

**ARTICLES**

NEW JUDICIAL REVIEW IN OLD EUROPE

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## I. INTRODUCTION

In a decision that shocked many observers, the Court of Justice for the European Union (CJEU) rejected the EU's draft agreement to accede to the European Convention on Human Rights (ECHR) on the basis that it threatened the autonomy of the EU legal order.<sup>1</sup> The decision identified the legal order with its highest court and insisted on that court's (its own) primacy as interpreter.<sup>2</sup> This type of approach did not appear in Luxembourg out of the blue. Rather it reflects thinking that has been prevalent in the law reform decisions of several EU member states that also saw their autonomy as under threat from the ECHR. Parliaments, particularly in the old democratic systems that value parliamentary supremacy, have sought to empower their own national judges to counter the threat to sovereignty they see from the ECHR.

In Western Europe, judicial review means review by international courts. Acceding to the ECHR and allowing individual petition to the European Court of Human Rights (ECtHR) in Strasbourg brought significant changes to both substantive rights and legal institutions throughout Europe. One of the most fundamental is the adoption of *ex post* judicial review.<sup>3</sup> While a number of countries adopted constitutional review in the wake of their experiences with authoritarian governments, the older parliamentary democracies saw no need to change their constitutional structures to include it. That pattern has begun to change. France and the United Kingdom have both had long internal debates with respect to whether judges should be permitted to engage in constitutional review of legislation; both now allow it.<sup>4</sup> Likewise, Belgium adopted a scheme very similar to the French one<sup>5</sup> and

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<sup>1</sup> Opinion 2/13, Opinion pursuant to Article 218(11) TFEU – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454, paras. 184–200 (Dec. 18, 2014), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0002&from=EN>.

<sup>2</sup> *Id.* paras. 245–48.

<sup>3</sup> “Ex post” judicial review means review of a law after it has been implemented. In contrast, “a priori” judicial review refers to review of a law before it has been implemented.

<sup>4</sup> Loi 2009-1523 du 10 décembre 2009, relative à l'application de l'article 61-1 de la constitution [Law 2009-1523 of December 10, 2009 relative to the Application of Article 61-1 of the Constitution], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 2009, p. 21379; Human Rights Act, 1998, c. 42 (Eng.); Constitutional Reform Act, 2005, c. 4 (Eng.).

<sup>5</sup> *Id.*

the idea seems to be spreading northward; having been introduced in the Netherlands and several Scandinavian countries.<sup>6</sup> These reforms are a measure of both the unease and the embeddedness of parliaments in a European rights system.

With some exceptions,<sup>7</sup> scholars have discussed these reforms as they have occurred in a specific national context.<sup>8</sup> However, they ought to be seen together as part of a widely adopted strategy of managing Europe's transnational counter-majoritarian difficulty. Members of parliament in several jurisdictions predicted that more judicial review at home would mean less review abroad. The new judicial review will certainly not defend against the encroaching European judicial review, but it does create a space for national jurisdictions within the European order. Thus, despite the strikingly nationalist rhetoric, the reforms represent a conciliatory stance towards integration. They set, not boundary lines, but the terms of a dialogue. And they only serve to reduce resort to Strasbourg if national courts decide the

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<sup>5</sup> Loi spéciale modifiant l'article 26 de la loi spéciale du janvier 1989 sur la Cour d'arbitrage [Special Law Modifying Article 26 of the Special Law of January 1989] of July 12, 2009, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 31, 2009, 51617.

<sup>6</sup> Ran Hirschl, *The Nordic Counternarrative, Democracy, Human Rights, and Judicial Review*, 9 INT'L J. CONST. L. 449, 450–52 (2011); Monica Claes & Gerhard van der Schyff, *Towards Judicial Constitutional Review in the Netherlands?*, in CONSTITUTIONALISM IN THE NETHERLANDS AND SOUTH AFRICA: A COMPARATIVE STUDY 123, 132 (Gerhard van der Schyff ed., 2008); Torbjörn Bergman, *Sweden: Democratic Reforms and Partisan Decline in an Emerging Separation-of-Powers System*, 27 SCANDINAVIAN POL. STUD. 203, 218 (2004).

<sup>7</sup> Marco Tabarelli, *The Influence of the EU and the ECHR on 'Parliamentary Sovereignty Regimes': Assessing the Impact of European Integration on the British and Swedish Judiciaries*, 19 EUR. L.J. 340 (2013) (comparing the influence of EU and European law on the British and Swedish judiciaries).

<sup>8</sup> See Anthony La Sueur, *The Conception of the UK's New Supreme Court*, in BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 3, 7–8 (Anthony La Sueur ed., 2007). In France, scholarly discussion has contrasted the country's weak *contrôle de constitutionnalité* (constitutional review) with its robust *contrôle de conventionnalité* (convention review). See, e.g., Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as First Resort in France*, 43 N.Y.U. J. INT'L L. & POL. 15 (2010); Jean-François Flauss, *L'influence du droit européen sur l'instauration d'un contrôle de constitutionnalité des lois par la voie préjudicielle*, in GUILLAUME DRAGO, L'APPLICATION DE LA CONSTITUTION PAR LES COURS SUPREMES ; CONSEIL CONSTITUTIONNEL, CONSEIL D'ETAT, COUR DE CASSATION 165 (2007); Olivier Dutheillet de Lamothe, *Contrôle de constitutionnalité et contrôle de conventionnalité*, in MELANGES EN L'HONNEUR DE DANIEL LABETOULLE (2007); Denys de Béchillon & Nicholas Molfessis, *Sur les rapports entre le Conseil constitutionnel et les diverses branches du droit: propos introductifs*, 16 CAHIERS DU CONSEIL CONSTITUTIONNEL 160 (2004).

same way Strasbourg would, further integrating European Rights norms into national jurisprudence.

Many have discussed why a liberal democracy might choose judicial review when a constitution is being drafted or why it might seek to empower courts at a later date. Legislators might want to empower courts as insurance, taking constitutional issues out of normal politics.<sup>9</sup> They might believe that courts will be more faithful rights protectors than legislatures.<sup>10</sup> A party might think itself capable of protecting rights but fear that it will lose the next election,<sup>11</sup> or rights issues might be so controversial that legislators would rather have judges make the decisions.<sup>12</sup> In countries such as Germany, Italy, and Spain, judicial review was a way to insure against the danger of future authoritarian regimes as well as a way to rid current law of anti-democratic vestiges.<sup>13</sup> In France, the moderate Gaullists' fear that they would lose control of Parliament played a significant role in the country's previous reform of the Constitutional Council.<sup>14</sup>

The recent rise of judicial review in Western Europe seems to be driven not by these internal factors, but by the need to respond to external developments. Transnational review displaces the control that national parliaments once had over a core part of their constitutions: the relationship between the state and its citizens. The values that some identify with a certain idea of Europe, others identify with their own specific national legal orders. They fear that Europeanization, particularly through the powerful and unelected CJEU and the Council of Europe's ECtHR, will erode their democracies. This is not a universalist Europe in which national rights are increasingly superfluous compared to deepening Europe-wide

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<sup>9</sup> See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22–26 (2003).

<sup>10</sup> See, e.g., Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1986 (2004).

<sup>11</sup> See, e.g., ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 238 (1992) (describing the political use of abstract review in France and Germany).

<sup>12</sup> See, e.g., Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 106–08 (2004) (describing judicial review on national and European levels as elite self-preservation against populist democracy).

<sup>13</sup> John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1674–75 (2004).

<sup>14</sup> See STONE, *supra* note 11, at 70–71.

commitments,<sup>15</sup> but a Europe in which tension between the two shapes institutions at both the national and transnational levels. This is what Neil Walker has termed “endemic boundary clash,” in which multiple and potentially competing sovereignties exist within as well as outside the state.<sup>16</sup>

The growing importance of the Strasbourg court and the use of the ECHR by national judges have been accompanied by renewed calls for national bills of rights and by expanded domestic rights protection mandates for national courts. Reactions have been particularly vehement in countries with a strong tradition of parliamentary sovereignty. The United Kingdom, Belgium, and France have all changed their laws to create new avenues of national-level rights review. Although they offered various and conflicting rationales for the changes, many politicians relied on the argument that the national constitution should be the primary instrument for preserving citizens’ rights. After assessing their own institutional capacity and that of domestic and transnational courts, sovereign parliaments gave domestic judges new authority to interpret the constitution. This choice has not returned them to a more closed legal order. Rather, it sets up new opportunities for conflict as the relationship of the ECHR to constitutional law is still uncertain, and all states remain subject to ultimate ECtHR review.

Part II of this Article gives a brief overview of the European legal context and the ECtHR as an institution. Part III describes the choice for judicial review in the United Kingdom and France, where years of parliamentary debates show the evolution of the idea of national courts as a response to Europe as the parliaments in question became more alarmed about the ECtHR’s review powers. Finally, Part IV discusses the results of reform, demonstrating its limited scope and its link to ongoing reform efforts at the transnational level.

## II. THE EUROPEAN CONTEXT

Unlike constitutional reforms in some democracies, the Western European reforms did not involve a choice for or against judicial review. They were already subject to review by transnational courts under two distinct bodies of region-wide laws: EU law, the law of the European Union;

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<sup>15</sup> *But see* Rubinfeld, *supra* note 10, at 1993–94; Jochen A. Frowein, *The Transformation of Constitutional Law Through the European Convention on Human Rights*, 41 *ISR. L. REV.* 489, 493 (2008).

<sup>16</sup> Neil Walker, *Late Sovereignty in the European Union*, in *SOVEREIGNTY IN TRANSITION* 3, 27 (Neil Walker ed., 2006).

and European law, the law of the Council of Europe. In some instances, national courts could apply these laws as well.

Although, my discussion will focus on European law and the European Court of Human Rights because that court and its jurisprudence were of particular concern in parliamentary debate, EU law has an increasingly significant role in rights review in Europe. The CJEU has often approached issues through a rights-based framework,<sup>17</sup> and the Charter of Fundamental Rights only increases its mandate to do so.<sup>18</sup> Additionally, the EU's Treaty of Lisbon requires ECHR accession and that ECHR rights be treated as general principles of EU law;<sup>19</sup> although the process is stalled as the result of the CJEU's decision.<sup>20</sup>

### *A. Subsidiarity and Margin of Appreciation*

Two concepts are essential to discussion of both European and EU law. The first is subsidiarity, the principle that matters should be decided by the member states or their local authorities whenever possible with transnational authority acting as a subsidiary to that of the states.<sup>21</sup> A transnational court acting according to this principle will not overturn a decision in a matter that national courts have handled adequately.<sup>22</sup> The second concept, the margin of appreciation, defines how subsidiarity is to be applied.<sup>23</sup> According to this principle, a national government should be afforded a margin of appreciation in how it interprets and applies ECHR rights.<sup>24</sup> This may occur in a number of acceptable ways.<sup>25</sup> Within the margin of appreciation, the judgment of

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<sup>17</sup> ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 89–91 (2004).

<sup>18</sup> Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364/1), available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>19</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 6(2)–(3), Dec. 13, 2007, 2007 O.J. (C 306) 1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>.

<sup>20</sup> Opinion 2/13, *supra* note 1, para. 179.

<sup>21</sup> See Consolidated Version of the Treaty on European Union art. 5(3), Oct. 26, 2012, 2012 O.J. (C 326) 13, 18.

<sup>22</sup> *Id.*

<sup>23</sup> See VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 57–58 (2010) (offering a selection of descriptions of the margin of appreciation).

<sup>24</sup> *Id.*

<sup>25</sup> See generally AIDEN O'NEILL, *EC LAW FOR UK LAWYERS* 20–21 (2011) (explaining that courts can consider Community recommendations or take national measures when implementing Community law).

how to balance the individual right and the public interest belongs to national authorities.<sup>26</sup> The principles suggest two rationales for avoiding ECtHR jurisdiction: domestic courts may have given the same answer as the ECtHR would, or they may have given a different answer that is nonetheless permissible under the ECHR.

### *B. The European Court of Human Rights*

First created by the ECHR in 1953, the ECtHR has been reorganized several times as its mandate has grown. Currently, judges are appointed by states parties to the ECHR and assigned on a rotating basis to five sections, which are balanced for gender and geography.<sup>27</sup> The court hears two types of applications related to ECHR violations: inter-state and individual. The first are exceedingly rare; the second, exceedingly common.<sup>28</sup> By 1990, all states parties allowed individual petition.<sup>29</sup> Since the Convention requires state action, the state is the defendant in every ECHR claim. If it finds a violation, the court may award monetary compensation under Article 41 and propose reforms to the government under Article 46.<sup>30</sup> The Committee of Ministers supervises enforcement,<sup>31</sup> but shows little alacrity in doing so.<sup>32</sup>

The court's original process was bureaucratic and less adversarial, limiting litigation by creating alternatives to it. Under the original procedure, the Council of Europe's Commission reviewed all individual petitions.<sup>33</sup> If the petition was admissible, the Commission endeavored to bring about a friendly settlement between state and petitioner.<sup>34</sup> If no settlement could be met, it transmitted a report regarding the facts and merits of the case to a political body, the Committee of Ministers.<sup>35</sup> This transmittal started a three-

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<sup>26</sup> ROGER MASTERMAN, *THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION: JUDICIAL COMPETENCE AND INDEPENDENCE IN THE UNITED KINGDOM* 70 (2011).

