Remedial Judicial Discretion in Constitutional Review of Legislation: A Comparative Analysis

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David Lalor

BCL (DCU), BCL (Oxon), BL (King's Inns)

School of Law & Government

Dublin City University

Supervisor: Dr. Tom Hickey

Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Doctor of Philosophy is entirely my own work, and that I have exercised reasonable care to ensure that the work is original and have conformed to the regulations on the use and declaration of generative artificial intelligence, and does not to the best of my knowledge breach any law of copyright, and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work. I hereby certify that no generative artificial intelligence tools have been used in the creation of this thesis.

Signed: David Lalor

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Date: 4 January 2026

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Abstract

Remedial Judicial Discretion in Constitutional Review of Legislation: A Comparative Analysis

Davy Lalor

This PhD is about "remedies" in "constitutional review." Constitutional review is where litigants bring a case to the superior courts (i.e., the High Court, Court of Appeal or Supreme Court) challenging the constitutionality of some exercise of state power – generally legislation. Think, for example, of legal challenges to the constitutionality of legislation prohibiting public worship during pandemics, or of constitutional challenges to legislation criminalising assisted suicide.

Remedies are the practical parts of a court's judgment which concretise a litigant's rights. From the litigant's perspective, they are the most important part of a court's judgment. After all, there would be little point in claiming constitutional rights without effective remedies for their violation. The most basic remedy is a declaration of invalidity, i.e., when courts invalidate laws because they infringe constitutional rights. In recent years, however, courts have become more innovative in the remedies they use.

This thesis thus explores the nature and scope of the "remedial discretion" that judges ought to enjoy where they find legislation is inconsistent with the constitution. That is, it assesses whether judges ought to enjoy greater flexibility in respect of the practical solutions available to them in cases where they find a law is unconstitutional than has traditionally been the case in constitutional democracies.

The thesis is concerned with describing, analysing, and comparing existing arrangements and practice in this area of constitutional law in selected jurisdictions around the world – namely Canada, Ireland, and the United Kingdom. And it aims to inform judicial practice, institutional design, and constitutional reform. It also draws on works of constitutional and political theory in developing a series of "remedial touchstones" which serve to both ground and constrain the remedial powers available to judges in constitutional review of legislation.

Acknowledgments

I am not sure I knew it then, but the genesis for this thesis was an article written by my supervisor, Dr. Tom Hickey, which appeared in the Irish Times on 8 June 2017. It suggested a possible "dialogue-oriented departure" in the relationship between the Supreme Court of Ireland and the Oireachtas following a judgment of the Court which indicated that a piece of legislation was unconstitutional, but which also gave the Oireachtas time to fix the problem the Court had identified. I am not a believer in the fates, but 8 June also happens to be my birthday.

There are too many people to thank arising out of an undertaking of this nature, but the level of indebtedness I feel to so many – and in so many ways – means I nonetheless must try. I thank, in particular, Dr. David Keane at DCU who provided valuable guidance and feedback on almost all of the chapters in this thesis at our annual PhD review meetings.

A special word of gratitude must go to Professor Aileen Kavanagh, who supervised my master's thesis at the University of Oxford, where I began to explore the ideas which would form the basis of this work. My year at Oxford remains a treasured memory, and the academic and personal lessons I learned from Aileen stay with me. There are several points about writing and clarity of expression she taught me which I return to on a daily basis. My thanks also to Madeleine Salinger, Dr. Jamie McLoughlin, and Dr. Nathan Van Wees, for their friendship and intellectual stimulation at Oxford and beyond. They are remarkable people. I also remember the late Professor John Gardner. I did not know him well, but he was the most extraordinary communicator of ideas, and leading a seminar discussion alongside Madeleine in his jurisprudence class on the BCL is something I remember with great fondness.

From my time at McCann FitzGerald, my thanks to Eamonn O'Hanrahan, who taught me how to read a statute forensically, and to Sean Carr who showed me the skills necessary to be a litigator. They were unquestioningly supportive when I told them out of left field that I wanted to leave the firm to do this PhD.

Much of the joy of this work has come from thinking about and seeing how it could be put into action. I thank Rosario Boyle SC, Emma Synnott BL, and James Kane BL for giving me the opportunity to do just that during the *Heneghan* litigation before the Supreme Court.

I am enormously grateful to my masters, Francis Kieran BL, Stephen B. Byrne BL, and Hugh McDowell BL - I admire them deeply and they have taught me a great deal about so many things. Unfortunately for them, a devil is for life, so they are stuck with my ridiculous questions for decades to come. Thanks also to Shane Costelloe SC – I will always be grateful to him as the colleague who first took a punt on me. I suppose I should also thank James Kneale BL, lest he get upset.

I came to the bar with the ambition to argue constitutional cases on behalf of the State. I therefore owe a debt to the Attorney General, Rossa Fanning SC, who first briefed me in the kinds of cases I had always hoped to argue, and who trusted me with those cases at a very early stage of my career. It is, and I suspect always will be, the greatest privilege in my professional life to represent the State in public law litigation.

Thank you to the residents of 236 South Circular Road, who endured me telling them how clever and important I was because I was doing a PhD, despite the fact most of them were real doctors. The level of support and camaraderie on offer over cups of tea in the "baggage room" is unparalleled. They have been my friends through many adventures, and I hope they will remain so for many years to come. A particular word of thanks to Jack Larkin, who understands me at a level few others do.

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I thank my parents, Roy and Maria, to whom I dedicate this piece of work. I owe them more than is possible to put into words - I love you both so much. Thanks to Peter, who has picked me up off the floor on a few occasions and really is the ultimate big brother. And then of course there is Róisín, who makes all things in my life immeasurably better. Tugann tú dom síocháin i mo chroí.

Lastly, and most importantly, I thank Tom, who has been an exceptional supervisor, mentor, and a great friend. Tom's guidance, insight, and wisdom have been constant

during this thesis and indeed since I entered his classroom in 2013. He introduced me to the subject which has provided me with a career I love, and which has played no small part in me finding my future wife. These are debts not easily repaid and try as I might to do so with this thesis, I have not come close.

Chapter 1 | Introduction

CHAPTER OVERVIEW

1.1 – Introduction

This introductory chapter is in four sections. First, it summarises my substantive research and research question, situates it in the existing literature in the area, and sets out what I hope to achieve with my thesis. Second, it explains why I have designed the research in the way that I have, and the consequent choices and trade-offs involved. Third, it outlines the different research methodologies I will use and why I have chosen them. Finally, it outlines the structure of my thesis.

1.2 – Thesis Subject Matter and Research Question

This thesis is about judicial 'remedies' in constitutional review of legislation. It explores questions concerning the nature and scope of the 'remedial discretion' that judges ought to enjoy when assessing whether legislation is compatible with the constitution.

Its central research question is whether judges ought to enjoy greater flexibility in respect of the practical solutions available to them in constitutional review of legislation than has traditionally been the case in constitutional democracies. In answering this core question, it examines – through the lens of a range of comparative jurisdictions – the development of the remedial toolkit of judges in constitutional review; what that toolkit looks like now; and how that toolkit should develop further – if, in fact, it should so develop.

At its core, then, my project is one of comparative doctrinal analysis informed by the practical realities of constitutional review of legislation. To that end, it critically examines the constitutional problems which innovative remedial judicial discretion frequently presents – in particular, those puzzles which flow from separation of powers based concerns.

Legal doctrine is therefore central to my thesis. However, the issues which the thesis examines also contain important theoretical elements. My project seeks to explore what a modern account of remedial judicial practice could and/or ought to look like. In doing so, it draws primarily on accounts of the separation of powers associated

with authors working within the "collaborative constitutionalist" school, such as Aileen Kavanagh, Dimitrios Kyritsis, and Eoin Carolan.[1]

Those scholars argue that rights are best protected when institutions collaborate in the service of good constitutional governance. However, despite the sophistication of their analysis, they merely gesture – admittedly deliberately – at what good governance actually requires. In the background of this thesis, then, is the neo-republican thought of Philip Pettit, which offers some guidance as to the ends to which constitutional governance – and in particular the separation of powers – ought to be directed. It explores what this line of political theory might say about the collaborative constitution and, in turn, considers what a republican informed conception of the collaborative separation of powers might say about the nature and proper scope of "remedial judicial discretion."

My project is therefore comparative, doctrinal, and reform oriented. That is, it is concerned with describing, analysing, and comparing existing arrangements and practice in this area of constitutional law in a selected range of jurisdictions around the world. And it aims to inform judicial practice, institutional design, and constitutional reform.

Ultimately, my research will assess whether the collaborative accounts of the separation of powers suggest that judges, operating in certain contexts, regulated by certain conditions, and justified by certain theoretical underpinnings, ought to feel more secure in exercising a greater range of remedies in constitutional review of legislation than they currently do. Its goal, then, is to offer a coherent framework for the exercise of remedial judicial discretion in constitutional review of legislation.

1.2.1 – Key Concepts

There are two broad instances of constitutional review. The first is where courts review a piece of legislation for compatibility with a country's constitution. Typically, in such cases, a litigant will claim that a particular piece of legislation – or part thereof - has breached her constitutional rights. The second is constitutional review of

[1] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2024); Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017); and Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009).

'governmental' action. This is where courts review the compatibility of a decision of the executive or of some administrative arm of the state with the constitution.

This thesis is about constitutional review of *legislation* and the corresponding judicial remedies as opposed to constitutional review of governmental action. However, it is not always possible to neatly separate the two types of constitutional review so constitutional review of governmental action will sometimes necessarily be discussed.

Though they share many similarities, constitutional review must also be distinguished from ordinary judicial review. That latter case concerns judges reviewing the lawfulness of legal measures and actions of public bodies. Whereas constitutional review is concerned with the compatibility of some legal measure (in the case of this thesis, legislation) with the constitution, ordinary judicial review is concerned with the mere lawfulness of some legal measure. Something may be unlawful without being unconstitutional.

While this thesis is primarily concerned with constitutional review of legislation, given constitutional review has its origins in ordinary judicial review, it will sometimes be necessary to discuss that latter case too. Additionally, courts may perform each type of review in the same case in the sense that different forms of relief may be sought, or arise out of the same set of facts. For instance, a litigant may challenge the *constitutionality* of a statute while at the same time challenging the lawfulness of the individual form of administrative action taken by the public body which the statute empowers.

Judicial remedies, then, are the practical solutions that judges have available to them when they find statutes unconstitutional or hold that governmental action breached an individual's constitutional rights. In simple terms, they are the actions a court may take to fix a constitutional wrong. They are the 'range of measures that may be taken in response to… a violation of human rights',[2] and are best understood as 'the operative element of the court's order which translates the right into concrete form.'[3] They can range from measures such as striking down statutes when they are

[2] Dina Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006) at 17.
[3] Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (7th edn, Irwin Law 2021) at 491.

unconstitutional to quashing unlawful governmental decisions such that they are of no effect. From the litigant's perspective, they are arguably the most important part of a court's judgment. After all, there would be little point in claiming constitutional rights without effective remedies for their violation.

Focusing primarily on remedies for unconstitutional legislation is a limitation of my thesis. There are at least two other ways this thesis could have been constituted. It could have been about all remedies in all types of constitutional and judicial review. Or it could have been about all remedies in all types of constitutional review. I chose to limit the thesis to judicial remedies for unconstitutional legislation largely for reasons of scale. Constituting the thesis in the other two potential ways I suggest would have been a mammoth task. Additionally, confining the thesis to remedies for unconstitutional legislation will bring conceptual clarity as different considerations frequently apply to different remedies in different types of judicial and constitutional review.

1.2.2 – Situating the Thesis

In some jurisdictions, the paradigmatic remedy for unconstitutional laws is immediate invalidation, often referred to as the 'strike-down'.[4] For unconstitutional action by other arms of government, the primary remedy is the immediate invalidation of that action. The traditional position at common law was that such impugned laws or actions would be void from the beginning of their operation, such that it would be as if they never existed and had no legal effect.[5] In recent decades however, courts have developed alternatives to immediate invalidation and have taken measures to limit the retroactive effect of their decisions. Some of these alternatives, such as severance, reading-in, and the presumption of constitutionality, avoid a finding of unconstitutionality altogether, or at least obviate the need for a formal declaration of invalidity. Others, such as suspended declarations and making declarations prospective in effect only, arguably avoid the harm that the traditional immediate invalidation does to a state's constitutional order.

[4] David Kenny, 'Remedial Innovation, Constitutional, Culture, and the Supreme Court at a Cross-Roads' (2018) 40(2) DULJ 85.
[5] Robert Leckey, *Bills of Rights in the Common Law* (CUP 2015).

Jurisdictions vary as to the black letter basis for remedial discretion. And even where textual mandates for remedial discretion are provided, the precise contours of these alternative remedies have been developed organically by judges. For example, suspended declarations were first used in discrete classes of cases where it was thought their use would be less problematic than a strike-down. In the *Re Manitoba Language Rights Reference* case, had the Supreme Court of Canada issued an immediate declaration of invalidity in response to the failure of Manitoba's provincial legislature to legislate in the constitutionally required bilingual fashion, the province of Manitoba would have been left without any state laws.[6] Several years later in *Schacter v Canada*, the same Court attempted to limit the use of suspended declarations to cases where immediate invalidation would: threaten the rule of law; pose a risk to public safety; remove all persons from the ambit of an under-inclusive statute's protection.[7] However, these initial boundaries were ignored and, for a time, suspended declarations became the default remedy for unconstitutional statutes in Canada, with no categorical limitation on the types of cases in which they were used.[8]

In the United Kingdom, where judges have the textually authorised ability under sections 3 and 4 of the Human Rights Act 1998 (the "**HRA**") to issue remedies for laws which conflict with the European Convention on Human Rights (the "**Convention**"), the boundaries of those remedies have been left to judges to develop. And while those two remedies have been the subject of sustained judicial and academic focus, there has been little to no theoretical analysis of what their proper scope ought to be.

