

# Reigniting the Dialogue: The Latest Use of the Notwithstanding Clause in Canada

Campbell, Meghan

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# REIGNITING THE DIALOGUE: THE LATEST USE OF THE NOTWITHSTANDING CLAUSE IN CANADA

Dr Meghan Campbell  
Lecturer in Law, University of Birmingham  
Deputy-Director of Oxford Human Rights Hub

The theory of judicial-legislative dialogue, originally developed in Canada, remains a popular descriptor and normative ideal in liberal democracies.<sup>1</sup> Its appeal is multifaceted. Dialogue theory can address criticisms of strong-form judicial review by carving out a space for mutually beneficial exchange over the scope and content on rights and is seen as fostering good relations across different branches of government. In the UK, the Human Rights Act, 1998 (HRA) has started a new conversation between courts and Parliament. There has been continued criticism that courts speak too loudly in this dialogue and that the development of human rights is a task best left to Parliament.<sup>2</sup> Even amongst the judges of the UK Supreme Court there are competing perspectives on the appropriate role of courts and Parliament.<sup>3</sup> Echoing these concerns, there have been similar critiques in Canada that the architecture of the Canadian constitution has failed to foster meaningful dialogue and that courts continue to have the last word in rights adjudication.<sup>4</sup> This case note examines the Saskatchewan Queen's Bench decision from April 2017: *Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No. 212 and The Government of Saskatchewan* on the public funding of non-Catholic students to attend Catholic schools and the Saskatchewan government's decision to invoke the notwithstanding clause. What can the latest use of the override clause in Canada tell us about judicial-legislative deliberation in the UK?<sup>5</sup> How might events in Canada positively influence ongoing debates about possible reform of the HRA? Drawing on comparative insights gained from this enquiry, I propose that a modified form of the notwithstanding clause which respects Parliamentary sovereignty could enhance democratic dialogue in the UK.

## I. Mechanisms for Inter-Institutional Interaction in Canada: Section 33 of The Charter

Dialogue theory was developed by Hogg and Bushell<sup>6</sup> to explain the observable interaction occurring between courts and legislatures in Canada and defend the strong judicial review mandated by The Canadian Charter of Rights and Freedoms (The Charter).<sup>7</sup> Under The Charter, if anyone's rights or freedom are infringed the court may apply a remedy 'as the court considers appropriate and just in the circumstances'<sup>8</sup> and any law that is inconsistent with The Charter is of no force or effect.<sup>9</sup> The Supreme Court of Canada has used this broad remedial discretion to strike down legislation,<sup>10</sup> to read-in terms to legislation,<sup>11</sup> to issue

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<sup>1</sup> Alison Young, *Democratic Dialogue and The Constitution* (OUP, 2017); for a critique of its uses see Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66 UTLJ 83.

<sup>2</sup> Aileen Kavanagh, 'What's So Weak about Weak-Form Review? The Case of the UK Human Rights Act 2009' (2015) 13 ICON 1008

<sup>3</sup> R (*on the application of Nicklinson and another*) v Minister of Justice [2014] UKSC 38.

<sup>4</sup> Carissima Mathen, 'Dialogue Theory, Judicial Review and Judicial Supremacy: A Comment on "Charter Dialogue Revisited"' (2007) 45(1) Osgoode Hall Law Journal 125, 145.

<sup>5</sup> 2017 SKBQ 109.

<sup>6</sup> Peter Hogg and Alison Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 Osgoode Hall Law Journal 75.

<sup>7</sup> Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>8</sup> Section 24, The Charter.

<sup>9</sup> Section 52(1), The Charter.

<sup>10</sup> *Carter v Canada (Attorney General)*, [2015] 1 SCR 331.

