American University International Law Review

Volume 17 | Issue 4 Article 1

2002

Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model

Ariel L. Bendor

Zeev Segal

CONSTITUTIONALISM AND TRUST IN BRITAIN: AN ANCIENT CONSTITUTIONAL CULTURE, A NEW JUDICIAL REVIEW MODEL

ARIEL L. BENDOR* AND ZEEV SEGAL**

---

* Associate Professor, Faculty of Law, Haifa University. LL.B., LL.D., Hebrew University of Jerusalem.

** Associate Professor of Law, School of Government and Policy, Faculty of Social Sciences, Tel-Aviv University. LL.B., LL.M., Hebrew University of Jerusalem; Ph.D., Tel-Aviv University.

The authors' names appear in alphabetical order. The authors are grateful to Lili Segal for a valuable Internet research and to Dana Rothman for helpful editorial remarks.

The authors are grateful to the editorial board and especially to the Senior Articles Editor, Julie Dunne, for excellent editorial contribution.

INTRODUCTION

It is a well-established maxim in Britain that Parliament can do no wrong, although it can do several things that might look somewhat odd.[1] The concept of Parliamentary supremacy is deeply rooted in Britain's cultural and legal tradition.[2] Britain exported Parliamentary democracy to different communities throughout the legal world, which then made it their rule of law.[3] The courts' inability to declare primary legislation null and void became part and parcel not only of the British legal system, but also of Britain's social culture.[4] Britain has traditionally painted the courts as crippled lawmakers and

---

1. *See* Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2091 (1994) (quoting Chief Justice Holt's opinion in London v. Wood, 12 Mod. 669, 687-88, 88 Eng. Rep. 1592, 1602 (1702)).

2. *See* Anthony V. Baker, *"So Extraordinary, So Unprecedented an Authority": A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQ. L. REV. 729, 735 (2001) (discussing British preference for Parliamentary supremacy to judicial review). "The power and jurisdiction of Parliament . . . is so transcendent and absolute that it cannot be confined . . . within any bounds. . ." *Id.* at n. 31 (quoting Sir William Blackstone's 1899 commentaries on English law).

3. *See* Stephen Wright, *The Government of Nigeria, in* INTRODUCTION TO COMPARATIVE GOVERNMENT 542, 560-62 (Michael Curtis ed., 4th ed. 1997) (describing the parliamentary style government created in Nigeria in 1963 in the wake of British colonial rule). Hirschel notes, "The British government believed that what was good for Britain was good for its colonies." *Id.* at 560. *Cf.* Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 430 (2000) (discussing the constitutionalization process in Canada, Israel, New Zealand, and South Africa).

4. *See* Michael Curtis, *The Government of Great Britain, in* INTRODUCTION TO COMPARATIVE GOVERNMENT 33, 48-89 (Michael Curtis ed., 4th ed. 1997) (explaining the inter-relation between Britain's legal, political, and social structures inter-relate).

stressed their function as law-declarers.[5]

The British Human Rights Act 1998[6] took effect on October 2, 2000.[7] The Act incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] ("Convention") into British law.[9] Some scholars look upon this legislation as a key part of Europe's reaction to World War II, which created a new sensitivity toward human rights and civil liberties.[10] One of the lessons Europe deduced from the period during Nazi Germany was that European countries must use constitutions and judicial review to curb the power of European legislators.[11] The Human Rights Act fundamentally challenges the old British concept that "Parliament can do no wrong."[12] Scholars have noted that the Act "unquestionably has the potential for being one of the most fundamental constitutional enactments since the Bill of Rights,"[13] and "will significantly affect the operation of traditional

---

5. *See id.* at 88 (noting that most British judges construe laws very narrowly because "it is Parliament, not judicial interpretation, that should change a law that is unjust.").

6. Human Rights Act, 1998, c. 42 (Eng.).

7. *See The Human Rights Act—The Rights of Victims of Crime* [hereinafter *The Rights of Victims of Crime*] (stating that the Human Rights Act of 1998 became law on Oct. 2, 2000), *at* http://www.bihr.org/outreach/victim/support.htm.

8. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

9. *See* Human Rights Act, 1998, c. 42 (Eng.), at pmbl. ("An Act to give further effect and freedoms guaranteed under the European Convention on Human Rights . . .")

10. *See* James Young, *The Politics of the Human Rights Act*, 26 J. L. & SOCIETY 27, 27-29 (1999) (postulating that the changed political landscape after World War II led to a focus on human and civil rights).

11. *See id.* at 27 (noting that, following World War II, even some very conservative English Lords recognized the need for significant constitutional change to protect human rights).

12. *See id.* (quoting Lord Jowitt as recognizing the necessity of adopting the Act, while also stating that he viewed its curbing of Parliament's power as an "unqualified misfortune").

13. Luke Clements & James Young, *Human Rights: Changing the Culture*, 26 J. L. & SOCIETY 1, 1 (1999) (examining the constitutional reform brought about by the Human Rights Act 1998 and its potential for creating a "human rights culture").

constitutional principles"[14] and British legal culture.[15]

It is well established that "trust is a salient preoccupation of many theories of [political] legitimacy."[16] Trust also plays a significant role in democracies.[17] This essay argues that in Britain, unlike the United States, the people neither practice, nor have a prevailing ethos of distrust for their government.[18] In Britain, people do not possess an inherent suspicion of the political authorities—Parliament and Government.[19] In the absence of such an attitude, it is understandable that there has never been a public outcry for increased judicial review of primary legislation.[20] In comparison with other legal systems, in Britain a more restrained judicial review of administrative actions has evolved.[21] Britain's absence of judicial power to strike down acts of Parliament, in combination with a deeply-rooted tradition of Parliament's supremacy and public trust in it, has opened the gates to a unique model for protecting human rights. This model, which is anchored in British culture and would not necessarily function well in other legal systems, does not focus on the judiciary as a guardian of human rights. [22] Rather, it revolves

---

14. David Feldman, *The Human Rights Act 1998 and the Constitutional Principles*, 19 LEGAL STUD. 165 (1999) (asserting that the impact of the Human Rights Act 1998 on British constitutional law, although significant, is evolutionary, not revolutionary).

15. *See* Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession*, 26 J. L. & SOCIETY 86, 87 (1999) (suggesting the Human Rights Act 1998 will profoundly change legal culture in Britain).

16. BARBARA A. MISZTAL, TRUST IN MODERN SOCIETIES 245 (1996) (arguing that trust is the foundation of political legitimacy).

17. *See* PIOTR SZTOMPKA, TRUST 139 (1999) (exploring the culture of trust in democracy and autocracy).

18. *See infra* Part III. (contending that the British citizenry have traditionally held the government in high regard).

19. *See id.* (addressing the reasons for the public's general trust in Parliament and Government).

20. *See* SZTOMPKA, *supra* note 17, at 140 ("A democratic polity requires legitimate criticism based on democratic allegiance; some distrust, in this sense, is essential for a viable democratic order.").

21. *See* Curtis, *supra* note 4, at 89 (stating that English judges are generally reluctant to limit the exercise of ministerial administrative power, although a few judges have asserted jurisdiction in such matters in recent years).

22. *See generally* Tom Campbell, *Human Rights: A Culture of Controversy*, 26

around Parliament and Government's heightened sensitivity to their traditional roles as the dominant protectors of human rights.[23]

I. THE BRITISH HUMAN RIGHTS ACT: BETWEEN NOVELTY AND TRADITION

A. BACKGROUND

The British Parliament did not enact the Human Rights Act 1998 as a result of a revolutionary moment.[24] In fact, Parliament adopted the Act through regular procedure and not by a special constituent assembly.[25] Parliament did not even require a special majority.[26] Still, many regard the Act as a legal and social revolution.[27] It constitutes a

---

J. L. & SOCIETY 6 (1999) (arguing that Government and Parliament play leading roles in Human Rights protection). Campbell asserts that, "A culture of rights need not involve looking principally to courts rather than to representative politics for solutions to value disagreements and competing interests. In fact, it may require that courts be seen as essentially protectors rather than definers of rights, providing remedies on the basis of proven violations of existing positive rights as enunciated elsewhere." *Id.* at 25.

23. *See id.* at 25-26 (concluding that Government and Parliament must address the protection of human rights).

24. *See Spotlight Britain: Human Rights in Britain* [hereinafter *Human Rights in Britain*] (discussing the procedures by which the Human Rights Act became law), *at* http://www.files.fco.gov.uk/info/spotlight/hract.pdf. *But cf.* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 791-94 (1997) (describing the United States' Constitution and the European Union's Treaty of Rome as two documents that were first adopted through ordinary federalist procedures but that were ultimately quite revolutionary).

25. *See Human Rights in Britain*, *supra* note 24 (discussing the adoption of the Human Rights Act 1998).

26. *See id.* (stating that the Human Rights Act came into force after Royal Assent); *see also Parliamentary Directory* (explaining that a "special procedure" is the stage in the parliamentary process when a special Committee elects to conduct a close, detailed examination of the proposed piece of legislation), *at* http://www.britpolitics.com/index.php?cat=11&articled=125. The decision whether to convene such a committee is subject to the exclusive discretion of the Parliament. *Id.*

27. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 203 (1995) (defining a "social revolution" as a revolution that fundamentally changes class structure).

new system for protecting "Convention rights" contained in Section 1 of the Act.[28] The Convention rights include rights to liberty,[29] freedom of expression,[30] thought, conscience, religion,[31] privacy,[32] as well as a fair and public hearing in determination of civil rights and obligations and criminal charges.[33] The Human Rights Act follows Europe's pattern of adopting the European Convention on Human Rights instead of drafting a new set of constitutional rights.[34] The Act embodies a substantive alteration of the judge's role in British society, giving the judiciary an extension of judicial powers. First, the Act directs the courts to interpret laws in a way that is compatible with the European Convention, if possible.[35] Second, the Act empowers the courts to issue a "declaration of incompatibility" when domestic primary legislation contradicts Convention rights.[36] This power rejects the classical concept of judicial review, while formulating a unique, new model of incompatibility.[37] A British court

---

28. *See* Human Rights Act, 1998, c. 42 (Eng.), § 1 (stating that the "Convention rights" mean the rights and fundamental freedoms set out in Articles 2-12, 14, et al., of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

29. *See* European Convention on Human Rights, *supra* note 8, art. 5 ("Everyone has the right to liberty and security of person.").