To be sure, there is a considerable literature on constitutional review and declarations of unconstitutionality. However, this thesis is novel due to the focus it places on the *range* of remedies – like interpretative remedies of reading-in, reading-down, and severance as well as suspension and deferrals of declarations – that should or should not be available to judges in constitutional review of legislation. Despite the importance of remedies to the constitutional review process, there has been limited scholarly work done on why it is that judges should – or should not as the case may

[6] [1985] 1 SCR 721.
[7] [1992] 2 SCR 679.
[8] An attempt to both retrench the widespread use of suspended declarations and offer guidance on the proper approach to remedies for unconstitutional legislation was made in *Attorney General of Ontario v G* [2020] 3 SCR 629.

be – be able to use different remedies in different situations. And the scholarly work which does address that point does not offer, as I hope to do in this thesis, a coherent normative basis – informed by the practical problems which remedial discretion poses – for the exercise of remedial judicial discretion.

The other novel element of my thesis is that it applies the collaborative constitutionalist theory of the separation of powers to the real world example of remedies for unconstitutional legislation. In essence, it offers suggestions as to what a theory of the collaborative constitution has to say about how judges ought to exercise their remedial powers.

That said, and perhaps somewhat intellectually unsatisfyingly, there are limits to what theory can accomplish in the field of remedial techniques. Judges decide cases on the basis of the legal arguments presented to them. Those arguments arise against a particular factual and contextual backdrop. They must be presented through the prism of existing legal rules; be grounded in relevant textual sources; and be calibrated – to some extent at least – to fit with the views of the relevant interpretive community. That is, the community of lawyers who will make the arguments and the judges who will adjudicate on the case.

Thus, while the aim of this thesis is to produce a coherent framework for the exercise of remedial judicial powers, it can only do so within the limitations imposed by the very nature of the process of constitutional review – which is an inherently context specific exercise.

1.3 – Thesis Design

My research is a piece of academic, desk-based inquiry. It is primarily focused on doctrinal and academic legal sources and is also a comparative piece of research. This section sets out the major research design choices I have made. In particular, it explains why I have chosen to approach my research questions through a comparative lens, why it explores those questions through the prism of collaborative constitutionalism, and why – notwithstanding that remedies are at the practical end

of the constitutional theory spectrum – a background theory of the State remains necessary to subtend the suggestions and arguments I make.

1.3.1 – Why Compare Jurisdictions?

In contemporary comparative constitutional law scholarship, many scholars are part of a 'sweeping and far-reaching movement towards universalism in modern constitutional law'.[9] Some authors believe that the commonalities which emerge across jurisdictions are, at points, so thick that they may be fairly described as generic issues in constitutional law.[10] While I would not go quite that far, it is reasonable to suggest that similar jurisdictions have much to learn from one another when confronted with similar problems. And remedial problems after findings of unconstitutionality are ones with which all courts are familiar.

Similarly, some comparative constitutional writers have argued that comparative constitutional scholarship can be divided into 'functionalist' and 'universalist' approaches.[11] Broadly speaking, a functionalist approach is one which examines specific legal systems, institutions, and their actors, while a universalist approach is one which attempts to divine universal truths about some aspect of law that should prevail in every legal system.[12]

This thesis is primarily functionalist – in the sense outlined above – in nature in that it identifies a common problem (the correct scope of remedial judicial discretion in constitutional review of legislation) confronting different apex courts (the supreme courts of Canada, Ireland, and the United Kingdom) and, having considered the different solutions posed by those courts, makes suggestions – within certain constraints – as a to a plausible remedial approach.[13] However, there is also a universalist aspect to my thesis as I am attempting to draw *relatively* generalisable conclusions about the proper scope of remedial judicial discretion in constitutional review of legislation. As such, it needs to offer some insights which can have a broader

[9] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013) at 9.
[10] David Law, 'Generic Constitutional Law' 89 (3) Minnesota Law Review (2005) at 659.
[11] Vicki Jackson, 'Comparative Constitutional Law: Methodologies' in Michael Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) at 61 – 66.
[12] ibid.
[13] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771 at 794.

application than in just one jurisdiction. Therefore, comparing a selected range of jurisdictions is appropriate.

However, my research is cognisant of the limits of convergence across my chosen jurisdictions.[14] Where constitutional culture, text, and practice vary from state to state, the role of the judge in constitutional review will not necessarily be the same. Thus, though I ultimately draw some generalisable conclusions, there are, inevitably, limits to that generalisability.[15]

Similarly, it is worth noting that this thesis is written from the perspective of an Irish scholar and lawyer. Having been educated and immersed in the Irish legal system and its corresponding interpretive community – rather than those of Canada or the United Kingdom – I may have a tendency to use the experience of remedial practice in those latter jurisdictions as a means of informing the Irish experience. And while I have sought to make this thesis a piece of truly comparative work which can be of use to scholars, judges, and practitioners working in each of the three jurisdictions which it examines, I must acknowledge that the thesis is conditioned by the Irish perspective of its author.

1.3.2 – Why the Collaborative Constitution?

The remedies that judges can grant when they find that legislation is incompatible with the constitution strikes at the very heart of the proper boundaries of the role of the judge in a constitutional democracy. In turn, questions around the remedial toolkit which judges ought to possess go to the very core of the separation of powers.

In almost every instance where a finding of unconstitutionality may be made, the remedial course charted by the courts has the potential to engage the separation of powers. That is, as Kavanagh notes, when courts review legislation for its compatibility with the constitution: '*they are inevitably drawn into the heart of complex and contentious policy questions on which people disagree*'.[16] Should a judge decide to make a declaration of constitutional invalidity, they – whether they are "correct" to

[14] Jeffrey Goldsowrthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (CUP 2006).
[15] Leckey, *Bills of Rights* (n5) at 25.
[16] Kavanagh, *The Collaborative Constitution* (n1).

do so – inescapably cut across the choices of the democratically elected representatives of the people.

Conversely, should the court decide to do any of: delaying making a finding of invalidity; suspending the operative effect of a finding of invalidity; or limiting the retroactive effects of its finding; there is a risk that a litigant's rights may not be protected to the degree warranted by the constitution.

It is these double-facing concerns which have led to sceptical academic and judicial commentary on remedial discretion. Equally, however, the arguments which frequently arise in favour of increased remedial discretion are often grounded on the view that they better respect the separation of powers.[17] I.e., if judges avoid issuing full and immediate declarations of invalidity, then – so the argument goes – they respect the democratic role of the legislature. Indeed, it was this line of thinking which, as we shall see in Chapter 4 in the UK context, led to the section 4 HRA declaration of incompatibility – where the Court indicates that legislation is not compatible with the HRA but leaves it to parliament to find the solution – being heralded as a valuable innovation which both respected rights and the differing roles of courts and legislature.

However, these apparent pitfalls and benefits of increased remedial discretion often work from (i) poorly thought through assumptions made about the demands of the separation of powers, without paying meaningful attention to how the separation of powers functions in reality, or (ii) poorly thought out visions of how the separation of powers *ought* to function.

Consequently, to properly work out a coherent framework for the exercise of remedial judicial discretion, it is necessary to assess the implications of both of these aspects of the separation of powers for remedial practice. Choosing the collaborative constitutionalist school as a basis for my research makes sense for both practical and values based reasons. The collaborative constitutionalist school, though still emerging, has become a leading academic theory of the separation of powers.

[17] See e.g., Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath' in Kieran Bradley, Noel Travers, and Anthony Whelan (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014).

Additionally, as I hope to demonstrate, it seems to offer a more descriptively accurate and morally attractive account of the separation of powers than traditional accounts against which the "pros and cons" of remedial judicial discretion have historically been measured. Thus, while all research choices have some degree of arbitrariness, working from within the walls of the collaborative theory of the separation of powers is, at the very least, a defensible methodological choice.

1.3.3 – A Background Political Theory?

Though this thesis primarily operates at the level of legal doctrine and constitutional theory, it nonetheless needs to be informed by a background political theory as I am making suggestions about how judges *should* exercise their powers. Any time normative claims about how important constitutional actors ought to exercise their powers are made, questions about the proper allocation of power within a state's constitutional order arise.

Therefore, it seems as if a background theory which discusses the proper allocation of power within a state - and the institutional structures consequent on that allocation - is necessary to make normative claims about what powers judges ought to have and how they ought to exercise them. It seems, then, as if a background theory of the *state* is necessary when making normative claims about the proper scope of judicial power. And Pettit's work is, essentially, a theory of the state.

Of course, there are many theories of the state that could be used in my research. I have chosen Philip Pettit's theory of republicanism over other theories for two reasons. First, it offers, in my view, a plausible account of the point of the modern state in that it recognises the purpose of the modern state is to enable its citizens to flourish, with state action treated as a necessary part of ensuring that flourishing, rather than more traditional accounts where state action is treated as inimical to freedom.[18]

Second, as outlined above, remedies in constitutional review of legislation are intimately connected with the separation of powers. Given that Pettit's work is so focussed the structure and allocation of power to prevent the exercise of arbitrary

[18] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

interference in the lives of citizens, it is deeply concerned with the separation of powers and the implications of that concept for judicial power. Thus, Pettit's work seems a useful foil for my research.

Of course, as noted above, no choice of background theory can ever be fully defended from perceptions of arbitrariness. In a thesis like this, all that can be done is to suggest defensible reasons for choosing a plausible background theory. Additionally, there are significant limits as to what theory can accomplish. Pettit's theory will be undoubtedly be helpful for shedding light on the ends of good governance which the collaborative constitutional theory of the separation of powers is designed to achieve. But it may be less helpful for working out the practical implications of the collaborative constitution for judicial remedies in constitutional review of legislation. Nonetheless, this thesis has normative elements so theory does have a role to play.

1.4 – Thesis Methodologies

This thesis makes suggestions as to the proper scope of remedial judicial discretion in common law constitutional democracies. To do this, I must first produce an up to date, detailed, and descriptive account of remedial practice in each of my chosen jurisdictions. I employ four different research methods to achieve this aim. I start with doctrinal methods as reading black-letter legal sources is the necessary first step in any project like mine. I then turn to comparative methods as moving from one jurisdiction to another while carrying out doctrinal research is the next obvious step. Having analysed the primary sources, I then theoretically assess the implications of the use of different remedies in constitutional review. Finally, I will utilise interdisciplinary methods to assess what the proper scope and limits of remedial judicial discretion ought to be in constitutional democracies.

1.4.1 – Doctrinal Methods

The starting point for any project like this is engagement with traditional black-letter legal sources such as constitutional provisions, statutes, and judgments of apex courts. In doing that, I address several doctrinal constitutional questions. These include describing the nature and range of remedial tools currently available to judges in my

chosen jurisdictions, analysing and comparing these tools in context – their historical development, their rationale, their practical implications (including, for example, how they influence judges in substantive adjudication) – and the strengths and weaknesses of these remedial tools.

In addressing these questions, my research adopts what some scholars have called an 'internal legal approach.'[19] Internal here refers to the close attention actors like judges and lawyers pay to texts and processes within legal institutions.[20]

This approach recognises the internal procedural aspects of constitutional litigation in legal systems, factors which are often forgotten by theorists when analysing constitutional judgments of courts. It appreciates that while judges are frequently cognisant of the broader theoretical issues at play in disputes which come before them, their focus is, ultimately, on determining those disputes on the merits of each individual case with reference to the principles and procedures in which they have been trained. And the internal approach recognises that in carrying out this role, legal rules, precedents, and practices considerably constrain the exercise of courts' powers.[21] Ultimately, the internal legal approach recognises that law channels action through distinctly legal avenues and procedures. In other words, it is mindful of the fact that *legal* reasoning, carried out by legal actors in legal arenas – with, for better or for worse, their own particular institutional and community-based pathologies, assumptions, and attitudes – is what shapes remedial judicial practice.

The internal legal approach, then, is the starting point for the doctrinal research methods I use, with the primary method being detailed reading of judgments of courts. There is a tendency within comparative constitutional scholarship to read judgments of courts in states with bills of rights and or codified constitutions as philosophical expositions.[22] And within political science, there is what some scholars have called a 'highly problematic' focus on judicial votes and the outcome of cases.[23] However, viewed through the internal legal lens, judgments merit attention as sources

[19] Leckey, *Bills of Rights* (n5).
[20] ibid at 11.
[21] ibid at 11.
[22] ibid at 12.
[23] Emmet McFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press 2013) at 101.

with a specialised meaning for lawyers and judges – in other words, they call for study from a lawyer's perspective.[24] That is not to deny that disciplines other than law might shed light on important questions in constitutional theory like remedial judicial discretion.[25] Rather, my research highlights the importance of influential technical legal features in adjudication. Without a focus on these features, any analysis of judgments issued in response to a complaint alleging a violation of rights contained in a bill of rights instrument or constitution risks being incomplete.[26]

Consequently, much of the doctrinal research in my project examines the practical issues which arise within rights adjudication. In much of the literature on constitutional review, scholars focus on the disagreement between the courts and the other branches of government about the substance of rights and underexplore practical issues like remedies. However, as works on the historical origins of judicial constitutional review demonstrate, remedies in constitutional review developed on a technical, procedural basis. In any examination of remedies in constitutional review, then, it is of crucial importance to examine the technicalities of constitutional litigation.