<sup>27</sup> REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, *ANNUAL REPORT 2011*, at 15–16, 21 (2012), available at [http://www.echr.coe.int/Documents/Annual\\_report\\_2011\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf).

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.* at 19.

<sup>32</sup> Cf. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS 1998–2006: HISTORY, ACHIEVEMENTS, REFORM* 113, 120–22 (2006) (noting problems in enforcement).

<sup>33</sup> *ANNUAL REPORT 2011*, *supra* note 27, at 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

month clock for the court to hear the case.<sup>36</sup> This procedure changed in 1994, allowing an applicant to submit his case directly to a three-judge screening panel.<sup>37</sup>

With individual petitions, the court's caseload swelled to a point that it threatened the ECtHR's effectiveness.<sup>38</sup> The Council of Europe responded by allowing single judges to make decisions on applications and by consolidating thousands of cases.<sup>39</sup> The court has finally begun to reduce the backlog.<sup>40</sup> In 2012, its number of pending cases fell for the first time since 1998.<sup>41</sup> As of January 2015, 69,900 applications were pending before the court, down from 99,900 the year before.<sup>42</sup> This downward trend continued in 2015, with 64,850 pending allocated applications in January 2016.<sup>43</sup>

The court's caseload suggests a number of possible problems, among them, a lack of understanding of the court's role and a lack of national judicial capacity. The number of inadmissible petitions suggests that Europeans know that they have rights, but do not necessarily know what these rights are or how to secure them. The second issue, lack of national judicial capacity, is tangential to the ones explored in this Article. The countries of the East that regularly top the court's list of most rights violations, such as Ukraine and Russia, face struggles over resources, democratization, and rule of law different in character and magnitude from those animating legal debate in countries such as Germany or the United Kingdom.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Helen Keller, Andreas Fischer & Daniela Kühne, *Debating the Future of the European Court of Human Rights After the Interlaken Conference: Two Innovative Proposals*, 21 EUR. J. INT'L L. 1025, 1025–26 (2010).

<sup>39</sup> This system started in 2010. *Id.* at 1030–31. In 2011, 46,930 cases were disposed of by a single judge. In 2012, the number jumped to 81,764. See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2012, at 4 (2013), available at [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf); ANNUAL REPORT 2011, *supra* note 27, at 14–15.

<sup>40</sup> Owen Bowcott, *Backlog at European Court of Human Rights Falls Below 100,000 Cases*, THE GUARDIAN (Jan. 30, 2014), <http://www.theguardian.com/law/2014/jan/30/European-court-human-rights-case-backlog-falls>.

<sup>41</sup> ANALYSIS OF STATISTICS 2012, *supra* note 39, at 4.

<sup>42</sup> EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2014, at 4 (2015), [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf).

<sup>43</sup> EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2015, at 4 (2016), [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf).

<sup>44</sup> Robert Harmsen, *The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges facing the European Court of Human Rights*, in THE NATIONAL

The ECtHR backlog affects my argument in several ways. First and most pragmatically, the reforms that I discuss are so recent that their effects may only now be becoming visible in ECtHR case law. The court's high caseload also suggests that complaints that it has taken control of national rights debates identify the wrong villain. By the time a case is heard in Strasbourg, national communities have had time to debate its merits. The more likely culprit, if one exists, is a national judge wielding the ECHR. That judge can introduce Strasbourg jurisprudence to reshape rights at a much earlier stage. Finally, attempts to respond to the high caseload offer a pro-Strasbourg rationale for reform that potentially reduces access to Strasbourg or seeks to offer a substitute. A litigant investing more time and resources in pursuing her case under the national constitution will take longer to get to Strasbourg, and will more likely win or abandon her case along the way. To the extent that Strasbourg judges feel that their interests will be advanced by issuing fewer, more considered rulings, they may welcome the growth of national, constitutional review.

### III. NEW JUDICIAL REVIEW IN OLD DEMOCRACIES

Shortly after he was elected President of France, Nicolas Sarkozy gave a speech at Épinal, where Charles de Gaulle had denounced the ill-fated, Fourth Republic Constitution and proposed a Fifth Republic. President Sarkozy called for significant reforms to the current, Fifth Republic Constitution, including to the Constitutional Council: "There is a paradox in the fact that French citizens can contest French laws in front of European courts but cannot contest French laws in front of French tribunals." Yet he did not include constitutional review in his reform agenda, considering it too "profound" a change.<sup>45</sup>

Despite the President's misgivings, his government later put forward a constitutional amendment giving the Constitutional Council the power to overrule the legislature by reviewing existing laws in response to "constitutional questions" raised by litigants.<sup>46</sup> When the Amendment went

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JUDICIAL TREATMENT OF THE ECHR AND EU LAWS: A COMPARATIVE CONSTITUTIONAL PERSPECTIVE 27, 29–31 (Giuseppe Martinico & Oreste Pollicino eds., 2010).

<sup>45</sup> Nicolas Sarkozy, President of Fr., Address at Épinal (July 12, 2007), <http://discours.vie-publique.fr/notices/077002273.html>. Unless otherwise noted, all translations from French are the author's.

<sup>46</sup> Loi 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution [Law 2009-1523 of December 10, 2009 relative to the application of article 61-1

into effect in 2010, it marked the first time in history that France had allowed concrete judicial review of constitutional claims.

France was following the lead of its neighbors. Among the experts called to discuss the reform in Parliament was Belgian Senator Francis Delpérée, who told the French deputies in the National Assembly that his own country's concerns "are not very far from the preoccupations expressed in [their] bill."<sup>47</sup> Belgium, once similarly hostile to constitutional review, has changed the name of its Cour d'Arbitrage to Constitutional Court and has given it constitutional review powers with priority over transnational law.<sup>48</sup>

A less obvious comparison surfaced during the Senate floor debates—the United Kingdom, too, has a strong tradition of parliamentary supremacy.<sup>49</sup> Nevertheless, the United Kingdom had introduced constitutional review in two stages: the Human Rights Act (HRA), which allowed courts to declare incompatibility between the Act and other laws;<sup>50</sup> and the creation of a Supreme Court, which consolidated most final HRA review into one body.<sup>51</sup> Recently, Norway engaged in a similar reform. Although Norwegian courts have long engaged in cautious constitutional review of legislation, the constitution contained a very limited menu of rights protections.<sup>52</sup> The Norwegian parliament significantly expanded this list in an effort to “bring

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of the Constitution] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 2009, 21379.

<sup>47</sup> *Hearing on A.N. no. 1599 Before the Commission des lois constitutionnelles, de la législation et de l'administration générale de la République* [Commission on constitutional law, legislation, and general administration of the Republic] (CR 58), 2008–2009 Leg., 13th Sess. Ordinaire 10 (23 June 2009), available at [http://www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809058.asp#P12\\_1410](http://www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809058.asp#P12_1410).

<sup>48</sup> Loi spéciale modifiant l'article 26 de la loi spéciale 6 du janvier 1989 sur la Cour d'arbitrage [Special Law Modifying Article 26 of the Special Law of January 1989] of July 12, 2009, MONITEUR BELGE [MB] [OFFICIAL GAZETTE OF BELGIUM] July 31, 2009, 51617.

<sup>49</sup> Sénat, Session Ordinaire de 2009–2010, Séance du mardi 13 octobre 2009, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 13, 2009, p. 8572 (statement of Sen. Patrice Gélard).

<sup>50</sup> Human Rights Act, 1998, c. 42 (Eng.); Constitutional Reform Act, 2005, c. 4 (Eng.).

<sup>51</sup> Not all Scots cases are subject to final review by the Supreme Court. See Courts Reform (Scotland) Act, 2014, (A.S.P. 18), § 117 (introducing the requirement that permission be obtained to appeal civil cases); Scotland Act, 2012, c. 11 (U.K.) (providing that the High Court of Justiciary, Scotland's supreme criminal court, retains power to ultimately resolve cases once the U.K. Supreme Court has determined the legal question at issue).

<sup>52</sup> Anine Kierulf, *Norway: Human Rights and Judicial Review Constitutionalized*, INT'L J. CONST. L. BLOG (June 5, 2015), <http://www.icconnectblog.com/2015/06/norway-human-rights-and-judicial-review-constitutionalized>.

rights home,” constitutionalizing rights already protected by the ECHR and domestic statutes as well as amending the constitution to explicitly authorize judicial review.<sup>53</sup> Like the French and Belgian parliaments, the Norwegian parliament was concerned that Norwegians were relying too heavily on the Convention in Norwegian courts and sought to make rights adjudication a domestic matter.<sup>54</sup>

Other Nordic countries and the Netherlands have traditionally given little space to constitutional review,<sup>55</sup> however, parliaments are rethinking their traditional stance under pressure from Europe.<sup>56</sup> In 1992, the Danish parliament voted to incorporate the ECHR into national law.<sup>57</sup> The change was accompanied by arguments that incorporation was necessary to avoid censure at Strasbourg<sup>58</sup>—the type of defensive incorporation argument made a few years later in the United Kingdom. In 2000, Finland overturned its long-standing rule forbidding judicial review of legislation, allowing courts to refuse to apply a law in cases in which doing so would be contrary to the Basic Law or the Constitution.<sup>59</sup> This reform followed the 1995 introduction of new fundamental rights based on the ECHR and other treaties.<sup>60</sup>

This section will focus on the examples of the United Kingdom and France. Both share a concern with parliamentary sovereignty and a

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<sup>53</sup> *Id.* This gesture suggests that Norwegian judges are seen as allies in the nationalization of rights. This view may have merit; the Norwegian Supreme Court has sought to read the Convention in light of “traditional Norwegian value priorities.” Geir Ulfstein & Andreas Føllesdal, *The European Court of Human Rights and the Norwegian Supreme Court: Independence and Democratic Control*, in *THE INDEPENDENCE OF JUDGES* 247, 253 (N.A. Engstad, A.L. Frøseth & B. Tønder eds., 2014).

<sup>54</sup> Ulfstein & Føllesdal, *supra* note 52, at 253.

<sup>55</sup> Article 120 of the Dutch Constitution, adopted in 1984, bans judicial review of legislation. Jerfi Uzman, Tom Barkhuysen & Michiel L. van Emmerik, *The Dutch Supreme Court: A Reluctant Positive Legislator?*, in *NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 423, 426 (J.H.M. van Erp & L.P.W. van Vliet eds., 2010).

<sup>56</sup> See Claes & van der Schoff, *supra* note 6, at 127–32 (describing a reform proposal in the Netherlands). Some Dutch legislators have called for judicial review in cases affecting “fundamental rights.” Gerhard van der Schoff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge too Far?*, 11 *GERMAN L.J.* 275, 282 (2010).

<sup>57</sup> Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 *INT'L J. CONST. L.* 470, 479 (2011).

<sup>58</sup> *Id.*

<sup>59</sup> Juha Lavapuro, Tuomas Ojanen & Martin Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 *INT'L J. CONST. L.* 505, 517–18 (2011).

<sup>60</sup> Jaako Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 *AM. J. COMP. L.* 345, 366 (2000).

democratic deficit at the European level. The significant differences between the common law and the French civil law tradition, as well as the political differences between the two countries, make their choice of a similar solution particularly striking.<sup>61</sup> Because of a web of European treaties and popular expectations, neither country can avoid subjecting legislation to judicial review short of exiting the system. The only choice that is open to them is whether and how to engage in rights review domestically. This situation sets up the paradox whereby the reforms could be presented as appealing to both pro- and anti-European sentiments. Pro-Europeans saw a chance for further integration of values. In contrast, Euro-skeptics saw a chance for reduced oversight by the ECtHR and CJEU; that is, more attention to rights at the national level should prompt the transnational courts to avoid intervening.

