Chapter 2: Constitutional Ferment in the United Kingdom: Towards a Republican Constitution

(draft)
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The drive for constitutional reform goes all the way back to the late 1970s, when lone intellectuals and political norm entrepreneurs raised the issue of a written constitution for Britain that would include a Bill of Rights. The term ‘norm entrepreneurs’ refers to political actors dissatisfied with the status quo who take action to change basic norms (Finnemore and Sikkink 1998). In the late 1970s, a coalition of cross-bench jurists in the House of Lords were calling for a modern, formal Bill of Rights (Norton 1991: 146). In 1976 Lord Hailsham proposed structural changes that would include

a much smaller House of Commons, a system of elective regional assemblies with limited powers and elected by methods different and in constituencies separate in extent from the reduced number of parliamentary constituencies, balanced by a second parliamentary chamber based on the regions and elected by a proportional system … and to some extent the adoption into our municipal law of the European Convention on Human Rights … which … would take the place of the existing system of judicial review founded on the old prerogative writs of certiorari, prohibition and mandamus. … (Hailsham of St. Marylebone 1990: 392)

These measures were meant to deal with the dangers of an ‘elective dictatorship’ where the government can completely dominate Parliament. Lord Hailsham’s phrase became iconic, especially for the Left, as one of the earliest calls for major constitutional reform, although he never in fact advocated a written constitution (Hailsham of St. Marylebone 1990). Intriguingly, Hailsham was a Conservative and apparently motivated by a desire to see the electoral system changed so as to undo the Labour Party’s hammerlock on government in his day. The same partisan strategic calculation would later motivate reformers on the Left too, but the difference is that what was an outlier position among 1970s Conservatives would become the norm with New Labour in the 1990s.

Devolution and electoral reform were the only constitutional reform issues that were taken seriously in partisan politics before the 1980s. Scottish devolution was on the political agenda of the Labour Party as far back as the early 1970s, when ‘the spectacular success’ of the Scottish National Party in the 1974 elections threatened its hegemony in Scotland and its chances of forming a majority government (Bogdanor 2009: 33). After eking out a wafer-thin majority, Labour proceeded to draw up proposals for Scottish devolution as a way of co-opting Scotland’s rising nationalism. Bills for Scottish and Welsh devolution were prepared, but were abandoned when the Scots rejected the Callaghan Government’s

1 Funded by COPOLIS.

2 It is excessively rare for a British government to be defeated in the House of Commons, in which they nearly always have a majority owing to first-past-the-post electoral system (Norton 1991: 146).
devolution plan in a 1979 referendum (Winetrobe 2011: 85-6). Thatcher’s Conservative government, which was strongly pro-Union scotched the idea immediately they won the elections in 1979. Yet, despite seeming failure in the 1970s, devolution stayed on the Labour Party’s agenda throughout the 1980s and the early 1990s (Labour Party 1983).

Once they were out of power, Labour too considered the reform the first-past-the-post electoral system in order to cut down the Conservative Party majority. Beyond devolution and electoral reform, however, the Labour Party’s constitutional reform agenda did not go until the 1990s. Labour had dominated British politics electorally, a post-war consensus which lasted until the fall of the Callaghan Government and the election of Margaret Thatcher in 1979. During this long reign, they had had plenty of opportunity to reform the constitution had they wanted to. Yet as late as the 1970s, Old Labour and most of the Left rejected the whole idea of constitutional revision as constraining their own power to carry through their agenda of state expansion and social change (Bogdanor 2009). Old Labour believed in the power of the people expressed through Parliament and their Marxist background made them sceptical of an updated Bill of Rights.

It was the Liberal Party (a forerunner of today’s Liberal Democrats) which was most self-interested in constitutional revision. The first-past-the-post electoral system produced such disproportionate Parliamentary majorities out of the merest electoral plurality as to render a third party’s situation hopeless. It will come as no surprise, then, that the first inklings of the movement for constitutional reform at the practical level of electoral politics may be traced to the Joint Commission on the Constitution set up in 1981 by the Liberal Party in alliance with the Social Democrats. Its purpose was to ‘examine the policies for reform of the British constitution, in particular of the electoral system … that our parties should present together at the next election for implementation’ (Joint Liberal/SDP Alliance Commission on Constitutional Reform 1983: 1). In addition to electoral reform the Joint Commission proposed the reform of both Houses of Parliament, Commons and Lords; a decentralisation that included regional devolution; a Bill of Rights; reforms of administrative law; and much greater freedom of information.

After Thatcher won election for a third term in 1987, the Labour Party, having spent a long night in the wilderness lasting nearly two decades, were forced to take stock of themselves and objectively review their competence. Their ideology outdated, they were on the prowl for fresh ideas. The necessity for self-criticism kept them open to outside influences. Vernon Bogdanor (2009: 48) explains Labour’s drive for constitutional reform arose from the resulting shift in ideology, a ‘natural consequence of a process of rethinking on the Left’. For many on the Left, the slogan of constitutional reform obviated the need to fill the ideological vacuum with anything more substantive. Other causes external to the Labour Party may have contributed, too. A ‘political realignment’ that weakened and volatilised political identities and voting behaviour, and an embittered public perception of political parties may well have ‘undermined support for the traditional “Westminster Model” of government and the old constitution’ (Bogdanor 2009: 48-9).

The contemporary agenda of constitutional reform began to take definitive shape with the rise of the movement styling itself Charter 88,that consisted of Left-leaning intellectuals. They were the single most influential civil societal force behind the drive for constitutional reform in the early 1990s. It was originated in 1987 by Stuart Weir, a British journalist and

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3 52% of those voting were in favour, but at 64% the turnout was so low that only 33% of the total electorate voted ‘Yes’. This did not meet the threshold of 40% required to implement devolution.
writer, editor of the *New Statesman* magazine, and a visiting Professor in the Government Department of Essex University. Weir had been editor of the Labour Party’s monthly *New Socialist* in the mid-1980s. Following the suggestion of American scholar Arthur Lipow, Weir and collaborators proceeded to appropriate the popularity and liberated symbolism of Czechoslovakia’s Charter 77 on the anniversary of 1968 and of the Glorious Revolution of 1688, and used it as a focal point of opposition to ‘Thatcherism’ (Weir 2008:3-4). In effect they exploited the struggle for freedom behind the Iron Curtain to legitimise changes in Britain radical enough to trend in unpredictable directions once the human rights jack-in-the-box is unpacked in greatly empowered courts. Charter 88 wove together several distinct and uncoordinated strands of constitutional reform programs and discourses that had been carried on by organisations such as the Constitutional Reform Centre, and the Electoral Reform Society (Weir 2008). They also enjoyed support mainly from the ‘chattering classes … intellectuals and artists prone to make public appearances and pronouncements’ (Norton 1991: 148).