30. *See id.* art. 10 ("Everyone has the right to freedom of expression.").

31. *See id.* art. 9 ("Everyone has the right to freedom of thought, conscience and religion . . .").

32. *See id.* art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

33. *See id.* art. 6 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

34. *See supra* notes 28-33 and accompanying text (listing the rights provided for in the Human Rights Act and the European Convention on Human Rights).

35. *See* Human Rights Act, 1998, c. 42 (Eng.), § 2(1) (directing British Courts to take into account opinions of the European Court of Human Rights and the Commission whenever making determinations in connection with Convention rights).

36. *See* Human Rights Act, 1998, c. 42 (Eng.), § 4 (giving British courts the power to declare domestic legislation incompatible with the European Convention on Human Rights).

37. *Compare id.* (describing declaration of incompatibility) *with* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1-57 (1996) (explaining the origins and

can, therefore, issue a declaration of incompatibility whenever it cannot possibly interpret the relevant parliamentary act in a manner consistent with the Convention.[38] If a higher court issues the declaration, the court's decision will likely trigger the Parliament to amend the relevant law.[39]

Many jurists contend that the new Act has caused an undeniable shift of power from Parliament to judges.[40] Under the Act, British judges theoretically have the authority, by their declaratory powers, to affect existing legislation.[41] Yet, the power to issue an incompatibility declaration differs significantly from the judicial power to strike down a legislative act altogether, as is the case in the United States' judicial system.[42] Under the unique approach adopted

---

development of classic judicial review in the United States).

38. *See Court Martial Procedures Are Convention Compatible*, TIMES (London), Oct. 8, 2001, at 22 (reporting the July 30, 2001, judgment from *Regina v. Williams*). For a discussion of the various problems regarding the interpretation provision of the Human Rights Act, *see* Geoffrey Marshall, *Interpreting Interpretation in the Human Rights Bill*, 1998 PUB. L. 167 [hereinafter Marshall, *Interpreting Interpretation*] (analyzing the meaning of Section 3 of the Human Rights Act and concluding that it gives broad authority to the courts in determining whether legislation is compatible with the European Convention on Human Rights); Geoffrey Marshall, *Two Kinds of Compatibility: More About Section 3 of the Human Rights Act 1998*, 1999 PUB. L. 377 (analyzing the terms "read" and "give effect" in Section 3 of the Human Rights Act and concluding that they do not substantially change existing rules of statutory interpretation); Francis Bennion, *What Interpretation is "Possible" Under Section 3(1) of the Human Rights Act?*, 2000 PUB. L. 77 (concluding that Section 3 of the Human Rights Act makes Parliament's intention a matter of secondary importance in British courts' interpretation of laws relating to human rights); Richard A. Edwards, *Reading Down Legislation Under the Human Rights Act*, 20 LEGAL STUD. 353 (2000) (concluding that Section 3 of the Human Rights Act requires British courts to read down legislation, interpreting it narrowly in a way that is compatible with the European Convention on Human Rights, not read into legislation remedies that are already present).

39. *See* Marshall, *Interpreting Interpretation*, *supra* note 38, at 170 (stating that the effect of a determination of incompatibility should lead to parliamentary action).

40. *See* K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN L. REV. 79 (1999) (noting the shift in power from the executive and legislature to the judiciary).

41. *See supra* note 39 and accompanying text (expressing the likelihood that such a declaration would encourage Parliament to amend the law in question).

42. *See* LOCKHART ET AL., *supra* note 37, at 1-57 (explaining the power of U.S.

in Britain, an "unconstitutional" act will remain in force until a Government minister or Parliament amends it.[43] Thus, Parliament has arguably retained its ultimate sovereignty over the court.[44] The British model is compatible with the continuing centrality of the British Parliament as the core democratic institution.[45] The British courts, however, still have less power than the courts of other European democracies, which have endowed their domestic courts with the authority to annul primary legislation that contradicts Convention rights.[46]

B. CURRENT CASE LAW

The events of the first year following the passage of the Human Rights Act have demonstrated its significance to the British legal system at large. Even a quick perusal of recent case law suggests that the court has placed a special focus on due process rights.[47] Article 6 of the Convention, the primary Article assuring due process rights, guarantees a right to "a fair and public hearing . . . by an independent and impartial tribunal" whenever a determination of civil rights and obligations is involved.[48] For example, in one case a lower court declared provisions in the Town and Country Planning Act 1990, which empower government ministers with broad planning authority,

---

courts to declare legislation unconstitutional).

43. *See* Ewing, *supra* note 40, at 91 (explaining that Parliament decided not to give courts the right to set aside legislation inconsistent with the Human Rights Act out of a fear that the courts would become unnecessarily engaged in Parliamentary politics).

44. *See id.* ("In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes.").

45. *See* Campbell, *supra* note 22, at 25 (articulating that the Human Rights Act furthers the political tradition of Parliament as the instrumental democratic institution).

46. *See* Ackerman, *supra* note 24, at 772 (noting that Germany, France, Spain, Italy, and Hungary *inter alia* have created constitutional courts since World War II).

47. *See infra* notes 48-63 and accompanying text (discussing recent case law addressing Convention rights under the newly enacted Human Rights Act).

48. *See* European Convention on Human Rights, *supra* note 8, art. 6 (guaranteeing the right to a fair hearing).

as incompatible with Article 6.[49] This decision leapfrogged the Court of Appeals straight to the House of Lords.[50] The Law Lords, while finding the provisions compatible with Article 6, made a conceptual distinction between judicial or quasi-judicial decisions, which have to meet the standards embodied in the Article, and ministerial decisions based on policy considerations, which are beyond the Article's scope.[51] In his concurring opinion, Lord Clyde observed:

> The supervisory jurisdiction of the court as it has now developed seems . . . adequate to deal with a wide range of complaints which can properly be seen as directed to the legality of a decision . . . But consideration of the precise scope of the administrative remedies is not necessary for the purposes of . . . [issuing a declaration of incompatibility].[52]

In another case, Article 6 of the Convention paved the way for a declaration of incompatibility in a case that involved a provision in the Consumer Credit Act 1974.[53] The Consumer Credit Act provides[54] that if a debtor has not signed a document containing all the prescribed terms of the agreement, the court has no power to issue an enforcement order.[55] The Act, in effect, renders the agreement unenforceable against the debtor.[56] As a result, the Court noted that the Act deprives "the Court of any power to enforce a regulated agreement."[57] This result opened the gates for the Court to

---

49. *See* Case 3742/2000, The Queen (on the application of Alconbury Dev. Ltd.) v. Secretary of State for the Env., Transport, and Regions, 2 All E.R. 929 (Q.B. 2000) (holding that the contested Act was not compatible with Article 6 of the European Convention on Human Rights).

50. *See* R. (on the application of Alconbury Dev. Ltd.) v. Secretary of State for the Env., Transport, and Regions, 2 All E.R. 963 (2001) (stating that Alconbury applied for judicial review directly to the House of Lords).

51. *Id.* (discussing the standards of Article 6 as applied to the case of Alconbury).

52. *See id.* at 997-98.

53. Wilson v. First County Trust Ltd., 3 W.L.R. 42 (2001). For interim judgments in this appeal see Wilson v. First County Trust Ltd., 407 Q.B. (2001).

54. *See* Consumer Credit Act, 1974, ch. 39, §§ 124-27 (Eng.) (legislating enforcement orders in infringement cases).

55. *See id.* (stating the stipulations for a court order of enforcement).

56. *See id.*

57. Wilson v. First County Trust Ltd., 3 W.L.R. at 47 (discussing the power of

declare Article 6 of the Convention incompatible with the Act.[58] The Court stressed that Parliament enacted the Human Rights Act to give further effect to rights and freedoms guaranteed under the Convention.[59] The object of the Act is to incorporate those rights into domestic law, and to give an effective domestic remedy.[60]

In a third case, the Court of Appeals declared a provision of the Mental Health Act 1983 incompatible with Article 5 of the Convention, which secures, *inter alia*, the right to liberty.[61] The Court declared this provision incompatible with Article 5 because it required patients in mental hospitals to prove that they did not suffer from a psychological disorder before they were able to gain their release from the hospital.[62] The Court fulfilled its duty to interpret statutes in a manner compatible with the Convention without straining the "boundaries" of the statutory language. The Court also focused on a due process question in this judgement.[63]

The time is not yet ripe for a comprehensive analysis of the impact of the Human Rights Act on the British cultural environment. Yet, it seems that a new dialogue of human rights and civil liberties is developing in Britain.

---

the court to make an enforcement order under the Consumer Credit Act 1974).

58. *See id.* at 45 (granting declaration of incompatibility).

59. *See id.* ("The purpose of the 1998 Act was to give "further effect" to the [European Convention on Human Rights] and its Protocols by incorporating existing rights into domestic law and giving an effective domestic remedy, not to introduce new rights.").

60. *See id.* (declaring that the purpose of the act was to codify the Convention rights into domestic law, not to introduce new rights or modify those enunciated in the Convention).

61. *See Term in Act Is Incompatible with Convention*, TIMES (London), Apr. 2, 2001, at 25 (reporting the Mar. 28, 2001 judgment from Regina (H) v. Mental Health Rev. Tribunal).

62. *See id.* (explaining the Court's rationale that placing the burden of proof on the mental patient to show his/her sanity prior to release was inconsistent with Article 5 of the European Convention on Human Rights).

63. *See id.* (explaining that the due process issue in this instance was the mental patient's right to be released from the institution).

II. CONSTITUTIONALISM AND TRUST FROM THE PERSPECTIVE OF OTHER COUNTRIES

A. BACKGROUND

By examining different legal systems, one can deduct that there is a nexus between constitutionalism and trust. The United States, for instance, founded constitutional judicial review.[64] Almost since its establishment, American democracy has shunned the notion that "Parliament can do no wrong."[65] Judicial review of executive and legislative actions is an integral part of American culture.[66] It stems from a deep-rooted distrust of authorities—the executive and legislature alike.[67] In fact, public distrust in the American government has increased over the last few decades.[68] Americans possess an ethos of profound suspicion whenever a governmental authority is involved[69] and restraining governmental action is a basic tenet of American democracy.[70] Consequently, the American system of government has developed a highly sophisticated system of checks and balances.[71] The United States Constitution establishes that, "[T]he executive power shall be vested in a President of the

64. *See generally* Baker, *supra* note 2, at 738-53 (detailing how the United States founded judicial review in eighteenth century and early nineteenth century).