1.4.2 – Comparative Methods

Much comparative constitutional law scholarship merely collates single country studies as opposed to integrating such studies into coherent pieces of analysis. My research accounts for this problem in two ways. First, the internal legal perspective prevents my comparative analysis becoming abstract and acontextual. That analysis is anchored in an examination of the practices and procedures associated with judging under a constitution or bill of rights instrument. Second, my research is an integrated piece of work with each jurisdiction appearing in each substantive section of my thesis.

The most important aspect of comparative research methods are the case selections chosen for comparison – in this instance the common law jurisdictions of Canada,

[24] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (UCP 1990) at 89.
[25] Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in Choudry, *Constitutional Ideas* at 69.
[26] Leckey, *Bills of Rights* (n5) at 12.

Ireland, and the United Kingdom. I have confined this thesis to common law jurisdictions because the conceptions of the judicial role in common and civil law countries are so distinct as to make comparison between them very difficult – or at least, difficult for a candidate without structured training in examining a civil law legal system. It also makes sense to limit the scope of the thesis to common law systems due to the 'familiarity of common law judges with law-making through the interpretation of legally authoritative materials.'[27]

At a general level, comparative study of Canada, Ireland, and the UK (as opposed to other possible combinations of states) is revealing due to, on the one hand, the similar parliamentary and judicial traditions in each country, and, on the other hand, the different powers and bases for remedying rights violations obtaining in each state. All three are constitutional democracies in the Westminster tradition and possess similar legal systems grounded in the common law tradition. Litigation is conducted in broadly the same way and the judicial decision-making process is almost identical in each country. Many substantive areas of law are also identical. And, crucially, 'theoretical perspectives on the nature of law' in each of my chosen jurisdictions has been predominantly shaped by Anglophone theorists in the positivist tradition.[28]

At a more specific level, each country's system of constitutional review is one of (a) concrete and (b) decentralised review. Concrete constitutional review means that legislation and governmental actions are reviewed in real cases – with real litigants – against a background of legislation and governmental decisions which have been applied in practice. This can be contrasted with abstract review, which usually arises out of a challenge by a public institution or through the referral of a constitutional question.[29] In abstract review, no harm need be demonstrated, and the apex court does not consider the impugned legislation in response to a specific set of circumstances. Thus, the remedial consequences of any such abstract review are often

[27] Robert Noonan *Declarations of Unconstitutionality in the Common Law Tradition: A Comparative and Theoretical Analysis* (Ph.D Thesis, Trinity College Dublin, 2019) at 11.
[28] ibid at 10.
[29] Of course, Ireland possesses the Article 26 reference procedure but, in general terms, it operates a system of concrete constitutional review.

limited, making jurisdictions whose constitutional review primarily centres on cases of concrete review most suitable for this thesis.

Decentralised review is where multiple courts – other than a single, bespoke constitutional court – have the power to review the constitutionality of legislation and governmental action. The more courts that conduct constitutional review in a legal system, the more opportunities there are for those courts to exercise different remedial choices, making these types of legal systems more appropriate for a thesis which aims to draw relatively generalisable conclusions about the proper scope of remedial judicial discretion in constitutional review.

At an even more specific level, there is considerable cross-pollination between courts in each country on judicial remedies specifically, with the jurisprudence in each of the three states containing significant commonalties. Additionally, each country reviews legislation with reference to a positively articulated bill of rights: the Canadian Charter of Rights and Freedoms (the "**Charter**"), the HRA, and the fundamental rights provisions of Bunreacht na hÉireann. Again, similarities between each jurisdiction are evident. Charter case-law considerably influences discussions about rights under the HRA and vice-versa. Both jurisdictions also heavily influence Irish judges' reasoning about rights, notably on contentious moral issues. Case-law on the European Convention heavily informs judicial practice in the UK (where it is incorporated at constitutional level) and Ireland (where it is incorporated at sub-constitutional level), and this case-law is often cited by Canadian Courts. Similarly, Charter jurisprudence is often cited by Irish and UK courts when discussing ECHR issues. The point here is that judges' *reasoning* on rights, and more importantly remedies for violations of those rights, is influenced by the same considerations and principles in *these* three common law countries than in other common law countries. There are also considerable textual similarities in each country's constitution (or in the UK's case – certain provisions of the HRA, which forms part of the UK's unwritten constitution).

Studying these jurisdictions also makes sense given that my research works from within the walls of republican theory. Each of these states – admittedly likely unconsciously and with differing levels of success – seems to be pursuing, by means of the welfare state, the republican aim of freedom as non-domination. That is, they

seem concerned, at an institutional design and rhetorical political level at least, with both minimising the ability of the state and private actors to interfere arbitrarily in the lives of citizens and, ultimately, with enabling those citizens to flourish.[30]

I did not include the United States for two primary reasons. The first is that any claim that the United States is committed to achieving the ideal of freedom as non-domination is notably open to debate. Second, and perhaps more importantly, while there are undoubtedly many similarities between how the Supreme Court of the United States and the apex courts examined in this thesis engage in constitutional review of legislation, on any reasonable analysis, the former court is possessed of its own particular institutional pathologies, pathologies which stem from its highly politicised nature. Indeed, some commentators have gone so far as to argue that the Court is so politicised that it cannot truly be considered a court in the ordinary sense; the argument here is that the Court makes all-things-considered decisions, not legal decisions, with the only real constraint on the institution being the judges' own views of what the people and the elected branches will tolerate or accept. In other words, policy and politics not law drives the Court's decisions in a manner that is inconsistent with the proper judicial role.[31] Thus, while I do not necessarily subscribe to that view, it may be more difficult to argue that the Supreme Court of the United States approaches its task of reasoning about rights in a similar fashion to the three jurisdictions examined in this thesis. The consequence of both of these points – but particularly the latter – is that the generalisability of conclusions informed by remedial practice in the Supreme Court of the United States may be much harder to sustain.

Undoubtedly however, there are limitations to a study such as mine from a comparative perspective. Its conclusions are, most likely, of limited value to civil law countries or even common law countries whose systems of constitutional review do not share the features outlined above. Additionally, choice of jurisdiction can never be fully defended from perceptions of some degree of arbitrariness. However, there

[30] N.W. Barber, *The Principles of Constitutionalism* (OUP 2018).
[31] Eric J. Segall, *Supreme Myths: Why the Supreme Court is Not a Court and Its Justices Are Not Justices* (Praeger 2012).

is enough convergence across each of the jurisdictions to justify their inclusion from a comparative perspective.

There is a significant caveat to my choice of jurisdiction. The Supreme Court of the United Kingdom, unlike its Canadian and Irish counterparts, does not possess the power to strike-down legislation. However, I do not think that this admittedly significant difference unduly lessens the sustainability of my choice of jurisdictions or particularly lessens the modest level of generalisability which I hope to achieve with my conclusions. As I hope to demonstrate, the remedial powers which the Supreme Court of the United Kingdom exercises are remarkably powerful, such that the absence of the strike-down from its remedial toolkit does not change the fact that the remedial choices it makes have the potential to change the law in a way which potentially infringes on the separation of powers to a much greater extent than a declaration of unconstitutionality. Additionally, as we will see, parliament has a near perfect rate of compliance with section 4 declarations of incompatibly, which suggests that the normative force of this remedy is perhaps not all that far removed from the formal declaration of invalidity.

1.4.3 – Theoretical Methods

As noted above, separation of powers concerns loom large with the exercise of increased remedial discretion. Thus, in investigating my overarching research question of whether judges ought to be equipped with greater remedial flexibility, I address several theoretical questions. These include: what are the 'prevailing' or 'traditional/conventional' understandings of the separation of powers; how these understandings informed institutional design (constitutional and statutory drafting, gradual judicial development of remedial tools etc) with respect to the question of 'remedies'; and how, if at all, they continue to influence constitutional culture, including judicial practice, in this area. I then explore the collaborative constitutionalist account in detail; assess whether it calls for a more nuanced remedial toolkit; as well as examining the benefits and pitfalls of greater remedial flexibility in constitutional review.

In answering these questions, I draw on existing scholarly literature on judicial remedies and judicial power, the separation of powers, the rule of law, republicanism,

as well as on other important work in the fields of constitutional and legal theory more generally.

The literature on remedies themselves, while considerable, is not so vast as to prevent an exhaustive examination of it in each of my chosen jurisdictions. Additionally, it is a relatively new literature – beginning in the 1980s in Canada and the 1990s in both Ireland and the United Kingdom – and is quite self-contained, making it possible to be comprehensively examined.

1.4.4 – Interdisciplinary Methods

My research is an interdisciplinary piece of work. It engages important concepts in constitutional law and theory and relates those ideas – informed by a background republican political theory – to the concrete practical example of remedial judicial discretion in constitutional review. Thus, I connect sources rooted in legal practice – such as judgments of courts – to philosophical and theoretical debates about constitutional review and the proper role of the judge in a modern constitutional state. I do this to produce a series of remedial touchstones which may serve as a guide to judges in the exercise of their remedial powers in constitutional review of legislation

That connecting exercise is challenging due to the vastness of the literature on issues in judicial power, constitutional theory, and political theory. Hence the importance of adhering as far as possible to the internal legal approach I outlined above; notwithstanding the light insights from other disciplines can shed on legal issues, legal texts call for analysis through a specific legal lens. Focussing on doctrinal sources as much as possible prevents this thesis becoming trapped in theoretical minefields and yet also reveals those doctrinal issues which require analysis with a more theoretical focus.

In essence, then, the thesis can be described as an interpretive piece of work which employs the method of reflective equilibrium, a concept associated with John Rawls. That is, the thesis engages in an ongoing iterative process of mutual adjustment of both the theoretical concepts the thesis discusses and the doctrinal considerations which emerge from the case law on remedies to produce a coherent set of remedial judicial touchstones.

1.5 – Thesis Structure

1.5.1 – Part 1: Introduction (Chapter 1)

Part 1 contains a general introductory chapter explaining what I propose to do in my research and how I propose to do it. In other words, it sets out the subject matter of my thesis, how it fits into existing scholarship in the area, my methodology and its limitations, as well as the structure my thesis follows.

1.5.2 – Part 2: Remedies for Unconstitutional Legislation in Practice (Chapters 2 – 4)

This part contains chapters which set out, primarily in a classic doctrinal legal fashion, the remedial positions in constitutional review in Canada, Ireland, and the United Kingdom. It will discuss orthodox approaches to invalidation and will discuss the alternative remedial approaches used by courts including: the temporal limitations courts place on their judgments; suspended declarations of invalidity and individual exemptions from those suspensions; as-applied declarations of invalidity and alternative remedies to invalidation such as reading-in, reading-down, and severance.

Each chapter also contain sections which provide a brief historical overview of the development of constitutional review of legislation in each jurisdiction. Additionally, each chapter outlines the bases of constitutional review of legislation in each of my chosen jurisdictions.

1.5.3 – Part 3: Conceptual Analysis (Chapters 5 – 7)

This part contains the theoretical analysis portions of my thesis and is in three chapters. Drawing on the comparative analysis conducted in chapters 2 – 4, the first part of Chapter 5 assess the potential problems of constitutional theory - primarily separation of powers and rule of law concerns - posed by remedial discretion.

The second part of Chapter 5 explores to what extent, if we adopt a better account of the separation of powers – an account which I argue ought to be informed by a neo-republican theory of freedom and government – many of the concerns associated with remedial discretion outlined in the first part of Chapter 5 might be viewed in a different light. To do that, it very briefly outlines the core tenets of neo-republican

thought, before considering in detail the collaborative constitutionalist account of the separation of powers.

Chapter 6, then, is the key chapter of this thesis. It aims to offer a coherent basis for the exercise of remedial judicial discretion in constitutional review. It answers my overarching research question of what the proper scope of remedial judicial discretion ought to be in common law constitutional democracies. In doing that, building on the analysis conducted in Chapter 5, it assesses what a republican informed account of the collaborative separation of powers might have to say about the proper role of courts and their remedial practice, it outlines what remedial powers ought to be available to judges, and offers a normative basis on which to both ground and constrain the exercise of those powers. It does this through the suggested adoption of the following four key remedial touchstones:

(i) The different institutional roles played by courts and legislatures;

(ii) A presumption for "tailored" remedies;

(iii) The rare use of suspension; and

(iv) The need to protect individual rights.

Ultimately, this chapter argues that judges should feel more comfortable deploying tailored and / or calibrated remedies than has traditionally been the case. Remedies falling short of full and immediate invalidity, in appropriate circumstances, better serve the concept of the separation of powers, where cooperation and calibration are understood as forming core parts of that concept in the service of the republican project of governance. Additionally, tailored and calibrated remedies can still ensure that the courts act as an effective check – while remaining within the proper boundaries of their constitutional role – on the exercise of majoritarian democratic power. However, the chapter also counsels restraint on the part of the judiciary generally, and suggests that remedial devices like suspended declarations should be used rarely given the particular separation of powers concerns they pose.