A written constitution was Charter 88’s campaign goal. This agenda polarised the Left: almost everyone took sides for or against it. Richard Holme, for example, who was chairing the Constitutional Reform Centre in the late ‘80s ‘was alarmed by talk of a written constitution and advised us [Charter 88] in his silky, rather pedagogic way that we should drop it’ (Weir 2008: 5). Surprising also was the intensity of resistance by very many left wing lawyers: ‘They were hostile to the idea of a Bill of Rights, because it would empower unelected judges at the expense of an elected parliament’ (Weir 2008: 7).

A written constitution was Charter 88’s solution to what they perceived to be a shift toward authoritarianism under Thatcher. They campaigned vigorously to overhaul the British constitutional monarchy and to replace it with a republic; however, they never wittingly took direct inspiration from the USA (which Britain’s Left intelligentsia tends to despise). As one of the founders of Charter 88 put it:

> [T]he American constitution is nearly as bad as the British constitution. It is racist. The Senate is built-in racial … is a white supremacist institution. By giving equal representation to Wyoming or Dakota … you are building-in a white majority, a massive white majority and a rural one, right into the political system. Secondly, it is gerrymandered, the House of Representatives is not at all representative. Thirdly, The Supreme Court has now become politicised by its appointments and the presidency is in a kind of quasi-imperial position. The American constitution is in no way an example for us … Britain is now … mentally, and in very many other ways subservient to America, to American television because of the language. So people think that to have a constitution is to be like America. Whereas I think that to have a constitution is to become European. A much better constitution for me … is the German constitution with a strong constitutional court, a strong parliamentary system, a very fair electoral system, very strong Länder, very strong decentralisation within that framework … Germany has a proper constitutional framework and it has a constitutional culture, a serious constitutional culture. (Charter 88 2014).

Nevertheless, the centrepiece of their written constitution was to be a Bill of Rights and a activist constitutional court like Germany’s – in effect transforming Britain into an American-style republic *generically*, inasmuch as the German constitutional review model as conceived by Austrian jurist Hans Kelsen in the 1920s was in fact based on American judicial practice.
The big window of opportunity for these norm entrepreneurs came with the rise of New Labour. A party desperate for fresh ideas, after being out of power for more than a decade, Charter 88 provided them with a new agenda: constitutional change. John Smith, the leader of the self-styled ‘New Labour’ before Blair, was persuaded to take up the idea, reportedly without being keen on a master document. The agenda gained momentum after the 1997 Labour electoral landslide, when important changes like devolution in Scotland, Wales and Northern Ireland and the Human Rights Act incorporating the European Convention on Human Rights (ECHR) into British law were passed. After that, however, the reformist vision began to wilt, meandering into the ill-conceived half-measure of the House of Lords denaturing, which accomplished little more than removing most hereditary peers because they were Conservatives, then packing the Lords with Labour Party bundlers, or the shell-game of shifting the Law Lords into a Supreme Court. Electoral reform to supersede first-past-the-post was never undertaken. There were lesser revisions the constitutional status of which might be disputed, like the Political Parties, Elections and Referendums Act 2000, which regulated political donations and the conduct of referendums.

This chapter will now concentrate on the main reforms: devolution, the Human Rights Act (1999), the Constitutional Reform Act (2005) and attempts at a written constitution for Britain. The timeframe covers the Blair years and developments since then.

The Scottish Devolution

Until Scottish devolution came to be advocated, first by reformers in the 1970s and then with a vengeance in the 1990s as Thatcherism was superseded by New Labour, the Union had not been challenged since 1746. By 2014 devolution was threatening its dissolution.

New Labour’s commitment to devolution in Scotland was reputed ‘unshakable’, especially under the 1992-1994 leadership of John Smith (McDonald and Hazell 2007: 7). Other New Labour elites publicly supported Scottish devolution, too. As early as 1992 Gordon Brown, who was to succeed Tony Blair as Prime Minister in 2010, framed devolution as a path to self-government, democratisation, and greater protection of human rights (Brown 1992). New Labour’s 1997 Manifesto averred:

A sovereign Westminster Parliament will devolve power to Scotland and Wales … As soon as possible after the election, we will enact legislation to allow the people of Scotland and Wales to vote in separate referendums on our proposals, which will be set out in white papers. These referendums will take place not later than the autumn of 1997. A simple majority of those voting in each referendum will be the majority required. Popular endorsement will strengthen the legitimacy of our proposals and speed their passage through Parliament. For Scotland we propose the creation of a parliament with law-making powers, firmly based on the agreement reached in the Scottish Constitutional Convention, including defined and limited financial powers to vary revenue and elected by an additional member system. In the Scottish referendum we will seek separate endorsement of the proposal to create a parliament, and of the proposal to give it defined and limited financial powers to vary revenue. The Scottish parliament will extend democratic control over the responsibilities currently exercised administratively by the Scottish Office. (Labour Party 1997)

Devolution had been spearheaded by the Scottish Constitutional Convention, brought into session in 1989 by norm entrepreneurs who had drawn up a Claim of Right for Scotland declaring it a sovereign nation and demanding a Parliament with entrenched powers. With
one exception the Claim was subscribed by all then-serving Labour and Liberal Democrat MPs, including several destined to reach high office in British politics; viz. Gordon Brown, Prime Minister 2007-2010, and Alistair Darling, Chancellor of the Exchequer 2007-2010. By 2014, when the unintended consequences of devolution had put the Union in peril, the same political elites were fighting to keep it together, as witness Alistair Darling’s Better Together, a cross-partisan group which ran a thirty-month-long campaign to keep Scotland in leading up to the Scottish independence referendum.