<sup>11</sup> *Vriend v Alberta*, [1998] 1 SCR 493.

mandatory orders,<sup>12</sup> and to order on-going judicial supervision of remedial orders.<sup>13</sup> Hogg and Bushnell argue that the broad powers of the court, a democratically unaccountable body, are not as problematic as they may initially appear as The Charter provides space for the legislature to respond through dialogue with the courts. Here, we focus on one dialogic aspect of The Charter: section 33, the notwithstanding clause. The strong role of courts in determining Charter rights was meant to be tempered by section 33. This provision allows the government to legislate notwithstanding the fact that the legislation is in contravention of the rights guaranteed in The Charter. In essence, s. 33 was designed as a “safety valve” for an ultimate expression of legislative will.<sup>14</sup> Specifically, the legislature is required to publically and *expressly declare* in an act of the legislative body that it is invoking s. 33. There is no ability to implicitly legislate notwithstanding a breach of The Charter.

Section 33 mandates transparency and in theory should be a powerful tool to foster dialogue. It serves two purposes. The government is mandated to (i) *formally* and *publically* indicate that it intends to continue to legislate notwithstanding the court’s decision and in practice (ii) the government must *articulate reasons* and *justifications* when invoking s. 33. The notwithstanding clause fosters a culture of transparency, accountability and good administration. By formally articulating reasons for the government’s disagreement with the court, it is a process that fosters respect for the roles of each branch of government in deliberating on human rights. The process of giving reasons also requires the legislative body to fully engage with the court’s decision. Moreover, due to the political-legal reality, the government must articulate reasons that are either framed in competing human rights terms or with justifications that are compelling in a ‘free and democratic society.’<sup>15</sup> In effect, this sifts out reasons and justifications that are based on purely majoritarian politics and interests. Fredman, drawing on Habermas, explains that justifications in the context of rights cannot be simply based on interest-bargaining but must be value-oriented and reflect the state’s commitment to human rights.<sup>16</sup> Section 33 seeks to achieve these aims.

In practice, however, this provision is rarely invoked as the political cost of legislating against a breach of The Charter is simply too high. Only three of the ten provinces and three territories have relied on s. 33. Prior to *Good Spirit*, the last time it was invoked was in 2000.<sup>17</sup> Courts then still tend to have the last word in judicial-legislative conversations. Until *Good Spirit* it was questionable if s. 33 really served any meaningful role in deliberative democracy in Canada.

## II. Deliberative Democracy in the UK: The Role of Declarations of Incompatibility

There are similar concerns about the role of courts and human rights adjudication in the UK. The HRA opens up space for courts to adjudicate human rights and now both Parliament and courts can put forth their understanding of human rights. The precise role of courts in the arena of human rights has been and remains contentious. Prior to the HRA being introduced, there was unity across the political spectrum in the UK that having strong-form judicial review would give too great a role to courts. Klug observes that ‘conservative opinion tended to dismiss Bills of Rights as lethal for the doctrine of “parliamentary sovereignty”’ and the left was concerned that ‘empowering unaccountable judges to overturn laws’ would limit the left’s ability to carry out their political platform.<sup>18</sup> These concerns are reflected in the HRA which sets out a delicate power-sharing between the different branches of government. Courts in the UK have a more limited role and are not empowered under the HRA, as their counter-parts in Canada are, to strike down legislation as this would

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<sup>12</sup> *Canada (AG) v PHS Community Services Society*, [2011] 3 SCR 13.

<sup>13</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3.

<sup>14</sup> Mathen (n 4) Y.

<sup>15</sup> Section 1, The Charter.

<sup>16</sup> Sandra Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Right to Vote’ (2013) Public Law 292, 294-298.

<sup>17</sup> Stefani Langenegger, ‘Sask. to use notwithstanding clause to over school ruling’ CBC (1 May 2017) <<http://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-catholic-1.4093835>>.

