Act 2011 both have shown this to be inaccurate, both these acts ensure that referenda are triggered in specific circumstances, removing political discretion from the calculation. (Leigh 2011, Gordon and Dougan 2012) Local referenda should form part of this modern theory based on an analysis of the data generated from the examination of the Dover, Manchester and Edinburgh referenda. Local referenda can give people more control over important aspects of their everyday lives, and fit well into the Government's localism agenda and impetus behind devolution. Some argue that local referenda abrogate local representative democracy and so are not appropriate (House of Lords, 2010). However it will be shown that this is inaccurate, these arguments against local referenda are the same as those historically put against referenda in general before the 1970s (Maine 1885, Adams 1889, Stoddart 1910). Just as national constitutional referenda are now seen to supplement representative democracy (Grimond & Neve, 1975; Alderson, 1975; Bogdanor, 1981), the same will be demonstrated with local referenda. This is especially important in the light of low levels of engagement with local democracy, and the growth in local governmental power. Finally, for this theory to be realised, and for referenda to develop both in concept and in practice with the evolving constitution policy changes will be needed. Further codification of the triggers of national constitutional referenda is needed,

along the lines of the European Act 2011. Additionally reform of the operating practices of local referenda is required such as allowing for postal and proxy votes, and longer polling both opening hours, as advocated by Charlie Elphicke MP (Hansard, 2012).

Methodology and Ethics

This research will take the form of a case study of the UK. The UK has been selected firstly for its completely unique constitutional arrangement, such as the unwritten constitution and the fundamental status of parliamentary, not constitutional, supremacy, which makes analysis particularly interesting. Secondly referenda are of growing significance in British politics, caused by constitutional change and coalition government, making it a pertinent time to clarify their place and use. There are no specific temporal limits to the focus of this research, however as it is providing a modern updated account of referenda in the UK most of the evidence will be from 1997 onwards, for this marks the start of the process of constitutional reform, with a significant focus on 2010 onwards coinciding with the Coalition Government's time in power. In focusing on referenda in the UK as a whole this research will have a high level of internal validity which is especially important in the UK due to the above stated constitutional uniqueness. This high level of internal validity will be utilised to produce policy suggestions which will be highly relevant and applicable to the United Kingdom, and will be informed by in-depth qualitative research including an interview with an MP. Producing such suggestions would have been more difficult under an overarching comparative analysis of referenda in different states. The strength of the comparative methodology is that the findings are highly generalisable, which

comes at the potential cost of a lack of internal validity, extent of knowledge is increased at the expense of intensiveness as the local idiosyncrasies of the political and constitutional situation can be overlooked. This potential is exacerbated in the UK due to the very unique constitutional context; it is highly unlikely that any generalisable theory of the referendum will be able to fully apply to the UK as well as other states, and the same applies to any policy suggestions. Furthermore, since the British Constitution is made up of conventions and precedents and is undergoing an unprecedented process of reform, a valid account of the specific use of referenda in the UK will be very useful in helping to inform and frame the theory of their use put forward in this research. The case study can incorporate comparative elements when relevant and appropriate, but the overall undiluted focus of the work will be to investigate referenda in the UK alone. Within the overarching case of the UK, subsidiary cases must be selected to be analysed. When it comes to looking at actual use of referenda in the UK the sample is naturally limited as there have only been eleven national referenda from central government in the history of the UK. When describing the politicisation of referenda, three cases will be analysed. These are the discussions under the Coalition government regarding referenda for House of Lords reform, EU membership and the AV referendum. This sample again is naturally limited as these are the three significant invocations of referenda under this Government. While these debates occur during the tenure of every government (especially regarding the EU), focusing on these three most recent examples helps best address the research question because they can be validity measured against the current trends in constitutional change, which may be unfair to

judge older debates against, allowing the analysis to be as up to date as possible. This research will comprise of political statements, speeches and with a large focus on the Hansard official report of Parliamentary debates, which offers a wealth of highly relevant, up to date, qualitative and empirical data. With regards to analysis of local referenda a similar case study approach will be taken. A large n approach was considered, however due to the unregimented and informal nature of these referenda it is not feasible. Information on every use of a local referendum under the Local Government Acts specifically is not easy to find, as they are conducted on parish and town level. There are around 8, 500 Parish Councils in England, and some may have an electorate of only a few hundred people (ACSES, 2006). Many have no dedicated website or mechanism to get the required data on use of local referenda, and any available data will be limited to turnout and the result of the referenda, leading to no large scale quantitative analysis being possible. However there is ample information to investigate the Dover, Edinburgh and Manchester local referenda. These were all high profile use local referenda, covering sizeable areas, and so they received a good level of media and political coverage. Furthermore I will be able to use the Dover and Deal Conservative Association's digital archives of Dover's media coverage to help with my research and to conduct a semi structured interview with Charlie Elphicke MP for Dover, who was a supporter of this referendum and remains an advocate for local referenda in general. Ethical considerations are of course important with all interviews, but even more so when with a serving politician. Mr Elphicke will be made aware of the specific purpose of my research, how I intend to use the interview, that the dissertation will only

be disseminated beyond the University of Kent with his consent and he will be given the right to see the transcript of the interview and the dissertation before submission to see how exactly it has been utilised. The research design for these sections may seem basic, but the aim of this dissertation is to describe these cases in an intensive manner and in as much depth as possible, which is facilitated by the case study method. The highly accurate and detailed empirical outcomes of these cases studies will then be analysed for their compatibility with the key tenants on the changing British constitution, and from there to inform policy suggestions to ensure that this conceptual fit with the constitution is realised in practice. So for example the data gathered on local referenda will show that they fit perfectly with the Government's localism agenda and the focus on empowering communities, and so fit in the evolving constitution, despite the objections of some. However, the common lack of proxy/postal voting in local referenda hampers their potential and so must be rectified with legislative change. This intensive case study method will naturally generate detailed qualitative data, which fits in best with the discursive political and legal analysis of the British constitution, especially as the constitution operates based on precedent and convention. The research is not investigating causal links or variables, but cases in a way that aids theory generation, and as Geering explains, a qualitative case study is the best design for theory generation (2007, pp. 37-43).

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