The Scotland Act was enacted in Westminster in November 1998 following a two-pronged referendum in which 74.3% of the 60.4% turnout agreed a Scottish Parliament, and 63.5% that it should have ‘tax-varying powers’ (BBC Scotland 1998). The Act left some crucially important questions unresolved, which have come to haunt British politics ever since. One of the most important was the ‘West Lothian Question’: whether non-English MPs sitting in Westminster ought to have the right to vote on laws binding England when English MPs may not vote in the devolved parliaments (Hazell 2007a). Another is the relationship of the Scottish to the UK Parliament. Section 28 of the Scotland Act provides that the former ‘may make laws, to be known as Acts of the Scottish Parliament’, yet that ‘[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland’ (Section 28, Scotland Act 1989). This provision was meant to forestall potential conflicts between the UK Parliament, which retains its legislative powers in full, and the Scottish Parliament with power to legislate for Scotland. The flash point was contained by that most British of institutions, the constitutional convention: ‘In order to avoid conflict, the Government undertook not to seek nor support relevant legislation in the UK Parliament without the prior consent of the Scottish Parliament’; yet by mid-2000s the Sewel Convention had given rise to much contestation (Bowers 2005).

Another unresolved issue was public finance: How shall the devolved administrations be financed? As of 2014 this was being handled by another convention, the so-called ‘Barnett Formula’, a mechanism designed in the 1970s by the Chief Secretary to the Treasury, Joel Barnett. The Formula distributes revenue to constituent parts of the UK in proportion to population in policy domains which the devolved administrations are responsible for. The key principle is that any increase or reduction in expenditure in England will automatically lead to a proportionate increase or reduction in resources to the devolved governments. Moreover, revenues are appropriated to each devolved administration en bloc so that it can allocate them as it sees fit. As the Formula determines annual increases in appropriations (the increment), so each year the increment is added to the previous year’s appropriation. By 2009 this had become a significant proportion of the UK budget. This prompted the House of Lords to inquire into the fairness of the Formula compared to alternatives, which concluded ‘the Barnett Formula should no longer be used to determine annual increases in the block grant for the United Kingdom’s devolved administrations’, and that a new system should replace it (Select Committee on the Barnett Formula 2009). At the time of writing new proposals have been formulated to revise but not scrap the Barnett Formula.

The Scotland Act’s repercussions may indeed make it one of ‘the most significant pieces of constitutional legislation’ enacted by the Blair Government (Winetrobe 2011: 85). Devolution has undoubtedly strengthened the role of courts, which were empowered by the terms of the ‘devolution constitutions’ to act as de facto constitutional courts, ‘interpreting and applying the legislation that created them and stipulated their powers’ (Norton 2003: 545).

The most significant consequences of all must be its impact on the Union. The first Scottish Parliament, located at Holyroo, was elected in May 1999. The vote distribution
was the following: Labour – 33.64%; SNP – 27.26%; Conservative – 15.35%; Liberal Democrats – 12.43%; Green and others – the remaining 12% of the vote. The result was a government formed by the Labour Party and the Liberal Democrats. By 2011, however, the Scottish Parliament was dominated by the SNP which won 69 out of 129 seats in that year’s elections under the leadership of Alex Salmond, the elected First Minister of Scotland. This was considered to be a ‘historical result’ that saw the unseating of many senior Labour politicians (Channel 4 2011). It had been the culmination of SNP’s progressive ascent to power since devolution. The consolidation of SNP’s domination of Scottish politics has turned out to have potentially crucial consequences for the Union as a whole. The SNP it has clearly fomented the drive for the full independence of Scotland, a matter decided by referendum on 18 September 2014. The fear of the unionists was that if a majority of the Scottish people voted ‘Yes’ on the question ‘Should Scotland be an independent country?’, Scotland will become a sovereign country and the Union will be dissolved.

The debates leading up to the referendum wrestled with complex constitutional issues about what happens if Scotland becomes a separate country. One of the most heated debates was over the currency: what would Scotland’s relationship to the British pound and the Central Bank be? The independence leaders proposed that Scotland continues to enjoy a currency union with the UK, a proposal rejected by all major parties, Conservatives, Labour and Liberal Democrats (Black 2014). The Treasury, too, advised against it on the grounds that: (1) a currency union goes hand in hand with ‘a closer [political] union between the peoples involved’, not operate against the background of a weakening union; (2) Scotland’s banking sector is disproportionately large to its national income, running the risk that the UK would have to supply the money to keep it liquid and solvent; (3) the UK taxpayer might have to bail out a bankrupt Scottish financial sector; and (4) the spending and tax commitments of the Scottish Government are at odds with forecasts of North Sea revenues (Macpherson 2014).

In the end independence was narrowly rejected: 44.7% of voters voted in favour, and 55.3% voted against. Even though the Scots turned independence down, the issue is far from being settled. Many commentators have predicted that Britain will continue on the path of devolution (Wright 2013: 115). Indeed, further promises were made just ten days before the referendum, following a YouGov poll that looked like Yes Scotland’s campaign for independence had taken a lead. This alarmed Westminster into ‘buying off’ Scottish voters with promises of more devolved tax and spending powers if the pro-Union vote wins (BBC News Scotland 2014).

Devolution is ongoing, and the post-referendum form it will take is still being decided. Lord Robert Haldane Smith of Kelvin was commissioned in November 2014 to chair a commission made of representatives of all the main parties in the Scottish Parliament, who agreed the Smith Report as basis for the legislation to devolve more powers to the Scottish Parliament (The Smith Commission 2014). But it also contains recommendations of constitutional significance for the Union as a whole – that the Scottish Parliament is made irrevocable and that the Sewel Convention is put on a statutory basis – which query that corollary of parliamentary sovereignty that no parliament can bind its successors. The proposed permanence of these devolved institutions would appear to do just that (Elliott 2014a); broaching an issue that is gaining prominence in British legal circles that reality as practiced has in fact superseded Diceyan theory, in that certain statutes may have come to be regarded as more ‘constitutional’ than others and cannot realistically be unmade by any Parliament (Peterson 2014). The ongoing debate is rich with intrigue: Was Dicey really wrong? What is the lifespan of a constitutional statute? He claimed that all endeavours by
Parliament to bind future Parliaments had ended in failure, suggesting that they may have succeeded for a time. What, over the centuries, has been the fate of statutes that on their face were intended to be constitutional? Have most of them stood the test of time at least as long as codified constitutions? The American constitution is an anomaly of perdurability; most written constitutions last nowhere near as long. Could written constitutions and constitutional conventions and statutes endure rather to the extent that they are useful than that they are hard to repeal (for other motives)? Equally intriguing are self-referential ‘super-statutes’ which make themselves irreversible in order formally to distinguish ordinary statutes from constitutional ones, such as a statute providing that, if it is passed by a two-thirds majority of the Commons, any statute passed thereafter by a two-thirds majority shall not be construed in a court of law as repealed unless it is repealed by a two-thirds majority. Setting aside the question of its wisdom, such a super-statute and the laws enacted under it might be tantamount to a written constitution.