<sup>18</sup> Francesca Klug, ‘A Bill of Rights: Do We Need One or Do We Already Have One?’ (2007) Public Law 701, 703.

fundamentally undermine the sovereignty of Parliament. Under the HRA, the courts are restricted to two remedial options. First, under s. 3, courts must interpret legislation as far as possible to make it compatible with the rights in the HRA and second, if that is not possible, under s. 4, the courts may make a declaration that the legislation is incompatible with the HRA. Adopting the dialogue metaphor, the HRA ensures that the last word theoretically still remains with Parliament. If it disagrees with the court's interpretation under s. 3 of the HRA, Parliament retains the power to amend the legislation to reflect its own understanding of human rights. If the court issues a declaration of incompatibility under s.4, it is theoretically Parliament who decides if and how the legislation in question should be amended.<sup>19</sup> The HRA stipulates that the declaration of invalidity does not affect the 'validity, continuing operation or enforcement' of the legislation in question.<sup>20</sup> In practice, since the executive has control over Parliament, it is the executive who decides how to respond to the court's declaration of incompatibility. There is no requirement that it amend legislation. If the executive fundamentally disagrees with the court's conclusion and it believes that the legislation is in fact compatible with the HRA or if it feels that there are weighty justifications for not amending incompatible legislation, then executive can choose not to respond to a declaration of invalidity. A good example of this is the executive's unwillingness to amend legislation to allow prisoner voting despite a declaration of incompatibility from the courts.<sup>21</sup> There is no formal mechanism in the HRA requiring the executive to issue a statement explaining its decision to not address a declaration. (In practice, however, in the case of prisoner voting, there were very public debates on Cameron's government's adamant opposition to this development in human rights law. <sup>22</sup>)

One further feature of the HRA worth mentioning is s. 19 as it requires a statement by the second reading that in the view of the Minister in charge of the proposed legislation that the proposal is compatible with the HRA or in the alternative, if the proposed legislation is not compatible, the Minister must make a statement that the government wishes to proceed notwithstanding the incompatibility. This further confirms both the executive and Parliament's central role in the interpretation of human rights commitments. However, again we can see a disjuncture between the lofty goals of the HRA and practice. Section 19 is a relatively weak provision and does not require the executive to give detailed reasons for its decision to pursue legislation that is not human rights compatible.

There have been numerous debates on the role of courts in deciding HRA claims. Here, we focus on the operationalization of s. 4, the declaration of incompatibility. In practice, the UK courts have rarely issued declarations of incompatibility and the overwhelming majority have resulted in changes to make the legislation compatible. Between 2000 and 2016, there have only 34 such declarations and only 22 have become final (ie. not subject to further appeal).<sup>23</sup> Of the 22 final declarations of incompatibility, 20 have been remedied through primary or secondary legislation or through remedial orders under s. 10 of the HRA. As of 2017, one declaration that the government intends to address through a remedial order<sup>24</sup> and one declaration is still under consideration. Kavanagh notes that there is a 'near-perfect rate of compliance with declarations of incompatibility since the HRA was enacted.'<sup>25</sup> The executive has been remarkably willing to amend legislation found to be incompatible with the HRA, although, as canvassed below, it has been criticized for not being sufficiently transparent when doing so. The only exception to this trend, being the declaration regarding prisoner voting. The executive's intransigence to remedying this declaration of

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<sup>19</sup>R. v. Shayler [2002] WLR 754 [53].

<sup>20</sup>Section 4(6), HRA.

<sup>21</sup>Smith v Scott [2007] CSIH 9; R (on the application of Chester) v Secretary of State for Justice (Scotland) [2013] UKSC 62

<sup>22</sup>'Cameron Sickened By Prisoner Voting' The Times (3 November 2010) <<https://www.thetimes.co.uk/article/cameron-sickened-by-prisoner-vote-j3zf67bbm2t>>.

<sup>23</sup>Ministry of Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2014-2016' (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf)>

<sup>24</sup>It is believed that this will be done in the September 2017 session of Parliament. See NGA Law, 'Surrogacy Law for Single Parents' <<http://www.nataliegambleassociates.co.uk/knowledge-centre/surrogacy-law-for-single-parents>>.