Chapter 2 | Remedial Practice in the Supreme Court of Canada

CHAPTER OVERVIEW

2.1 – Introduction

The Canadian Constitution is comprised of multiple statutes and instruments enacted by Canadian and British parliaments over several centuries. Its foundation stone is the Constitution Act 1867, and its most recent addition for the purposes of this thesis is the Canada Act 1982. Attached to this latter Act as a schedule is a crucial part of the Canadian Constitution, the Constitution Act 1982 (the "**1982 Act**").[1]

The Canada Act was passed by the British Parliament - at Canada's request - as a final step on Canada's path to independence and gives the 1982 Act its constitutional status.[2] Part I of the 1982 Act, in turn, incorporates the Canadian Charter of Rights and Freedoms (the "**Charter**") into the Canadian Constitution. The Charter is Canada's bill of rights instrument and contains many of the fundamental rights guarantees traditionally associated with common-law constitutional democracies.

Thus, much of the jurisprudence on constitutional review in Canada centres on the compatibility of legislation with the Charter. And, as set out in Chapter 1, the primary focus of this thesis is on the judicial remedies used by apex courts for unconstitutional legislation. Consequently, although it will be necessary to address some of the wider case-law on unconstitutionality to fully understand the Supreme Court of Canada's remedial jurisprudence, this chapter primarily discusses constitutional review of legislation under the Charter.

The remainder of this chapter proceeds in the following way. It starts by outlining the development of the historical and orthodox approach of Canadian courts to remedies for unconstitutionality, paying particular attention to the classic remedy for unconstitutional laws – the so-called 'strike-down'. It then turns to a remedial innovation closely associated with the Supreme Court of Canada, the suspended declaration of constitutional invalidity. After that, it moves to a discussion of what the Supreme Court has recently termed 'tailored' remedies, such as reading-in, reading-down, and severance. And finally, the chapter will close with a summary of the Supreme Court of Canada's remedial jurisprudence.

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[1] On the development of the Canadian Constitution generally, see Peter Hogg, *Constitutional Law of Canada* (5th edn, Thomson 2007).
[2] Robert Leckey, *Bills of Rights in the Common Law* (CUP 2015) at 41.

Throughout the chapter, significant attention is paid to two recent judgments of the Supreme Court. The first is the Court's recent attempt in *Attorney General (Ontario) v G* to "restate" it's approach to remedies.[3] That judgment followed several years of sustained academic and judicial criticism that the Court's approach to remedies had become unprincipled and lacking in clarity. In particular, the judgment called for a retrenchment on the use of suspended declarations given the discrete separation of powers concerns which that remedy presents.

The second is the Court's judgment in *R v Albashir*,[4] where the Court revisited many of its themes from its judgment in *G*. For example, the Court highlighted that suspended declarations should only be granted where warranted by some "*compelling public interest*", [5] and that the effect of declarations would generally be "*immediate*".[6] Additionally, the Court also made several comments regarding its approach to the temporal effects of declarations of invalidity. In particular, the Court noted that there is a "*strong*" but "*rebuttable*" presumption that judicial declarations are retroactive.[7] However, the Court also left itself significant scope to both limit the retroactive effects of its declarations and, where necessary, make its declarations prospective in effect only. Building on the call for transparency which it made in *G*, the Court also admitted that the reasons for particular remedial choices it had made in the past had not always been expressly stated, and therefore set down an expectation that courts in the future would expressly state whether their declaration of invalidity – be it immediate or suspended – would be retroactive or prospective.[8]

As with Chapters 3 (Ireland) and 4 (the United Kingdom), in the interests of clarity, this chapter generally confines itself to attempting to discuss doctrinal legal material. The majority of the theoretical issues associated with remedial judicial discretion – and the merits or otherwise of the various judgments and associated academic literature considered in Chapters 2, 3, and 4 – will be discussed in Part III, in particular Chapter 6, of this thesis.

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[3] [2020] 3 SCR 629.
[4] [2021] 3 SCR 531.
[5] ibid at para 1.
[6] ibid at para 42.
[7] ibid at para 34.
[8] ibid at para 53.

2.2 – Historical and Orthodox Unconstitutionality in Canada

Although constitutional review in Canada predated the 1982 Act and the Charter, it was historically a more limited power of review primarily concerned with federal devolution matters.[9] Federal courts reviewed provincial legislation for its compliance with the proper distribution of legislative powers contained in the federal constitution.[10] In some of its earliest judgments, the Supreme Court of Canada – established under the Supreme and Exchequer Courts Act 1875 – considered it had the power to judicially review legislation for compatibility with the federal constitution.[11] And the remedies in those early federal cases were generally straightforward, usually being 'shaped, granted, or denied on the basis of general principles of legal invalidity of an act or contract.'[12]

Thus, the early case-law of the Supreme Court indicates a relatively orthodox approach to remedies for unconstitutionality. When a statute exceeded its legislative competence, at the level of theory at least, the Court generally held that the impugned law no longer existed, had never existed at all, and was therefore of no legal effect.[13] And the remedy which flowed from this 'void *ab initio*' view of unconstitutionality was usually immediate retrospective invalidation of the impugned law.[14] But, as we shall see, both the practical application and remedial effects of that doctrine have shifted considerably.

2.2.1 – Early Non-Charter Case-Law

The Supreme Court was forced to consider the effects of unconstitutionality in several non-Charter cases dealing with the restitution of unconstitutionally collected taxes. The Court flip-flopped somewhat in its approach in these cases, initially expressing strident approval for the voidness *ab initio* doctrine, holding that unconstitutionally

[9] For a full account of the historical background to Canadian review of legislation, see Jennifer Smith, 'The Origins of Judicial Review in Canada' (1983) 16 Canadian Journal of Political Science 115.
[10] Leckey, *Bills of Rights* (n2) at 59.
[11] *Severn v The Queen* [1878] 2 SCR 70 and *Valin v Langlois* [1879] 3 SCR 1.
[12] Barry Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3rd edn, Butterworths 1988) at 299.
[13] Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book 1994) at para 14.920.
[14] Robert Noonan, *Declarations of Unconstitutionality in the Common Law Tradition: A Comparative and Theoretical Analysis* (Ph.D Thesis, Trinity College Dublin, 2019) at 105.

collected taxes could be recovered from the public purse.[15] It then appeared to significantly alter its approach by gesturing at the possible value of a restitutionary principle which would bar the recovery of unconstitutional taxes, largely on the basis that such recovery could have far-reaching consequences for public finances.[16] However, relatively recently, the Court returned to its orthodox position of voidness *ab initio* in non-Charter cases of constitutional review, reasoning that allowing legislatures to collect and retain taxes based on an unconstitutional statute would significantly undermine the rule of law, albeit that unconstitutional statutes could nonetheless retain some application through suspended declarations and other legal doctrines.[17]

2.2.2 – Unconstitutionality under the Charter

Turning to constitutional review under the Charter, two of the Constitution's provisions are key to understanding the Court's jurisprudence here. The first is section 52(1) of the 1982 Act, which provides that:

> "*The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force or effect*."

While this clause contains no textual basis for constitutional review of legislation, it has been held to task the Supreme Court with ultimate enforcement of both the Constitution and the Charter, with the courts also holding that it impliedly equips them with a broad remedial jurisdiction.[18] In *Canada v Power*, the Court held that s.52(1):

> "*…establishes the supremacy of the Constitution and empowers courts to declare legislation "of no force or effect"* ***in part or in full***. ***This remedy allows courts to***

[15] *Amax Potash v Government of Saskatchewan* [1976] 2 SCR 576.
[16] *Air Canada v British Columbia* [1989] SCR 576.
[17] *Kingstreet Investments Ltd v New Brunswick* (Finance) [2007] 1 SCR 3. Such doctrines include the 'de facto' doctrine, where public authorities have acted in good faith on laws later declared invalid, and the doctrine of 'res judicata'.
[18] *AG v G* (n3) at para 85.

protect Charter rights while respecting the distinct role of the legislature in our constitutional order."[19] (**emphasis** added throughout, unless otherwise stated)

The present tense language of this provision appears to have created an unspoken assumption that, in the ordinary course, remedies granted on foot of s.52(1) would be immediately effective.[20]

The second key remedial provision of the Canadian Constitution is section 24(1) of the Charter. It allows anyone whose Charter rights or freedoms have been infringed to apply to a court to obtain such a remedy as the court thinks '*appropriate and just in the circumstances*.' The broad and expansive language of section 24(1) was inserted into the Charter partly as a means of compensating for the failure of judges to award meaningful remedies to individual litigants for violations of the rights contained in the Charter's predecessor, the Canadian Bill of Rights.[21] It provides a "personal" or "individual" remedy in the sense that it is specific to the violation of the applicant's rights.[22] And, as the Supreme Court has noted, it is difficult to imagine a provision which could confer broader discretionary powers on courts.[23] In some cases, it has been used to grant individualised exemptions from the wider effects of court rulings,[24] reflecting the expansive nature of the remedial powers of the section which the Court has held can only be limited by constitutional principles which require: a meaningful remedy that responds to the circumstance of the violation and the claimant; respect for the role of the legislature and the executive; reliance on judicial functions and powers; and fairness to the party against whom the remedy is directed.[25] And while there has been some academic debate as to whether remedies under s.52(1) of the 1982 Act and s.24(1) of the Charter can be granted alongside one another, the Supreme Court very recently held that combined remedies can be granted under each provision in the same case.[26]

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[19] *Canada v Power* [2024] SCC 26 at para 34.
[20] Leckey, *Bills of Rights* (n2) at 103.
[21] Kent Roach, 'Principled Remedial Discretion Under the Charter' (2004) 25 Supreme Court Law Review 101 at 104 - 105.
[22] *Canada v Power* (n19) at para 36, see also *R v Albashir* [2021] SCC 48 at para 33.
[23] *R v Mills* [1986] 1 SCR 863 at 965.
[24] *AG v G* (n3).
[25] *Doucet-Boudreau v Nova Scotia* [2003] 3 SCR 3 at paras 51 – 59.
[26] *Canada (Attorney General) v Power* (n19) at para 45.

The initial view of unconstitutionality under the Charter reflected classic theories of voidness *ab initio* and nullity at common law. In the *Big M Drug Mart* case, the Supreme Court held that the Lord's Day Act 1970 was unconstitutional as it violated the Charter's section 2 freedom of conscience and religion guarantees.[27] Section 4 of the Lord's Day Act placed a criminal prohibition on goods being sold on Sundays and the Court struck it down in its entirety as it essentially required all Canadians to abide by a tenet of the Christian faith or face a criminal sanction. In a significant passage, the Court seemed to suggest that the wording of section 52(1) of the 1982 Act rendered unconstitutional statutes void *ab initio*:

> "***Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme***. *The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law…Any accused, whether corporate or individual, may defend a criminal charge by arguing that* ***the law under which the charge is brought is constitutionally invalid****…Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant…A law which itself infringes religious freedom is, by that reason alone, inconsistent with s.2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation.* ***It is the nature of the law****, not the status of the accused,* ***that is in issue***."[28]

The Court therefore seemed to view unconstitutionality as a matter of internal constitutional logic, meaning that any consequent declaration of invalidity merely recognises an unconstitutionality and is not constitutive of it.[29] This reflects a Blackstonian declaratory theory of law, whereby judges do not make law, but instead merely discover it.[30] And in *Nova Scotia v Martin*, the Court endorsed this declaratory view when it said that the invalidity of an unconstitutional law '*does not arise from the fact of its having been declared unconstitutional by a court, but from the operation of s. 52(1) itself*.'[31] The logic of this view, of course, is that laws are of no force or effect from the

[27] [1985] 1 SCR 295.
[28] ibid at paras 38 – 41.
[29] Noonan, *Declarations of Unconstitutionality* (n14) at 109 – 110.
[30] *AG v G* (n3) at para 87; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 at para 79.
[31] [2003] 2 SCR 504.

date of their enactment, with immediate invalidation of that law generally being the appropriate remedy.[32]

2.2.3 – The Contours of the Strike-Down

Given the centrality of immediate invalidation to the orthodox Canadian approach to unconstitutionality, it is worth spending some time considering the precise contours of that remedy. As we shall see below, Canadian remedial jurisprudence is notable for its reliance on the suspended declaration, with it arguably functioning as the default remedy during much of the past twenty years. However, following the deliberate attempts at moving away from that position in both *G* and *Albashir*, in *Canada v Power*, the Court very recently stated that a declaration of invalidity under s.52(1) is the "*first and most important remedy*" when dealing with unconstitutional legislation.[33]

When a law is declared immediately invalid, lawyers often refer to it as having been 'struck down' from the statute books. And the Supreme Court of Canada has held that the power to use this remedy is implicit in the text of section 52(1) of the 1982 Act. In exercising this power, the Court has held that it must determine the extent of a law's unconstitutionality, as the nature and extent of the violation will ultimately determine the breadth of the remedy.[34] The Court has noted that it can declare *all* groups of people and *all* sets of circumstances exempt from a law's application, or it can declare a law to be of no force or effect *only* to the extent it violates rights, thereby preserving its constitutionally compliant effects 'as it applies' to particular groups of people or particular sets of circumstances.[35]

Thus, we can see that there are two types of strike-down the Court typically uses. The first is where the entirety of a law, or part of a law, is struck down such that it is of no force or effect in respect of all persons and circumstances subject to its application. And the second is what has been referred to in academic literature as an 'as applied' declaration of unconstitutionality, where a law is only of no force or effect 'as it

[32] *AG v G* (n3) at para 87.
[33] *Canada v Power* (n19) at para 34.
[34] ibid at para 109.
[35] ibid at para 111.

applies' to a specified class of people or circumstances.[36] An 'as applied' declaration can be in the form of a declaration exempting specified persons or circumstances from the reach of a law's application or the Court can strike-down a specified provision or provisions of a statute.[37]

The more common declaration in Canada is an 'as applied' declaration.[38] And this seems appropriate given the circumscribed nature of the language of section 52(1) of the 1982 Act. The Court has demonstrated a preference for retaining the constitutionally compliant aspects of a law where possible, with the Court recently noting in *Attorney General (Ontario) v G* that it had only struck down the entirety of a statutory scheme on eight occasions.[39] For example, in the aforementioned *Big M Drug Mart* case, the Court said it would strike-down the entirety of a statute which prohibited Sunday trading as the statute's overall purpose was unconstitutional. And in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers*, the Court declared an entire law invalid where the statute's 'comprehensive and integrated' structure made it difficult to carry out, with sufficient specificity, the pruning necessary to assure constitutional compliance.[40]

An important aspect of the strike-down is the extent to which its effects reach back into the past. Under a strict application of the void *ab initio* doctrine, all an unconstitutional law's effects ought – in theory at least - to be unwound after it is struck down. While the Supreme Court has recognised the intuitive appeal of this logic, it has limited the practical retroactive effects of the strike-down – based on protecting both the rule of law and the public interest – through several innovative solutions. First, the Court has used the doctrine of *res judicata* as a bar to re-opening cases finalised under laws which were previously thought to be constitutionally compliant, even where those laws impose criminal convictions.[41] Second, the Court

[36]David Kenny, 'Grounding Constitutional Remedies in Reality: The Case for As-Applied Constitutional Challenges in Ireland' (2014) 37(1) Dublin University Law Journal 53.
[37] Leckey, *Bills of Rights* (n2) at 99.
[38] ibid.
[39] *AG v G* (n3) at para 112.
[40] [2013] 3 SCR 733 at para 40.
[41] Kent Roach, *Constitutional Remedies in Canada* (2nd edn, Canada Law Book 2013) at para 14.1980.

has held that the effects of its declarations can be prospective only, a quite radical break with the traditional effects of the void *ab initio* doctrine.