*A. Why Would a Court Protect a Parliament: The Administrative Rights Tradition*

In the United Kingdom in particular, reform proponents tended to hail from the more pro-Europe Labour Party. In France, reform efforts began with the Socialists who might be less troubled by Strasbourg. However, the Gaullists, who quite clearly viewed Europe as a threat, later took up the banner of reform as well. New proposals from the British Conservative Party show that it has largely adopted Labour's strategy, perhaps to avoid making significant changes to the law to appease a conservative base.<sup>62</sup> Still, the argument for empowering national courts was more than an argument

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<sup>61</sup> Unlike the French, the UK Constitution is based on a set of context-specific historical conventions without a single anchoring text. But this difference is not as salient in the case of rights law. The French Constitution includes no bill of rights, and constitutional rights today flow from judicial elaboration of the Preamble as well as "fundamental principles of the laws of the Republic," which is as close to "the principles of the British Constitution" as it sounds. Compare Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 INT'L & COMP. L.Q. 594, 609 (1986) (describing the sources and scope of French constitutional law), with Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 850–65 (1978) (discussing the evolution of seventeenth and eighteenth century British "fundamental law"); R.C. Van Caenegem, *Constitutional History: Chance or Grand Design?*, 5 EUR. CONST. L. REV. 447, 543–54 (2009) (describing the basic principles of the British Constitution). Judges in the two countries have different careers, training, and role expectations.

<sup>62</sup> See *infra* Part III.B.2.

offered in bad faith by pro-European members seeking to win over conservatives skeptical of rights review. Parliament's sovereignty remains abridged whether it approves reform or not. The only difference is whether domestic or foreign judges do the abridging.

This difference is potentially significant to both countries because of the historical relationship between domestic courts and the parliaments in both Westminster and French-derived systems.<sup>63</sup> These pure parliamentary systems rejected the American-style tripartite separation of powers. Parliament combined all three. Independent judges were to help the British and French Parliaments effectively impose their will, and they did so in part by scrutinizing the administration of the law by the bureaucracy.

Although France and Britain did not protect constitutional rights as such, courts in the twentieth century protected human rights through administrative law. British judges developed the *ultra vires* and “*Wednesbury* unreasonableness” doctrines, which limited bureaucratic power to that clearly delegated by statute and not exercised in an “outrageous” manner.<sup>64</sup> Similarly, the French Council of State developed the doctrine of *service public*, which limits ways in which regulations can be imposed, balancing individual and general interests in a manner quite similar to constitutional proportionality doctrines.<sup>65</sup> Courts striking down regulations did so in Parliament's name—Parliament, it was said, could never have intended its laws to allow the agency in question to infringe on individual rights.<sup>66</sup> This history helps to explain why national courts might be expected to speak for their parliaments when confronted with European law.

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<sup>63</sup> See VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 13 (2009).

<sup>64</sup> See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* 1948 (K.B.) 223 (a regulation will not survive scrutiny if it is “[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”); *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] I.C.R. 14.

<sup>65</sup> See generally JACQUES CHEVALLIER, *LE SERVICE PUBLIC* (7th ed. 2008) (describing the elaboration of this doctrine).

<sup>66</sup> See, e.g., Nicholas Bamforth, *Ultra Vires and Institutional Independence*, in *JUDICIAL REVIEW AND THE CONSTITUTION* 111, 116–19 (Christopher Forsyth ed., 2000) (describing how theorists have grounded judicial review of administrative law in parliamentary sovereignty). The French Council of State grew in importance and independence in concert with the flourishing of parliamentary democracy in the Third Republic. STONE, *supra* note 11, at 32. It was in this period that the Council laid claim to key administrative law concepts such as misuse of power. See, e.g., *Pariset*, CE, Nov. 28, 1875, Rec. Lebon 47544.

*B. Rights Brought Home to London*

The United Kingdom has responded to the growth of European rights law in two steps: first, “bringing rights home,” and second, consolidating national rights jurisprudence by creating a Supreme Court. Historically, the British Constitution “could be summed up in just eight words ‘What the Queen in Parliament enacts is law.’”<sup>67</sup> But in 1966, the United Kingdom began allowing citizens to appeal to the European Court of Human Rights.<sup>68</sup> Although they could not use the Convention directly as a source of law prior to the HRA, lawyers cited the ECHR and relevant case law to UK courts.<sup>69</sup> In 1972, the House of Lords held that the European Communities Act made Community law directly applicable as part of national law, allowing it to override acts of Parliament.<sup>70</sup> The House of Lords put that law into effect when it relied on EU law to “disapply” domestic law in the 1991 *Factortame* case.<sup>71</sup> That de facto loss of parliamentary sovereignty helped spur action on the long-discussed bill of rights.<sup>72</sup> In turn, the development of rights review furthered the creation of a Supreme Court of the United Kingdom.<sup>73</sup>

The 1998 Human Rights Act incorporates the ECHR into national law and allows UK judges to review the legality of other laws through reference to these rights.<sup>74</sup> Judges cannot strike down legislation. If a law conflicts with the HRA, a court may issue a “declaration of incompatibility,” which then starts a process to change the law in Parliament.<sup>75</sup> The Act was the product of a long struggle to create some sort of written constitution, or at least a bill of rights, for the United Kingdom.<sup>76</sup> Before the HRA, the United Kingdom had one of the highest rates of review by, and of losses in front of,

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<sup>67</sup> BOGDANOR, *supra* note 63, at 13.

<sup>68</sup> *Id.* at 58.

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 57.

<sup>72</sup> *See* ROBERT BLACKBURN, TOWARDS A CONSTITUTIONAL BILL OF RIGHTS FOR THE UNITED KINGDOM 5–10 (1999) (describing early debates over the issue).

<sup>73</sup> Alyssa S. King, Recent Development, *A Supreme Court, Supreme Parliament, and Transnational National Rights*, 35 YALE J. INT’L L. 245, 246–48 (2010).

<sup>74</sup> Human Rights Act, 1998, c. 42 (Eng.).

<sup>75</sup> MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 28 (2008).

<sup>76</sup> BLACKBURN, *supra* note 72, at 5.

the ECtHR. Politicians often attributed those rates to the country's lack of a domestic mechanism for handling rights questions.<sup>77</sup>

Prior to the Constitutional Reform Act of 2005 (CRA),<sup>78</sup> legislative, executive, and judicial power was consolidated in Parliament. The judicial branch was represented by the Law Lords who sat in the House of Lords as legislators, and sat in the Appellate Committee of the House of Lords and on the Privy Council as judges.<sup>79</sup> The CRA ultimately removed them from the legislature, giving them the title of "Justice."<sup>80</sup> The Government also sought a separate building for the Court.<sup>81</sup> That physical, as well as legal, separation signals the importance of the courts and the Supreme Court's status as a separate branch of government.

The Supreme Court both promotes a new view of separation of powers and unifies jurisdiction of almost all of the United Kingdom's top courts, as well as increases their visibility, continuing a theme from the HRA.<sup>82</sup> Even though the United Kingdom has kept its weak courts, which do not have the power to definitively stop an Act of Parliament, their combination of the HRA and the Supreme Court has raised the profile of constitutional review and thus considerably raised the stakes of parliamentary non-compliance with the ECHR.

### *1. Bringing Rights Home*

Policy-makers began to seriously discuss a written bill of rights in the post-war period.<sup>83</sup> The issue first went to general debate in Parliament in 1975.<sup>84</sup> The rise of rights jurisprudence at the European level, including the

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<sup>77</sup> See, e.g., Mary Baber, HOME AFFAIRS SECTION, THE HUMAN RIGHTS BILL, 1997-8, H.C. 98/24, at 14; Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, in A EUROPE OF RIGHTS 31, 41 (Helen Keller & Alec Stone Sweet eds., 2008).

<sup>78</sup> Constitutional Reform Act, 2005, c. 4 (Eng.).

<sup>79</sup> *Id.* § 24. By custom, Law Lords did not participate in legislative debate.

<sup>80</sup> *Id.*

<sup>81</sup> DEP'T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 12 (2003), <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

<sup>82</sup> See *id.* at 19–22.

<sup>83</sup> See Peter Lanston Fitzgerald, *An English Bill of Rights? Some Observations From Her Majesty's Former Colonies in America*, 70 GEO. L.J. 1229, 1239–46 (1982), for a discussion of the pressure the international human rights movement—particularly as manifested in the European Convention on Human Rights—exerted on the United Kingdom.

<sup>84</sup> *Id.* at 1249. So began a long line of doomed legislation aimed at incorporating the ECHR into national law. See Bill of Rights, 1974-5, H.C. Bill [59]; Bill of Rights Bill, 1980-1, H.C. Bill [60]; Human Rights and Fundamental Freedoms Bill, 1985, 1985-6, H.L. Bill [21],

United Kingdom's losses in front of the European Court of Human Rights, was instrumental in securing the HRA's passage.<sup>85</sup>

It is plausible to tell a straightforward story in which change in the United Kingdom came from a desire for institutional modernization and alignment with Europe. Early supporters of Labour's proposal also pointed out the gap between the United Kingdom and the continent and even its former colonies, suggesting that the country was behind the times.<sup>86</sup>

Supporters of the HRA presented the change in more nationalistic terms. The Government showed great awareness that the choice presented to legislators in the late 1990s was not between more judicial review or less judicial review, but between review "at home" by UK judges or continued embarrassment abroad. Even the name of the Government's white paper on the HRA, *Rights Brought Home*, demonstrates the importance given to the localizing, rather than the harmonizing, aspect of the reform.<sup>87</sup>

Moreover, the HRA's supporters argued that the European rights they sought to incorporate into national law had a British origin, emphasizing their country's role in the ECHR drafting process.<sup>88</sup> With the HRA, they promised: "British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe."<sup>89</sup> Issues that might have reached the European courts for want of local jurisdiction might be resolved at home; whereas those that did reach the supranational level might have a different quality.<sup>90</sup> In this telling, British judges are set against "European" judges, who are identified with European

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Human Rights Bill, 1993-4, H.C. Bill [38] (requires that laws be interpreted so that they are compatible with it); Human Rights Bill, 1994-5, H.L. Bill [5]; Human Rights Bill, 1996-7 [11].

<sup>85</sup> Compare Labour Party, *A Discussion Document on a Statutory Charter of Human Rights (1976)*, reprinted in BLACKBURN, *supra* note 72, at 917, 921, with HOME DEP'T, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, ¶ 1.16, available at <http://www.archive.official-documents.co.uk/document/hoffice/rights/contents.htm>.

<sup>86</sup> Jean-François Flauss, *Human Rights Act 1998: Kaleidoscope*, 48 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [FRENCH REVIEW OF CONSTITUTIONAL LAW] 695, 696 (2001).

<sup>87</sup> HOME DEP'T, *supra* note 85, ¶ 1.14.

<sup>88</sup> See 582 PARL. DEB., H.L. (5th ser.) (1997) 1227f, reprinted in BLACKBURN, *supra* note 72, at 377.

<sup>89</sup> HOME DEP'T, *supra* note 85, ¶ 1.14.

<sup>90</sup> See Erin Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 584-85 (2014) (noting that the HRA provided British courts with the ability to opine on Convention-based claims *ex ante*, giving them the opportunity to explain and distinguish the nature of the British practice at issue).

law.<sup>91</sup> Lord Kingsland argued that European judges did not understand British practices, “which are, after all, unique.”<sup>92</sup> Mike O’Brien, Undersecretary for the Home Department, echoed these views, arguing that UK courts interpreting the HRA “can assist in shaping those rights in a manner sensitive to our country’s ways.”<sup>93</sup> Lord Woolf, then Master of the Rolls, took a similar view on an earlier, 1996, Human Rights Bill, noting that the United Kingdom was “losing a real opportunity to influence the European human rights jurisprudence.”<sup>94</sup>

Here the judge is linked tightly with local law as its representative and promoter. The primary value of the HRA was not in creating rights—these were already guaranteed at least in theory by the ECHR—but in allowing local courts to intervene in how rights are protected in practice. This emphasis on the influence of British judges helps explain why the creation of a Supreme Court follows from rights legislation.

## 2. *British Judges*

“Modernization” was also a theme of arguments in favor of a supreme court.<sup>95</sup> The late Lord Bingham, one of the new court’s principle supporters and himself, an influential judge, described the separation of powers as “a cardinal aspect of a modern liberal democratic state governed by the rule of law.”<sup>96</sup> Meanwhile, the opposition relied on British exceptionalism to explain why the Appellate Committee of the House of Lords should stay in Parliament.<sup>97</sup> The Supreme Court promotes a vision of the separation of powers different from the one given by parliamentary sovereignty, which emphasizes unified, rather than separated, power.<sup>98</sup>

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<sup>91</sup> King, *supra* note 73, at 246.

<sup>92</sup> Quoted in BABER, *supra* note 77, at 26.

<sup>93</sup> BLACKBURN, *supra* note 72, at 412.

<sup>94</sup> *Id.* at 813. Lord Woolf’s various responsibilities have included reforming the civil procedure system of England and Wales. His voice, like those of Lords Lester and Bingham, serves to underscore just how significant these arguments are in the British legal establishment.