The Human Rights Act (1998)

One of the first constitutional reforms of the New Labour Government of Tony Blair was the Human Rights Act (HRA) 1998. It domesticated the European Convention on Human Rights (ECHR) by way of imposing on the British courts the obligation to interpret Acts of Parliament in the manner most compatible with the ECHR.

Crucially, the HRA eschewed empowering any constitutional or other court to strike down Acts of Parliament. The circumspect design has been attributed to Lord Irvine of Lairg, the man appointed Lord Chancellor by PM Blair himself immediately after his election victory in 1997. He had been the supervising barrister during Blair’s (and wife Cherie’s) pupillage, and his appointment had long been settled after the recommendation of Blair’s predecessor John Smith; whom Irvine had served as his shadow Lord Chancellor. Irvine had been a key supporter and keen advocate of the Human Rights Act, which John Smith also supported. The Act prohibits judges to nullify Acts of Parliament, limiting them to notifying Parliament in case they find an Act ‘incompatible’ with the HRA. This procedure shielded Parliament’s supremacy from judicial ambition.

Rights were expanded under the Conservative government: the individual’s right of access to information held about them on computers; rights of access to local authority meetings, documents and records; Personal Files Act (1987); rights of victims and suspects e.g. the Police and Criminal Evidence Act (1984); the Victims’ Charter (1990), seeking to ensure that the victims do not suffer twice (p. 11); expansion of the rights of women and children, viz. the Finance Act (1988) (12), the Children Act (1989); the rights of those who have grievances against agencies of the State, viz. the 1989 Security Service Act (Patten 1991: 12-3). But, restricting rather than expanding State power, these were not the kind of rights that counted with the Left.

The political and intellectual origins of bills of rights as the contemporary Left conceives it has been traced back to the 1970s and the 1980s, when –

a growing number of people favoured introducing to domestic law at least those rights which people could already enforce in Strasbourg. Some went further arguing for a distinctively British bill of rights, reflecting British values including commitment to the rule of law. (Feldman 2011: 66)

The entrenchment of a bill of rights in a written constitution has also stood atop the agenda for constitutional change of Charter 88:
The time has come to demand political, civil and human rights in the United Kingdom. The first step is to establish them in constitutional form, so that they are no longer subject to the arbitrary diktat of Westminster and Whitehall … our rights in the United Kingdom remain unformulated, conditional upon the goodwill of the government and the compassion of bureaucrats. To create a democratic constitution at the end of the twentieth century, however, may extend the concept of liberty, especially with respect to the rights of women and the place of minorities. (Unlock Democracy 2013)

And a bill of rights was included in the first fully fledged model (written) Constitution for Britain drafted by the Institute for Public Policy Research (IPPR), a Labour think tank (Institute for Public Policy Research 1991). The IPPR’s Bill of Rights was comprehensive, seeking, like all such documents, to settle many questions of public policy in advance (Lester, Cornford et al. 1990).

Surprisingly, Labour’s electoral manifesto as late as 1993 included but vague, perfunctory mention of rights, and nothing like the Human Rights Act:

Labour’s aim is to create equal rights at work for women and to overcome the effects of past discrimination … [and to] [r]estore and extend women’s employment rights to include part-time and home workers … Labour gives the highest priority to the protection of human dignity, civil rights, democracy and freedom, which will be reflected in all that a Labour government does. (Labour Party 1983)

Of all the major political parties, only the Liberal Democrats’ manifesto pledged a Bill of Rights:

Britain’s political institutions need thorough-going reform: stable and representative government, elected Parliaments in Scotland and Wales, decentralisation of power to the English regions and to local government, freedom of information and a Bill of Rights … Liberal Democrats will: [f]ight discrimination by incorporating the European Convention on Human Rights into UK law and then extending it into a full UK Bill of Rights. This will reinforce existing protection in British courts against discrimination on the grounds of sex, race, age, disability, religion or sexual orientation. We will set up a Commission on Human Rights to assist individuals to take legal action in cases of discrimination or other breaches of the rights guaranteed in the Convention. (Liberal Democrats 1992)

By the time of the 1997 election campaign, however, New Labour had aligned itself with the rights movement, and announced plans for a two-stage reform leading to enactment of a ‘British Bill of Rights’. John Smith had favoured, but Tony Blair while shadow Home Secretary had disfavoured a Bill to incorporate the European Convention, and was said to have ‘never been wholeheartedly convinced of its worth’ (Feldman 2011: 66). Although himself reluctant, he allowed others in his circle who were keen on this particular reform to carry it out. Blair’s coolness may explain why, once having incorporated the ECHR into the Human Rights Act, Labour abandoned any idea of expanding it into a ‘British’ Bill of Rights.

Just such a British Bill of Rights is what the Conservative Party promised in the electoral campaign preceding the 2010 elections (Conservative Party 2010). The motive seems to have been the perceived need of a ‘better balance’ in the relationship between politicians and judges (Wright 2013: 33). These plans have come to naught as of 2014, as PM
Cameron failed to attract enough support from his own party. Nonetheless, the idea has continued to surge in popularity hand in hand with a ‘hardening attitude’ toward the Human Rights Act and the ECHR its root (Elliott 2014b). Disenchantment with the latter at the highest levels of the Conservative political elite is one peculiar aspect of constitutional change in Britain that sets her apart from most of Europe. Policy Exchange, a Conservative-affiliated think tank, has called for a renegotiation of Britain’s relationship with the Council of Europe, and withdrawal if reform proves unsuccessful:

The UK should open time-limited negotiations with the Council of Europe to make substantial reforms to the way that the Court is run and its caseload managed. Such reforms would include new procedures to assure the judicial competence of new judges and the greater efficiency of the Court. The negotiations would seek to find agreed ways to ensure that the judges at Strasbourg give greater discretion to the domestic judges of each member state. If such negotiations are unsuccessful, the UK should consider withdrawing from the jurisdiction of the European Court of Human Rights in Strasbourg and establishing the Supreme Court in London as the final appellate court for human rights law. (Pinto-Duschinsky 2011: 13)

This view was echoed in 2013 by Home Secretary Theresa May, who pledged –

it’s ridiculous that the British Government should have to go to such lengths to get rid of dangerous foreigners. That’s why the next Conservative manifesto will promise to scrap the Human Rights Act. It’s why Chris Grayling is leading a review of our relationship with the European Court. And it’s why the Conservative position is clear – if leaving the European Convention is what it takes to fix our human rights laws, that is what we should do … Those are issues for the general election, when Labour and the Lib Dems will have to explain why they value the rights of terrorists and criminals more than the rights of the rest of us. In the meantime, we need to do all we can now to limit the damage. (May 2013)

Were the Human Rights Act to be abolished, it is would almost certainly be replaced with another act, like the British Bill of Rights promised in 2010. Some believe that such a Bill would make little difference in practice; more, however, think it an opportunity to bolster human rights in Britain by deeper entrenchment and by the transfer of greater powers to judges relative to Parliament and the Executive (Hazell 2007b: 31). Whether what it bolsters will be procedural rights absent in the ECHR, like the right to ‘trial by jury’, or substantive rights like ‘the right to be free from torture’, remains to be seen (Feldman 2011: 83). What is undoubted is that a British Bill of Rights would create an window of opportunity that human rights entrepreneurs would seek to exploit.