A good example of such a 'prospective only' ruling is the decision in *Canada (Attorney General) v Hislop*, where the Court explained that while declarations are generally retroactive, they are not necessarily so.[42] That case concerned a challenge to remedial legislation which purported to fix the constitutional flaws in a statute which the Court had previously struck down for failing to include same-sex couples within its ambit.[43] Although the remedial legislation would apply prospectively to same-sex couples who had been wrongfully excluded from the ambit of the original statute, it offered no retroactive remedy for those couples. In the challenge to the remedial legislation, the Court held that parliament was entitled to provide remedial legislation from the moment of the Court's decision only on the old legislation if it so wished. While, on its face, *Hislop* simply addresses the remedial law, the practical effect of the decision is that it ultimately renders the earlier decision as prospective only. Sharpe and Roach have pointed out that the Court in *Hislop* suggested that prospective remedies could be justified where: the Court made a substantial change in the law; the government reasonably relied in good faith on the law as previously stated; a retroactive remedy would unduly interfere with the role of government, especially in allocating public resources; and the departure from the retroactive norm would not be unfair to the charter applicants.[44]

More recently, *R v Albashir*, the Court, while restating the presumption that remedies will generally be retroactive, emphasised its ability to make the effects of its declarations of unconstitutionality prospective only.[45] *Albashir* concerned the practical effects of a declaration of unconstitutionality which the Supreme Court made in 2013 in *Canada (Attorney General) v Bedford*.[46] In *Bedford*, the Court found s. 212(1)(j) of the Criminal Code, which prohibited living on the avails of sex work, to be unconstitutionally overbroad because it criminalised non-exploitative actions that could enhance the safety and security of sex workers – such as those offered by

[42] [2007] 1 SCR 429.
[43] *M v H* [1999] 2 SCR 3.
[44] Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (7th edn, Irwin Law 2021) at 499.
[45] (n4).
[46] [2013] 3 SCR 1101.

bodyguards and drivers. The Court declared this offence to be inconsistent with the Charter and hence void, but suspended the declaration's effects until 2014. The Court did not explicitly state whether this declaration would apply retroactively or purely prospectively at the conclusion of the period of suspension.

Two weeks before the period of suspension expired, parliament enacted remedial legislation to replace the impugned section but did not state whether the remedial legislation was to apply retrospectively or prospectively.

The Applicants in *Albashir* – who were "pimps" and therefore not the category of persons whom the suspension deployed in *Bedford* was designed to protect – committed certain offences previously governed by the s.212 *during* the suspension period, but were charged and convicted *after* that period ended. Some of their offences were captured by the legislation declared unconstitutional in *Bedford*, while others were captured by the remedial legislation. Unsurprisingly, the applicants challenged those aspects of their convictions based on the legislation in respect of which the Court issued the suspended declaration in *Bedford*.

The question for the Court was whether the 2013 declaration operated retroactively, or prospectively. Ultimately, the Court held that the declaration operated prospectively and upheld the Applicants' convictions. In reaching that the conclusion, the Court was motivated by the reason for suspension in the first place, which was to avoid a level of deregulation which would leave sex workers vulnerable. If the declaration had been retroactive, the Court reasoned, the purpose of suspension would have been frustrated. Accordingly, the accused could be charged and convicted, after the suspension expired and the declaration took effect, for committing the offence of living on the avails of sex work under s. 212(1)(j) during the suspension period. In the Court's view, because they engaged in exploitative and parasitic conduct, the exact conduct that was always legitimately criminalized, the applicants ought not to be to be able to avail of any potential individualised remedy under s. 24(1).

The Court expressed the view that the temporal effect of a remedy is rooted in the nature of the remedy itself,[47] and that it had to be guided by three principles in arriving at an appropriate remedial choice, those being: constitutional supremacy; the separation of powers; and the rule of law.[48] To that end, the Court also noted that it must consider each of these principles in making its remedial choice as well as, at times competing, constitutional imperatives.[49]

Though I return to suspended declarations in more detail below, the Court held that suspended declarations can constitute an exception to the general presumption of retroactivity, where the purpose of suspension – by necessary implication – requires a purely prospective declaration.[50] In the Court's view, the circumstances in *Albashir* met this threshold, with the Court stating that the purpose of suspension of the declaration in *Bedford* required the declaration to operate prospectively only.[51] The Court ultimately concluded:

> "*A suspended declaration of invalidity may be purely prospective where the purpose of the suspension requires such a temporal application. In Bedford, this Court's remedy was purely prospective, because the purpose of the suspension — avoiding deregulation that would leave sex workers vulnerable — would be frustrated by a retroactive remedy.As the remedy was purely prospective, the appellants could be charged for their conduct prior to the declaration taking effect. Thus, an accused could be convicted for conduct caught by s. 212(1)(j) before the effective date of the declaration. However, an accused who could demonstrate that their personal rights were prejudiced by the constitutional infirmity could seek relief under s. 24(1), provided their conduct did not undermine the public interests the suspension was designed to protect.*"[52]

To militate against the potential unfairness of prospectively effective declarations on individual litigants, the Court, again referring to its comments on this issue in *G*, held that individualised remedies can be crafted using a combination of a s.52(1) remedy

[47] *Albashir* (n4) at para 26.
[48] ibid at para 27.
[49] ibid at para 30.
[50] ibid at para 46
[51] ibid at para 55.
[52] ibid at para 72.

alongside a remedy under s.24(1).[53] Having then rehearsed the case-law where the Court had granted individualised relief – either by way of combination of s.52(1) and s.24(1) or more generally – the Court held that individualised relief will be limited so as not to undermine the compelling public interest which necessitated the granting of the suspension in the first place.[54]

However, as noted above, the Court in *Albashir* refused to grant an individualised exemption from the effects of the Bedford suspension because the reasons why the Applicants were convicted had nothing to do with the unconstitutional overbreadth of the statute declared unconstitutional. It will be recalled that s.212 was struck down because it criminalised everyone who "lived on the avails of sex work". The purpose the suspension was to keep in place those portions of the law which protected sex workers, not to enable genuine pimps to overturn legitimate convictions. As the Court stated:

> "*Because the appellants engaged in exploitative and parasitic conduct, the exact conduct that was always legitimately criminalized, a s. 24(1) remedy is not available to them.*"

In *R v Sullivan*,[55] which followed shortly after its judgment in *Albashir*, in a case which largely concerned the effects of a declaration of unconstitutionality made in one provincial court in other provinces, the Court adopted a novel view of the effect of a declaration of invalidity, opining that, in fact, courts do not have the ability to "strike down" legislation from the statute books, but rather that the effects of a declaration of invalidity must be understood through the prism of *stare decisis*, like any other judicial finding.[56] While the Court did hold that a declaration had some form of legal effect, in a potentially troubling development it appeared to collapse the distinction between the reasons for a judgment and the formal finding and effect made on foot of that judgment.

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[53] ibid at para 62.
[54] ibid at para 66.
[55] [2022] SCC 19.
[56] Amitpal C. Sing, 'Declarations of Invalidity and the Metaphysics of Judicial Review' (Forthcoming, 2025) 58(1) University of British Columbia Law Review at p.1 – copy on file with author.

2.3 – Suspended Declarations

We have seen that the Supreme Court initially expressed the view that unconstitutional laws were void *ab initio,* and that immediate invalidation – the so called 'strike-down' – of that law was the appropriate remedy for the violation, albeit that the practical effects of the doctrine and its corresponding remedy have often been circumscribed. However, shortly after its decision in *Big M Drug Mart*, the Court's intellectual commitment to the void *ab initio* doctrine and to immediate invalidation would be tested in the famous *Re Manitoba Language Rights* case.[57] There, the Court found that a failure by Manitoba's provincial legislature to enact most of its laws in both English and French breached the Manitoba Language Act 1870, the provisions of which mandated that all provincial legislation be passed in both English and French. The Court held that this failure rendered all legislation which had not been passed in the required bilingual fashion unconstitutional. Naturally, the Court viewed the prospect of Manitoba being left without much of its provincial legislation with considerable apprehension. A further complication was that the validity of the provincial legislature *itself* could potentially have been called into question as many of its constitutive statutes had only been passed in English. Thus, the Court was faced with the distinctly unappealing prospect - if it decided to apply the traditional doctrine of retrospective and immediate invalidation – of leaving Manitoba without both most of its provincial laws *and* a parliament which could pass replacement legislation.[58]

Mindful of the obviously chaotic consequences which would have flowed from this, the Court decided to suspend the operation of the declaration of invalidity for a period of twelve months to allow the Manitoban legislature to pass remedial legislation. However, the Court nonetheless reaffirmed its commitment to the void *ab initio* doctrine and held that the Constitution itself, through the language of section 52(1) of the 1982 Act, rendered unconstitutional laws void *ab initio* and that judicial declarations merely recognised that reality.[59] As Noonan has pointed out:

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[57] [1985] 1 SCR 721.
[58] Hogg, *Constitutional Law* (n1) at para 58-21.
[59] *Manitoba Language Rights* (n57) at 745.

> "*It might seem odd to simultaneously claim that invalidity is timeless and to impose a definite time frame on a court's order following that invalidity, but that is what was done by the court in the Manitoba Language Rights reference*."[60]

Essentially, the Court in *Manitoba* attempted to maintain the retrospective invalidity of laws which violate the Constitution but wavered on the immediate effect of that invalidity.[61]

From where did this power to suspend a declaration come? Rather than hold it to be implicit in the text of section 52(1) of the 1982 Act, the Court identified a series of common law doctrines to justify temporary validity in service of the overarching value of the rule of law.[62] The *de facto* doctrine, *res judicata*, mistake of law, and the doctrine of necessity were deployed 'to ensure [the protection of] the unwritten but inherent principle of the rule of law which must provide the foundation of any constitution.'[63]

Despite the length of a suspension being a crucial aspect of the remedy, the Court offered no justification for choosing a twelve-month period and no guidance as to the appropriate length of suspension in future cases. This lack of guidance would prove problematic from a conceptual consistency perspective in later case-law.

2.3.1 – The Development of the Technique

The *Manitoba* reference marked a watershed moment in the jurisprudence of the Supreme Court of Canada and, whatever about the Court's pronouncements otherwise, did mark a shift away from the orthodox void *ab initio* common law approach to invalidity. The Court was one of the first common law courts in the world to suspend a declaration of invalidity and no doubt believed it had little other option in the face of the extraordinary circumstances presented to it in *Manitoba*.

Subsequently, however, the suspended declaration came to be used in cases with much less extreme circumstances. For example, in *R v Swain*, the Court suspended a declaration where immediate invalidation of a statute would potentially have caused

[60] Noonan, *Declarations of Unconstitutionality* (n14) at 112.
[61] Leckey, *Bills of Rights* (n2) at 62.
[62] Caroyln Mouland, 'Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity' (2018) 41 Manitoba Law Journal 281.
[63] *Manitoba Language Rights* (n57) at 766 – 768.

persons who had been found not guilty of crimes by reason of insanity to be immediately released into the community.[64] To be sure, the circumstances of *Swain* placed the Court in an invidious position. But the consequences of an immediate declaration in that case were undoubtedly far less extreme than those which confronted the Court in *Manitoba*.