<sup>95</sup> 671 PARL. DEB., H.L. (5th ser.) (2005) 13 (U.K.).

<sup>96</sup> Anthony Lester, *The Human Rights Act 1998 – Five Years On*, 3 EUR. HUM. RTS. L. REV. 258, 271 (2004) (quoting Lord Bingham of Cornhill).

<sup>97</sup> 657 PARL. DEB., H.L. (5th ser.) (2004) 1221 (U.K.).

<sup>98</sup> One example of this attitude is Lord Craig’s argument that removing the Law Lords from Parliament weakens them because as long as they remain in the House of Lords, an “attack on them individually or as a group would be an attack on Members of your Lordships’ House and an affront to the primacy of Parliament.” 657 PARL. DEB., H.L. (5th ser.) (2004) 1254 (U.K.).

European jurisprudence pushed the United Kingdom towards a more visible separation of powers. In *McGonnell v. U.K.*, the ECtHR questioned the unity of the judiciary and legislature, holding that the combination of legislative and judicial roles was improper in a magistrate who served on a planning commission whose actions he was later to judge.<sup>99</sup> The House of Lords can delay, but neither create nor veto legislation;<sup>100</sup> and there was a convention against Law Lords taking part in legislative deliberations.<sup>101</sup> Still, several speakers worried that the ECtHR would eventually demand reforms.<sup>102</sup> Having a supreme court was a question of being understood by the rest of Europe.<sup>103</sup> A separate supreme court served to underscore the independence of British judges to domestic and international observers alike by making the highest court more visible.<sup>104</sup>

The Government also called for the creation of a “single apex” for the national system.<sup>105</sup> The HRA brought increased attention to UK constitutional law.<sup>106</sup> Creating the Supreme Court unified rights jurisdiction, which until that point had been spread between the Lords and the Privy Council.<sup>107</sup> Under devolution, Scotland, Wales, and Northern Ireland were subject to Privy Council review for violations of the HRA.<sup>108</sup> While the Law Lords sat on both courts, they had separate jurisdiction, raising the possibility

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<sup>99</sup> *McGonnell v. United Kingdom*, 30 Eur. Ct. H.R. Rep. 289, 291 (2000). *But see* MASTERMAN, *supra* note 26, at 80–84 (noting subsequent decisions have taken a more pragmatic approach).

<sup>100</sup> The Parliament Act, 1949, 1 & 2 Geo. 5, c. 13; *see also* *The Parliament Acts*, <http://www.parliament.uk/about/how/laws/parliamentacts> (discussing the removal of the House of Lords’ veto power).

<sup>101</sup> GRAEME BROADBENT, PUBLIC LAW DIRECTIONS 123 (2009) (noting the convention against Law Lords taking part in the creation of legislation).

<sup>102</sup> *See, e.g.*, 657 PARL. DEB., H.L. (5th ser.) (2004) 1217 (U.K.) (Lord Falconer citing an instance in which a Law Lord, who had commented on legislation, was then unable to sit on a judicial review).

<sup>103</sup> DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 81, at 11.

<sup>104</sup> MASTERMAN, *supra* note 26, at 225.

<sup>105</sup> DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 81, at 20.

<sup>106</sup> *Id.* at 11–12.

<sup>107</sup> *Id.* at 10.

<sup>108</sup> Aiden O’Neill, *Judging Democracy: The Devolutionary Settlement and the Scottish Constitution*, in BUILDING THE UK’S NEW SUPREME COURT, *supra* note 8, at 23, 45; King, *supra* note 73, at 247.

that different panels in two similar cases could produce the equivalent of a circuit split between them.<sup>109</sup>

As with the HRA, however, the nationalist argument for reform was also present. Being understood by Europe is quite different from capitulating to it. Having a unified court system and being understood matters because of the expectation that UK judges can intercede in Europe on the country's behalf; their rulings forestalling further review. The argument for a supreme court relates directly to the dichotomy between "British judges" and foreign ones set up in the HRA debates. The HRA thrusts the UK judge in between Parliament and Europe. Subsequent reforms aimed to make that judge a more convincing representative.

Adopting the HRA has not settled the matter of how, if at all, the United Kingdom should protect rights.<sup>110</sup> Both the Brown and the Cameron Governments have again taken up the issue of whether there should instead be a British Bill of Rights.<sup>111</sup> The possibility of "Brexit" from the European Union will be put to a vote in June.<sup>112</sup> However, even today's Conservatives are not prepared to leave the Council of Europe and the ECHR. Instead they have now adopted Labour's earlier strategy—defining rights domestically and increasing the power of judges in hopes that a British view of rights will

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<sup>109</sup> Now, HRA violations pertaining to Scotland, like those involving England, may ultimately be judged by the Supreme Court of the United Kingdom. See Anthony Bradley, *The Sovereignty of Parliament—Form or Substance?*, in *THE CHANGING CONSTITUTION* 25, 35, 59 (Jeffrey Jowell & Dawn Oliver eds., 7th ed. 2011); Lester, *supra* note 96, at 265. Another potential source of a "circuit split" has not been removed, as the Supreme Court does not have jurisdiction over Scottish criminal cases. O'Neill, *supra* note 108, at 43–44.

<sup>110</sup> Even Labour Prime Minister Gordon Brown suggested creating a British "bill of rights and responsibilities." MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK, 2009, Cm. 7577, at 11–13 (U.K.). The Conservative-Liberal Democrat Government that followed promptly took up the same issue. COMMISSION ON A BILL OF RIGHTS, DO WE NEED A BILL OF RIGHTS? (2011), available at <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/cbr-discussion-paper.pdf>. The issue is once again on Parliament's agenda. *Human Rights and Prisoner Voting: Key Issues for the 2015 Parliament*, <http://www.parliament.uk/business/publications/research/key-issues-parliament-2015/justice/human-rights-and-prisoner-voting>.

<sup>111</sup> For instance, they characterize the ECHR as an "entirely sensible statement of the principles which should underpin any modern democratic nation. Indeed the UK had a great influence on the drafting of the Convention, and was the first nation to ratify it." *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law*, CONSERVATIVE PARTY (GB), [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf).

<sup>112</sup> Economist Data Team, *A Background Guide to "Brexit" from the European Union*, *ECONOMIST*, Feb. 24, 2016, <http://www.economist.com/blogs/graphicdetail/2016/02/graphics-britain-s-referendum-eu-membership>.

prevail. The Conservative proposal for a British Bill of Rights explicitly states that it will transpose the ECHR into a bill of rights act, just as the HRA did.<sup>113</sup> However, the Conservatives insist that their bill will be different because it does not instruct judges to follow ECtHR judgments as well as the ECHR.<sup>114</sup> Given that British judges operate in a precedent-based legal system and that appeal to the ECtHR would remain open, these changes appear to be cosmetic.

### C. *Dirty French Laundry*

The Fifth Republic Constitution created France's Constitutional Council in 1958 to help define the division of power in France's semi-presidential system.<sup>115</sup> The Council's mandate soon expanded. The 1958 Constitution included no discussion of rights in its operative clauses; these rights were read into the constitution through Council decisions interpreting the Preamble starting in 1971.<sup>116</sup> At first, only a select group of political leaders, including the President, the Prime Minister, and the heads of both houses of Parliament could refer a law to the Council.<sup>117</sup> In 1974, Parliament expanded access to the Council to allow sixty senators or deputies to send a new law to the Council for review; this soon became a common way to challenge legislation.<sup>118</sup> The legislative majority, which is also typically the party that holds the presidency, controls the lawmaking process.<sup>119</sup> Parliamentary minorities check the majority and contribute to law creation through their power to submit laws to the Council for abstract review and through the credible threat that they will use it.<sup>120</sup> Until 2010, the Council engaged only in this abstract review.

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<sup>113</sup> *Id.* at 2.

<sup>114</sup> *Id.* at 5.

<sup>115</sup> 1958 CONST. arts. 56–63 (Fr.).

<sup>116</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 18, 1971, Rec. 29; Conseil constitutionnel [CC] [Constitutional Court] decision No. 73-51DC, Dec. 27, 1973, Rec. 25 (first decision to make specific reference to the Declaration of the Rights of Man); Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 16, 1975, Rec. 19 (referring to 1946 constitution when deciding challenge to abortion law); STONE, *supra* note 11, at 66–69.

<sup>117</sup> WILLIAM G. ANDREWS, *PRESIDENTIAL GOVERNMENT IN GAULLIST FRANCE: A STUDY OF EXECUTIVE-LEGISLATIVE RELATIONS 1958–1974*, at 116 (1982).

<sup>118</sup> STONE, *supra* note 11, at 53–59.

<sup>119</sup> *Id.* at 121.

<sup>120</sup> *Id.* at 120–22.

As a result of French treaty obligations, Parliament and the President controlled constitutional, but not judicial, review. French litigants could seek concrete review of legislation only under supra-national law because the French constitution directly incorporates treaty law into national law.<sup>121</sup> The Constitutional Council declined to exercise review under the ECHR in 1975.<sup>122</sup> The other two supreme courts stepped in: the Court of Cassation took up ECHR review the same year;<sup>123</sup> the Council of State waited until 1989.<sup>124</sup> In 1981, France acceded to the optional protocol allowing individuals to appeal their cases to the ECtHR.<sup>125</sup>

President François Mitterrand first proposed the constitutional question procedure on July 14, 1989, presenting it as giving citizens a new right to constitutional protection.<sup>126</sup> The Gaullists in the Senate blocked the proposal, but twenty years later, a Gaullist parliament passed a similar proposal.<sup>127</sup> It resurfaced, and failed again, at the end of President Mitterrand's term.<sup>128</sup> Constitutional reform was again at issue in the 2007 presidential election, and shortly after taking office, President Sarkozy

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<sup>121</sup> 1958 CONST. art. 55 (Fr.) (general provision incorporating international treaties). *See also* 1958 CONST. art. 88 (concerning the transposition of EU law).

<sup>122</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, Rec. 19, considérants 3–7 (Fr.).

<sup>123</sup> This court breaks “ties” resulting from circuit splits among France’s general appellate courts.

<sup>124</sup> SocCh. mixte, 24 mai 1975, aff. sté. Jacques Vabre, Bull. civ. C.M. n° 4 p. 6; D.1975.497 concl. Touffait [hereinafter Jacques Vabre]; CE Sect., Oct. 20, 1989, Rec. Lebon 190, Frydman [hereinafter Nicolo].

<sup>125</sup> Elizabeth Lambert Abdelgawad & Ann Weber, *The Reception Process in France and Germany*, in *A EUROPE OF RIGHTS*, *supra* note 77, at 105, 109.

<sup>126</sup> Projet de loi constitutionnelle n°1203 portant révision des articles 61, 62 et 63 de la Constitution et instituant un contrôle de constitutionnalité des lois par voie d’exception [Proposed Amendment revising articles 61, 62, and 63 of the constitution by Instituting Constitutional Review on an Exceptional Basis] Mar. 30, 1990 (Fr.).

<sup>127</sup> Constance Grewe, *L’élargissement de la saisine du Conseil constitutionnel*, [Enlarging the Constitutional Council’s Jurisdiction], in *LA REVISION DE LA CONSTITUTION : JOURNEES D’ETUDES DES 20 MARS ET 16 DECEMBRE 1992* [Constitutional Reform: Symposia of March 20 and Dec. 16, 1992] 235, 240 (1993).

<sup>128</sup> RAPPORT REMIS AU PRESIDENT DE LA REPUBLIQUE LE 15 FEVRIER 1993 PAR LE COMITE CONSULTATIF POUR LA REVISION DE LA CONSTITUTION [Report to the President of the Republic on February 15, 1993 from the Consultative Committee on Constitutional Revision], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE* [Official Gazette of France] [J.O.], Feb. 16, 1993, 2537 [hereinafter 1993 Report], *available at* [http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/0840\\_00091/0000.pdf](http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/0840_00091/0000.pdf).

created a committee on institutional reform.<sup>129</sup> In a few months' time, the committee produced a report entitled "A More Democratic Fifth Republic," which included the suggestions for concrete constitutional review that the Gaullists had once opposed.<sup>130</sup> The final law allows litigants to raise a constitutional question related to individual rights at any stage in the proceedings.<sup>131</sup> The claims are subject to review by the judge in front of whom the question is raised and are then sent to the Court of Cassation or Council of State, depending on whether the proceedings are "ordinary" or "administrative."<sup>132</sup> Those courts determine whether or not to send the question to the Constitutional Council, which will then decide the issue.<sup>133</sup> A party seeking to raise a rights question must raise a constitutional question prior to asking for a decision under European or Community law.<sup>134</sup> The resulting law aims to give the French constitution primacy, while consolidating review authority in the Constitutional Council.