The consequences of the HRA still transpire, but one already disclosed is the reshaping of judiciary-elected branch power relations. Supreme Court judges themselves opine that the political effect of the Act has been to fortify the judiciary:

There is a real dialogue and Parliament knows that what it has enacted, is going to be scrutinised in the courts and it may be reinterpreted within the requirements of the Human Rights Act, or in the case of the European Union with regard to the European (Communities) Act. Or, ultimately, in the context of Human Rights, it may actually declare it incompatible, and so I think the British constitution has actually established quite a fruitful and interesting relationship which … perhaps gives courts more freedom to develop the law
than they may have in continental eyes. (Mance Jonathan Hugh (Lord) 2014)

And –

the Human Rights Act has transformed the nature of public law cases … when I get a public law case now, there will almost invariably be a human rights aspect to the case. … [J]udges have had to think about things in a different way, so it has certainly had that impact. And when I compare what has happened in the country I came from originally, Australia, which does not have a Human Rights Act, public law there has remained more unreconstructed as it were … so much more is determined by the courts these days, so it has had an effect. (Cranston Ross (Sir) 2014)

The Constitutional Reform Act (2005): The New Supreme Court and the Revision of the Lord Chancellor’s Powers

The HRA was not the only piece of legislation with repercussions for Parliament-judiciary relations. Three notable revisions thereto were embodies in the Constitutional Reform Act (CRA) 2005: the Lord High Chancellor of Great Britain (‘Lord Chancellor’) and Leader of the House of Lords was deposed as head of the judiciary, the Law Lords were removed to the new Supreme Court separate from the Houses of Parliament but vested with the old jurisdiction of the Lords’ Appellate Committee, and a Judicial Appointments Commission was established to select and discipline the judges of England and Wales.

In its 2003 White Paper Constituutional Reform: A Supreme Court for the United Kingdom the Government made the case for the Act. It took many MPs by surprise, who complained against the Government’s ‘back-of-the-envelope changes’ that they had been made without consultation (Dominic Grieve, Conservative MP, House of Commons 2005). Controversial too was the choice of enactment procedure. The bill was committed to a select committee. This circumvented debate and stultified backbench resistance by drastically minimising the number of MPs who might participate in deliberations (Fairbairn and Broadbridge 2005). The Conservatives vehemently opposed this way of proceeding, arguing that a bill of such constitutional significance ought to be debated by the full House – (a proposal which the government rejected) – lest it fails to ‘command widespread approval and stand the test of time’ (Dominic Grieve, Conservative MP, House of Commons 2005).

The Lord Chancellor

Disempowering the Lord Chancellor was a key feature of the CRA, which transferred most of his powers as head of the judiciary [Minister of Justice] – some four hundred statutory functions – to the Lord Chief Justice of the Supreme Court, an office the Act also created, or to the new Judicial Appointments Commission. The Lord Chief Justice not the Lord Chancellor was thenceforth to decide ‘where judges sit, and the type of cases they hear’ (UK Government 2014).

The Lord Chancellor is one of the oldest government offices in Great Britain, dating as far back as the Norman Conquest of 1066, if not farther. He was responsible for the independence and proper functioning of the judiciary. At the time of the 2005 reform, he combined the roles of Executive Cabinet minister with presiding officer of the House of Lords in Parliament, and head of the judiciary of England and Wales. Himself a judge, the leader of the Court of Chancery, his key judicial function was to appoint all the other judges.

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4 In Britain, White papers are documents produced by the Government that set out the government’s policy on a particular issue. They constitute the basis for a Bill to be put before Parliament.
judges. Almost as importantly, he ‘represent[ed] the judiciary in the heart of Government’ (House of Commons 2005). The Lord Chancellor’s concomitant responsibility to all three branches of government constituted an original and effective check and balance even in the absence of a formal separation of powers. Institutional design resorts to the separation of powers in order to set up checks and balances that do not already exist. But where they do exist ‘natively’, it is not always appreciated that a separation of powers per se needs not be their basis. As a member of all three competing ‘estates’, or divisions of Parliament (a.k.a. ‘the State’) – i.e. both Houses as well as the judiciary qua officers of the Crown (together with the Bar qua officers of the courts), – the Lord Chancellor was subject to being pulled at once three different ways. Having to render an accounting to all and sundry, he was in no position to please one at the expense of all the others. In the words of one Chancellor, Lord Irvine, he thus became ‘a bulwark’ of the British constitutions … ‘withstand[ing] pressure from all sides’ (quoted in BBC News 2001).

The fiercest opposition to the Lord Chancellor’s demotion came from the House of Lords, forcing the Labour Government to compromise on certain aspects. One compromise was to accept, at the Lords’ insistence, retention of the title and formal office of Lord Chancellor, albeit in a much diminished format, in lieu of the original intention to abolish it altogether (Fairbairn and Broadbridge 2005). A formal Concordat was also found necessary ‘because of the alarm of the judiciary’, whose fear was that ‘this measure would constitute a serious transfer of power to the Executive that would affect the independence of the judiciary’ (Dominic Grieve, Conservative MP, House of Commons 2005). But these were marginal compromises compared to the enormity of the transformation. Labour’s crushing majority at the time ensured that the Bill was not struck off.

The Concordat was an arrangement where the Lord Chief Justice would in practice share with the Lord Chancellor some of his new responsibilities for the administration of justice, in a sort of partnership. It was understood, however, that in formal constitutional terms the Lord Chief Justice was the ‘senior partner’ (House of Lords 2007). The Lord Chancellor’s attenuated role is to appoint judges upon the recommendation of the newly created Judicial Appointments Commission. Only one candidate, supposedly selected on merit alone, is put up for each vacancy, so that after consulting the Lord Chief Justice about this prospective candidate, the Lord Chancellor may do no more than issue a one-off veto with a request for reconsideration (House of Commons 2005).

