



# Brexit: Is the UK's 'Constitutional Moment' here at last?

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Codified constitutions are most commonly adopted following a major schism with the previous order. For example, following an armed uprising such as the American War of Independence or the French Revolution. The sweeping away of the old regime, of necessity, demands the creation of new fundamental principles and rules to organise the State. A codified constitution also presents an opportunity to set out the core values on which the nation can rally around. It is commonly asserted that the lack of such a critical break in UK history since the 17th century explains the absence of a codified constitution.

It is, of course, possible to have constitution-making in a situation that falls short of, effectively, the birth of a new nation. The American constitutional law scholar, Bruce Ackerman, talks of '[dualist democracy](#)'. Loosely speaking, we usually live in times of 'normal politics' with decision making by the government and limited engagement from the general public. However, there come certain periods of such societal upheaval that an extraordinary number of citizens become seized by a question of 'higher', constitutional law-making. These tumultuous periods are often called 'constitutional moments' and can legitimate major constitutional reform in the name of 'the people'. How might we identify such a moment? Ackerman points to the following features:

much of the softness of normal political opinion will dissolve. The apathy, ignorance, selfishness ... will have been dissipated by hundreds of millions of arguments, counterarguments, insults, imprecations ... There will be a great deal of passion and personality, action as well as argument, drama as well as debate—the stakes are much too high to imagine otherwise.

Ackerman was referring to the great crises and evolutions in American history, including reunification after the Civil War, the New Deal, and the Civil Rights movement. However, could the current situation we face in the United Kingdom not also be a constitutional moment?

## **Popular engagement**

Certainly, the high level of public engagement with Brexit, a constitutional issue, is beyond doubt. As the political scientist Sir John Curtice has [highlighted](#), over the past 50 years there has been a marked decline in the number of people who identify strongly with any political party and the electorate has generally become less engaged with politics. However, 'Brexit has stirred up a degree of political passion of which, in the wake of the long-term decline in the strength of party identification, voters had long since seemed incapable.' According to recent [research](#) by NatCen, 77% of people identify strongly with either Remain or Leave, compared with only 37% who identify strongly with a political party. Even more strikingly, 44% of people identify very strongly with Remain or Leave compared with only 9% who identify very strongly with a political party. It is therefore unsurprising that Brexit is the [most followed news story](#) by the general public.

The exceptionally high level of public engagement is also reflected in the very high turnout in the referendum and the scale of protest the UK has witnessed since. Approximately one million people took to the streets on Saturday 23rd March to campaign for a [People's Vote](#). It is estimated that around 700,000 marched in October. These are the greatest mass mobilisations around an issue since the protests against the Iraq War. A [petition](#) on the Parliament website to revoke Article 50 has over 6 million signatures and counting. Parliament's petitions committee announcing that it is the most popular petition ever submitted and the rate of signatures is the highest the site has had to deal with, at one point nearly 2,000 signatures per minute.

However, this political passion has not coalesced around overwhelming majority support for either side and recent [polling](#) shows that overall public opinion remains heavily polarised.

### **Political or constitutional crisis?**

There is a constitutional crisis in our political institutions. The government has proven unable to deliver the Withdrawal Agreement, with divisions in Parliament and within the Executive. In January 2019, the Meaningful Vote on the Withdrawal Agreement was [lost by 230 votes](#)—the largest defeat suffered by a government in modern times.

In previous eras, such a catastrophic defeat on a key piece of legislation would have been a matter of confidence prompting the PM to [resign](#). However, under the Fixed-term Parliaments Act 2011, it fell to Labour to table a motion of no confidence. The PM was able to survive that vote, meaning an enfeebled government has struggled on.

Since then, a [second Meaningful Vote](#) was rejected and a third. On 20th March, the PM delivered a [radical speech](#) claiming to be on the side of the people against obstruction from Parliament. To paraphrase [Vernon Bogdanor](#), we have a government in office but not in power.

Even within the executive, the constitutional convention of [cabinet collective responsibility](#) has been severely eroded and ministers have [repeatedly spoken out](#) against the government's position. Additionally, an unprecedented number of ministers have [resigned](#), including two Brexit Secretaries and a Foreign Secretary.

### **Devolution**

Brexit has also deepened pre-existing tensions around devolution. There was already extremely high public engagement in Scotland with questions around devolution and independence, as most clearly demonstrated by the incredibly high voter turnout in the 2014 Scottish independence referendum—84.6% of eligible voters cast their ballots. As the EU select committee of the House of Lords [highlighted](#), EU membership has been 'part of the glue holding the United Kingdom together'. A range of areas of policy that are devolved—including agriculture, fisheries and environmental protection—are subject to EU law which has limited the possibilities for divergence in policy across the four parts of the UK.