### 1. *Unfinished Integration*

Since President Mitterrand first introduced the priority question procedure, there has been a distinct paradox in the reforms' presentation. Although reform was a matter of protecting France, it was also about keeping up with the neighbors by doing as they do.<sup>135</sup> Even in 1990, such an institution could be presented as part of a model of constitutionalism shared

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<sup>129</sup> Nicolas Sarkozy, President of Fr., Address at Épinal (July 12, 2007), <http://discours.vie-publique.fr/notices/077002273.html>.

<sup>130</sup> COMITE DE REFLEXION ET DE PROPOSITION SUR LA MODERNISATION ET LE REEQUILIBRAGE DES INSTITUTIONS DE LA VE REPUBLIQUE [Committee of Reflection and Proposition on the Modernization and Recalibration of the Institutions of the Fifth Republic], *UNE VE REPUBLIQUE PLUS DEMOCRATIQUE* [A More Democratic Fifth Republic] 68 (2008), available at [http://www.comite-constitutionnel.fr/telechargements/Rapport\\_du\\_comite\\_une\\_Ve\\_Republique\\_plus\\_democratique.pdf](http://www.comite-constitutionnel.fr/telechargements/Rapport_du_comite_une_Ve_Republique_plus_democratique.pdf).

<sup>131</sup> Loi 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution [Law 2009-1523 of December 10, 2009, Relative to the Application of Article 61-1 of the Constitution] *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE* [J.O.] [Official Gazette of France], Dec. 11, 2009, 21379, ch. II § 1, art. 23-1.

<sup>132</sup> *Id.* at ch. II § 1, art. 23-2.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at ch. II § 1, art. 23-2(3).

<sup>135</sup> Commentators such as Constance Grewe have presented the French reform as Europeanization, a step towards the creation of a German or Italian style constitutional court. Grewe, *supra* note 127, at 237-38.

by “all the great democracies” or, at least, many of the European ones.<sup>136</sup> Lacking such a system, France was an outlier.<sup>137</sup> Such a status suggested that it ought to change to keep up with its counterparts. Justice Minister Pierre Arpaillange claimed that the reform would return France to the “rank that must be its own, that is to say the first, in the domain of protection of human rights.”<sup>138</sup> Failing to protect rights in this way threatened the French government’s standing in Europe and in the eyes of its own people.

In 1993, the Vedel Committee on constitution reform noted that the time was ripe for reform due to the “evolution of French democracy,” and pointed to France’s “unfinished” integration into the European order.<sup>139</sup> The committee treated citizen initiative in the protection of constitutional rights through litigation as the normative model—a standard countries in the New Europe had to meet.<sup>140</sup> The idea of reform as evolution was also present in legislative debate in which parliamentarians sought signs of convergence.<sup>141</sup> One deputy spoke approvingly of the “progressive harmonization” of European legal norms, calling it necessary as a uniform guarantee of the rule of law.<sup>142</sup>

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<sup>136</sup> Assemblée Nationale, Seconde Session Ordinaire de 1989–1990, 2e séance du mardi le 24 avril 1990, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 24, 1990, 604 (statement of Deputy Michel Sapin, Président du commission des lois [Chairman of the Law Committee]).

<sup>137</sup> *Id.* at 594 (statement of Justice Minister Pierre Arpaillange). Assemblée Nationale, Seconde Session Ordinaire de 1989–1990, 2e séance du mercredi le 25 avril 1990, Débats Parlementaires, JOURNAL OFFICIEL DE LA REEPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 25, 1990, 667 (statement of Deputy Gérard Gouzes).

<sup>138</sup> Parliamentary Debate, *supra* note 136, at 593 (statement of Justice Minister Pierre Arpaillange).

<sup>139</sup> 1993 Report, *supra* note 128, at 2547.

<sup>140</sup> *See id.*

<sup>141</sup> Sénat, Seconde Session Ordinaire de 1992–1993, séance du mardi le 26 mai 1993, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 26, 1993, 442 (statement of Sen. Michel Dreyfus-Schmidt); Assemblée Nationale, Seconde Session Ordinaire de 1992–1993, 3me séance du mardi le 22 juin 1993, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 1993, 2046, 2048, 2057, 2059 (statements of Deputies Jacques Floch, Jean-Jacques Hyst & Jean-Pierre Michel).

<sup>142</sup> Assemblée Nationale, Seconde Session Ordinaire de 1992–1993, 3e séance du mardi le 22 juin 1993, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 1993, p. 2056 (statement of Deputy José Rossi).

## 2. *Rights at Home Rhetoric*

When President Mitterrand introduced his reform in 1989, supranational law was not as significant a factor as it is today. But by April 1990, when Parliament was ready to discuss Constitutional Council reform, the situation had begun to change. The Council of State had demonstrated its willingness to use treaty law to disapply domestic legislation in *Nicolo*.<sup>143</sup> Shortly after debates over constitutional review began, the Strasbourg court handed France its first defeat in a case about government wire-tapping.<sup>144</sup> The UN Human Rights Committee in Geneva had also recently censured France.<sup>145</sup> Those decisions provided a new rationale for reform, which the Prime Minister seized on in his opening remarks, explaining that he preferred sanction by French judges to “the humiliation of being sanctioned in Geneva, or, moreover, in a supranational court, at Strasbourg.”<sup>146</sup>

Like the Prime Minister, some deputies treated constitutional review as if it would be a substitute for review under the ECHR, although nothing would have prevented both from operating simultaneously.<sup>147</sup> Better “to wash your dirty laundry at home,” some Senators said.<sup>148</sup> Others understood that European law would stay in the legal system, even with the creation of concrete constitutional review.<sup>149</sup> They were concerned about the effects of

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<sup>143</sup> Sénat, Seconde Session Ordinaire de 1989–1990, séances du mardi le 12 juin et mercredi le 13 juin 1990, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 12–13, 1990, 1513, 1551 (statements of Sens. Jacqueline Freysse-Cazalis & Paul Masson regarding *Nicolo*).

<sup>144</sup> *Id.* at 1502 (statement of Justice Minister Pierre Arpaillange); Assemblée Nationale, Seconde Session Ordinaire de 1989–1990, séance du jeudi le 21 juin 1990, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 21, 1990, 2772 (statement of Deputy Pierre Mazeaud).

<sup>145</sup> April 24, 1990 Parliamentary Debate, *supra* note 136, at 591 (statement of Prime Minister Michel Rocard) (referencing the cases). This issue was later taken up by the Council of State. MARCEAU LONG ET AL., LES GRANDS ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE 884–85 (15th ed. 2005).

<sup>146</sup> April 24, 1990 Parliamentary Debate, *supra* note 136, at 591 (statement of Prime Minister Michel Rocard).

<sup>147</sup> *See, e.g., id.* at 615 (statement of Deputy Francis Colcombat) (“France is constantly condemned by the Strasbourg court”).

<sup>148</sup> June 12, 1990 Parliamentary Debate, *supra* note 143, at 1525 (statement of Sen. Michel Dreyfus-Schmidt); *see also id.* at 1526 (statement of Sen. Michel Dreyfus-Schmidt).

<sup>149</sup> Assemblée Nationale, Seconde Session Ordinaire de 1989–1990, 2e séance du mercredi le 25 avril 1990, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE

the Constitutional Council's 1975 decision to leave application of the ECHR to other courts.<sup>150</sup>

Subsequent debates followed a similar path. The 1993 debates repeated many of the themes from 1990, targeting European and EU (then, Community) law.<sup>151</sup> Deputies complained that as lower courts made use of the ECHR, the hierarchy of norms, of which the constitution was supposed to be the apex, had fallen into disarray.<sup>152</sup> To correct the problem, they insisted, one constitutional court should be given control over rights subject to diffuse review.<sup>153</sup>

The theme of resistance to European law resurfaced in more recent debates. The 2008 Senate Law Committee hearings soon focused on the hierarchy of norms. Former Constitutional Councilor Jean-Claude Colliard critiqued the bill as allowing other courts to exercise constitutional review.<sup>154</sup> Former Justice Minister Badinter complained of the ECHR: "We could not live perennially with a system in which French courts can become censors of laws by invoking the European Convention on Human Rights . . . but could not censor laws based on the protection of fundamental rights inscribed in the Constitution."<sup>155</sup> Having reversed his previous position, President Sarkozy attended the fiftieth anniversary celebrations of the Constitutional Council and highlighted the reform, telling the assembled crowd, "I prefer

[J.O.] [OFFICIAL GAZETTE OF FRANCE], J.O., Apr. 25, 1990, 662 (statement of Deputy Jean-Pierre Mazeaud).

<sup>150</sup> *Id.* at 614 (statement of Deputy Jacques Barrot); April 24, 190 Parliamentary Debate, *supra* note 136, at 662, 666 (statements of Deputies Jean-Pierre Mazeaud and Gérard Gouzes). *But see* Assemblée Nationale, Seconde Session Ordinaire de 1989-1990, 1re séance du mardi le 24 avril 1990, Compte rendu intégral, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 24, 1990, p. 599 (statement by Deputy Michel Sapin) (arguing that allowing the Council to consider treaties such as the ECHR would lead to significant changes in French case law and should be avoided).

<sup>151</sup> Assemblée Nationale, Seconde Session Ordinaire de 1992-1993, 3e séance du mardi le 22 juin 1993, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 1993, 2056-58 (statements of Deputies José Rossi and Jean-Pierre Michel). Today, Article 88 gives special status to Community law, but at the time, both sources of supranational law had equal status. Politicians regularly confuse the two in debate.

<sup>152</sup> *Id.* at 2063 (statement of Deputy Arnaud Cazin d'Honincthun).

<sup>153</sup> *Id.*

<sup>154</sup> Hearing on Constitutional Reform Before the Commission des Lois, Sénat, 2008-2009 Leg., 13th Sess. Ordinaire (2008), available at <http://www.senat.fr/bulletin/20080526/lois.html#toc2>.

<sup>155</sup> Sénat, Session Ordinaire de 2007-2008, séance du mardi le 24 juin 2008, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2008, p. 3356 (statement of Sen. Robert Badinter).

that our laws are censured based on our Constitution rather than based on international or European conventions.”<sup>156</sup>

Discussions of the organic law that implements the judicial review amendment raised similar issues. Law Committee hearings in the Senate and National Assembly asked how the procedures for constitutional adjudication would affect the use of the ECHR and EU law.<sup>157</sup> Early drafts of the organic law did not specify how a judge had to respond to constitutional question motions compared to others based on European and Community law. In the National Assembly hearings, experts and deputies attacked this provision as potentially allowing an escape hatch through which judges might avoid the constitutional question.<sup>158</sup> The “hierarchy of norms” needed to be reflected in procedure.<sup>159</sup> They had to end the “paradox”<sup>160</sup> and “contradiction”<sup>161</sup> in which citizens were used to invoking European rights rather than French ones. Deputies remained concerned that the law would not assure priority for the French Constitution.<sup>162</sup> The way to end that contradiction was to put the Constitutional Council at the top of a hierarchy of courts that paralleled the hierarchy of norms and to make it the first stop for litigants that invoked their rights. The final design of the organic laws that give priority to

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<sup>156</sup> Guy Canivet, Constitutional Councilor, *La question prioritaire de constitutionnalité ou le “ravisement” du constitutionnaliste*, Address at the University of Montpellier (Sept. 11, 2009), ¶ 16.

<sup>157</sup> *Hearing on Constitutional Reform Before the Commission des Lois*, Sénat, Session Ordinaire de 2008–2009 (Sept. 30, 2009), available at <http://www.senat.fr/bulletin/20090921/lois.html#toc3>; *Hearing on A.N. no. 1599 Before the Commission des Lois Constitutionnelles, de l’administration générale de la République (CR 58)*, Session Ordinaire de 2008–2009 (June 23, 2009), available at <http://www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809058.pdf>; *Hearing on A.N. no. 1599 Before the Commission des Lois Constitutionnelles, de l’administration générale de la République (CR 63)*, Session Ordinaire de 2008–2009 (June 30, 2009), available at <http://www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809063.pdf>.

<sup>158</sup> See Statement of Deputy Jean-Pierre Mazeaud, *supra* note 149.

<sup>159</sup> Sénat, Session Ordinaire de 2009–2010, séance du mardi le 13 octobre, *Débats Parlementaires*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 13, 2009, 8559, 8565 (statements of Sens. Jean-Marie Bockel and François Zocchetto).

<sup>160</sup> *Id.* at 8565 (statement of Sen. Zocchetto).

<sup>161</sup> *Id.* at 8567 (statement of Sen. Robert Badinter).