The evidence of practice shows that the Lord Chancellor feels free to veto virtually none of the recommendations of the Judicial Appointments Commission: since 2006 only five out of approximately 3000 or a sixth of one percent; which means that judges are now ‘heavily involved in selecting their own colleagues’ (Malleson and Gee 2013). Thus, in practice, developments on the Continent, where the trend has been towards giving autonomy to the judiciary branch to govern itself, are at work in the UK as well, only in a different guise.

The debilitation of the Lord Chancellorship was not welcomed at all by the Conservatives, who much preferred to conserve its dual capacity of judgeship and Member of the Lords. They typically argued that ‘a judge representing the judiciary in the heart of Government is among the principal important functions that the Lord Chancellor has fulfilled’ (Dominic Grieve, Conservative MP, House of Commons 2005). It is notable that strong opposition to the Bill came from within the Labour Party itself. Mackay Irvine, the Lord Chancellor who Prime Minister Blair himself had appointed, was so vociferous in his opposition that Blair felt obliged to replace him with a more sympathetic appointee, Lord Falconer of Thoroton, who proceeded to shepherd enactment of the Bill.

The Lord Chancellorship has been further debilitated by the current Conservative-Liberal
Democrat Coalition. The Crime and Courts Act 2013 has transferred the Lord Chancellor’s power to appoint judges below High Court level, viz. Circuit Judges and District Judges, to the Lord Chief Justice and the Senior President of Tribunals (Crime and Courts Act 2013, Schedule 13 Part 4b).

The Supreme Court

The highest appellate court of the land for full six hundred years, known since 1947 as the Appellate Committee of the House of Lords, had been the Upper House of Parliament. The 2003 White Paper proposed to transfer this jurisdiction to a Supreme Court for the United Kingdom, a judicial body separate from other English, Welsh, Scottish or Northern Ireland courts. The Law Lords, formerly of the Appellate Committee, would cease to sit and vote in the House of Lords. The Supreme Court’s power would be limited: the proposal stopped short of creating a US-style Supreme Court with power to ‘strike down’ acts of Parliament. Appointments to the Supreme Court would be devolved to a dedicated Commission. The Supreme Court’s power would be limited: the proposal stopped short of creating a US-style Supreme Court with power to ‘strike down’ acts of Parliament. Appointments to the Supreme Court would be devolved to a dedicated Commission. The Supreme Court would be accountable to the extent of being obligated to produce an annual report to Parliament, and judges might be required to appear and testify before committees. Candidates proposed for appointment may also be examined by parliamentary committees (Department for Constitutional Affairs 2003). The Supreme Court started up in 2009.

The Department of Constitutional Affairs claimed that the revisions were needed to ensure judicial independence; however, little if any hard evidence was ever provided of any real problems. Even Labour supporters had to admit that the decisional independence of judges – that which matters most to the quality of justice on the ground – had never been an issue of concern in Britain; nor had the Law Lords’ professionalism ever been in doubt (House of Commons 2005). Even Lord Bingham, perhaps the most influential norm entrepreneur lobbying for a Supreme Court, admitted the sterling quality of the Law Lords: ‘Most would … agree that the House [of Lords] has, not least in relatively recent times, included among its members judges of outstanding distinction, erudition and wisdom’ (Bingham 2002).

Some Lords found the lack of empirical evidence in support of reform and the influence of ‘some’ legal experts particularly problematic:

I am reminded of the recent judicial pronouncement in the case of sudden cot deaths that the evidence of expert witnesses alone is not enough. The experts’ views must be accompanied by material evidence before an accused should be found guilty. We should apply the same test to the proposals for a Supreme Court. We have the current fashionable view of some if not all legal experts, but there is not a shred of factual evidence that damns the Appellate Committee. (Lord Craig of Radley, Crossbencher, House of Lords 2004)

Such evidence raises the question as to why the abolition of the Law Lords was necessary, and whether the reformers harboured ambitions for the stricter separation of powers that in many parts of Europe (e.g. Italy, CEE) has led to the de facto construction of the judiciary as a ‘State within the State’ (Parau 2013a). Who drove this transformation and why? Are the norm entrepreneurs of it part of the transnational legal professional network which has

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5 Judges are to be appointed by a Selection Commission that is set up whenever a new vacancy arises, and is composed of the President and Deputy President of the Supreme Court plus one member each of the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission (Constitutional Reform Act 2005).
been found promoting across Europe a paradigm of judicial autonomy and supremacy over the elected government? (Parau 2012; Parau 2014)

The remote consequences of creating a wholly new institution like the Supreme Court have yet to transpire. Some opine the Supreme Court is unlikely to mar the English judiciary’s impeccable reputation for decisional independence. Others think it may make a difference on a symbolic plane by creating a ‘Supreme Court identity’ for top judges (O’Brien 2011). This might embolden them to push the formal boundaries of their competence, just as their counterparts in other countries, from the US to Israel to France, have done. An upsurge in conflicts between the Supreme Court and politicians would then ensue. A few instances of conflict have already been recorded; e.g. between Chief Justice Lord Phillips and Minister of Justice Kenneth Clark over who shall have the last word on budgetary allocations to the courts, which made headlines in 2011.

All of these constitutional changes taken together could suggest that the Blair revisions and their elaboration under the Coalition have launched the British judiciary on the same path as the rest of Europe toward judiciary autonomy and impunity. The recent conflict between elite judges and the Ministry of Justice over budgetary administration could be interpreted as evidence of pressure from unknown sources being brought to bear on the Executive for greater empowerment of the judiciary, just as in Europe (Hazell 2007a; Parau 2013a).

Equally important are the consequence for the House of Lords. The demolition of the Lord Chancellor weakened the Lords, reinforcing an earlier move in this direction in the form of the House of Lords Act (1999) that slashed the number of hereditary peers from 750 to 92. This disempowered the Conservatives, for the hereditary peers were mostly Conservatives. Since then the Lords has been subjected to waves of partisan packing and counter-packing. Blair appointed 374 new peers to balance the traditional Conservative majority. Now the Conservative-Liberal Democrat Coalition has appointed 160 peers. This kind of behaviour is similar to court packing, if not indeed worse, as no credentials of any kind are needed; appointment to the Lords is now wide open to campaign finance bundlers and other partisan hacks of the kind that used to be paid off by appointment to minor ambassadorial posts. The supersizing that has ensued has reportedly fragmented the House, debilitating the carrying on of business.