In order to protect the internal market, the UK government wants Westminster to, initially, retain a number of devolved powers returning from Brussels after Brexit. This has met with fierce objection from the Scottish Parliament and has given fresh impetus to calls for another independence referendum. In Wales, longstanding calls for a codified [federal system](#) have been renewed, one recent poll showing that 36% of people in Wales think that Brexit makes independence more likely in the next ten years.

Turning to Northern Ireland, sectarian divisions remain high with peace founded on a fragile power sharing agreement and the promise of a border poll on reunification at any time when it seems there is likely to be a majority for unification.

In this regard, it is important to reflect on the clear sectarian [divisions](#) in the way that people voted in the Brexit Referendum in Northern Ireland: 88% of those identifying as nationalist voted Remain; compared with only 34% of unionists. The leader of Sinn Féin has already called on the Dublin government to urgently convene a forum to [plan for Irish unity](#). Recent [polling](#) suggests 60%

of voters in Northern Ireland believe Brexit makes unification more likely within 10 years.

Against this backdrop of dysfunction and uncertainty, the Bingham Centre for the Rule of Law, the Bonavero Institute of Human Rights, Oxford University, and the Constitution Unit of University College London organised a joint conference in Oxford on 22-23 February 2019. The title was 'Remaking the UK Constitution' and it gathered politicians, scholars, lawyers, policy makers, civil servants and journalists from all parts of the UK and from other countries including Argentina, Canada, Iceland, Ireland, Switzerland and the US to discuss how the UK constitution could be reformed via processes capable of attracting broad support.

The conference covered a wide range of topics over two days. These proceedings will be distilled into an accessible public report to be published in the near future. An edited collection of the papers presented will also be published. The main topics covered were the following (please click links to see videos of each panel):

Session 1—Kate O'Regan (Chair), Robert Hazell, Stuart White, Alan Renwick. This was an introductory framing session. The panel provided an overview of the UK's constitutional reform in recent decades. There was also an introduction to fundamental concepts of constitution-making and a comparison of the arguments for and against codified, entrenched constitutions. The main ways in which contemporary democracies have developed proposals for constitutional reform were outlined, with particular focus on actors and mechanisms.

Session 2—Lord David Anderson QC (Chair), the Right Honourable Gisela Stuart, Joanna Cherry QC MP, Frances Foley, Anthony Barnett, Elliot Bulmer. The panel explored opportunities for building political consensus around the need for constitutional reform and what the process of remaking the UK constitution should be.

Session 3—Paul Gillespie (Chair), Laura McAllister, Sunder Katwala, Robin Wilson, Lesley Riddoch. The panel addressed the specific concerns of each of the four parts of the United Kingdom and how their interests could be incorporated in a constitution-making process.

Session 4—Jeff King (Chair), Matthias Mahlmann, Silvia Suteu, Richard Bellamy, Maartje de Visser, Peter C. Oliver. The panel discussed different methods for entrenching a new, codified UK constitution and also whether it would be a worthwhile pursuit.

Session 5—Adam Ramsay (Chair), David Farrell, Graham Smith, Arianna Giovannini, Udit Bhatia. The panel discussed how citizens' assemblies could help to settle controversial constitutional issues. This entails allowing a representative group of citizens to hear evidence from experts, deliberate on an issue and produce recommendations. Particular reference was made to the success of a citizens' assembly in Ireland on abortion.

Session 6—Udit Bhatia (Chair), Eirikur Bergmann, H  l  ne Landemore, Jeff King, Jon Elster, Roberto Gargarella. The panel explored possibilities for establishing a constitutional convention. For example, this could involve establishing a constituent assembly to draft a codified constitution.

Murray Hunt, Director of the Bingham Centre for the Rule of Law, closed the conference, reminding the audience that the UK is leaving a legal system of which it has been a part for 45 years and which provided the UK with a degree of constitutional entrenchment. He argued that this is a constitutional moment.

He emphasized the need to build a bridge from the conference discussions to the practical world of politics. In this regard, he proposed citizens' assemblies or other 'mini publics' (assemblies of citizens that are demographically representative of the larger population) as a means of achieving breakthroughs on deadlocked issues. This could begin with a series of such inclusive, deliberative processes on a bill of rights in each part of the UK, which could be the first of many constitutional reforms to be addressed in this way. The challenge, he stressed, is not to be paralysed by this constitutional uncertainty, but to seize the

opportunity for meaningful reform which Brexit presents.

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