<sup>162</sup> Assemblée Nationale, *Seconde Session Extraordinaire de 2008–2009*, 1<sup>re</sup> séance du lundi le 14 septembre 2009, *Débats Parlementaires*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 14, 2009, 7042–43 (statements of Deputies Patrick Braouezec and Jean-Christophe Lagarde) (concern that litigants will not choose ECHR over constitutional review).

constitutional issues leaves little doubt that it meant to cause the litigant to favor internal norms.<sup>163</sup>

Like the British, French conservatives did not subsequently reconcile themselves to ECtHR review. Center-right deputies recently attempted to introduce a resolution instructing the government to renegotiate the terms of the ECtHR's jurisdiction.<sup>164</sup> However, the resolution quickly failed in the National Assembly where the left maintains a slim majority.<sup>165</sup>

The UK and French reforms offer two particularly striking examples of countries with strong parliamentary traditions in which parliaments sought to empower national judges. In both countries, reform was presented as simultaneous integration of national law into the European legal system and protection of the national law from Europe. Parliament's old allies against the local bureaucracy might be new allies against the transnational one, and in particular, against international courts with insufficient regard for local traditions. Paradoxically, this position required adopting a European concept—judicial review, and in the case of the United Kingdom, “bringing home” European rights. Although presented as a way of preventing outside meddling, this approach achieved one of the ECHR's goals by providing more rights' protection at the national level.

#### IV. THE BOUNDARIES OF DOMESTIC REFORM

Several years have passed since the UK Supreme Court moved out of Westminster and down the street to Middlesex Guildhall and since the Constitutional Council issued its first decision in response to a priority constitutional question. Have they promoted national values or European ones? The answer depends on how and whom one asks.

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<sup>163</sup> Loi organique 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la constitution [Organic Law 2009-1523 of December 10, 2009, Relative to the Application of Article 61-1 of the Constitution] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 2009, 21379, ch. II § 1, art. 23-2(3).

<sup>164</sup> Proposition de résolution invitant le Gouvernement à renégocier les conditions de saisine et les compétences de la Cour européenne des droits de l'Homme (CEDH) sur les questions touchant notamment à la sécurité nationale et à la lutte contre le terrorisme. [Proposed Resolution inviting the Government to Renegotiate the Conditions for Referrals and Jurisdiction of the European Court of Human Rights (ECtHR), Notably on Questions Related to National Security and the Fight against Terrorism], Assemblée Nationale, Feb. 18, 2015, available at <http://www.assemblee-nationale.fr/14/propositions/pion2601.asp>.

<sup>165</sup> ASSEMBLEE NATIONALE, SESSION ORDINAIRE DU 2014-2015, SEANCES DU JEUDI LE 2 AVRIL 2015, Débats Parlementaires, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 2, 2015, 3457.

The reforms discussed above reflect the shared expectation that the ECtHR is actively seeking to expand its reach. Parliament also assumed that national judges would seek to guard their terrain from interference by the ECtHR. Within this assumption seems to be the idea that national courts will interpret rights in a manner that parliamentarians and the public find more congenial. This view has merit. Judges on the UK Supreme Court have openly criticized Strasbourg for overstepping its bounds, and substituting its judgment not only for the national legislature's, but for their courts' as well.<sup>166</sup> Apex courts within a domestic political order remain tied and responsive to national politics through a variety of mechanisms. In the very act of creating new review powers, parliaments have demonstrated their willingness and ability to alter those courts' jurisdiction. Appointment processes also involve political choices. In the United Kingdom, review under the HRA gives Parliament an important role.<sup>167</sup> In France, legislation or constitutional amendment are possible responses to a constitutional decision—something of which constitutional judges are well aware.<sup>168</sup>

However, those ties do not guarantee that national judges will prefer national norms. The ECHR gives national judges the ability to refuse to apply legislation that threatens human rights. Lacking other mechanisms, judges in systems of strong parliamentary sovereignty will find that power especially valuable.<sup>169</sup> Litigants know that the ultimate destination of a claim may still be Strasbourg. Additionally, CJEU and ECtHR case law prevents the UK Supreme Court and French Constitutional Council from blocking resort to these courts for rights review. The Lisbon Treaty may restrict

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<sup>166</sup> Lord Leonard Hoffmann, Judicial Studies Board Annual Lecture: The Universality of Human Rights, ¶¶ 15, 22–28, 39, 44 (Mar. 19, 2009), available at [https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann\\_2009\\_JSB\\_Annual\\_Lecture\\_Universality\\_of\\_Human\\_Rights.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf); see also Stijn Smet, *President of Belgian Constitutional Court Criticizes European Court of Human Rights*, STRASBOURG OBSERVERS (May 17, 2010), <http://strasbourgobservers.com/2010/05/17/president-of-belgian-constitutional-court-criticizes-european-court-of-human-rights/> (President Marc Bossuyt stating that he agrees with Lord Hoffman that Strasbourg fails to respect its “double subsidiary nature” to national legislatures and national courts).

<sup>167</sup> See *supra* Part III.B.

<sup>168</sup> See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 2015-713 DC, 23 July, 2014, Rec. 2751, paras. 2–3 (spelling out the responsibility of the legislature and President for safeguarding rights). The Council repeated that Parliament enjoys wide discretion when legislating on rights. The French Constitution has also been amended repeatedly throughout the life of the Fifth Republic.

<sup>169</sup> King, *supra* note 73, at 249.

attempts by the UK Supreme Court or French Constitutional Council to block questions of EU law referred by lower courts. Although France may give the constitutional question procedural priority, the ECtHR does not. The only way to alter this relationship would be through efforts at jurisdiction-stripping at the Council of Europe level. The UK attempted to lead one such effort, but it was unsuccessful. As a result, neither the UK Supreme Court nor the French Constitutional Council have the only, or the last, word on rights within their borders.

Instead, these jurisdictions are left with the continued ambiguity of what many have termed “judicial dialogue.” At the transnational level, the dialogue is stilted because the ECtHR takes so long to respond.<sup>170</sup> But lawyers and judges at the national level are constantly choosing the sources of law they refer to in petitioning for appeal and in adjudicating rights. They control the dialogue by deciding whether they view national and international versions of rights as being in harmony or conflict. Here, too, nationalists will be disappointed. To the extent that their objections to European rights were not merely to form, but to substance, putting national courts in charge never could satisfy them. Although national court judgments may convince Strasbourg that there exists a margin of appreciation, national rights adjudication takes place within European bounds. The UK Supreme Court recognizes the ECHR’s influence directly and gives itself only a limited scope for resisting ECtHR interpretations. The French Constitutional Council mostly has avoided explicitly referring to the ECHR in either its judgments or in the accompanying dossier, but its reading of the rights protected by the French Constitution corresponds with the ECHR.

#### *A. The Failure of a Blocking Mechanism*

The European context in which they remain embedded limits the ability of national courts to block review in Strasbourg, even if they wanted to. Purely local reform simply cannot alter that. UK Conservatives eventually realized as much, and proposed stripping jurisdiction from the ECtHR. However, they found that other member states had little appetite for strong measures and had to settle for merely reiterating the principle of subsidiarity.

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<sup>170</sup> See ISUFI Int’l Assocs., *Preparing a Case for the European Court of Human Rights*, HG.ORG, <http://www.hg.org/article.asp?id=4832> (noting the current backlog prevents the ECtHR from reviewing applications for about one year).

### *1. Treaty Obligations Remain*

Prioritizing constitutional over transnational law may itself violate treaty obligations. Judges in France scrutinized the constitutional question procedure as a possible violation because it would retard a litigant's ability to vindicate his or her EU rights as had occurred in Belgium, which had adopted similar reforms.<sup>171</sup> The CJEU ruled that interlocutory constitutional question procedure is invalid "so far as the priority nature of that procedure prevents . . . all the other national courts or tribunals [besides the constitutional court] from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling."<sup>172</sup> Because EU law includes the Charter of Rights and Freedoms, which is very similar to the ECHR, and because the CJEU has incorporated the ECHR in its "general principles of EU law," a preliminary rights ruling for a transnational court remains a possibility.

At the same time that reforms are too strong for Luxembourg, they may be too weak for Strasbourg. The UK Supreme Court cannot strike down an act of Parliament. The ECtHR held in the 2002 case, *Hobbs v. United Kingdom*, that a declaration of incompatibility with the HRA did not offer a

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<sup>171</sup> Called to provide an opinion on the constitutionality of the proposed law, the Belgian Council of State analyzed the proposed legislation in light of the CJEU's *Simmenthal* decision, which discussed the relation of ordinary national law to community law and insisted on the primacy of the latter. *Avis du Conseil d'Etat [CE]*, 3 Mar. 2009, No. 45.905, ¶ 7 (Belg.). It mapped a way in which a national court might seek to circumvent the constitutional question by reviewing the law on constitutional question procedure for conventionality and sending a question to the CJEU. *Id.* ¶¶ 5–8. Soon after their respective constitutional questions were put in place, the Courts of Cassation in both Belgium and France raised the issue of whether the question violated EU treaties by giving priority to the constitutional court and limiting their ability to seize the CJEU. Cases C-188/10 and C-189/10, *Melki v. France*, 2010 E.C.R. I-05667; Case C-457/05, *Chartry v. Belgium*, 2011 E.C.R. I-00819; Guy Carcassonne & Nicolas Molfessis, *La Cour de cassation à l'assaut de la question prioritaire de constitutionnalité*, LE MONDE (PARIS), Apr. 23, 2010. The CJEU heard both cases and decided the French case first, holding that the constitutional question could avoid violating EU law only if all French courts remained free to refer cases to the CJEU, to provide provisional protection for EU rights, including fundamental rights under the Charter (identical to the ECHR), and to refuse to apply law contrary to EU law. *Melki*, 2010 E.C.R. I-05667, ¶ 76.

<sup>172</sup> *Melki*, 2010 E.C.R. I-05667, ¶ 57.

sufficient domestic remedy because it is not binding on the parties and because it does not require Parliament to amend its legislation.<sup>173</sup>

Meanwhile, France has adopted a model that gives several judges discretion as to whether a petition reaches the constitutional court. This type of discretionary petition does not necessarily meet the ECHR's standard for domestic remedy. In *Horvat v. Croatia*, the ECtHR held that a petition to that country's constitutional court was not a domestic remedy to be exhausted because the court had discretion over whether to hear the case and because a successful petition had to meet several other criteria, such as the requirement that the petitioner's rights were "grossly violated."<sup>174</sup> This formulation did not create a sufficiently certain domestic remedy that petitioners could be required to exhaust before going to the ECtHR.<sup>175</sup> France introduced multiple levels of discretionary, rather than mandatory, review because it is up to the judge and then, to the Court of Cassation and Council of State to decide whether to submit a constitutional question up the chain to the Constitutional Council.<sup>176</sup> Manifest violation or non-violation may prove no less ambiguous than "gross violation" in the ECtHR's eyes. However, the ECtHR used the same case to announce that it considered the practical, as well as *de jure*, availability of the remedy or hearing.<sup>177</sup> These jurisdictions may fare better on that scale.

EU and European doctrines combine to undermine any blocking potential the reforms may have. They underscore how little the solution of judicial review accords with the rhetoric that accompanied its adoption. Introducing more rights review at the national level does not preclude ECtHR review.<sup>178</sup> Nor does it allow national courts to take and maintain an attitude toward rights fundamentally different from Strasbourg's without censure. Domestic, supreme or constitutional courts have greater capacity that can be used to

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<sup>173</sup> *Hobbs v. United Kingdom*, App. No. 63684/00, 44 Eur. H.R. Rep. 54 (2002). However, if a court has the option of reading down legislation to make it compliant with the HRA, the ECtHR considers this reading a remedy that must be exhausted before it will hear the case. *Upton v. United Kingdom*, App. No. 29800/04, 47 Eur. H.R. Rep. 24 (2006).

<sup>174</sup> *Horvat v. Croatia*, App. No. 51585/99, 6, ¶¶ 41–42 (2001).

<sup>175</sup> *Id.* at 6–7, ¶ 43.

<sup>176</sup> The Council's Secretary General pointed this out early on. Marc Guillaume, *Question Prioritaire de Constitutionnalité et Convention Européenne des Droits de L'Homme*, 32 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 67, 91–92 (2011).

<sup>177</sup> *Horvat*, App. No. 51585/99, at 7.