65. *See id.* at 736 (tracing the roots of U.S.-style judicial review to great British thinkers Sir Edward Coke and John Locke, who were opposed to total Parliamentary sovereignty).

66. *See generally* ROBERT J. BLENDON, ET AL., WHY PEOPLE DON'T TRUST GOVERNMENT 205-16 (Joseph S. Nye, Jr., Philip D. Zelikow & David C. King, eds., 1997) (discussing the check and balance system present within American democracy).

67. *See id.* (examining the attitudes in America towards the government).

68. *See* SEYMOUR M. LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP 17 (1983) (analyzing Americans' confidence in government from 1958-1984).

69. *See supra* notes 67-68 and accompanying text (discussing the American public's general distrust of government).

70. The famous American revolutionary Thomas Paine expressed this notion most accurately when he said: "That government is best which governs least."

71. *See generally* LOCKHART ET AL., *supra* note 37, at 172-220 (explaining how the U.S. Constitution embodies the concepts of separation of powers and checks and balances).

United States of America."[72] The President enjoys broad powers, but Congress has the ability to hold the President in check in some key areas of executive power, such as the appointment of ambassadors, public Ministers and Consuls, and Judges of the Supreme Court.[73] Although the President can apply his veto power to annul congressional legislation, Congress can override the President's veto with a two-thirds vote of both houses of Congress.[74] American-style separation of powers does not aim to enhance efficiency, but rather to weaken each branch of government's authority.[75] Americans view governmental power as a potential threat to individual liberty, and perceive absolute power as an all out assault on that liberty.[76]

The judicial branch's power of constitutional review over both legislative and executive actions is another expression of the American preference for limiting governmental powers.[77] The centrality of the role of judicial review derives directly from the public's suspicion of arbitrary government.[78] The United States has developed a flourishing system of judicial review over the executive and legislative branches, which some have referred to as a "Government by injunction."[79] Judicial control of governmental action in the United States developed without concern for differences

---

72. U.S. CONST. art. II, § 1, cl. 1.

73. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring two-thirds of the Senate to approve of all presidential appointments of ambassadors and Supreme Court Justices).

74. *See* U.S. CONST. art. I, § 7, cl. 3 (requiring every resolution passed by the House and Senate to be presented to the President for approval, and permitting the House and Senate to override a presidential veto and pass the legislation with a two-thirds majority vote).

75. *See generally* LOCKHART ET AL., *supra* note 37, at 172-220 (explaining the philosophy underlying the checks and balance system).

76. *See id.*

77. *See generally* Baker, *supra* note 2, at 738-53 (discussing the foundation of the U.S. system of judicial review).

78. *See id.* at 738-39 (stating that even before the Revolutionary War, Americans were questioning acts of Parliament).

79. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001) (discussing the early twentieth century practice by American judges to use the court injunction to quash labor strikes, a practice referred to by pro-labor activists as "government by injunction").

between administrative and legislative functions.[80] The courts directed their control equally towards legislative and administrative bodies, and the Supreme Court became a "national policy maker."[81]

B. GERMANY

The effects of the Second World War and the rise of Nazism led to an era of constitutional judicial review in Europe.[82] It became evident that European's believed that Parliament *can* do wrong and that other entities, mainly the courts, might apply their powers to correct such wrongs.[83] Distrust in the authorities was a central factor in the German development of constitutional review in post-World War II Germany.[84] Following the enactment of the Constitution (known as the Basic-Law—the *Grundgesetz* of May 22nd, 1949),[85] judicial control was viewed as a protector of human rights against the will of the Legislature and the Government of the day.[86] The German

---

80. *See generally* LOCKHART ET AL., *supra* note 37, at 172-220 (examining the history of the American form of government).

81. *See* Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957) (asserting that the Supreme Court of the United States is primarily a political institution and secondarily a legal institution); *see also* RONALD G. DWORKIN, TAKING RIGHTS SERIOUSLY 149-50 (1977) (debating the merits of the Supreme Court's power of judicial review); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, AM. POL. SCIENCE REV. 1209 (1986) (studying changes in public support of the U.S. Supreme Court over time). *Cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980) (arguing for a "representation-reinforcing theory of democracy," under which courts would review legislation only to assure that it prevented no one from participating in the democratic political process and not concern themselves with the substantive merits of choices made by the legislature).

82. *See generally* KARLY LOEWENSTEIN, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 191 (Arnold J. Zurcher, ed., 1955) (stating that since 1945, fifty nations have enacted new constitutions).

83. *See id.* at 192-93 (examining the process and the effects of constitutionalization).

84. *See id.* (discussing the process of constitutionalization following World War II in Germany).

85. *See* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (1995) (containing official English translation of the *Grundgesetz*).

86. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 173 (1994) (noting that Germany created a special Constitutional Court

Framers adapted the American model, including judicial review, into the Basic-Law.[87] A distrust of the legislative and the executive branches, as well as the regular courts in which judges from the Nazi period still served, led to the creation of the separate Federal Constitutional Court.[88] This Court enjoys exclusive jurisdiction to declare laws unconstitutional.[89] By establishing this separate court, Germany distinguished itself from the American model,[90] which entrusts *all* courts with the power to declare laws unconstitutional.[91]

C. SOUTH AFRICA

Developments in South Africa during the 1990s also illustrate the impact of people's distrust upon constitutional law.[92] Distrust in South Africa's judges, who applied apartheid laws, paved the way for South Africa to establish a separate constitutional court, where black and white judges serve together.[93] Reflecting upon the state of the judiciary prior to the Court's establishment, one commentator wrote: "[T]he South African Judiciary has faced . . . a determined government bent upon destroying the rights of most of the people subject to it . . . . The Judiciary was in a weak constitutional position

---

to provide greater protection against government abuses of power than that provided by the American system).

87. *See* Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MODERN L. REV. 1, 3 (2001) (explaining that the Framers of the Basic Law relied upon the American experience).

88. *See id.* at 4 (discussing the establishment of the Federal Constitutional Court).

89. *See* Gisbert Brinkmann, *The West German Federal Constitutional Court: Political Control Through Judges*, 1981 PUB. L. 83 (stating that the Federal Constitutional Court exclusively interprets the West German Constitution).

90. *See generally* LOCKHART ET AL., *supra* note 37, at 1-57 (describing U.S. system of judicial review).

91. *See* Brinkman, *supra* note 89, at 83-84 (emphasis added) (noting political problems associated with giving courts the power to determine the constitutionality of the law).

92. *See generally* Puis N. Langa, *The Role of the Constitutional Court in the Enforcement and Protection of Human Rights in South Africa*, 41 ST. LOUIS U. L.J. 1259 (1997) (examining the development and origins of constitutional law in South Africa).

93. *See id.* at 1261 (discussing past controversy regarding the South African judiciary).

to oppose these trends [prior to the development of the constitutional court]."[94] Thus, South Africa's history impelled it to grant greater power to its judicial branch.

D. ISRAEL

Israel also serves as a unique example of the nexus between constitutionalism and trust.[95] For three decades following the establishment of the Israeli State in 1948, the Israeli public maintained significant trust in governmental authorities.[96] This common public sentiment made the Israeli Supreme Court reluctant to apply judicial review to administrative action. Moreover, the Court refrained almost entirely from judicial review over acts of Parliament. Over time, Israelis developed a distrust of the government, especially with respect to the executive branch.[97] Distrust of the government as a whole, however, paralleled a growing *trust* in the judiciary.[98] As a result, the judiciary assumed more active control over administrative actions.[99] In the process, the Israeli Supreme Court followed a model of interpretation, similar to a leading interpretative theory in the United States, which stresses the importance of protecting civil liberties.[100] Such a judicial activism

---

94. Christopher Forsyth, *The South African Judiciary in Time of Crisis*, *in* THE ROLE OF COURTS IN SOCIETY 25, 33 (Shimon Shetreet ed., 1988).

95. *See* EPHRAIM YUCHTMAN-YA'AR & YOCHANAN PERES, BETWEEN CONSENT AND DISSENT 38 (2000) (discussing the degrees of trust given to the five major political institutions in Israel).

96. *See id.* at 37-39 (examining Israeli trust in its political institutions). According to empirical surveys conducted during the 1990s, figures show that forty percent of the public trusted the Israeli Government fully and thirty percent trusted it somewhat. *Id.*

97. *See id.*

98. *See id.* In the 1990s, figures show that eighty-five percent of the Israeli citizenry fully trusted the Supreme Court and ten percent trusted it somewhat. *See* YUCHTMAN-YA'AR & PERES, *supra* note 95, at 37-39. This trust in the judiciary is compared to forty-one percent who trusted the Parliament fully and thirty percent who trusted it somewhat. *See id.*

99. *See generally id.*

100. *See* Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 4 (1992) (articulating that the Israeli Supreme Court followed a model of interpretation similar to that of the United States).

contributed to a stronger legal orientation of Israeli society, as a whole, and Israeli politics in particular.[101] In 1995, an Israeli Supreme Court decision represented the climax of the trend towards greater judicial activism.

In a 1995 case, the Israeli Supreme Court recognized the power of all courts to declare parliamentary acts unconstitutional and invalid if they violate rights guaranteed by the constitutional Basic Laws.[102] Such a judicial announcement—in spite of the absence of any express constitutional provision granting courts the power of judicial review over primary legislation—represents a "constitutional revolution."[103] Although the Court mentioned the seminal U.S. Supreme Court case *Marbury v. Madison*[104] as a source of inspiration for its judgment,[105] the Israeli Supreme Court remains hesitant to declare primary legislation unconstitutional.[106]

---

101. *See infra* note 103 (discussing an Israeli Supreme Court decision holding that the Arrangements Law violated the Basic Law).