The check and balance that the House of Lords used to have over the House of Commons is now purely partisan. Though the hereditary peers have traditionally been Conservatives, they were motivated rather by conviction than electoral motives. They played a crucial role in the British system of checks and balances which, as Blackstone noted, used to operate between social classes not branches of government; the Lords in particular were a brake on the headstrong partisan majorities in the House of Commons. Aristocrats cannot of course be popular, but bundlers and hacks are just as unrepresentative and even less reputable and moreover lacking all gravitas. Hereditary peers have an ancient family tradition stretching back centuries that they were fully aware of and probably mostly committed to. This too is a check and balance on demagogues and their control of State institutions. They inspired at least some respect, even when disliked. Hacks and bundlers are neither liked nor respected. In time, they may come to inspire notoriety less confidence in the nation than hereditary peers.

The upshot of it all is that the Blair government has enacted the most radical reform of the British constitution in modern times. Devolution has moved Britain toward federalism, the House of Lords was stultified not least by the disempowerment of the Lord Chancellor in favour of a taxonomic separation between Legislative, Executive and Judiciary. Yet Blair was not committed to a written constitution and stopped short of it – to the disappointment
of many on the Left.

**A written constitution for Britain**

Whether or not to reduce the uncodified British constitutions to a single document is not an issue in most of Europe. In Britain it has become one of the main cleavages between those who wish radical constitutional revisions and those content with *status quo*. To be sure, the British constitution is in fact ‘written down’ in one form or another – either in statutory or common law. Should all written sources be gathered together in a single legal instrument, ‘it would make a vast and impressive volume’ (Wright 2013: 17). But the debate has never been about consolidating in one master document what exists already, but about drafting a constitution from scratch in a grand-schematic, American-style Constitutional Convention.

A written constitution was central to Charter 88’s agenda:

The draft [Charter] called for a new constitutional settlement, based on ten demands, the most important of which was for a written constitution … It is … to Charter’s credit that talk of a written constitution … [which] is now [2008] more or less routine. Then [in 1988] was positively revolutionary. (Weir 2008: 4, 5)

In their manifesto, Charter 88 called for a ‘new constitutional settlement’ that would:

- ‘Enshrine, by means of a Bill of Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression.
- ‘Subject executive powers and prerogatives, by whomsoever exercised, to the rule of law.
- ‘Establish freedom of information and open government.
- ‘Create a fair electoral system of proportional representation.
- ‘Reform the upper house to establish a democratic, non-hereditary second chamber.
- ‘Place the executive under the power of a democratically renewed parliament and all agencies of the state under the rule of law.
- ‘Ensure the independence of a reformed judiciary.
- ‘Provide legal remedies for all abuses of power by the state and the officials of central and local government.
- ‘Guarantee an equitable distribution of power between local, regional and national government.
- ‘Draw up a written constitution, anchored in the idea of universal citizenship, that incorporates these reforms’. (Unlock Democracy 2013)

The idea of a written constitution was taken up by IPPR, a Labour-associated think tank that in 1991 published a detailed model of a written Constitution (Institute for Public Policy Research 1991).

If PM Blair does not appear to have ever entertained the idea, his successor Gordon Brown (2007-2010) is remembered for his commitment to it (Kelly 2014). In Brown’s own words:

> [T]he question of a written constitution … [is] an issue on which I hope all parties can work together in a spirit of partnership and patriotism. […] I have
asked the Cabinet Secretary to lead work to consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document … And if we are to decide to have a written constitution, the time for its completion should be the 800th anniversary of the signing of the Magna Carta in Runnymede in 1215. (Brown 2010a)

Brown’s constitution was designed to: (1) limit Executive powers, e.g. over deployment of troops abroad, the dissolution of Parliament, the recall of Parliament, and the ratification of international treaties; (2) make Governments more accountable; (3) invigorate democracy, e.g. a substantially or wholly elected second chamber; and (4) develop a British statement of values and a ‘review of British citizenship’ (Brown 2010b: 13). His efforts did not bear fruit; the financial crisis diverted all energies and attention to more pressing issues.

The drive for a written constitution was revived under the Conservative-Liberal Democrat Coalition. In 2010, as soon as the Coalition took power, Liberal Democrat Deputy Prime Minister Nick Clegg initiated the creation of a Political and Constitutional Reform Select Committee by the House of Commons. It was given a broad remit, ‘to consider political and constitutional reform’ (Political and Constitutional Reform Committee 2010).

Under the Chairmanship of Labour MP Graham Allen, this remit has been interpreted to include the issue of a written constitution for Britain. Allen has been described as a ‘long-term champion of a written constitution’ (Atkins 2014). The Committee produced a study intituled Mapping the Path to Codifying – or not Codifying – the UK’s Constitution, which included inquiries into the role of the judiciary, and how it might change under a codified constitution; and a British Constitutional Convention (Political and Constitutional Reform Committee 2013a ; Political and Constitutional Reform Committee 2013b). The work on a written constitution culminated with the publication of the New Magna Carta in 2014, on which the Committee are currently carrying on a public consultation. A final report will be presented to the Government ahead of the 2015 general election. The New Magna Carta is a blueprint of three alternative pathways or successive stages toward codifying the British constitution in some form (Political and Constitutional Reform Committee 2014).