<sup>178</sup> On this issue in France, see Constance Grewe, *Contrôle de constitutionnalité et contrôle de conventionalité: à la recherche d'une frontière introuvable*, 100 REVUE FRANÇAIS DE DROIT CONSTITUTIONNEL 961, 962 (2014).

resolve rights disputes, but that does not necessarily mean they will reduce the burden on the ECtHR.<sup>179</sup>

## 2. *Seeking a Wider Margin*

From a nationalist perspective, the constitutional changes I described would be more successful if they matched a renewed commitment to the principle of subsidiarity and a wide margin of appreciation. Adopted unanimously in April 2012, the Council of Europe's Brighton Declaration changes the preamble to the ECHR to enshrine the principle of subsidiarity.<sup>180</sup> It also includes detailed instructions describing how member states would like the ECtHR to enact this principle. As long as they do not appear in the form of an additional protocol, the court is free to ignore these instructions, and Sir Nicholas Bratza, the UK judge and then President of the ECtHR, announced his intention to do as much.<sup>181</sup> However, the declaration shows one direction the push for national judicial review could take and exemplifies an effort to broaden the trend.

The Brighton Declaration was primarily the work of the UK Government, which sought to strip ECtHR jurisdiction.<sup>182</sup> In February 2012, newspapers

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<sup>179</sup> The UK Supreme Court began sitting in October 2009. Thus far, it has received a total of 612 applications, most of which were refused. It has issued 183 judgments, including judgments on issues unrelated to the HRA. THE SUPREME COURT ANNUAL REPORT AND ACCOUNTS 2011–2012, at 22–23; THE SUPREME COURT ANNUAL REPORT AND ACCOUNTS 2010–2011, at 22; THE SUPREME COURT ANNUAL REPORT AND ACCOUNTS 2009–2010 HC 64, at 23, available at <http://www.supremecourt.gov.uk/news/annual-report.html>. The French Constitutional Council has issued 435 decisions on constitutional questions. CONSEIL CONSTITUTIONNEL, QUESTION PRIORITAIRE DU CONSTITUTIONNALITE, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-type/les-decisions-qpc.48300.html>.

<sup>180</sup> Brighton Declaration, Eur. Ct. H.R. art. 12(b), 3 (2012).

<sup>181</sup> Owen Bowcott, *European Court of Human Rights President Criticizes UK Reforms*, THE GUARDIAN (Manchester), Apr. 19, 2012, <http://www.guardian.co.uk/law/2012/apr/19/european-court-human-rights-uk-reforms?newsfeed=true>.

<sup>182</sup> Vaughne Miller & Alexander Horne, *The UK and Reform of the European Court of Human Rights*, HOUSE OF COMMONS LIBRARY, Mar. 29, 2012, available at <http://www.parliament.uk/briefing-papers/SN06277>; David Cameron, Speech on the European Court of Human Rights (Jan. 25, 2012), in THE GUARDIAN (Manchester), Jan. 2012, <http://www.theguardian.co.uk/law/2012/jan/25/cameron-speech-european-court-human-rights-full?intcmp=239>. It has the support of at least some HRA advocates. Anthony Lester, *The European Court of Human Rights Needs These British Reforms*, THE GUARDIAN (Manchester), Mar. 13, 2012, <http://www.theguardian.co.uk/commentisfree/2012/mar/13/court-human-rights-needs-british-reforms>.

in the United Kingdom and France obtained a leaked document outlining the Cameron Government's strategy for reforming the ECtHR. The memorandum outlines a number of reforms aimed at nationalizing rights and judicial review, presented as a way to reduce the ECtHR's caseload.<sup>183</sup> It would have limited ECtHR involvement to cases in which the national court made a manifest error or in which the ECHR question was of grave importance.<sup>184</sup> The final declaration does not include this provision, replacing it with threatening language, but no jurisdiction stripping.

The Brighton Declaration raises two factors contributing to the ECtHR's untenable workload: weak national institutions and an interventionist court.<sup>185</sup> This characterization encompasses the human rights demands of the East and the democratic angst of the West.<sup>186</sup> The declaration's insistence on sovereignty and the plethora of articles specifically mentioning national institutions make clear that national governments, and not the ECtHR, should play the leading role in rights protection. National governments should also typically be the exclusive source of such protections. The declaration calls on member states who lack an "independent National Human Rights Institution" to create one.<sup>187</sup> The parties were careful not to specify that the institution be a court, but this expectation is implicit in calls for "new domestic legal remedies, whether of a specific or general nature."<sup>188</sup>

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<sup>183</sup> See James Landale, *UK Presses for European Human Rights Convention Changes*, BBC NEWS, Feb. 29, 2012, available at <http://www.bbc.com/news/uk-politics-17201024> (discussing the leaked position paper known as the Brighton Draft).

<sup>184</sup> *Id.*

<sup>185</sup> See Brighton Declaration, *supra* note 180, arts. 6–7.

<sup>186</sup> As Article 3 makes evident, the Declaration aims both to empower and to constrain national actors:

The States Parties and the Court share responsibility for realizing the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.

*Id.* art. 3. The last two sentences temper the aggressive language of the first three, as does Article 7, which calls for national courts to take the convention into account. *Id.* arts. 3, 7, 9(a)–(c), 10, 11, 12(a)–(c).

<sup>187</sup> *Id.* art. 9(c)(i).

<sup>188</sup> *Id.* art. 9(c)(iii).

Increased national attention to the Convention's values is to be coupled with decreased attention from Strasbourg.<sup>189</sup>

A watered-down Brighton Declaration has been incorporated into Protocol 15, amending the ECHR's preamble to state that "the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation."<sup>190</sup> It accomplishes only the mildest jurisdiction stripping—reducing by two months the time that parties have to file.<sup>191</sup> It sits somewhat uneasily next to Protocol 16, which allows national judges to refer questions to Strasbourg for advisory opinions.<sup>192</sup> Such a provision might encourage national courts to avoiding taking responsibility for hard cases through a well-timed reference. Lower courts using this protocol might also bypass the national apex courts, frustrating legislative attempts to restore a hierarchy of norms.

### *B. Dialogues and Monologues*

The expectation that national courts can substitute for international ones actually involves a set of assumptions favorable to European norms. For review under the national constitution to replace review under the ECHR, whether by local judges or at Strasbourg, the rights protection offered under constitutional law must be at least as robust as that under the ECHR. And it must be done in a manner similar enough to the ECtHR's approach to rights protection that even foreign judges sitting in Strasbourg can agree that it is as protective of the same fundamental rights. Only then can the new constitutional review take the place of convention review. Viewed in this light, the claims made by UK and French reformers are not contradictory—

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<sup>189</sup> See *id.* art. 11.

<sup>190</sup> Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, C.E.T.S. No. 213, *available at* [http://www.echr.coe.int/Documents/Protocol\\_15\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf); see also Comm. of Ministers, Protocol No. 15 Amending the Convention for Protection of Human Rights and Fundamental Freedoms-Explanatory Report, 123d Sess., para. 7, Doc. No. CM(2012)166-add (2012).

<sup>191</sup> *Id.* art. 35.

<sup>192</sup> Protocol No. 16 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Oct. 2, 2013, C.E.T.S. No. 2014, *available at* [http://www.echr.coe.int/Documents/Protocol\\_16\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf).

internalization of European rights really will stop “embarrassment” at Strasbourg.

The strong version of the nationalist argument thus assumes that domestic rights law provides an adequate substitute for the ECHR. This ends up resembling the more pro-European story—that Convention rights should be fully incorporated into national law. First, for domestic review to replace international review, the national constitution or statute must be at least as protective of fundamental rights as the ECHR.<sup>193</sup> Moreover, the constitution must not offer an approach to rights that differs significantly from the approach that an ECtHR judge would take. Unless this assumption holds, constitutional law does not provide a shield from the ECtHR; the losing party will simply “appeal” to Strasbourg. Appeal will be unavailing only if values and approaches already have to be internalized, or conversely, the nation’s values and approaches must have heavily influenced European ones.<sup>194</sup> Members of the UK Parliament were endorsing this view when emphasizing the Britishness of the ECHR.<sup>195</sup> The French Justice Minister also invoked his country’s historical leadership in the development of human rights.<sup>196</sup>

The ECtHR explicitly allows states to differ in how they implement the Convention under the margin of appreciation. Almost any case the court hears for argument will tend to turn on whether the national government has engaged in a rights violation by going below this floor, or whether it has applied the rules within its margin of appreciation. In judging whether a state has stepped outside the margin, the concept of European consensus looms large. A challenge to practice that is within this consensus will likely result in a case being rejected as manifestly ill-founded.<sup>197</sup> The cases that get argued are cases in which there is no consensus, or a state seeks to deviate from the consensus. Staying within this consensus is likely to be the only

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<sup>193</sup> UK judges are legally bound to interpret the HRA in a manner “no less” expansive than the ECtHR’s ECHR interpretation. Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. CONST. L. 167, 191 (2010).

<sup>194</sup> See Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in A EUROPE OF RIGHTS, *supra* note 77, at 677, 710.

<sup>195</sup> See 582 PARL. DEB., H.L. (5th ser.) (1997) 1227f, *reprinted in* BLACKBURN, *supra* note 72, at 377.

<sup>196</sup> Assemblée Nationale, Seconde Session Ordinaire de 1989–1990, 2me séance de mardi le 24 avril 1990, Débats Parlementaires, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 24, 1990, 593 (statement of Justice Minister Pierre Arpaillange).

<sup>197</sup> Kanstantsin Dzehtsiarou & Pavel Repyeuski, *European Consensus and EU Accession to the ECHR*, in THE EU ACCESSION TO THE ECHR 309, 312 (Vasiliki Kosta, Nikos Skoutaris & Vassilis Tzevelekos eds., 2014).

way to protect a state from Strasbourg review. Moreover, national courts are not well placed to determine the scope of the margin of appreciation. So, a case that turns on the margin of appreciation will typically mean a Strasbourg appeal. That does not mean that the state may not ultimately win its appeal. But if the aim is to avoid ECtHR oversight entirely, relying on the margin of appreciation is risky.

The ECtHR frequently cited the House of Lords and now cites the UK Supreme Court in order to understand UK law. It did so prior to the HRA.<sup>198</sup> UK courts generally accept ECtHR jurisprudence and apply it in domestic law.<sup>199</sup> However, in select cases, the courts have refused to accept the ECtHR's interpretation at face value and have either issued a controversial re-interpretation on the issue or, rarely, confronted Strasbourg.<sup>200</sup> European judges take seriously calls by the House of Lords and Supreme Court to reconsider their judgments. For instance, judicial dialogue led Strasbourg to alter its view of hearsay evidence, although the result was only a partial victory for the UK Government.<sup>201</sup> Cases remain in which the UK Supreme Court and the ECtHR are at odds, such as with prisoner voting. The ECtHR has now ruled several times that a blanket ban on prisoners' voting is unacceptable under Article 3 of Protocol 1 of the Convention, but the UK courts have refused to find incompatibility with the HRA.<sup>202</sup> Although Westminster might prefer that Strasbourg actually listen, its own courts' refusal to apply Strasbourg's rule immediately is a signal that courts will, at least in some instances, defend a British interpretation of Convention rights.

Although a parliamentary committee found inadequate implementation of the ECHR and a "flood" of applications to Strasbourg,<sup>203</sup> the number of cases in which Strasbourg censured the United Kingdom went down in 2009 and

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<sup>198</sup> MASTERMAN, *supra* note 26, at 28.

<sup>199</sup> Merris Amos, *The Dialogue Between the United Kingdom Courts and the European Court of Human Rights*, 61 INT'L & COMP. L.Q. 557, 564 (2012).

<sup>200</sup> *Id.* at 565–68, 582; *see also* Victor Nealon v. Sec'y of State for Justice, [2015] EWHC 1565, [46] (admin) (finding the Strasbourg court's decision regarding the applicability of Article 6(2) of the European Convention on Human Rights to section 133 of the Criminal Justice Act of 1988 unpersuasive and erroneous).

<sup>201</sup> Delaney, *supra* note 90, at 586–89.

<sup>202</sup> Amos, *supra* note 199, at 578–79.

<sup>203</sup> LORDS & COMMONS JOINT COMM. ON HUMAN RIGHTS, ENHANCING PARLIAMENT'S ROLE IN RELATION TO HUMAN RIGHTS JUDGMENTS, 2010–15, H.C. 455, at 5, *available at* <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>.

2010, when the Supreme Court was established.<sup>204</sup> This observation suggests that the UK Supreme Court may be helping to bring UK case law in line with European norms, and the UK Supreme Court's explanations of the UK approach may have encouraged Strasbourg judges to find that it fits within the margin of appreciation. In many cases, the former approach seems to have taken hold, with the UK courts implementing ECtHR case law to expand the HRA. For instance, in *Ullah*, the UK Supreme Court was willing to recognize much more extensive defenses to deportation on the basis of ECtHR judgments.<sup>205</sup> The UK Supreme Court also overturned the House of Lords' earlier ruling in *Marper* that retaining fingerprints and DNA profiles was not a violation of Article 8 after the ECHR's judgment finding a violation in *Marper*.<sup>206</sup> The Supreme Court ruled that the statute authorizing police collection of data was unlawful. Instead of ordering destruction of all of the collected data because the statute was unlawful, the Court allowed Parliament a reasonable time to cure the deficiencies in the statute.<sup>207</sup>

On balance, the ECtHR appears to have devoted less attention to the French Constitutional Council.<sup>208</sup> That body's syllogistic reasoning style provides less material to respond to than do the UK Supreme Court's *seriatim* opinions, but Strasbourg judges reference the other French supreme courts, the Court of Cassation and Council of State, much more often.<sup>209</sup> Dialogue with the Council may be only a matter of time; French cases decided in the past year show greater engagement with the Constitutional Council's reasoning.<sup>210</sup> However, the Council's own approach to European law has barely changed.