Following *Manitoba* and *Swain*, in its seminal judgment on constitutional remedies, *Schachter v Canada*, the Supreme Court both affirmed its previous use of suspended declarations and attempted to set down guidelines on how the remedy should be used in the future.[65] The Court held that whether a declaration should be suspended should turn on how immediate invalidation would affect the public, as opposed to considerations relating to the different institutional competences of courts and legislatures.[66] The Court also held that declarations should only be suspended in three types of case. First, where immediate invalidation would threaten the rule of law. Second, where it would pose a threat to public safety. And third, where it would deprive all subjects of the protection of a statute which the Court had found to be under-inclusive in respect of the categories of person on whom the statute conferred benefits. *Schachter* itself was an under-inclusive benefit case - a stay-at-home father could not obtain the same statutory payment which a stay-at-home mother could, whereas adoptive parents could get the payment on a gender-neutral basis.

Unfortunately, the Court in *Schachter*, much as it had in *Manitoba*, missed the opportunity to bring early consistency to the remedy as it once again failed to offer any meaningful guidance on the appropriate length of suspended declarations.

Despite the varying degree of severity of the consequences which would have flowed from immediate invalidation in *Manitoba*, *Swain*, and *Schachter*, the thrust of these early decisions on suspended declarations seemed to suggest that the Court believed the primary value of the remedy was in its ability to uphold the rule of law and to protect public safety.[67]

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[64] [1991] 1 SCR 933.
[65] [1992] 2 SCR 679.
[66] ibid at 717.
[67] Peter Hogg and Cara Zwibel, 'The Rule of Law in the Supreme Court of Canada' (2005) 55 University of Toronto Law Journal 715.

2.3.2 – The Dilution of *Schachter*

However, *Schachter* was subsequently considerably diluted. The suspended declaration became an increasingly popular remedy, with little categorical limitations placed on its use.[68] A good example of this is *Corbiere v Canada (Minister of Indian and Northern Affairs)*.[69] There, the Court held that certain residency-based exclusions from provincial elections infringed the Charter's equality guarantee. To remedy the violation, the applicant requested a 'reporting period,'[70] which would enable negotiations on new voting rules. Although the Court explicitly predicted legislative inaction could be troublesome from the perspective of remedial legislation being enacted, it nonetheless ordered an eighteen- month suspended declaration.[71]

Other examples of the post-*Schachter* dilution abound – in *Dunmore v Ontario*, the Court suspended a declaration in a case about the right of agricultural workers to freely associate.[72] In *Figueroa v Canada*, the Court suspended a declaration in a case about the restriction of benefits available to political parties which nominated over fifty candidates in elections.[73] And in *Nguyen v Québec*, the Court suspended a declaration in a case about restrictions on eligibility for minority language education.[74] While each of these cases undoubtedly raised significant issues of public importance, they did not fit easily into the categories of cases laid down by the Court in *Schachter*.[75]

By the early 2000s, suspended declarations were verging on the routine,[76] eventually becoming the preferred remedy for unconstitutionality.[77] Although the Court has only suspended declarations in twenty-three out of ninety cases where it has declared

[68] Bruce Ryder, 'Suspending the Charter' (2003) 21 Supreme Court Law Review 267.
[69] [1999] 2 SCR. 203.
[70] ibid at para 109.
[71] ibid at para 23.
[72] [2001] 3 SCR 1016.
[73] [2003] 1 SCR 912.
[74] [2009] 3 SCR 208.
[75] Anthony Niblett, 'Delaying Declarations of Constitutional Invalidity' in Frank Fagan and Saul Levmore (eds), *The Timing of Lawmaking* (Edward Elgar 2017) at 305.
[76] Sujit Choudry and Kent Roach, 'Putting the Past behind Us? Prospective Judicial and Legislative Constitutional Remedies' (2003) 21(2d) Supreme Court Law Review 212 at 217.
[77] Mary Liston, *Honest Counsel: Institutional Dialogue and the Canadian Rule of Law* (Ph.D Thesis, University of Toronto, 2007) at 135 – copy on file with author.

legislation to be of no force or effect for violating the Charter, between 2003 and 2020, the Court suspended thirteen out of seventeen declarations of invalidity.[78]

A core problem of the post-*Schachter* dilution, stemming from the 'appropriate length of time' oversights in *Manitoba* and *Schachter*, is that it is difficult to discern any meaningful pattern or underlying rationale for the Court's decisions on the duration of suspensions it has imposed. Some suspensions have been for a year, others for six months, others again for eighteen months, and there is a suggestion that a default period of twelve months obtains in Canada.[79] Perhaps most crucially, though, the periods of suspension do not seem to correspond to the complexity or significance of the matter at issue. For example, in *M v H*, the Court concluded that the impugned social welfare legislation was unconstitutional due to its failure to include same sex couples within the ambit of the benefits it granted.[80] As Leckey has noted, given that the Court's finding would affect multiple, complex statutory provisions, what the correct legislative response should be to this finding raised significant and difficult questions of social policy.[81] However, the Court suspended its declaration for a period of just six months. This can be contrasted with the decision in *Charkaoui v Canada*, where the Court gave the legislature a full year to remedy a procedure for the judicial approval of preventative detention based on a security certificate.[82] The problem confronting the legislature in *Charkaoui* was not obviously a more complex task than the problem which confronted it in *M*, yet, in *Charkaoui*, the Court chose to give double the amount of time to parliament to remedy the defect.[83] The Court generally gives no justifications for the length of the suspension, thereby equipping its power here with 'the hallmarks of pure discretion.'[84]

Suspended declarations arguably reached their apotheosis in the *Canada v Bedford* and *Carter v Canada* cases, two decisions, decided in 2013 and 2015 respectively, which

[78] *AG v G* (n3) at para 118.
[79] ibid at para 135.
[80] *M v H* [1999] 2 SCR 3.
[81] Leckey, *Bills of Rights* (n2) at 140.
[82] [2007] 1 SCR 350.
[83] Leckey, *Bills of Rights* (n2) at 141.
[84] Roach 'Principled Discretion' (n21) at 109.

attracted considerable judicial and academic criticism.[85] We saw above in the context of the discussion on retroactivity and prospectivity, that *Bedford* concerned a challenge to the constitutionality of criminal prohibitions on prostitution, and it neatly encapsulates how the Court's jurisprudence had become 'irreconcilable' with the *Schachter* principles.[86] The Court unanimously struck down the impugned provisions because they exacerbated the risk of harm to sex workers and deprived them of their right to security of the person in a manner incompatible with the principles of fundamental justice.[87]

The Court held that it was 'subject to debate' whether immediate invalidation would endanger the public or imperil the rule of law as *Schacter* seemed to require.[88] Despite this uncertainty, the Court nonetheless chose to suspend the declaration for twelve months.[89] The Court pointed to the competing considerations of (1) prostitution being totally unregulated as a result of immediate invalidation and (2) the risks to the applicants' security of person which would result from keeping the provision in force with a suspended declaration.[90] The Court noted that the choice between these competing propositions was 'not an easy one' with 'neither alternative [being] without difficulty'.[91] However, it made almost no effort to grapple with these issues and, ultimately, was prepared to run the risk of violating the rights of the sex workers by leaving the impugned provisions in place for the year-long period. Whatever else might be said about the merits or otherwise of this decision, it is quite clear that it did not fall within the *Schachter* rubric, despite the obvious important public interests at play. It is also of interest to note that the first instance judge, Himel J, did not believe that a legislative vacuum would result from immediate invalidation and was able to identify numerous legislative provisions which supported her view.[92]

[85] *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101 and *Carter v Canada (Attorney General)* [2015] 1 SCR 331.
[86] Leckey, *Bills of Rights* (n2) at 139.
[87] ibid at 141.
[88] *Bedford* (n85) at para 167.
[89] ibid at para 169.
[90] ibid at paras 167-168.
[91] ibid at para 169.
[92] Mouland (n62) at 293.

In *Carter*, the Court declared unconstitutional an absolute ban on assisted suicide. The Court held that, for competent adults with grievous and irremediable medical conditions producing sustained suffering, the prohibition against seeking medical help to end their life unjustifiably infringed section 7 of the Charter. The Court further held that the prohibition affected the liberty and security of the person by interfering with fundamentally important medical decision making and by imposing pain and psychological stress. The prohibition was overbroad and thus incompatible with the principles of fundamental justice. The Court delayed the declaration for twelve months.

Again, like *Bedford*, there may be much of value in the Court's decision in *Carter*. Perhaps it is correct that the Court batted a politically contentious issue like assisted suicide back to the legislature - and I examine this point in Part III. Suffice it to say for the moment however, it is quite clear that the decision in *Carter* cannot be reconciled with the principles the Court laid down for itself in *Schachter*. As Leckey has noted, rather than any one of the three *Schacter* principles being in play, the Court justified the suspension in *Carter* on the basis of allowing the legislature to bring its distinctive democratic capabilities to bear in resolution of a morally sensitive topic.[93] There may be good instrumental reasons for courts to engage in this kind of interaction with legislatures. But, as we have seen, the different institutional capacities of courts and legislatures was not something which the Court in *Schacter* envisaged should be considered when deciding whether to suspend a declaration of invalidity.

2.3.3 – A Retrenchment?

Carter is emblematic of the conceptual confusion which has dogged Canadian remedial practice. Although the Court never repudiated *Schacter* and continued to cite it in its judgments on remedies, it is difficult to disagree with Leckey's assessment that the Court's jurisprudence in the late 20th and early 21st centuries cannot be reconciled with it.[94] Indeed, the Court had received considerable academic criticism

[93] Robert Leckey, 'Assisted dying, suspended declarations, and dialogue's time' (2019) 69(1) University of Toronto Law Journal 64.
[94] Leckey, *Bills of Rights* (n2) at 138.

for its approach to remedies, with several scholars arguing that the Court's remedial jurisprudence had become unprincipled and lacking in transparency.[95]

Mindful of this criticism, the Court in *Attorney General (Ontario) v G* purported to 'clarify' and 'update' the principles governing its remedial jurisprudence.[96] In *R v Boudrealt*, a 2018 case, the Court had previously hinted at a possible return to the *Schachter* principles when it refused to suspend a declaration as the respondents had not met the 'high burden' of showing that immediate invalidation would 'pose a danger to the public or imperil the rule of law.'[97] However, *G* went considerably further and effectively amounts to a restatement of the principles governing remedies for Charter violations. I will consider it here in the context of suspended declarations and below in terms of its application to tailored remedies for unconstitutionality.

The facts of *G* were relatively unexceptional. The applicant claimed that Ontario's '*Christopher's Law*' violated the Charter's section 15 equality guarantee, which provides for equal treatment before the law irrespective of one's personal characteristics. *Christopher's Law* required persons found not criminally responsible for the commission of sexual offences by reason of mental deficiency to sign Ontario's sex offender's register. However, such persons could not have their information removed from the register even if they were found to no longer pose a danger to the public by an independent review. Such an opportunity was, however, available for persons who had been found guilty of sexual offences. The Court had no difficulty in declaring *Christopher's Law* unconstitutional on the basis of unjustifiable unequal treatment and upheld the first instance decision to suspend the declaration of invalidity for twelve months and grant the applicant an exemption from that suspension.

The Court laid down some general remedial principles and offered guidance on the use of tailored remedies. On suspended declarations specifically, the Court concluded

[95] For examples of such criticism, see Grant Hoole, 'Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Constitutional Invalidity in Canadian Constitutional Law' (2011) 49 Alberta Law Review 107, Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14(3) International Journal of Constitutional Law 584, and Robert Leckey 'Remedial Practice Beyond Constitutional Text' (2016) 64 American Journal of Comparative Law 1.
[96] *AG v G* (n3) at para 107.
[97] [2018] 3 SCR 599.

that they should be granted rarely and where an identifiable public interest grounded in the Constitution is endangered. The Court further held that a suspension should only be granted where that constitutionally grounded public interest is shown to be endangered by an immediate declaration to such an extent that it outweighs the potentially harmful impacts of delaying the declaration's effect.[98] The Court also noted that, if it was appropriate and just to do so, individualised exemptions from those suspensions should be granted to successful claimants in the absence of compelling reasons not to.[99]

As to the appropriate duration of suspensions, the Court did not attempt to provide any guidance as to what appropriate lengths of time might be, beyond stating that the period of suspension should be long enough to give the legislature the amount of time it has demonstrated it requires to remedy the constitutional defect. The Court also noted that this would have to be balanced with recognition of the fact that delays to the invalidation taking effect could harm individual rights.

On the one hand, then, it appears that the Court in *G* attempted to constrain the discretion afforded to judges when it comes to suspending declarations of invalidity without unduly hampering their ability to grant them in appropriate cases. On the other hand, in effectively creating a presumption for individual exemptions from the effects of a suspended declaration, the Court has moved considerably beyond traditional common law approaches to invalidity and the appropriate resultant remedy. Thus, the Court's approach to suspended declarations after *G* is that they should be used rarely but, if they are used, there is a presumption that the successful applicant will be granted an individual exemption from their effects. The category of cases in which they can be used is not restricted to *Schachter*-like categories. Instead, their use now ought to be tied to the protection of some specifically identified constitutionally grounded public interest like the rule of law or the separation of powers. Interestingly, the Court in *G* said that – unlike its previous comments in *Schachter* – the fact that courts and legislatures play different institutional roles was a relevant consideration in deciding on an appropriate remedy. In addition, then, to

[98] *AG v G* (n3) at para 83.
[99] ibid at para 49.

being an attempt to restate the principles governing its broader remedial jurisprudence, the decision in *G* seems to have been an attempt by the Court to retrench its use of suspended declarations while also providing a conceptually clearer basis for the use of the remedy in appropriate cases.