102. *See* C.A. 6821 6821/93, United Mizravi Bank Ltd. V. Migdal Cooperative Village, 49(4) P.D. 222 [hereinafter United Mizrahi Bank Ltd.]. *Cf.* Ariel L. Bendor, *Investigating the Executive Branch in Israel and in the United States: Politics as Law, the Politics of Law*, 54 U. MIAMI L. REV. 193, 232-34 (2000) (discussing the interrelation between political and legal issues before Israeli courts).

103. *See* Zeev Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, 8 CONST. FORUM 53 (1997) (discussing the case in depth); Zeev Segal, *Parliament in the Era of Judicial Review*, *in* DEVELOPMENTS IN EUROPEAN, ITALIAN, AND ISRAELI LAW 164, 169-78 (Alfredo M. Rabello & Andrea Zanotti, eds., 2001) [hereinafter Segal, *Parliament in the Era of Judicial Review*].

104. 5 U.S. 137 (1803) (holding that the U.S. Supreme Court had the power to determine whether laws created by Congress are consistent with the U.S. Constitution).

105. *See* United Mizravi Bank Ltd. P.D. 222, *supra* note 102 (noting the courts' inspiration from the decision in *Marbury v. Madison*).

106. *See id.* Since the 1995 decision in United Mizrahi Bank Ltd. v. Migdal Cooperative Village, the Israeli Supreme Court has found only three other statutory provisions unconstitutional. *See, e.g.*, H.C. 1715/97, Association of Investment Managers In Israel v. Minister of Treasury, 41(4) P.D. 367; H.C. 6055/95, Zemach v. Minister of Defense, 43(5) P.D. 241; H.C. 1030/99, Oron v. Speaker of the Knesset, not yet published (ruled on 3/26/2002); *see also* Segal, *Parliament in the Era of Judicial Review*, *supra* note 103, at 175-77 (discussing the Association of Investment Managers and Zemach cases).

III. CONSTITUTIONALISM AND TRUST: THE BRITISH PERSPECTIVE

The element of trust should not be overlooked in evaluating possible developments pursuant to the new British Human Rights Act. The Act, through its incompatibility clause, clearly establishes that Parliament is not beyond scrutiny.[107] Yet, while the judiciary may declare an act of Parliament incompatible with the Convention, it lacks the power to strike down the offending primary legislation.[108] To understand this distinctly British model, one must also appreciate the British people's trust in governmental authorities.

Unlike other countries, British culture does not have a deep-rooted ethos of distrust in Parliament or in Government.[109] The British Parliamentary system does not draw a rigid demarcation line between the two.[110] In contrast, the U.S. governmental system requires the executive branch to maintain total detachment from the legislative branch; for example, by precluding a member of Congress from becoming a judge.[111] A rigid separation between the executive and legislative branches of government present within the United States aims to limit the powers of each.[112] Although Americans may conclude that separation contributes to safeguarding human rights,[113] such a belief is not found in the British model.

---

107. *See* Human Rights Act, 1998, c. 42 (Eng.), § 4(2); *see also supra* notes 35-63 and accompanying text (discussing the judiciary's newfound power under the incompatibility clause).

108. *See* Human Rights Act, 1998, c. 42 (Eng.), § 4(4); *see also supra* notes 41-46 and accompanying text (explaining that Parliament retains its ultimate sovereignty because the judiciary is precluded from nullifying the law altogether).

109. *See supra* notes 1-2 and accompanying text (discussing the British political and cultural belief that "Parliament can do no wrong").

110. *See generally id.* (discussing the public's deeply held trust in the Government as a whole).

111. *See* U.S. CONST. art. I, § 6, cl. 2 (enunciating the prohibition against the appointment of Congressional members to positions within the judicial or executive branches).

112. *See supra* note 75 and accompanying text (discussing the rationale for adopting the American checks and balances system).

113. *See* The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke, ed., 1961); *see generally* The Federalist Nos. 9, 73 (Alexander Hamilton), 48-51 (James Madison).

Hence, whereas the American Constitution provides that all three branches of government—including the judiciary—are co-equal, the British judiciary, although it enjoys professional independence, is subject to the legislature's will.[114] The British courts enjoy discretion to interpret acts of Parliament, but their power to do so is limited.[115] With some notable exceptions, the general rule has remained clear under the Human Rights Act: the plain language of an act "excludes a consideration of anomalies, i.e., mischievous or absurd consequences."[116] In essence, the law is what Parliament says it is.[117] Indeed, even the Human Rights Act's judicial power to declare acts of Parliament incompatible with a Convention right is a far stretch from constituting absolute power over parliamentary actions.[118] The concept of Parliament's supremacy, which the Human Rights Act has not abandoned, is more a reflection of deeply engrained cultural beliefs than it is a legal technicality.[119] In fact, parliamentary supremacy reflects a great deal about British political, social, and cultural beliefs.[120] It excludes the idea of judicial review of primary

---

114. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 51-52 (1990) (stating that the special co-equal status of the judicial branch, anchored in Article III of the U.S. Constitution, was influenced by the Framers' belief that there was little to fear from the judicial powers). Alexander Hamilton once described the judiciary as the "least dangerous branch." *Id.*

115. *See* David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL STUD. 323, 325 (2001) (discussing the courts' role in interpreting and applying acts of Parliament); Lord Irvine of Lairg, *Sovereignty in Comparative Perspective*, 76 N.Y.U. L. REV. 1, 16-18 (2001) [hereinafter Lairg, *Sovereignty*] (outlining the legal control mechanisms at work in Britain).

116. Stock v. Frank Jones (Tipton) Ltd., 1 WLR 231, 239 (1978) (assessing when a court is allowed to interpret words used by Parliament).

117. *See generally* Williams, *supra* note 115, at 323-33 (addressing the judiciary's general reluctance to interfere with the decisions of Parliament).

118. *See id.*; *see also* Stock v. Frank Jones (Tipton) Ltd., 1 WLR at 239 (noting that courts can intervene and save the legislature from being defeated, if it is shown that there was a drafting mistake by parliament).

119. *See* Herbert M. Kritzer, *Courts, Justice, and Politics in England, in* COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 81, 82 (Herbert Jacob et al., eds., 1996) (suggesting that Parliamentary supremacy is rooted in the English concept of politics).

120. *See id.* 82-100 (reflecting upon British people's deep-seeded notion of Parliamentary supremacy).

legislation and, in the past, has also led to a rather restricted judicial review of administrative actions.[121]

The British maxim that "Parliament can do no wrong" encompasses two separate perceptions.[122] First, British people believe that acts of Parliament cannot constitute an unlawful deed, since Parliament—like Gilbert and Sullivan's Lord Chancellor—embodies the law.[123] Second, the British think that Parliament never intends to deviate from common moral norms.[124] Indeed, the people's confidence that Parliament is above judicial review, coupled with the public trust in its common morality, led Parliament to develop a policy of self-restraint.[125] This parliamentary self-restraint might therefore diminish the need for judicial review of primary legislation that is vital to other legal systems.[126]

Constitutionally and administratively, some jurisdictions look upon judicial review as less natural than the judiciary's obvious role in determining criminal and civil liability.[127] Judicial review of indoor Parliamentary proceedings, therefore, is arguably not an essential part of a democratic system.[128] Different approaches have developed with regard to judicial review of Parliamentary

---

121. *But see id.* at 156 (noting that English courts are increasingly willing to oversee the actions of government officials when they believe their actions are improper).

122. *See supra* note 1 and accompanying text (explaining the origins of the phrase "Parliament can do no wrong.").

123. *See* Kritzer, *supra* note 119, at 82 (emphasizing that Parliament can change any law it chooses).

124. *See* Lairg, *Sovereignty*, *supra* note 115, at 3 (quoting Chief Justice Coke as stating that when acts of Parliament are against "common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void"); Hamburger, *supra* note 1, at 2092-93 (arguing that Parliament is subject to natural law and intends to follow common moral norms).

125. *See* Vernon Bogdanor, *Britain: The Political Constitution*, *in* CONSTITUTIONS IN DEMOCRATIC POLITICS 53, 56 (Vernon Bogdanor, ed., 1988) (noting that although Parliament remains supreme, it is still primarily controlled by the Government).

126. *See supra* notes 77-81 and accompanying text (discussing the reliance on judicial review in the United States).

127. *See generally* Baker, *supra* note 2, at 729 (discussing generally the roots of judicial review and its roles in society).

128. *But see id.* (considering the perceived benefits of strong judicial review).

proceedings.[129] In the United Kingdom, judicial review does not exist, and its approach that precludes the courts from interfering in politically tense matters is advantageous in many respects.[130] Arguably, Britain has no need for judicial review of parliamentary internal management since Parliament itself serves as a sufficient substitute.[131] Such parliamentary self-judging can prevail only when there is a basic public confidence that Parliament is playing fairly by the rules of the game.[132]

Germany may serve as an example of a different model, one that has developed in an environment of public distrust in government.[133] Because of this distrust, the German Federal Constitutional Court exercises wide judicial review that reflects a readiness to intervene in the day-to-day life of Parliament.[134]

Even though more intensive judicial control over public bodies has

---

129. *See generally id.* (exploring the evolution of judicial review and the different approaches taken during various historical periods); *see also* Hamburger, *supra* note 1, at 2137-47 (analyzing Chief Justice Holt's approach to sovereign parliamentary power and judicial review); Christina M. Kitterman, *The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish its Sovereignty to Ensure Human Rights Protection in Domestic Courts?*, 7 ILSA J. INT'L & COMP. L. 583 (2001) (discussing judicial review under the Human Rights Act).

130. *See* Williams, *supra* note 115, at 331 (quoting Lord Irvine's parliamentary remarks describing the problem of the "basic tension between judicial engagement in political controversy and public confidence in the judges' political impartiality in deciding disputes according to the law"). *See generally* Nixon v. United States, 506 U.S. 224 (1993) (providing an example of the problems created when courts must deal with political questions).

131. *See supra* note 125 and accompanying text (discussing Parliament's adoption of a policy of self-restraint).

132. *See supra* notes 1-5, 16-20 and accompanying text (discussing Britain's traditional confidence and trust in Parliament).