<sup>25</sup>Kavanagh, 'Weak Form Review' (n 2) 1026.

incompatibility is likely due to both its own political ideology and strong cross-party and public support against allowing prisoners to vote.<sup>26</sup> Looking forward, there is no guarantee that future disagreements between courts and the executive will garner similar media attention or Parliamentary scrutiny. To prevent a situation where the government decides to let the incompatibility stand and does not provide any or any meaningful reasons for this decision formal structures need to be in place. Furthermore, even for future situations where the government decides to amend the incompatible legislation, providing reasons and explanations for how it remedies the incompatibility enhances transparency, accountability and deliberation between institutions.

The limited use of the declaration of incompatibility brings two issues into focus. First, similar to Canada, it is crucial to acknowledge the role of politics. Government lawyers will often ask the court to remedy any human rights violations through s. 3 (a compatible interpretation) so as to avoid the political fall-out from ‘the headline grabbing damning verdict involved in a declaration of incompatibility.’<sup>27</sup> If the court does issue a declaration of incompatibility, the executive faces significant political pressure to amend the legislation.<sup>28</sup> Second, there has been very little chance for good practices to develop on the procedural aspects of responding to declarations of incompatibility. The Joint Committee on Human Rights (JCHR) in its watch dog role has issued guidance on how the executive should respond to declarations of incompatibility.<sup>29</sup> It encourages the executive to respond fully to the declaration to prevent future violations; to respond in a timely fashion and to notify the JCHR of the content of its intended responses. However, this guidance has no legal effect. Without any binding procedures on how to respond to declarations of incompatibility, the executive response is often delayed, minimal and ‘accompanied by...political rhetoric about the problems of court rulings.’<sup>30</sup> The JCHR has criticised the executive for not always being transparent on precisely what remedial measures it is taking to guarantee compatibility. It strongly recommends that the ‘Government *always* draw...to the attention of [the JCHR], to ensure that Parliament receives the advice of its expert human rights committee about [the steps it has taken to remedy] the incompatibility identified by the courts.’<sup>31</sup> Akin to s. 33 in Canada, s. 4 in the UK is arguably not fostering a rich culture of justification where courts, executive *and* Parliaments are transparent about their understandings of human rights.

### III. From Victorian Political Settlements to Protecting Rural Life: The Latest Use of the Notwithstanding Clause under The Charter of Rights and Freedoms

Just when it appeared that s. 33 could confidently be said to play only a marginal role in Canadian constitutional law, it was suddenly thrust back into the national spotlight. In April 2017, the Saskatchewan Queen’s Bench held that the province’s funding of non-Catholic students to attend Catholic school violated section 2(a) (freedom of religion) and 15 (equality) of The Charter. In response to this decision, the Saskatchewan government has publically declared that it will invoke s. 33 to continue to fund non-Catholic students notwithstanding the court’s judgment in *Good Spirit*.<sup>32</sup> Interestingly, and as a clear sign of the political costs in using s. 33, the government has stressed that it is using the notwithstanding clause to protect the rights of parents and children to attend the school of their choice.

What does this latest use of s. 33 tell us about the state of dialogue theory in Canada? And does this give us any insights into how the HRA might be refined so as to promote greater constructive dialogue in the UK?

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<sup>26</sup> *ibid.*

<sup>27</sup> *ibid* 1022-23.

<sup>28</sup> *ibid* 1023-28.

<sup>29</sup> JCHR, ‘Enhancing Parliament’s Role in relation to human rights judgments: Fifteenth Report of Session 2009-10 Annex: Guidance for Departments on Responding to Court Judgments on Human Rights’ <<https://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>>.

<sup>30</sup> Kavanagh (n 2) 1026.

<sup>31</sup> JCHR ‘Seventh Report (n 11) [4.7].