Committee Chair Allen worked in close collaboration with academia and academic norm entrepreneurs such as the Centre for Political and Constitutional Studies at King’s College London. Founded in 2010, the Centre is led by Robert Blackburn, a lawyer and Professor of Constitutional Law (Political and Constitutional Reform Committee 2014: 10). Although the Centre claims to be ‘politically non-aligned’, its Left tendency is noticeable. Blackburn is a former member of the IPPR Commission that drafted the 1991 model constitution. One of the Centre’s Directors is Professor Vernon Bogdanor, a member in 1981 of the Joint Commission of the Social Democrat and Liberal Parties that made recommendations for constitutional change (Joint Liberal/SDP Alliance Commission on Constitutional Reform 1983: 1). Notable, too, was the sponsorship of the Joseph Rowntree Reform Trust set up by English philanthropist Joseph Rowntree, and the Nuffield Foundation established by industrialist William Morris, Lord Nuffield. In the past Rowntree has funded the Liberal and Social Democratic Parties, and more recently their 1988 merger, the Liberal-Democratic Party (The Joseph Rowntree Reform Trust Ltd. 2004). Charter 88 would not likely have made significant progress had they not been chosen by Trevor Smith, chairman of the Joseph Rowntree Reform Trust, for funding (Smith 2008 ; Weir 2008). The involvement of ‘repeat players’ who were involved in spearheading constitutional reform in the late 1980s and early 1990s shows that the Left is still waiting for their ‘window of opportunity’.
The Conservative position on these developments has been puzzling. Generally, they resist any idea of a codified constitution, preferring the traditional mix of Parliamentary statutes, political conventions, and case law. Yet some Conservative pundits (likely a minority) take it seriously. Writing for The Telegraph, Philip Johnston notes that: ‘The liberal Left incline towards a US-style constitution, enshrining in one place what they would consider to be the basic rights of the citizen. Yet if we had one, I suspect the Right would be its greatest champions’ (Johnston 2014). The argument goes that the Conservatives would favour a written constitution on the basis that it might prevent the erosion of liberties due to EU membership. The EU would be less able to ‘chip away’ at a British sovereignty that was etched in stone in a master document; which would prevent British citizens being extradited to a jurisdiction which lacks habeas corpus. None of these claims can be taken seriously. A constitution would not prevent EU law from binding Britain, as suggested by the US Supreme Court precedent in Missouri v. Holland (the enumeration of limited powers in the United States does not limit assumption under treaty of powers not enumerated); while an Act of Parliament is sufficient protection against extradition of British citizens on a European Arrest Warrant. To what extent such views are shared by Conservatives cannot be determined at this point. It ought to be treated with caution, as pundits may be seeking to set an agenda by announcing that it is already there.

At least in the beginning, Conservatives were quick to point out the feet of clay the project stands on. One of the thorniest controversies ensnaring the writing of a constitution is the question of authorship. The Constitutional Mania, a policy paper written twenty years ago by Kenneth Minogue, Emeritus Professor of Political Science and Honorary Fellow at the London School of Economics, and published in 1993 by the Conservative think tank, the Centre for Policy Studies, points out what must have been of concern to a sizeable number of Conservatives: ‘Who shall draft the new constitution?’ or more precisely ‘Who shall not draft it, who will be left out?’ And for that matter, ‘Who should one trust? If none of the reformers can be trusted, what legitimacy will they have?’ (Minogue 1993). This brings to the fore an uncomfortable universal truth: constitutions are written exclusively by political and intellectual elites (cf. Galligan 2013; Parau 2013b). The implication is that none of the prospective drafters can be trusted, as none are genuinely representative:

From whom today would you buy a new constitutional settlement? From those who have so wisely and brilliantly conducted the affairs of the Labour Party in recent decades? From a Conservative Party whose tenure in office over fifteen years is precisely what has provoked many to seek a constitutional salvation they do not find in ordinary politics? Or would you put your trust in academic constitutional experts? You may find they do not always agree among themselves. Or judges perhaps? Or are you happy, perhaps, with the actual constitutional changes which are quietly and furtively descending upon us from the federalists in Brussels? Even the most light-hearted projectors of a new constitutional settlement might be expected to pause when they contemplate the hideous question of who will draw up these new proposals. (Minogue 1993: 13)

Indeed, the question of legitimacy is the pivotal one. Who can authorise the engineering of society? Once enshrined, a constitution ‘corners’ those who discover too late that they did not want to be engineered thus, or in ways no one intended; yet little can be done because a written constitution is far harder to amend than an Act of Parliament is to repeal. Minogue also feared lack of coherence in the reformers’ agenda: there will be too many authors, too much rivalry and dissension to yield an output superior to the result of centuries of organic evolution.
The gambit of calling a Constitutional Convention has been discussed especially in legal academic circles in recent years. The thorniest issue is how to set it up. Some propose that it is entirely elected; others that half are selected by lot (Bogdanor and Vogenauer 2008). It is noteworthy that prominent constitutional scholars disfavour selection by lot, despite the undeniable fact that this would be the most democratic option of all.

Elite academics like Bogdanor and Vogenauer favour a Convention of like-minded persons who prefer change to the status quo: ‘An alternative suggestion is a representative but non-elected constitutional Convention analogous to that which met in Scotland from 1989 to 1995’, which was composed only of devolution advocates. Alternatively, they favour some arrangement in-between that appears to be a reasonable compromise but which will almost certainly privilege elite preferences, e.g. public consultation through a Royal Commission whose members ‘would be experts nominated by the government … with the approval of the main opposition parties for its nominees’ (Bogdanor and Vogenauer 2008: 52). Research in another connection has revealed that public consultations tend to be dominated by those who have a special interest in the issue, especially when the general public has little interest in it (Parau and Bains 2008).

The Constitutional Convention-cum-written constitution issue has been recently reignited in the aftermath of the Scottish Independence Referendum, which has transpired to be an opportunity for the Left to further their agenda. A few months before the referendum, the Political and Constitutional Reform Committee Chair was already claiming that devolution necessitates a review of constitutional arrangements – and a Constitutional Convention to carry that through (Political and Constitutional Reform Committee 2013a). Ed Milliband, the head of the Labour Party, is also favourable to such a Convention, which will not only settle the question of further devolution and the right of Scottish MPs to vote on English laws, but also consider other proposals ‘including reform of the House of Commons and the case for replacing the House of Lords with a new Senate of the Nations and Regions’ (BBC News 2014). These discourses can be interpreted as the Left’s attempt to set the stage in the event that Labour will win the 2015 elections. None of the issues to be settled now that Scottish independence was rejected actually require either a Constitution Convention or a written constitution. Parliament itself could easily carry out the review. A Constitutional Convention will almost certainly mean that Parliament will be marginalised in favour of academic experts.

The push towards a written constitution seems to be a vehicle for the entrenchment of the power of the Left. It would usher-in a Constitutional or Supreme Court with the power to interpret the meaning of the supreme law of the land with absolute finality. As long as top judges, of course, continue to be as self-restrained as in the past, parliamentary sovereignty would be secure. In the long run, however, judges inured to the British tradition of virtuous judicial subordination (Parau 2012) are likely to be supplanted by others trained in the very law schools where elite academics want a written constitution that they could then master. A written constitution would most likely launch Britain on the path toward American-style judicial supremacy (Whittington 2007), replacing a political with a legal constitutionalism (Bellamy 2007).

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