133. *See supra* notes 82-91 and accompanying text (discussing the German Framers' belief when drafting the Basic Law that government action should be kept in check by judicial review). The judicial review established by the Framers was not universally held by all courts, however. *See id.* Since many courts were still controlled by Nazi period judges, the Framers empowered only the nation's highest court, the Federal Constitutional Court, with the authority of unfettered judicial review of Parliamentary action. *See id.*

134. *See* CURRIE, *supra* note 86, at 173 (1994) (explaining that Germany has established an independent judiciary with a Constitutional Court that has broad powers of judicial review).

developed in Britain in recent decades,[135] the basic attitude of self-restraint has survived due in large part to the judiciary's trust in other governmental authorities.[136] A strong presumption of legality still plays an important role in shaping the boundaries of the courts' intervention in governmental affairs.[137]

One might argue that the British model of reserved judicial review reflects the public's limited trust in the judiciary.[138] Some scholars have even argued that British judges, who are drawn from a narrow social class, are the enemy of any reform.[139] Indeed, in the 1990s, Britain ranked eleventh among fourteen countries examined with respect to their level of confidence in the judiciary.[140] In Lord Diplock's words, "[t]hose who represent the people and have been elected democratically in a representative Parliament know better and are better judges of . . . [the needs of the society] than appointed judges, who have been appointed not for their social philosophies or their politics but for their qualification in the law."[141] This principle

---

135. *See, e.g.*, Inland Revenue Commr's v. National Fed'n of Self-Employed and Small Bus. Ltd., 1982 App. Cas. 617, 632.

136. *See* Kritzer, *supra* note 119, at 176 (stating that English judges are becoming less reluctant to become involved in government oversight, yet it is unlikely the courts will involve themselves beyond their current practices of judicial review).

137. *See id.* at 81-100 (explaining the rationale underlying the courts' reluctance to intervene in governmental affairs).

138. *See* Gareth Jones, *Should Judges Be Politicians?: The English Experience*, 57 IND. L.J. 211, 215 (1982) (explaining that English civil servants have never liked lawyers).

139. *See id.* at 213 (discussing the limited role of judges in interpreting statutes). The pre-World War II interpretations of welfare statutes left the Labour Party distrustful of the judiciary and led it to exclude the courts from judicial review. *See id.*

140. Only 3.2 percent held absolute trust in the judiciary, while 16.5 percent indicated high confidence, and 50.7 percent reported only partial confidence. Israel ranked first. The United States preceded Britain, enjoying 5.8 percent of public confidence. Only New Zealand, Poland, and Italy enjoyed a lesser degree of public confidence in the courts. *See* INTERNATIONAL SOCIAL SCIENCE PROGRAM (ISSP), 'RELIGION 1991' KOLN, GERMANY: ZENTRALARCHIV FUR EMPIRISCHE SOZIAL FORSCHUNG, ZA V. STUDY 2150 (May 1993) (cited in GAD BARZILAI, EPHRAIM YUCHTMAN-YAAR & ZEEV SEGAL, THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC 55 (1994)).

141. 396 PARL. DEB., H.L. (5th ser.) (1978) 1366 (quoting Lord Diplock); *see*

reflects Parliament's failed attempt to provide judges with an enhanced role in shaping policy. Attempts to pass a special Protection of Privacy Act, vesting the courts with the power to strike a balance between the right to know and the right to privacy, failed because the legislators preferred not to give the courts wide discretion to decide when public interest justified an infringement on privacy.[142]

Judicial activism at large arguably requires a *conditio-sine-qua-non,* i.e., convincing judges of their authority and responsibility to rebut governmental decisions without harming their impartial status.[143] British courts' reluctance to intervene in matters that fall into the "no-man's land" of law and politics, e.g., issues dealing with political questions, might be due to their perception of their limited role in the legal system.[144]

---

also Lloyd of Hampstead, *Do We Need a Bill of Rights?*, 39 MOD. L. REV. 121, 125 (1976) (contending that judges are ill-equipped to make fundamental policy decisions).

142. REPORT OF THE COMMITTEE ON PRIVACY, 1972, Cmnd. 5012, at 202 (noting the differences between the English judiciary and courts of other countries where the balancing function is left to the courts).

> The vital difference . . . between decisions on what is in the public interest, taken by the courts in countries where a general remedy for invasions of privacy exists, and the decisions on the public interest taken by English courts in cases under existing laws which are relevant to the protection of specific aspects of privacy, is that the judicial function in the latter is much more circumscribed.

Id.; *see also* REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, 1990, Cm. 1102; INFRINGEMENT OF PRIVACY (CONSULTATION PAPER, LORD CHANCELLOR'S DEPARTMENT, 1993); Lloyd of Hampstead, *supra* note 141, at 125 (suggesting that the background and training of judges tend to make them less creative and unreceptive to society's needs). It should be noted that the new Human Rights Act might fill, to a certain extent, the gap in the area of privacy. Thus, the right to privacy may be introduced into British law, despite the hesitation exhibited to the proposed enactment of the Privacy Protection Act. *See id.*

143. *See supra* note 130 (explaining the political question doctrine and why judges have difficulty with such issues).

144. *See id.*

IV. GOVERNMENT-PARLIAMENT ORIENTED MODEL FOR PROTECTING HUMAN RIGHTS

A. A TWOFOLD MODEL

The above analysis of the nexus between constitutionalism and trust in the United Kingdom sets the stage for a background understanding of the new judicial role *vis-a-vis* primary legislation in Britain.[145] We contend that the British approach is best summarized as a Government-Parliament oriented model for protecting human rights.[146] To fully appreciate this contention, one must remember that the British Parliament is perceived not only as the deviser of the law, but also as the protector and nurturer of common moral norms.[147] It is an unwritten rule in Britain that there are "certain things" that Parliament will not do, including trampling on basic human rights.[148] British constitutional law is unique for its conventions, which are not deviated from, despite the lack of formal, written rules.[149] Parliament and government share the same public trust in their reasonableness and sense of proportion.[150]

---

145. *See supra* notes 6-15 and accompanying text (positing that the adoption of the Human Rights Act was a part of a post-World War II European trend of taking power from legislative bodies and giving it to the courts to protect human rights).

146. *See infra* notes 147-236 (proposing the Government-Parliament oriented model for protecting human rights).

147. *See supra* notes 122-24 and accompanying text (discussing the public's dual perceptions of Parliament).

148. Lairg also notes that:

> It is often said that it would be unconstitutional for the United Kingdom to *do certain things*, meaning that the moral... [or] other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But [i]f Parliament chose to do any of them the courts could not hold the Act invalid.

See Lairg, *Sovereignty*, *supra* note 115, at 10-11 (emphasis added).

149. *See* Williams, *supra* note 115, at 325 (discussing the lack of a formal written constitution and the lack of a federal structure); Jason Gundel, *Effects of Judicial Review on Canadian Judicial Culture*, 7 SW. J.L. & TRADE 157 n.2 (2000) ("British legal culture held the supremacy of Parliament in making laws to be its utmost value. This notion of parliamentary supremacy so saturated Great Britain's legal culture that no written constitution ever developed.").

150. *See generally* MISZTAL, *supra* note 16, at 245-46 (discussing trust as a primary aspect of legitimacy of Parliament and Government).

The foundations of the Human Rights Act have been built within the framework of this cultural background. The Government is expected to only introduce bills into the Parliament that are compatible with the letter and the spirit of the Act.[151] Parliament must show a readiness to pass as legislation only bills that reflect a commitment to the Convention rights, as adopted in the Human Rights Act.[152] Any breach by Government or Parliament of these expectations may be classified as "certain things" that Parliament should not do.[153]

Whenever a court declares, in a final judgment, that an act of Parliament is incompatible with a Convention right, it is expected that a Government minister or Parliament will attach heavy weight to this judicial statement.[154] Refusal by either the executive or legislative branch to reconsider the legislation involved might be characterized as a misuse or abuse of authority.[155] It is expected that such conduct would not be tolerated.

Yet, following the British model, a declaration of incompatibility does not entail a duty to amend the law in accordance with the court's declaration.[156] Parliament's ultimate authority manifests in its ability to retain a law deemed by a court as incompatible with the Human Rights Act.[157] Such an exercise in authority is appropriate,

---

151. *See* Lairg, *Sovereignty*, *supra* note 115, at 18 (describing the Human Rights Act of 1998 as giving public authorities the duty of writing legislation that respects fundamental human rights); Kitterman, *supra* note 129, at 586-87 (noting that British courts presume in all circumstances that Parliament acted in conformity with the Convention).

152. *See supra* note 28-33 and accompanying text (outlining the Convention rights).

153. *See supra* note 148 and accompanying text (discussing the public's faith that Parliament instinctively practices self-restraint when dealing with certain issues).

154. *See* Ewing, *supra* note 40, at 92 (noting that courts would have power to indirectly strike down legislation because the government would almost always want to change the law).

155. *Cf. id.* (explaining that even though the government and Parliament may refuse to take steps to amend incompatible legislation, it has still transferred significant powers to the judiciary).

156. *See id.* (stating that it is up to the government to decide how to deal with the decisions of the courts).

157. *See id.* (commenting that a decision of incompatibility will not always lead

however, only when Parliament is convinced that the legislation in question is, in fact, *compatible* with the Human Rights Act.[158]

Thus, the influence of the Human Rights Act on the day-to-day agenda of the British Parliament may be far greater than its impact on the judiciary's role in shaping daily life. Parliament can also uphold compatibility with the European Convention on Human Rights by assuring that all legislation it passes is consistent with Convention rights.[159] The mere fact that the British courts lack the power to nullify acts of Parliament may actually induce a willingness among the courts to issue declarations of incompatibility more frequently.[160]

In other countries, such as Israel,[161] in which courts have the power to nullify parliamentary acts, the judiciary is notably hesitant to declare legislative acts unconstitutional.[162] If the British courts do not sparingly utilize their authority to issue declarations of incompatibility, the courts may contribute to an even greater protection of human rights than in other countries.[163] In addition, the absence of the courts' ability to revoke legislation might spare Britain the problems relating to separation of powers and justiciability that have arisen in countries with "full" judicial

---

to a legislative amendment).

158. *See id.* (noting that there are examples of legislation that will survive incompatibility, including provisions dealing with emergencies and constitutional signals).