Indeed, the Court in *Albashir* appeared to confirm this when it explained the effect of G in the following terms, highlighting in particular that their use should be "*exceptionally rare*":

> "*…this Court provided a framework for identifying those exceptionally rare cases where a declaration of constitutional invalidity should be temporarily suspended to permit the legislature to respond.* ***A suspended declaration is only justified where a compelling public interest****, grounded in the Constitution, outweighs the harms of temporarily maintaining the unconstitutional law*."[100]

In addition to the notably high threshold which the Court imposed for the use of suspended declarations in the first place, it is also instructive to consider the Court's express view that suspending a declaration axiomatically causes "*harm*", seemingly to the State's constitutional order. This is an important statement from the Court because, as I return to in Chapter 6, the jurisprudence seems to suggest that – aside from perhaps cases with remarkably stark facts such as the *Manitoba Language Rights Reference* or, as discussed in Chapter 3, the challenge in *Heneghan* to Ireland's system of electing a portion of its upper house – suspension seems to create an unavoidable level of constitutional difficulty. Indeed, in the course of working out the answer to the question posed in *Albashir*, the Court also stated that the fact *any* answer it might give would create "*some degree of legal uncertainty*" indicated why suspensions must be "*rare*."[101] With that in mind, what remedial choices seem to demand is a contextual, balancing exercise where the Court weighs competing constitutional principles and the various potential harms involved – whether to a State's broader structure of governance or to an individual's rights – to arrive at a sustainable solution.

[100] *Albashir* (n4) at para 1
[101] ibid at para 58.

2.4 – Tailored Remedies

The long term effects of the decision in *G* – and the subsequent interpretation of that judgment in *Albashir* – on Canada's remedial jurisprudence remains to be seen. Similarly, the novel view of the effects of declarations of invalidity expressed in *Sullivan* have the potential to add to remedial uncertainty. But there is no doubt that the Court attempted to move the Canadian remedial dial to a considerable degree, albeit that the Court spoke as if it was merely integrating its conclusions in *G* and *Albashir* with its previous jurisprudence. To that end, the Court had much to say - in addition to the principles applicable to suspended declarations - about the principles governing the use of tailored remedies.

The Court in *G* noted that it had historically resorted to three tailored remedies instead of immediate invalidation – reading-in, reading-down, and severance. And it said its use of these different remedies had historically coalesced around four remedial principles: (1) Charter rights should be safeguarded through effective remedies; (2) the public has an interest in the constitutional compliance of legislation; (3) the public is entitled to the benefit of legislation; and (4) courts and legislatures play different institutional roles. The Court held that these principles, and the language of the Charter itself, suggested that, where the separation of powers allowed, and where the rule of law so required, 'tailored' remedies for Charter violations should be granted. Considering that the decision in *G* seems to require courts to try and use tailored remedies instead of a strike-down, if at all possible, it is necessary to spend some time examining the development of these tailored remedies before considering how *G* has impacted on their future use.

2.4.1 – The Presumption of Constitutionality

The presumption of constitutionality is more properly described as a doctrine which avoids unconstitutionality in the first place, but I nonetheless consider it here due to the considerable impact it can have on the remedies courts decide to grant for unconstitutionality.

As Paul Daly has said:

> "*Various presumptions of constitutionality are used by Canadian courts in the performance of their extensive judicial review jurisdiction over constitutional issues. One of them is the presumption of constitutionally conforming interpretation. But there is significant debate even about the scope of this presumption, in particular, whether it has any role in the absence of statutory ambiguity*."[102]

In short, Canadian courts do use presumptions of constitutionality but the strength of those presumptions varies depending on the type of legal measure being reviewed and the part of the Constitution against which it is being reviewed. For example, presumptions may operate differently or to different degrees of strength depending on whether the legislation at issue allegedly violates constitutional rules on federalism as opposed to violating the rights guarantees contained in the Charter.

For challenges to legislation which it is claimed violates the Charter, the Supreme Court has adopted conflicting views as to whether such legislation enjoys a presumption of constitutionality.[103] In *Attorney General of Manitoba v Metropolitan Stores (MTS) Ltd*, the Court defined a presumption of constitutionality as requiring 'that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force or effect.' [104] The Court rejected the existence of a presumption characterised in that way and held that a presumption of constitutional validity – in respect of laws enacted prior to or after the Charter – was not compatible with the 'innovative' and 'evolutive' character of that instrument.[105] However, the Court was clear that the burden of demonstrating a statute's unconstitutionality lies, initially at least, on the party making the application.[106] It was also clear that it was not rejecting a canon of construction where statutes are interpreted compatibly with the Charter where such readings are possible.[107] Though in 1991 in *Osborne v Canada (Treasury) Board*, the Supreme Court found it 'unnecessary'

[102] Paul Daly 'Constitutionally Conforming Interpretation in Canada' in Matthias Klatt (ed) *Constitutionally Conforming Interpretation – Comparative Perspectives* (2023 Bloomsbury).
[103] Noonan, *Declarations of Unconstitutionality* (n14) at 103.
[104] [1987] 1 SCR 110 at para 14.
[105] ibid at para 23.
[106] ibid at para 25.
[107] ibid at para 26.

to resolve whether a presumption of constitutionality exists in Canada,[108] the decision in *MTS* has been supported in subsequent cases.[109]

In *Bell ExpressVu Limited Partnership v Rex*, the Court appeared to suggest that legislation which allegedly violates the Charter does enjoy a presumption of constitutionality:

> "*[W]hen a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not", it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations*."[110]

However, there does not seem to be any equivalent interpretive instruction provision to section 3 of the Human Rights Act 1998, whereby UK courts are required to interpret legislation in a manner compatible with the European Convention on Human Rights. Instead, it seems that such an interpretive power is an option Canadian courts can exercise – and one which they have often exercised robustly – rather than being a constitutionally required practice.

2.4.2 – Reading-In

Reading-in is where courts effectively amend a statute by adding in words to amend a constitutional defect in that statute.[111] It is generally effective immediately and differs from mere interpretation in that a finding of unconstitutionality is definitively made, and the amending words are then added in, whereas in compatible interpretative exercises, courts try and see if they can read legislation in a

[108] [1991] 2 SCR 69 at 114.
[109] *R v Zundel* [1992] 2 SCR 731 at 758 and *Harper v Canada (Attorney General)* [2000] 2 SCR 764 at para 33.
[110] [2002] 2 SCR 559 at para 62.
[111] Leckey, *Bills of Rights* (n2) at 100.

constitutionally compliant manner, thereby avoiding having to make a finding of unconstitutionality in the first place.

Until *G*, the leading Canadian decision on remedies was *Schachter*. There, the Court held that the remedy of reading-in was the logical corollary of severance (discussed below) in that if it could remove words to make a statute constitutional, it could also add words to make it constitutional:

> "*[E]xtension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme.*"[112]

The Court in *Schachter* held that reading-in could be justified on the basis that tweaking a statute shows greater respect to the legislature than would striking down a statute and that reading in can help ensure respect for the broader purposes of the Charter as a whole.[113] The Court further held that reading-in or severance would only be appropriate where three criteria were met:

> "*A. the legislative objective is obvious . . . and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;*
>
> *B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,*
>
> *C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.*"[114]

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[112] *Schachter* (n65) at 698.
[113] ibid at 700 – 702.
[114] ibid at 718.

The test, then, is: (A) what did the legislature intend; (B) can the Court read-in or sever words in a way which faithfully respects that intention; and (C) can the Court read-in or sever words in a minimally intrusive way.

The remedy has been widely used in Canada in a variety of different contexts. For example, it has been used to broaden the definition of spouse, thereby extending certain statutory protections to unmarried couples.[115] It has also been used, in a challenge to criminal provisions regarding child pornography, to read precisely worded exceptions into an impugned law, thereby vitiating the need to strike down a law which otherwise contained many valuable child protection measures. And in a particularly controversial example of its use, a majority of the Supreme Court read-in 'sexual orientation' into an anti-discrimination scheme's list of prohibited grounds.[116]

However, this latter case sits uneasily with the Court's reluctance to read-in words to a statute where doing so would undermine its role as the ultimate guardians of Charter rights. The Court has held that it will not read-in words which would override an expressed legislative will to violate the Charter, as arguably happened in the sexual orientation case. For example, in *R v Swain*, the Court refused to bring the challenged search and seizure regime into line with the Constitution by reading-in procedural safeguards which would have lessened the considerable tension between the powers given to police and Charter rights. Thus, as I will explore in Part III, the boundary between the proper exercise of a remedy like reading-in and judicial legislation is often not immediately apparent, and this can pose significant problems of constitutional theory.

2.4.3 – Reading Down

Like reading-in, reading-down takes place after a court has concluded that a statute is unconstitutional.[117] It occurs where a court limits the reach of legislation by declaring

[115] *Miron v Trudel* [1995] 2 SCR 418.
[116] *Vriend v Alberta* [1998] 1 SCR 493.
[117] Kent Roach, 'Enforcement of the Charter – Subsections 24(1) and 52(1) in Errol Mendes and Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th edn, LexisNexis 2013) at 1144-1146.

it to be of no force or effect to a precisely defined extent.[118] And it is an appropriate remedy when the offending portion of a statute can be defined in a limited manner.[119]

Despite being far less common than reading-in, reading-down has nonetheless proved a valuable tool in Canadian courts' remedial arsenal. For example, in *R v Grant*, the Court read-down a provision which authorised, in certain circumstances, warrantless searches so that the provision did not apply where obtaining a warrant was feasible in those same circumstances.[120] The remedy owes its origins to section 52(1) of the 1982 Act which, as we have seen, mandates that laws be declared of no force or effect only to the extent of their inconsistency with the Constitution. Additionally, it has a close relationship with 'as-applied' declarations of unconstitutionality, discussed in section 2.2.3, because as the Court noted in *G*:

> "*a declaration reading down Christopher's Law such that it is of no force or effect* ***to the extent it applies*** *to everyone unconstitutionally affected effectively vindicates rights without interfering with aspects of the statute's operation unaffected by the finding of unconstitutionality*."[121]

2.4.4 – Severance

Severance is the narrowest remedy available to Canadian courts and it is where courts 'sever' words from a statute, where the statute would be otherwise unconstitutional if those words were left in.[122] When utilising the remedy, a court declares certain words to be of no force or effect, thereby achieving the same effects as reading-down or reading-in, depending on whether the severed portion serves to limit or broaden the legislation's reach.[123] Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. The test for whether it should be used is the same as that set out above in *Schachter* for reading-in.

While it might be the most limited remedy in the Supreme Court of Canada's remedial toolbox, for the early part of the 21st century at least, it was also one of its most

[118] *AG v G* (n3) at para 113.
[119] *Schachter* (n65) at 697
[120] [1993] 3 SCR 223.
[121] *AG v G* (n3) at para 166.
[122] *R v Lucas* [1998] 1 SCR 439 at paras 86 and 109.
[123] *AG v G* (n3) at para 113.

popular.[124] Hogg notes that this historic popularity stems from the fact that it is unusual for a Charter breach to entirely taint a statute.[125] And when this is combined with the textual obligation, contained in section 52(1) of the 1982 Act, for such invalidity only as is necessary, it is easy to see why severance has been popular with Canadian courts.

An intriguing example of severance in action in Canada is *R v Hess*.[126] There, the applicant complained that the statutory rape provision of the Criminal Code made it an offence for a male to engage in sexual intercourse with a female under the age of 14 'whether or not he believes that she is fourteen years of age or more'. The Court found the exclusion of a defence of honest mistake to be unconstitutional but, unperturbed by the fears expressed by the Irish Supreme Court in a case with an almost identical fact pattern regarding the pre-emption of a legislative response to the situation from the bench, the Court simply severed the phrase and ordered a re-trial of the accused under the new section. No extra words had to be inserted to inject a requirement of *mens rea*. On what would follow if the Court had chosen a different option, Professor Hogg said:

> "*The alternative would have been to strike down the entire offence, which would mean that intercourse with a girl under fourteen would no longer be an offence, even for a man who was aware of the girl's age – [at] least until Parliament amended the Criminal Code to reintroduce the offence*."[127]

This case, and its Irish counterpart *CC v Ireland*, are particularly interesting examples of the different conclusions courts can reach on the proper scope of their remedial powers and will help inform the theoretical analysis components in Part III of this thesis.

[124] Mark Murphy, 'The Problem of Unconstitutionality and Retroactivity in Criminal Law: Ireland, the US and Canada Compared' (2007) 42(1) The Irish Jurist 63 at 83.
[125] Peter Hogg *Constitutional Law of Canada* (4th edn, Carswell 1997) at 926.
[126] [1990] 2 SCR 906.
[127] Hogg, *Constitutional Law* (n125) at 927.

2.4.5 – Tailored Remedies Post *G*

The Court in *G* seemed to endorse the principles which have developed in its jurisprudence over the last forty years in respect of each individual tailored remedy discussed in this section.

However, the Court did make a considerable change to the general application of tailored remedies. It effectively mandated courts to see if they can use a tailored remedy first and if they cannot, to proceed only then to use a strike-down:

> "*In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights,* ***courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the Charter violation.*** *To ensure the public retains the benefit of legislation enacted in accordance with our democratic system,* ***remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved*** *(Schachter, at p. 700; Vriend, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.*"[128].