<sup>32</sup> *ibid.*

The starting point for engaging with these questions is to understand *Good Spirit*. The facts are straightforward. Over the past number of years, schools in rural Saskatchewan have rapidly been closing down and students transported to larger centres. This has a devastating impact on rural communities. Using provincial legislation, the community created the Theodore Roman Catholic School Division. The motivation in creating the new school division had significantly less to do with protecting religious minorities and more to do with protecting the vitality of the rural community. However, once it opened it has operated as a Catholic school. The Saskatchewan government provides funding for the non-Catholic students who attend the school. Without this funding the school would not be able to operate, but this does divert funding from the public school system. The Good Spirit School Division argued that this funding arrangement is unconstitutional, violating section 2(a) (freedom of religion) and 15 (equality) of The Charter.

Canada has a complicated system in place to protect minority religious education that springs out of the political tensions present at the time of confederation. As Justice Lahy eloquently states:

Confederation required statesmanship and compromise to bring together two founding nations, one with strong ties to Britain and the other with strong ties to France; one English-speaking, the other French-speaking; one essentially Protestant, the other Roman Catholic; one a victor in war, the other vanquished in war.<sup>33</sup>

To achieve and maintain the union of Canada, there are a series of provisions spanning across The Constitution Act, 1867 and The Charter that protect the rights of minority of Catholic and Protestant schools.<sup>34</sup> For our purposes, it is not necessary to go into the details of these complex and convoluted provisions. The key aspect of the case was the determining if funding non-Catholic students to attend Catholic school violates the states obligation to remain neutral towards religious groups under section 2(a) of The Charter, the right to freedom of religion.<sup>35</sup> The court found that the funding arrangement promotes the interests of Catholic faith and violates the state's Charter obligations to remain neutral as between different religious groups, violating section 2(a). Justice Lahy repeatedly stressed that other religious groups, such as Muslims, are not given public funding to educate non-Muslims.<sup>36</sup> At the same time, the court found that the funding arrangement violates s. 15 of The Charter, the right to equality. To determine if there has been discrimination, *Good Spirit* applies the test the Supreme Court of Canada established earlier in the *Andrews* case.<sup>37</sup> The focus of this test is on discriminatory impact. By providing funding for one faith to education non-believers, but not providing similar funding to other faiths sends a 'message that some faith are more valued than others' which contravenes s. 15's commitment to equal treatment.<sup>38</sup>

Thus, the Saskatchewan government can no longer continue to fund non-Catholic students to attend Catholic school. The court has given the government till June 2018 to make the necessary transition arrangements. However, in May 2017, the government released a statement in the press that it would invoke s. 33 and continue this funding arrangement notwithstanding the decision of the Saskatchewan Queen's Bench. The statement stresses that moving non-Catholic students will place exorbitant pressure on the public system. If the funding is removed non-Catholic families will need to face the difficult choice of spending \$10,000 a year for their children to attend the local Catholic school or face being bused into the next nearest school which

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<sup>33</sup> *Good Spirit* (n 5) [73].

<sup>34</sup> Section 93, The Constitution Act, 1867 (UK) 30 & 31 Victoria, c.3 and Section 29, The Charter.

<sup>35</sup> *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 SCR 3.

<sup>36</sup> *ibid* [397].

<sup>37</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>38</sup> *Good Spirit* (n 5) [438].

could be several towns away.<sup>39</sup> Thus, to protect both the integrity of the public system and the rights of parents and learners to choose their school, the government stated it will continue to fund non-Catholic students. This is a strong example of dialogue and deliberative democracy. The government and the courts disagree on the content of human rights. The government does not respond with silence or a meagre statement that it is invoking s. 33. Instead it responds to the court's decision with detailed value-oriented reasons that justify its decision to take a different interpretation of human rights.

#### IV. Enhancing Democratic Dialogue: A Due Consideration Clause in the HRA

At first glance, a dialogue between a first instance court and a provincial legislature on a very contextual education rights issue in a prairie province in the middle of Canada has little to offer on enhancing judicial-legislative deliberation on human rights in the UK. However, a careful reading of *Good Spirit* and the latest use of s. 33 points the way forward to reforms that could enhance dialogue between courts, executive and Parliament in the UK.