159. *See* Ewing, *supra* note 40, at 96 (explaining that the Parliament and ministers themselves must make statements that affirm that bills in either house of Parliament are compatible with Convention rights); *see also* Lairg, *Sovereignty*, *supra* note 115, at 18 (noting that legislators have a new duty under the Human Rights Act to respect fundamental human rights in drafting legislation).

160. *See* Gundel, *supra* note 149, at 159-60 (noting that British courts may not strike down acts of Parliament as unconstitutional).

161. *See supra* notes 100-01 and accompanying text (discussing the development of judicial review in Israel).

162. *See supra* note 106 and accompanying text (explaining that despite the Court's authority to nullify legislation, the Israeli Supreme Court has invoked its authority on only three occasions).

163. *See* Ewing, *supra* note 40, at 99 (explaining that the Human Rights Act gives significant power to the courts and enables them to formally set the agenda on human rights questions).

review.[164]

Our proposed model is premised on two assumptions. The first assumption recognizes the undeniable fact that the enactment of the Human Rights Act heralds a new era in British constitutionalism.[165] The second assumption is that Parliament and Government will continue as the main players in shaping the boundaries of this new constitutional age.[166] While the first assumption is almost self-evident, the second might be found to contradict the common belief that pursuant to the Human Rights Act, judges will become leading players in shaping national policies.[167]

Indeed, the British judiciary is now entrusted with a significant cultural and legal role.[168] Britain's impact, however, upon society will differ to a large extent from the role courts assume in countries where classical judicial review exists.[169] Judicial declarations of incompatibility, as provided for under the new Act, may play only a secondary role in the constitutional process. Still, the British judiciary, equipped with the power to issue declarations of incompatibility, may serve as an impartial referee on the constitutional playing field by warning the main players in the political arena, i.e., Parliament and Government, of their duty to consider fundamental constitutional concepts before drafting rules.[170]

---

164. *See* Williams, *supra* note 115, at 328 (presenting two views of the connection between judicial review and separation of powers). *See generally* Thomas Jefferson, 8 *The Writings of Thomas Jefferson* 310 (1897) (setting forth the problem Jefferson saw with the relation of judicial review to separation of powers and checks and balances in the United States), *quoted in* LOCKHART ET AL., *supra* note 37.

165. *See* Ewing, *supra* note 40, at 99 (noting that the government has retrieved the first constitutional principle of democratic socialism).

166. *See id.* (stating that the standard set out by the Human Rights Act allows for Parliament to retain its sovereignty).

167. *But see supra* notes 138-44 and accompanying text (discussing the general belief that the judiciary should not have a voice in questions of policy).

168. *See supra* notes 13-15 and accompanying text (asserting that the Human Rights Act extends significant new powers to the judiciary; thus, altering the British cultural and legal tradition).

169. *See* Ackerman, *supra* note 24, at 772 (noting that France, Germany, Hungary, Italy, and Spain, *inter alia*, have created constitutional courts since World War II).

170. *See* Kitterman, *supra* note 129, at 591-93 (explaining the court's role under

A post-legislation declaration of incompatibility, accompanied by detailed legal analysis, may guide a Government minister or Parliament in adjusting the law to make it consistent with the European Convention rights.[171]

In light of the above analysis, we propose a twofold model. The first aspect focuses on Parliament and Government, with both bodies needing to formulate new methods and tools in order to fulfill their responsibility to act consistently with the Convention rights. The second aspect of the proposed model centers around the special role of the judiciary in issuing declarations of incompatibility, as opposed to systems that give courts the ultimate power to strike down primary legislation.

B. THE ROLE OF GOVERNMENT AND PARLIAMENT UNDER THE HUMAN RIGHTS ACT

We suggest that the British Government and Parliament bear primary responsibility to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights, as adopted in the Human Rights Act. This proposition places the elected bodies, and not the courts, as responsible for enforcing the Human Rights Act. The legislative and executive branches of government are both responsible for examining existing and future legislation. The Government and Parliament cannot execute their roles under the Human Rights Act by passively waiting for judicial declarations of incompatibility.

---

the Human Rights Act and its ability to issue declarations of incompatibility). *But see* Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT'L & COMP. L. REV. 357, 364-65, 595 (2000) (criticizing the restriction on courts under the Human Rights Act 1998 and suggesting that injured parties should still take their cases to Strasbourg because of the limited effect of declarations of incompatibility).

171. *See* Kitterman, *supra* note 129, at 592-93 (arguing that the declaration of incompatibility's purpose is to create public pressure on the government to change the law); Lairg, *Sovereignty*, *supra* note 115, at 19. Lairg states that, "[T]he issue of a declaration is very likely to prompt the amendment of defective legislation. This follows because such a declaration is likely to create considerable political pressure in favor of the rectification of national law and because a litigant who obtains such a declaration is likely to secure a remedy before the European Court of Human Rights if a remedy is not forthcoming domestically." *Id.*

This Government-Parliament oriented constitutionalism is based on the principles of limitation of power, separation of powers, and the doctrine of responsible, accountable government.[172] Under this concept of constitutionalism, judicial review of primary legislation is not a necessary component of democracy.[173] The Human Rights Act supports the well-grounded tenet that protecting human rights can be advanced and achieved without according the courts the power to strike down primary legislation.[174]

The Government-Parliament oriented model, however, may not be suited for all legal systems. As described above, judicial review of statutes has become the flag-bearer of constitutionalism in various legal systems.[175] In many systems, judicial review is regarded as the ultimate precondition, if not the only precondition, to the supremacy of the constitution.[176] In such systems, the power of the judiciary to interpret and enforce the constitution as the supreme law is viewed as the most remarkable aspect of the courts' authority.[177]

The judicial-review centered model neglects any other possible means of securing protection of human rights. In Canada, for

---

172. *See* HILLAIRE BARNETT, CONSTITUTIONAL & ADMINISTRATIVE LAW 6 (3d ed. 1998) (explaining that the British doctrine of constitutionalism suggests that the exercise of power should be within the legal limits established by Parliament). The exercise of this power must conform with individual rights, powers given to institutions must be dispersed equally among those institutions to avoid abuses of power, and the government and legislature must be accountable to the electorate. *See id.*

173. *See id.* at 932 (stating that the Convention has a subordinate status to primary legislation, thus preserving the Parliament's sovereignty and the separation of powers).

174. *See id.* at 932-33 (commenting that the government did not intend to allow courts to strike down primary legislation, but gave them power over secondary legislation).

175. *See id.* at 1007 (noting that judicial review ensures that those institutions with the power to make and enforce laws are kept within the specified confines of the power conferred).

176. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 43 (1997) (stating that *Marbury v. Madison* established that courts have the role of settling disputes over the distribution of power under the Constitution, thus maintaining the Constitution's supreme authority).

177. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 210 (3d ed. 2000) (explaining that the Constitution is to be considered the supreme law of the land and it is the duty of the courts to determine the meaning of the law).

example, the Minister of Justice's responsibility for pre-enactment scrutiny of proposed federal statutes is insignificant as it entrusts the Government—the executive branch itself—with the responsibility of testing its own bills in light of the Charter rights.[178] No House of Commons standing committee is charged with pre-enactment scrutiny.[179]

In contrast, the British Human Rights Act requires a minister of the Crown to make a statement before Parliament that a proposed bill is compatible with the European Convention rights.[180] The minister is also entitled to declare that although he is unable to make a statement of compatibility, the government nevertheless wishes the House to proceed with the bill.[181] It is also of extreme importance that the Act requires establishment of a Parliamentary Select Committee on Human Rights to advise both Houses of Parliament (the House of Commons and the House of Lords) of whether Government proposals comply with the European Convention.[182] The Select Committee's authority to scrutinize proposed legislation might emerge as a vital facet in the development of the new constitutionalism.[183]

Entrusting both Government and Parliament with responsibility for ensuring compliance with the European Convention rights

178. *See* Ewing, *supra* note 40, at 96 (stating that the Minister of Justice must examine every bill that is introduced to the House of Commons to see if any provisions are inconsistent with the Bill of Rights).

179. *See* HOGG, *supra* note 176, at 952-53 (detailing the Canadian procedure).

180. *See* Human Rights Act, 1998, c. 42 (Eng.), § 19(a).

181. *See id.* § 19(b) (outlining the provisions of the Human Rights Act). *See generally* Ewing, *supra* note 40, at 96 (discussing the legislative process in accordance with the Human Rights Act). *But see* Nicholas Bamforth, *Parliamentary Sovereignty and the Human Rights Act*, 1998 PUB. L. 572, 575-82 (arguing that the provision requiring ministers to make a statement of compatibility with the Act or state that they are unable to make such a statement, is unenforceable since no one could have standing to challenge a matter of parliamentary procedure).

182. *See* Ewing, *supra* note 40, at 97 (noting that the committee's function would be to assist the Government and Parliament in deciding what human rights actions to take).

183. *See id.* (commenting that the committee could watch over the protection of human rights, while also being in the forefront of educating the public about human rights).

secures essential constitutional guarantees. The active procedures of the Parliament outlined above distinguish the British Government-Parliament oriented model from legal systems that focus primarily on judicial review.[184] The function of the legislative and the executive branches in the British constitutional process is of special significance in that the pre-legislation scrutiny relates to every bill introduced in Parliament.[185] By way of contrast, in a system dependent upon judicial review, a law's constitutionality is not analyzed until a victim brings an application for judicial review.[186]

Despite the fact that litigants in Britain have urged the courts to apply the new Human Rights Act in a variety of matters since it came into force, judicial proceedings under the Act are, by nature, rare and relate only to specific violations of a law.[187] Judicial intervention is *ex post facto* and usually relates to matters in which a litigant has already suffered significant harm.[188] The narrow view of standing adopted by the Act prevents full, comprehensive protection of the Convention rights.[189] This limitation on a litigant's ability to challenge infringement of Convention rights reflects Parliament's desire to permit courts to use judicial review only to remedy individual claims of harm by specific parliamentary acts.[190] Such a narrow view of the judicial role differs sharply from the objective approach that aims to involve the judiciary broadly in protecting the

184. *See* TRIBE, *supra* note 177, at 210 (explaining the importance of judicial review and the court's ability to interpret the Constitution).

185. *See* Ewing, *supra* note 40, at 96 (describing the reasons for pre-legislative scrutiny by the government).