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<sup>204</sup> Amos, *supra* note 199, at 581. *The Supreme Court*, COURTS AND TRIBUNAL JUDICIARY (2015), <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/the-supreme-court/>.

<sup>205</sup> *Id.* at 580.

<sup>206</sup> R (GC) v. Comm'r of the Police, [2011] UKSC 21, [15] (citing S. and Marper v. United Kingdom, App. Nos. 30562/04, 48 Eur. H.R. Rep. 1169 (2008)).

<sup>207</sup> *Id.* at 45–49.

<sup>208</sup> The ECtHR did not review any cases from the French Constitutional Council in 2014. EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2014, at 64 (2015), available at [http://www.echr.coe.int/Documents/Annual\\_report\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf).

<sup>209</sup> In 2014, the ECtHR reviewed only two cases from France, one from the Council of State and one from Court of Cassation.

<sup>210</sup> See, e.g., *Agnelet v. France*, App. No. 61148/08, Eur. Ct. H.R. at 33 (2013), available at <http://hudoc.echr.coe.int/eng/?=001-115980> (reference to Constitutional Council's decision on a priority question); *Segame SA v. France*, App. No. 4837/06, Eur. Ct. H.R. at 38 (2012), available at <http://hudoc.echr.coe.int/fre?i=002-3881> (discussing the Constitutional Council's ruling on a priority question); *Depalle v. France*, App. No. 34044/02, Eur. Ct. H.R. at 35-37 (2010) (reference to Constitutional Council in pre-2009 case).

The French Constitutional Council's approach to European case law is markedly different from the UK Supreme Court's. This difference arises not only because of its very different style of giving judgments, but because the Council has maintained since 1975 that it is a judge of the constitution, not of treaties.<sup>211</sup> This attitude did not change after the creation of the priority constitutional question procedure. The Council's priority question decisions appear in a traditional format, and they are often spare, even in important cases, with a singular focus on the law (in this case the constitution).<sup>212</sup> This format meshes with the understanding that law is legitimate if it is clear on the face, which encourages a syllogistic style because it presents the Council's interpretation as flowing deductively from the law as written.

The Council draws from an eclectic mix of sources for rights law. The operative clauses of the 1958 Constitution contain no rights, so the Council instead references the 1798 Declaration of the Rights of Man and the Citizen and the Preamble to the 1946 Constitution, both of which are cited in the 1958 Constitution's preamble. The Council also has recourse to "general principles" of the French Constitution. In response to constitutional questions, it will typically cite to the above documents and principles directly as well as to its own prior case law or, more rarely, the Court of Cassation or Council of State. Unlike the ECHR, which has no direct constitutional standing, Article 88 of the French Constitution gives EU law a distinct place in the constitutional order, and the Council has been called on to judge issues such as the constitutionality of the Lisbon Treaty.<sup>213</sup> In contrast, I have not found an instance in which the Council cited either the ECHR, an ECtHR judgment, or a French court's judgment about an ECHR article.

Sources beyond the text of opinions suggest that the ECHR and ECtHR jurisprudence both have influence. The Council is quite aware that its syllogisms sometimes require further explanation, and publishes a "dossier" of documents related to the case. In important cases, its Secretary General will often publish an academic commentary. ECHR references are not prominent in the dossiers. In one case, its decision stating that Parliament

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<sup>211</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, Rec. 19 (Fr.).

<sup>212</sup> Grewe, *supra* note 178, at 965.

<sup>213</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-560DC, Dec. 20, 2007, Rec. 459 (Fr.) (Lisbon Treaty accession). The Council even referred a question to the CJEU. See Christine Maugeue, *La QPC: 5 Ans Déjà et Toujours Aucun Prescription en Vue*, 79 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 9, 15 (2015).

could prohibit same-sex marriage, the Council cited to two ECtHR decisions noting that states have a margin of appreciation in this area in the accompanying dossier.<sup>214</sup> A decision upholding a new law allowing same-sex marriage included one ECtHR decision.<sup>215</sup> It has also cited ECtHR decisions in its review of security legislation in the wake of recent terror attacks.<sup>216</sup>

However, even when the Council does not mention it, the ECHR seems to have had an effect.<sup>217</sup> Among the general principles of constitutional law are several rights, such as a right to privacy in personal data and the right to family life, which directly track ECHR rights not recognized elsewhere in the constitutional corpus. For instance, the Council's decision on the retention of DNA information of all convicted offenders never mentioned the ECtHR's *Marper* judgment, but the Council's holding that blanket retention was unconstitutional was certainly in keeping with Strasbourg's.<sup>218</sup> At the outset, professional commentary surrounding the Council embraced the idea of convergence between the Council's decisions and the ECtHR's.<sup>219</sup>

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<sup>214</sup> Conseil constitutionnel [CC] decision No. 2010-92QPC, Dossier documentaire, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201092QPCdoc.pdf> (same-sex marriage prohibition).

<sup>215</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-669DC, Dossier documentaire, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013669DCdoc.pdf> (law allowing same-sex marriage).

<sup>216</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2015-719DC, Dossier documentaire, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015713DC2015713dc\\_doc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015713DC2015713dc_doc.pdf) (domestic intelligence gathering); 2015-527QPC, Dossier documentaire, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015527QPC2015527qpc\\_doc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015527QPC2015527qpc_doc.pdf) (temporary house arrest permitted by emergency legislation).

<sup>217</sup> Constitutional scholar Denys de Bechillon noted this phenomenon. See Denys de Béchillon, *Cinq Cours Suprêmes: Apologie (Mesurée) Du Désordre*, 137 POUVOIRS 33, 36 (2011).

<sup>218</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-25QPC, Sept. 16, 2010, Rec. 220 (retention of genetic data).

<sup>219</sup> Most significantly the Council's Secretary General, who directs legal staff that aid in research for its decisions, embraced this view in a commentary in its official journal. Guillaume, *supra* note 176, at 91. He cited the work of Olivier Dutheillet de Lamothe, an influential member of the Council of State and proponent of the convergence thesis. *Id.* at 68, 78 (citing Dutheillet de Lamothe, *supra* note 8). Guillaume was at particular pains to describe how the Council's procedure would meet due process standards under Article 6 of the ECHR. *Id.* at 70–83. The Council would thus apply the ECHR through its practice though it might not refer to it in its legal interpretations, which were to remain limited to the constitution. *Id.* at 67. See also Helène Surrel, *Conseil constitutionnel et jurisprudence de la CEDH*, 47 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 311 (2013) (discussing convergence between French and ECHR rules related to the independence of tribunals).

Moreover, the structure of the constitutional question means that constitutional judging is not confined to the Constitutional Council. The lower courts, the Council's co-apex courts, and the Council of State and Court of Cassation have substantial familiarity with the ECHR as well as responsibility for framing and filtering constitutional questions. This mandate makes convergence in legal orders likely to occur.<sup>220</sup>

In both France and the United Kingdom, reforms have mainly led to courts seeking compatibility with the ECHR and the ECtHR's interpretations of it. These decisions forestall more censure on the international level, preventing international "embarrassment" by weaving the ECHR and Strasbourg's approaches to it more tightly into domestic law. Importantly, they require that lower courts now have to attend to domestic high courts and domestic sources of law when judging rights.<sup>221</sup>

British conservatives, never entirely mollified by Labour's promises of avoiding Strasbourg, are not pleased and continue to contest the HRA's existence as well as the United Kingdom's ties to the EU and Council of Europe. The UK Supreme Court faces the same criticism as the ECtHR. In France, however, the continued appeal of anti-Europe rhetoric, readily apparent with the National Front party's rise, is not mixed with anti-Council rhetoric. The Council has taken a cautious approach, emphasizing the Constitution to the exclusion of other sources of law. It has also repeatedly emphasized Parliamentary power to set policy in controversial cases in which there is a clear margin of appreciation. An example of such cases are same-sex marriage and abortion in which the Council has refused to engage arguments about equality and dignity.<sup>222</sup> *A priori* review powers give it continued importance to all parties in Parliament. Along with these structural factors, the Council's rights review powers may have simply not been around long enough. In another decade, it may have its first major confrontation with Parliament over rights or answer a constitutional question in a way that places it firmly outside the margin of appreciation, both of which might require more direct use of the ECHR.

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<sup>220</sup> Grewe, *supra* note 178, at 966.

<sup>221</sup> See Maugue, *supra* note 213, at 15–16.

<sup>222</sup> See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-669DC, May 17, 2013, Rec. 721 (Fr.) (Parliament may decide whether to allow or prohibit same-sex marriage); 2010-9 QPC, *supra* note 214; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2014-700 DC, July 31, 2014 (Fr.) (Parliament has authority to remove restrictions on abortion).

The approach to rights jurisprudence created by the states parties is pluralistic but favors the continued primacy of the ECHR.<sup>223</sup> The CJEU and ECtHR are unwilling to wait categorically, for the domestic courts. British attempts at actual jurisdiction-stripping fizzled in Brighton, and member-states were left instead with a new preliminary reference protocol that, once enacted, could take more issues out of the apex courts and give them to the ECtHR. The UK Supreme Court and the French Constitutional Council have, for the most part, brought national law in line with Europe. The difference in the Supreme Court's open dialogue with the ECtHR and the Council's decision to cite only the constitution reflect differences in prevailing norms for their own legal systems.

## V. CONCLUSION

Individual petition under the ECHR brought the end of strong parliamentary sovereignty across Europe. Under pressure from the ECtHR, old democracies have chosen to adopt more robust forms of judicial review. The political rhetoric supporting their adoption included some references to embracing modern, human-rights oriented Europe, but also included a large dose of legal protectionism. In the United Kingdom and France, parliaments sometimes treated national judicial review as an alternative to international review. This it may be, but only if subsidiarity works as it is supposed to and national rights law largely matches the international court's rules—a result pro-Europeans would be at pains to disagree with. The system outlined here resembles the pattern of overlapping jurisdictions and ultimate consensus one might see in a federal court system.<sup>224</sup> If constitutional meaning changes as

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<sup>223</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 184 (2008).

<sup>224</sup> See Rudolf Smend, *Constitution and Constitutional Law*, in WEIMAR: A JURISPRUDENCE OF CRISIS 240, 248 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper trans., 2000) (“[C]onstitutional law is expected to ensure fulfillment of an ever-changing challenge that must constantly be met in an optimal fashion. The factors in meeting this challenge shift as time goes by and situations change.”); see also Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1245–47 (1994). But the American system's preemption and abstention doctrines work very differently. Federal law is not subsidiary to state law, but rather preempts it—and state supreme courts, final interpreters of their state constitutions, receive no margin if interpreting the national constitution instead. Although he mistakenly thinks that a federal system would create a stable one, de Béchillon has argued that French scholars should throw out the idea of a hierarchy of norms and embrace the tension between treaty and constitution because it better reflects actual practice. See de Béchillon, *supra* note 217, at 36–37.

the demands that people place on it change, the balance that federal constitutions create between local and national readings may also change.<sup>225</sup> It is out of the blurring of boundaries and of the origin of legal values that a shared normative universe can emerge.

Meanwhile, the national courts' place in the European legal order is likely to change again. The EU's Charter of Rights covers much the same content, and the CJEU has held that EU law incorporates ECHR rights as general principles. If accession to the ECHR cannot occur, and the CJEU's interpretations fail to track the ECHR either *de jure* or *de facto*, national courts may end up moderating between them. The real challenge for the old democracies may lie in the development of domestic jurisprudence that goes beyond the European minimum, so that the ECHR, which has emboldened so many courts in emerging democracies, does not become an excuse for complacency in established ones.

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<sup>225</sup> *Id.* Commenters have often made this point regarding American federalism. See, e.g., Mauro Cappelletti & David Golay, *Judicial Branch in the Federal and Transnational Union*, in 1 INTEGRATION THROUGH LAW: EUROPE AND AMERICAN FEDERAL EXPERIENCE, BOOK 2: POLITICAL ORGANS, INTEGRATION TECHNIQUES, AND JUDICIAL PROCESS 261, 306 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986).