*Good Spirit* is a helpful reminder that even though s. 33 is rarely invoked in Canada, it is not irrelevant. When government's feel they have political capital on the issue, they will legislate notwithstanding a decision of the court that the legislation in question violates human rights. The government's arguments for using s.33 are framed so as to appeal to both rural voters and parents. By framing this as an issue of parental choice and the vitality of rural communities the Saskatchewan government is not risking a politically damning headline. It is offering reasons that are based on human rights values, are plausible and that will be acceptable to the community. In the context of the UK, although s. 4 is rarely used by the courts and the executive has largely been receptive to amending legislation, it is crucial to remember that the executive retains the power to ignore declaration of incompatibility. In situation in which the executive has either cross-party or grassroots political backing on an issue, it may feel empowered to allow a declaration of incompatibility to stand. There is no guarantee in the future that prisoner voting will be an isolated incident. It is easy to envision future judicial-legislative disagreement on the development of human rights post-Brexit and the government may have the political power to ignore future declarations of incompatibility from the courts.

On purely procedural grounds this is problematic as there is no requirement for the executive to justify its decision to reject the court's declaration. This is where *Good Spirit* offers some insights into developing best practices on declarations of incompatibility. It will be recalled that s. 33 requires a public and formal statement (ie. an Act of Parliament or provincial legislature) that the government will continue with the legislation notwithstanding that it violates The Charter. And the latest use of the notwithstanding clause, also demonstrates that in practice, to avoid political fall-out, the executive offers substance reasons for its decision. This process has merit for the UK. When the court issues a declaration of incompatibility this already indicates that there is a disagreement between the judicial, executive and legislative branches on human rights. There is no obligation on the government to formally respond to this declaration. If the executive decides to take action, it has discretion on what measures to take to correct the incompatibility. As the JCHR observed it can be difficult to pin-point these measures.<sup>40</sup> This leads to a very opaque or arguably even non-existence dialogue between courts, executive and Parliament. If the executive decides not to address a declaration of incompatibility there is no obligation to provide any formal reasons or justifications for this decision. This, in effect, shuts down any dialogue between branches of government. It is submitted that a 'due consideration clause' where the executive must formally articulate its response, reasons and justifications upon a declaration of incompatibility would significantly enhance the accountability, transparency and the deliberation of human rights in the UK. Requiring reasons for not addressing incompatibilities or explanation on the measures it intends to take, encourages greater respect between courts, executive and legislature,

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<sup>39</sup> Langenegger (n 15); Jennifer Geens, 'Court ruling could force thousands of Sask. students from Catholic school, education minister says' CBC (21 April 2017) <<http://www.cbc.ca/news/canada/saskatoon/saskatchewan-catholic-student-funding-1.4079718>>.

<sup>40</sup> JCHR, 'Seventh Report' (n 11).

allows legislative scrutiny of executive action, promotes good governance, assists the JCHR in its supervisory role, respects the rights of those affected by the legislation and provides the necessary information for sophisticated public debate on human rights. To avoid political fall-out, the government would be forced to articulate its competing understanding of human rights or use justifications that are consistent with justifications that are permissible under the HRA. This proposal recognizes that there can be legitimate disagreement between Parliament and the courts on the development of human rights but it requires that Parliament, similar to courts, needs to formally articulate the reasons for this disagreement. As Young observes, in relation to courts, ‘democratic dialogue would have been furthered...if a declaration had been issued, with a clear explanation of the reasons...and an outline of the consideration the legislature should take into account when determining, if and how, to respond to this declaration of incompatibility.’<sup>41</sup> The same equally holds true for the executive and Parliament. It should be required to formally and publically articulate its response to a declaration of incompatibility so as to enhance democratic dialogue.

This is not a radical proposal and in fact builds on provisions already in the HRA. A due consideration partially mirrors s. 19 of the HRA. Ministerial statements need to state that the legislation is compatible or incompatible with the HRA. . This is a forward-looking provision. A ‘due consideration clause’ is backward looking, requiring the government to respond to a court decision in a more robust fashion as to when it proposes legislation.