186. *See* Human Rights Act, 1998, c. 42 (Eng.), § 7(3) (outlining the methods of applying for judicial review of a case); *see also* Joanna Miles, *Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication*, 59 CAMBRIDGE L.J. 133 (2000) (asserting that for a person to be considered a victim, the act or measure must violate his or her rights directly or indirectly).

187. *See* notes 49-63 and accompanying text (discussing recent case law interpreting the Human Rights Act).

188. *See id.*

189. *See generally* Miles, *supra* note 186, at 133-34 (describing the requirements necessary to demonstrate standing under the Act).

190. *See* S.M. THIO, LOCUS STANDI AND JUDICIAL REVIEW 2 (1971) (defining "juridiction de droit subectif" as protecting private individuals by preventing encroachments on their individual rights).

rule of law and human rights.[191]

The British Government and Parliament can fulfill their primary duties to protect human rights under the new Human Rights Act only by systematically reconciling existing primary and secondary legislation in accordance with the letter and spirit of the Act.[192] This requires what might be termed "genetic monitoring," i.e., an ongoing process of examining existing legislation in light of the Convention rights.[193] Such monitoring will ensure that the Convention rights are taken seriously.

The Government-Parliament oriented model does not allow the legislative and executive branches to remain idle while human rights are violated.[194] Even a mere refusal by a court to issue a declaration of incompatibility will not necessarily mean that the legislation involved is compatible with the Convention rights. It might simply be a case of the court deeming that the applicant lacks a sufficient interest, or standing, to make a challenge under the Act.[195] It might also be that the court is hesitant to issue a declaration of incompatibility due to its policy of judicial self-restraint in relation to the legislative branch.[196] The courts' judicial approach should not

---

191. *See id.* (describing "juridiction de droit objectif" as preserving the law by conforming the legislative and executive branches of government within their powers for the interest of the public). *See generally* TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 361-68 (4th ed. 1998) (discussing comparative aspects of standing law in the European Community); Michael C. Jensen et al., *Analysis of Alternative Standing Doctrines*, 6 INT'L REV. L. & ECON. 205 (1986) (analyzing the American perspective on standing and noting that the U.S. Supreme Court has held that access to the courts is a citizen's fundamental right).

192. *See* Ewing, *supra* note 40, at 96 (describing the reasons for pre-legislative scrutiny by the government).

193. *See id.* at 96-98 (discussing the current system of monitoring and scrutinizing legislation in light of the Convention rights).

194. *See* Lairg, *Sovereignty*, *supra* note 115, at 19 (stating that, although Parliament cannot strike down Parliamentary acts, in pragmatic terms, the public pressure resulting from a declaration of incompatibility will probably lead to amendment of the legislation).

195. *See* Miles, *supra* note 186, at 134 (stating that one has "sufficient interest" in the illegal act only if he or she is a victim of the act or is likely to be a victim).

196. *See* Kritzer, *supra* note 119, at 176 (discussing the reluctance of judges to get involved in legislative matters).

discourage either the Government or Parliament from acting on their authority to amend a law that offends a Convention right.

The primary responsibility of the British Government and Parliament also enables them to refrain from amending an Act, despite a judicial declaration of its incompatibility.[197] Notwithstanding the heavy weight of such a declaration and the possibility of an appeal to the European Court of Human Rights in Strasbourg, the legislative and executive authorities preserve the prerogative of inaction.[198] This policy, adopted by the Act, is not coincidental; it preserves the tradition of regarding Parliament as standing at the heart of British constitutionalism.[199]

C. THE ROLE OF THE COURTS UNDER THE HUMAN RIGHTS ACT: A NON-PURE JUDICIAL REVIEW MODEL

The conception of separation of powers as formulated in the Human Rights Act diverges from the conception that prevails in systems in which courts are entitled to strike down primary legislation. The British system, with Parliament retaining the upper hand, cannot be classified as a system of *pure* judicial review.[200]

Legal systems that adhere to pure judicial review (such as Canada, Germany, Italy, Sweden, and the United States),[201] and the British

---

197. *See* Ewing, *supra* note 40, at 92 (stating that the Government can decide how to deal with the decision of the courts).

198. *See id.* (explaining that the court can choose not to remedy the incompatibility).

199. *See* BARNETT, *supra* note 172, at 932 (discussing the tradition of Parliamentary sovereignty); *see also* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995) (discussing the constitutional change in Israel after its independence from the United Kingdom).

200. *See supra* notes 42-46 and accompanying text (contending that the judiciary's ability to declare legislation "incompatible" is not the same as nullifying the legislation altogether).

201. *See* Erik Holmberg & Nils Stjernquist, *Introduction* to THE CONSTITUTION OF SWEDEN 27 (Ray Bradfield trans. 1989) (commenting that the question of the constitutionality of judicial review of was a central feature of the debate in Sweden in relation to the Basic Law: The Instrument of Government, which is a part of the Swedish Constitution). Courts may only set aside a law if it is manifestly unconstitutional. *See id.*

system share the common feature of wide judicial discretion in deciding social, political, and ethical issues.[202] This wide discretion is part of the judge's power to strike a balance between conflicting rights and interests.[203] Prior to the Act's entry into force, strong judicial involvement was not totally unfamiliar to the British legal system; however, since its enactment, it is certainly correct to suggest that this type of judicial involvement has been reinforced. This is true despite the fact that the British courts, unlike their counterparts in pure judicial review systems, lack authority to unilaterally strike down acts of Parliament.[204]

Given the judiciary's power to issue declarations of incompatibility, the British Government-Parliament oriented model cannot be classified as completely lacking judicial review.[205] The Act's specific provision relating to this special declaratory power constitutes what might be termed a *non-pure* judicial review model. This model enables the courts to extend more intensive protection to human rights.[206] At the same time, however, the model does not arm

---

202. *See supra* note 81 and accompanying text (describing the U.S. Supreme Court as a "national policy maker").

203. *See generally* Bendor, *supra* note 102, at 194-98 (noting that in striking the delicate balance between relevant considerations in constitutional matters, the courts play a significant role in society at large). The role of law and judges in politically controversial cases is a source of controversy in may legal systems. *Id.*

204. *See* Lairg, *Sovereignty*, *supra* note 115, at 17 (noting that British courts cannot strike down legislation but can use interpretation to bring legislation in line with fundamental rights); Principe, *supra* note 170, at 365 (noting that under the Human Rights Act the courts cannot directly strike down legislation but can issue declarations of incompatibility); Gundel, *supra* note 149, at 159-60 (distinguishing the role of courts in Britain from the role of courts in a pure judicial review system); Kitterman, *supra* note 129, at 591-92 (describing the courts role under the Human Rights Act).

205. *See* BARNETT, *supra* note 172, at 932-33 (stating that the courts still have power to strike down secondary legislation).

206. *See* Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act*, 58 CAMBRIDGE L.J. 509, 514 (1999) (contending that language in the Human Rights Act does not suggest that courts should grant deference to legislative and government acts); *see also* Helen Fenwick, *The Right to Protest, the Human Rights Act and the Margin of Appreciation*, 62 MOD. L. REV. 491, 497 (1999) (using the term "margin of appreciation" to refer to deviations in which the European Convention on Human Rights allows states to make from the guarantees of Articles 8-11, where such deviations are "prescribed by law, have a legitimate aim, [are] necessary in a

judges with what might be described as a "non-conventional" weapon of striking down acts of Parliament.[207] The model is premised on limiting judicial responsibility so that judges can only advise the Government and Parliament to reconsider Acts that are incompatible with Convention rights.[208] Despite the weighty force of such a highly authorized judicial declaration, it is still not binding on the executive and legislative branches.[209] Parliament can refuse the court's recommendation to strike down primary legislation, as embodied in a declaration of incompatibility.[210] Thus, the Human Rights Act, with its non-pure judicial review characteristics, allows Britain to edge cautiously forward into the age of constitutionalism, without introducing chaos into the system by demolishing its tradition of trusting Parliament.[211]

This unique constitutional framework of non-pure judicial review might encourage the courts, in the future, to take a more active role in Britain's new constitutional age.[212] The limited power granted to the British courts might encourage them to overcome the natural reluctance to exert judicial power over primary legislation.[213]

---

democratic society and . . . [are] applied in a non-discriminatory fashion"). The European Convention on Human Rights, unlike the British Human Rights Act, accords this "margin of appreciation" to many basic political rights guaranteed by Articles 8-11, such as freedom of expression and the right to protest. *See* European Convention on Human Rights, *supra* note 8, arts. 8-11.

207. *See supra* notes 42-46 and accompanying text (explaining that the judiciary's ability to declare legislation "incompatible" is a limited power).

208. *See* Fenwick, *supra* note 206, at 505 (noting that even though a court might find the legislation incompatible with the Act, it must still apply the legislation and hope that it is later amended by Parliament).

209. *See id.* (discussing the courts' authority under the Human Rights Act).

210. *See id.*; *see also supra* notes 42-46 and accompanying text (discussing the judiciary's ability to declare legislation "incompatible").

211. *See* Williams, *supra* note 115, at 328 (noting that the Human Rights Act represents a significant step toward constitutional adjudication); Kitterman, *supra* note 129, at 586-95 (discussing the U.K.'s traditional legal framework and the effect of the introduction of the Human Rights Act).

212. *See supra* note 160 and accompanying text (asserting that the courts may actually be more willing to invoke their authority because Parliament remains the ultimate decision-maker regarding the fate of the legislation in question).

213. *See also supra* note 162 and accompanying text (comparing the general reluctance of courts in countries that utilize pure judicial review to countries with the ability to nullify acts of the legislature).

Ironically, such reluctance is a prevalent characteristic of some pure judicial review systems, especially at the beginning of a judicial review era.[214]

In a pure judicial review system, judicial power to declare acts of the legislature unconstitutional, with the effect of striking them down, might clash with basic elements of democracy and rules derived from the rule of law. Vesting courts with the power to annul primary legislation raises a counter-majoritarian dilemma, namely, the issue of allowing non-elected judges to act contrary to the will of the majority, as reflected by the elected Parliament.[215] The counter-majoritarian difficulty is sharpened by the gray area of typical constitutional choices, in which there is a need for striking a delicate balance between conflicting rights and interests.[216] Such choices might be subjective in nature and influenced by the judge's personal convictions, especially in difficult cases.[217] This subjectivity emphasizes the possible disadvantage of vesting judges with an ultimate power to set aside the will of the majority's representatives.[218]

---

214. *See supra* notes 95-106 and accompanying text (providing the situation in Israel as an example).

215. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962) (noting that the difficulty with judicial review is that elected officials must delegate some of their constitutionally assigned tasks to judges who are not elected, thus, they are not directly accountable to the people); *see also* Friedman, *supra* note 79, at 347-49 (commenting that when the people, in general, agree with the court's decision, there is less countermajoritarian criticism and the will of the people is not as highly regarded); MICHAEL PERRY, THE CONSTITUTION IN COURTS 16 (1994) (arguing that when the Supreme Court declares a legislative act unconstitutional, it interferes with the will of the people and works against the prevailing majority).

216. *See* Vincent P. Pace, *Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate*, 13 CONN. J. INT'L L. 149, 184-85 (1998) ("Cases involving conflicts between rights may afford judges even greater discretion because outcomes in these cases often turn solely upon policy considerations.")

217. *See id.* (discussing how a judge's personal convictions may unduly influence outcomes, especially in cases where there is a conflict between rights).

218. *See* PERRY, *supra* note 215, at 15-30 (addressing the difficulties encountered when courts are given the power to act against the supposed will of the people).

The Government-Parliament oriented model circumvents the counter-majoritarian dilemma by retaining the concept of Parliament's supremacy.[219] In addition, the role of the judiciary is respected—judicial declarations of incompatibility enjoy a special status.[220] While neither Government nor Parliament can simply overlook such declarations, and are likely to amend the law involved accordingly, the will of the majority still prevails.[221] Government and Parliament are entitled to let an offending statute remain in force, while risking that the European Court of Human Rights in Strasbourg will rule against them.[222]

The Government-Parliament oriented model also offers a solution to any possible outcry naturally following a judicial decision to set aside an act of Parliament.[223] Such a decision by the judiciary, especially when it involves a law deeply rooted in the legal system, could meet with extensive public criticism. Since the courts lack the authority to nullify an act of Parliament, such an outcry probably will never occur in Britain. Furthermore, granting the judicial branch the ultimate power to declare statutes void in a mature democracy might cause much greater difficulties than introducing such a principal in a state's formative period.[224] This argument might also justify the

---

219. *See* BARNETT, *supra* note 172, at 932 (stating that courts are not allowed to strike down primary legislation, thus preserving the supremacy of Parliament).

220. *See generally supra* notes 42-46 and accompanying text (discussing the judiciary's role under the Human Rights Act).

221. *See* Kitterman, *supra* note 129, at 591-93 ("The purpose of a declaration of incompatibility is to create public interest and put pressure on the government to change such law."); Lairg, *Sovereignty*, *supra* note 115, at 19 (noting that declarations of incompatibility have the ability to create public pressure to change the law).

222. *See generally* HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 10 (1996) (commenting that according to the "margin of appreciation" doctrine, with respect to many matters, the Convention leaves the Contracting Parties an area of discretion, in which the European Court will not intervene); J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 151 (2d ed. 1993) (noting that though Contracting Parties retain discretion, this area is very difficult to adjudicate).

223. *See supra* note 130 and accompanying text (discussing why courts should always avoid entanglement in political questions).

224. *See also supra* note 106 and accompanying text (explaining the reasons for the Israeli Supreme Court's apparent reluctance to declare legislative acts

British special model of non-pure judicial review in a constitutional judicial review world.

It should be noted that the more recently constructed democratic governments, which have adopted constitutions permitting judicial review, have modified their judicial systems in order to avoid the complexities that arise from the impact of judicial decisions that set aside existing laws.[225] For example, the Canadian Supreme Court has ruled that courts may suspend the implementation of a decision to strike down a legislative provision until Parliament has had the opportunity to amend it if annulling the provision poses a threat to the rule of law.[226] In such cases, the Canadian Supreme Court stays its decision for a period long enough to allow Parliament to address the difficult issue of amending the law to meet the constitutional requirements.[227] Israel has adopted a similar approach when the court decides to declare a law unconstitutional.[228] In Italy, the Constitutional Court has developed a policy of suspending, in exceptional cases, the publication of its forthcoming decisions, in order to give the legislature time to amend the law.[229]

Such special procedural mechanisms have narrowed the gap between pure and non-pure judicial review systems. In both systems, it is possible for offending primary legislation to remain in effect until Parliament addresses the matter.[230] Nevertheless, a difference still exists. In a pure judicial review system, a judicial declaration of nullity comes into effect in the event that the legislature refrains from

---

unconstitutional).

225. *See generally* Gundel, *supra* note 149 (discussing the adoption of the Charter of Rights and Freedoms in Canada in 1982 with its system of judicial review and the effect that it has had on the Canadian legal system).

226. *See* Schachter v. Canada [1992] 93 D.L.R. (4th) 1, 21 (discussing when a court can decide to suspend the declaration of invalidity).

227. *See* R. v. Swain [1991] 1 S.C.R. 933.

228. *See supra* notes 95-106 and accompanying text (discussing the process of judicial review in Israel).

229. *See generally* Alessandro Pizzorusso et al., *The Constitutional Review of Legislation in Italy*, 56 TEM. L.Q. 503, 515 (1983) (noting the importance of supporting the legislature).

230. *See* Kitterman, *supra* note 129, at 592-93 ("Even following a declaration of incompatibility, the government is not bound to act either by way of primary or subordinate legislation.")

acting.[231] In contrast, under the new British non-pure judicial review system, a judicial declaration of incompatibility could be no more than a voice lost in the wilderness.[232] However, one might reasonably assume that the echo of the judicial voice would be strong enough to bring about a change in the law.[233]

We may have reached a paradoxical situation in which the courts' weakness in a non-pure judicial system may be a source of judicial activism. The fact that a court decision does not have the effect of striking down a law might encourage judges to exercise their limited powers to the fullest in interpreting existing laws in accordance with the liberal view drawn by the Human Rights Act. [234] It also might help to develop a legal culture at large more compatible with the spirit of human rights. Thus, in the future, judges in the United Kingdom might feel, after getting accustomed to their new role, freer to assume an active role in the protection of human rights than their counterparts in pure judicial review systems.[235] Upholding Parliament's supremacy might help the British courts to overcome their reluctance to participate in the civil liberties arena and to exercise intensively their interpretative and declarative powers over primary legislation.[236]

---

231. *See generally supra* notes 77-81 and accompanying text (providing the example of judicial review in the United States).

232. *See supra* notes 210-11 and accompanying text (explaining that Parliament is under no legal obligation to conform its laws to a court's ruling of "incompatibility").

233. *See supra* note 171 and accompanying text (asserting that the probable effect of a court's declaration of incompatibility would be a Parliamentary amending of the offending law).

234. *See* Lairg, *Sovereignty*, *supra* note 115, at 16-17. Lairg notes that,

> By such interpretative means the judiciary has been able to confer a high degree of protection on a range of fundamental norms, such as access to justice, judicial review, and rights of due process. Consequently, although British courts cannot strike down legislation, they can often, by interpretative means, bring legislation which appears to be inconsistent with fundamental rights into line with them.

Id.

235. *See generally id.* (discussing how courts can use their interpretative power to help protect human rights).

236. *See* Keir Starmer, *How the Judges Have Grappled with Human Rights*, THE TIMES, Oct. 2, 2001, at Law 7 (reporting that Lord Chancellor emphasized that the

V. CONCLUSION

It is evident that one cannot achieve an accurate understanding of the British Human Rights Act's implications without first appreciating the context of the cultural atmosphere and background in which it will operate. Indeed, the shift to a rights-based system under the Act will have far-reaching consequences.[237]

Trust is deeply connected to political legitimacy. Trust in governmental authorities is an integral part of democratic concepts. Public trust is a key element in shaping the interrelations between authorities. In the absence of an ethos or practice of distrust of the political authorities, a restrained judicial review of government is expected and even advisable. From our viewpoint, this is the case in Britain.

The fact that the British judiciary has no legal power to strike down primary legislation, and in light of the deeply-rooted tradition of Parliament's supremacy and public trust in Parliament, the enactment of the Human Rights Act allowed Britain to adopt a unique model for protecting human rights. This model is anchored in British culture and would not, therefore, necessarily work well in other legal systems, such as Canada, Germany, Israel, or the United States.

The impact of the Human Rights Act on the day-to-day agenda of the British Parliament may be far greater than its influence on the judiciary's overall role. Parliament might observe very carefully, under the influence of the Act, the compatibility of its future primary legislation. Its preoccupation with its new constitutional task might be more crucial than the judicial review of the compatibility of legislation. The fact that the British courts are not empowered to strike down primary legislation might actually encourage them to

---

Government should not look on declarations of incompatibility as defeats, but as opportunities to enhance the protection of rights in the United Kingdom).

237. *See* Lord Irvine of Lairg, *The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights*, 1998 PUB. L. 221, 224 (arguing that the Human Rights Act is significant because liberty rights become positive rights guaranteed under Articles 5 and 6 of the Convention that the government may only violate under the specific terms of the convention). At common law, liberty was a negative right—that is, the only right an individual had left after all things prohibited by law were taken away. *See id.*

issue declarations of incompatibility. The non-pure judicial review power might make the British courts more robust in exercising their powers than their counterparts in pure judicial review systems. In doing so, the courts might contribute to a stronger protection of civil liberties. In addition, the lack of power to annul legislation might also diminish some problems of separation of powers and justiciability that have arisen in countries with pure judicial review.

We have suggested a paradigm, which might be defined as a Government-Parliament oriented model. It recognizes the undeniable fact that the enactment of the Human Rights Act heralds a new era in British constitutionalism. Arguably, Parliament and Government alike will still be the main players in shaping the boundaries of this new constitutional age in Britain. The model focuses on the need to formulate new methods and tools in order for both bodies to fulfill their responsibilities to act in a way that is compatible with the Convention rights. It visualizes a special kind of constitutionalism—a unique British constitutional culture—that combines the best of the ancient and the new.