There is a real risk that a ‘due consideration clause’ will suffer the fate of s. 19 and become a mere box-ticking exercise; that the executive will give minimal explanation for its response to a declaration of incompatibility. There are several factors operating in harmony that provide a solid basis to hope that a due consideration will achieve its intended aims. It is tempting to argue that the phrase ‘due consideration’ in and of itself mandates a robust response to a declaration of incompatibility and that this is sufficient bulwark against this proposal becoming a form-filling exercise. However, the failures of the ‘due regard’ provisions in the Equality Act, 2010 to achieve substantive equality provides a cautionary lesson in relying on statutory language to foster institutional change.<sup>42</sup> A better option to embed a culture of deliberation on human rights is for courts when issuing a declaration of incompatibility to remind the executive that this activates their obligation to provide a fulsome, transparent and accessible response. Leaving aside issues of breaching a due consideration clause and the role of the courts in those circumstances, at the conclusion of a judgment where it has invoked s. 4 of the HRA, the court can stress that the executive should present for public debate the course of (in)action it intends to undertake. It can recommend that the executive publically articulate reasons for taking this course, the grounds for why it thinks this course is compelling and ‘the reasons for thinking that [this course] is consistent with the general objective of maintain respect for rights’.<sup>43</sup> Given the overall positive relationship between the courts and the executive, as evidence by the small number of s. 4 declarations and the executive’s willingness to amend legislation, reminders and guidance from the court on the due consideration obligation could be a successful strategy to ensure the vitality of this proposal. On a practical level, the number of instances where a due consideration clause will be activated are likely to be small. This scarcity means that it is less likely that a due consideration clause will be reduced to a pro-forma statement. Furthermore, the due consideration clause is for when there is a disagreement between the courts and the executive on the development of human rights. There is a strong likelihood that this disagreement will generate media and social media attention. To avoid bad press the executive will feel compelled to provide competing human rights reasons for its different understanding of rights. The reasons will need to be persuasive and compelling. This in turn can prompt debates in Parliament and other public forums. Even if the executive starts to slip into a habit of providing minimal reasoning upon a declaration of incompatibility, Parliament can hold them to account and probe and weigh the merits of the executive response in open debates. One of the strong

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<sup>41</sup> Young (n 1) 233.

<sup>42</sup> Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The Story So far’ 35 (3) *Oxford Journal of Legal Studies* (2015) 453

<sup>43</sup> The Joint Committee on Human Rights, ‘First Report: Scrutiny of Bills: Progress Report’ (2002) [16] <<https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/24/2403.htm>>.



attractions of a due consideration clause is that it not only mandates a more substantive deliberation on human rights but provides a greater role for legislative bodies.

## **V. Conclusion**

Adjudicating human rights is a complex task. Both courts and legislative bodies have a role in developing human rights. The latest use of the notwithstanding clause in *Good Spirit* shows that there can be different and competing visions of human rights. At the same time, it also demonstrates that the dialogue and deliberation on human rights is immeasurably enhanced by transparency. Courts give long and detailed reasons to support their understanding, but in the UK, the executive is under no similar obligation. Drawing on the structure and the practice of s. 33 of The Charter, it is argued here that the HRA should be reformed so as to include a due consideration clause. This would require that when a court issues a declaration of incompatibility, the executive must formally and publicly respond with either its intended remedial responses or reasons and justifications for its disagreement with the courts. It is beyond the scope of this short case note to delve into these issues, but the next step forward would be to consider how best to operationalize this duty and remedial enforcement for failing to discharge the due consideration obligation. There is also the possibility of applying a due consideration clause to s. 3, but at a minimum it should be automatically triggered upon a declaration as this is a focal point for judicial-legislative disagreement. A due consideration clause cannot address every critique of the HRA but at a minimum it mandates a richer deliberative democracy.