There is much of interest in the Court's statement of the principles applicable to remedies generally, but three key points emerge. First, the Court clearly indicated a preference, where possible, for the use of remedies other than full invalidation. Second, it seems implicit in the Court's analysis that whether a case is suitable for a

[128] *AG v G* (n3) at para 116.

tailored remedy will be a matter of degree and will ultimately turn on the facts of individual cases. Third, the Court highlighted its awareness of the different institutional roles and capacities of legislatures and courts and was at pains to point out that its preference for tailored remedies stemmed from a deep respect for the separation of powers.

2.5 – Conclusion

The Canadian approach to remedies can be summarised as follows. The courts conceive of unconstitutional statutes as being void *ab initio*, but recognise that full, immediate, and retrospective invalidation must often give way to a broader, balancing exercise involving a weighting of sometimes competing constitutional principles, with the Supreme Court adopting what might be sometimes termed a pragmatic view of appropriate remedial choices. As Turley and Oxaal have noted,[129] in *Sullivan* the Court expressed this balancing approach in more dogmatic terms, noting: "*The principle of constitutional supremacy cannot dominate the analysis of s. 52(1) to the exclusion of other principles*."[130]

If a declaration of unconstitutionality is to be used, it should generally be confined to the extent of the statute's unconstitutionality, thereby preserving the constitutionally compliant effects of the statute.

It is possible to suspend the effects of declarations of unconstitutionality, but such suspensions should be rare and will only be granted where some compelling public interest warrants it. The benefits of suspension must also outweigh the harms which immediate invalidation would pose. If a suspension is granted, the successful claimant should generally be granted an individual exemption from that suspension, unless some compelling reason suggests otherwise. The suspended declaration had become the remedy of choice for the Court but, since the decisions in *G* and *Albashir*, there is something approaching a presumption against its use.

[129] Anne M. Turley and Zoe Oxaal, 'The Significance of R. v. Albashir in the Evolution of Constitutional Remedies' (2023) 108 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 139 at 145
[130] (N55) at paras 60 – 61.

Tailored remedies, such as reading-in, reading-down, and severance should be utilised wherever possible so that the public retains the benefit of legislation. They should not be used if the tailored version of the statute would not have been countenanced by the legislature or if it would run contrary to the intention of the legislature.

The Canadian approach to remedies has undoubtedly been shaped by the drastic set of circumstances the Supreme Court faced in *Manitoba*. As I will return to in Part III, that case undoubtedly shows the value of not forcing judges to follow through on the remorseless logic of a void *ab initio* finding. Equally, however, subsequent developments show that the unprincipled application of remedial discretion in respect of devices like suspended declarations can, without constant vigilance, arguably lead to conceptually confusing results. Additionally, as Part III will also address, the Canadian experience of tailored remedies suggests that they can pose significant conceptual difficulties related to the separation of powers, due to the uncertain line between the proper conduct of the judicial role and impermissible judicial law-making.

Chapter 3 | Remedial Practice in the Supreme Court of Ireland

CHAPTER OVERIVIEW

3.1 – Introduction

Unlike the Canadian and United Kingdom constitutions, the Irish Constitution takes the form of a single, codified document. Bunreacht na hÉireann came into force on 29 December 1937 after receiving the approval of the Irish people in a referendum.[1] This plebiscitary adoption of the Constitution marked the completion of a process which secured Ireland's legal independence from the United Kingdom.[2]

The Irish Constitution contains several important features, including, like the Canadian Charter of Rights and Freedoms (the "**Charter**") and the United Kingdom's Human Rights Act (the "**HRA**"), a series of personal rights common to many bills of rights in liberal constitutional democracies. And one of its most important features, which will be discussed in more detail later, is an explicit textual basis for constitutional review of legislation by courts.

As I will draw out in this chapter, there are considerable similarities between Ireland and Canada's constitutional order and remedial practice. Indeed, Irish courts have recently become heavily influenced by Canadian remedial practice and the Supreme Court of Ireland has adopted some of the Supreme Court of Canada's remedial techniques, most notably suspended declarations, albeit that the use of 'tailored' remedies in Ireland is far more circumscribed than in Canada and the suspended declaration has only recently been adopted.[3] Additionally, in respect of the strike-down, Irish courts have only recently considered the possibility of using 'as applied' declarations of unconstitutionality, with laws generally being struck down with global application, unlike in Canada where the declarations which courts issue usually have a limited application.[4] Throughout this chapter, I will also highlight some similarities and differences between Canadian, Irish, and UK remedies jurisprudence, though the majority of that exercise will take place in Chapter 4.

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[1] J Anthony Foley and Stephen Lalor (eds), *Annotated Constitution of Ireland* (Gill and MacMillan 1995) at 19.
[2] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) at 1.
[3] *PC v Minister for Social Welfare* [2018] IESC 57.
[4] David Kenny, 'Grounding Constitutional Remedies in Reality: The Case for As-Applied Constitutional Challenges in Ireland' (2014) 37(1) Dublin University Law Journal 53.

A key distinguishing aspect of Ireland's constitutional order is that, in addition to laws passed since the coming into force of the 1937 Constitution, it also possesses a considerable amount of "pre-constitution" law. This is law which came into force prior to Ireland being declared an independent sovereign state and which was enacted either by the parliament in Westminster or by the parliament of the Irish Free State. The Free State parliament was a devolved parliament which effectively took over the running of the country after the signing of the Anglo-Irish Treaty in 1921 – a treaty which marked the end of the Irish War of Independence.[5]

The remainder of this chapter proceeds in the following way. It starts by outlining the development of the historical and orthodox approach of Irish courts to remedies for unconstitutionality, paying particular attention to, as in Chapter 2, the contours of the strike-down and its retrospective or otherwise remedial character. It then discusses the adoption, and development, of the suspended declaration by Irish courts. After that, it moves to a discussion of the 'tailored' remedies used by Irish courts and highlights how the Irish courts' remedial practice is more limited in this respect than that of Canadian courts. Finally, the chapter closes with a summary of the Irish courts' remedial jurisprudence.

3.2 – Historical and Orthodox Unconstitutionality in Ireland

3.2.1 – The Textual Boundary Lines

There are four key provisions of the Irish Constitution when it comes to constitutional review and the remedies granted for unconstitutionality. The first is Article 34.3.2° which provides that:

> "*Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or*

[5] For a full account of the development of the transition from the Irish Free State Constitution to Bunreacht na hÉireann, see Gerard Hogan and Gerry Whyte et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) at 3 – 7 and Gerard Hogan, *The Origins of the Irish Constitution* (Royal Irish Academy 2012).

otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court."

This provision vests the Irish superior courts with the power to review laws for compatibility with the Constitution. And its presence is a nod to Ireland's colonial past in that it was inserted primarily as a means of signifying a break with the British tradition of parliamentary sovereignty.[6]

The second key provision is Article 15.4.1° which provides that:

"*The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof*."

As we shall see, this provision has had a considerable impact on what it is the courts say the Irish parliament has done when it has enacted unconstitutional legislation which, in turn, has influenced the courts' view of what must happen when they declare a piece of legislation unconstitutional.

The third provision is Article 15.4.2° which provides that:

"*Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid*."

This provision bears considerable resemblance to section 52(1) of the Canadian Constitution Act 1982 but, as we shall see, the Irish courts have not taken it to require the same limited remedies for unconstitutionality as have courts in Canada. Its apparent present tense phrasing has been taken as authority for the use of immediate invalidation of laws by way of the strike-down,[7] with the strike-down historically being the primary remedy for unconstitutional laws in Ireland.[8] However, as in its

[6] Paolo Passaglia, 'Irish Judicial Review of Legislation: A Comparative Perspective' in Giuseppe Franco Ferrari and John O'Dowd (eds), *75 Years of the Constitution of Ireland: An Irish-Italian Dialogue* (Clarus Press 2014).
[7] *Murphy v Attorney General* [1982] IR 241.
[8] David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2018) 40(2) Dublin University Law Journal 85 at 86.

similarly worded Canadian counterpart, it contains no explicit power for courts to strike-down legislation.[9]

The final key provision is Article 50.1 which provides that:

> "*Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas*."

This provision means that all the laws of the Irish Free State in force prior to the 1937 Constitution remain in force so long as they do not conflict with the 1937 Constitution and are not repealed or amended by any post-1937 laws. An important feature of these laws is that they do not enjoy any presumption of constitutionality.

Notable by its absence, for comparative purposes with Canada and United Kingdom at least, is the lack of any provision analogous to section 24(1) of the Charter or Section 8 of the HRA. Section 24(1), it will be recalled from Chapter 2, gives Canadian courts the power to make any order as they think just and appropriate where a litigant's Charter rights have been unjustifiably infringed. And, as we shall see in Chapter 3, section 8 gives UK courts a similar remedial discretion in respect of remedying rights violations by public authorities, excluding parliament. Interestingly, in its 1996 Report, the Constitutional Review Group recommended that a clause similar to section 24(1) of the Charter be inserted into the Irish Constitution, but its suggestion was never acted on by successive governments.

3.2.2 – Early Case-Law

These provisions, then, set the boundary lines of constitutional review in Ireland. And it took the Supreme Court some time to consider the precise effects that their wording - and the wording of other provisions – would have on unconstitutional legislation and the remedies available in such circumstances.

[9] *PC* (n3) at para 20 of the judgment of O'Donnell J.

The starting point for a discussion of those effects is *McMahon v Attorney General*.[10] There, the Supreme Court declared provisions of the Electoral Act 1923 invalid as they insufficiently protected the secrecy of the ballot box. In theory, such a finding could have placed the validity of all post-1923 elections in questions if the Court applied the void *ab initio* doctrine with full retroactive effect. Though this was not specifically argued in *McMahon*, and no challenges to the validity of any elections were brought on foot of it, the Court was mindful of the potentially problematic effects which could flow from a retrospective finding, with O'Dalaigh CJ stating that constitutional rights are declared 'not alone because of the bitter memories of the past but no less because of the improbable, but not-to-be-overlooked perils of the future.'[11] And Fitzgerald J noted the majority's finding 'raises or could raise' the issue of the validity of all post-1923 elections.[12] O'Dalaigh CJ seemed to consciously limit the findings of the majority judgment so as to avoid consequences of this nature and, interestingly, the Court phrased its order in the present tense such that it read that the impugned provisions 'are not consistent with Constitution' and 'are not continued by Article 50 the Constitution.'[13]

The possible consequences of retroactive applications of declarations of invalidity were also brought to light in two cases related to the composition of juries. In *de Búrca v Attorney General*, the Supreme Court declared unconstitutional a provision of the Juries Act 1927 which contained a property qualification for membership of juries.[14] The Court then considered the question of the validity of trials which had taken place before juries empanelled under the unconstitutional 1927 Act. O'Higgins CJ adopted the rather inventive solution that as it could not be shown that no-one who had previously served on juries had been ineligible to serve, it therefore could not be shown that the trials were constitutionally flawed. Walsh J, however, did recognise, at the level of principle, that the jury verdicts could be invalid but held that such a possibility did not arise in *de Búrca* because, as the Chief Justice had said, it could not

[10] [1972] IR 69.
[11] ibid at 111 – 112.
[12] ibid at 113.
[13] See the discussion of this point at para 10 of the judgment of MacMenamin J in *PC* (n3).
[14] [1976] IR 38.

actually be shown that ineligible persons had served on the juries empanelled under the 1927 Act.

Subsequently, in *State (Byrne) v Frawley*, the applicant challenged the validity of a trial which had been conducted after the Court's decision in *de Búrca*.[15] The Court held that the applicant in *Frawley* had decided to proceed with the trial despite having knowledge that it could be affected by the outcome of the yet to be decided *de Búrca* case. The Court held that the applicant was therefore estopped from raising this as a ground for the trial's invalidity.

These two cases are a good example of the intellectual challenges the Irish courts have created for themselves due to their traditional commitment, in an apparent search for principled clarity, to the classic remedy of the strike-down. It is intriguing, if no more at this point, to note that when confronted with a similar set of 'validity of jury trials' related circumstances, the Supreme Court of Canada simply suspended its declaration of invalidity.[16] But, as we saw in the previous chapter and as we shall see in Chapter 5, such suspensions create their own conceptual problems.

3.2.3 – *Murphy v Attorney General* and Voidness *ab initio*

While *de Búrca* and *Frawley* undoubtedly gestured at the effects of a finding of unconstitutionality and its remedial consequences, they avoided addressing the issues in full. In *Murphy v Attorney General*, however, the Supreme Court addressed both of those matters head on.[17] The plaintiffs in *Murphy* were a married couple and argued that legislation which effectively forced married persons to pay more tax than they would have to if they were single was unconstitutional. The Court agreed and held that the impugned law constituted an unjustified discrimination against married persons. On foot of this finding, the plaintiffs sought restitution of the taxes which they had been overpaying for over ten years. The problem here was that if the plaintiffs and other similarly situated litigants were entitled to recoup their monies, the Irish State's finances could have been put in a potentially perilous position.

[15] [1978] IR 326.
[16] *R v Bain* [1992] 1 SCR 91.
[17] *Murphy* (n7).

Two competing views of unconstitutionality, attributable to Henchy J and O'Higgins CJ respectively, emerged in *Murphy*. Henchy J, for the majority, held that the text of Article 15.4.1°, which prohibits the Oireachtas from enacting unconstitutional legislation, meant that where the Oireachtas had enacted legislation repugnant to the Constitution, such legislation was simply *ultra vires* the Oireachtas and was therefore void *ab inito*.[18] In vivid language, he described the declaration to be used in such cases as a 'judicial death certificate with a date of death stated as the date when the Constitution came into operation.'[19] Similarly to his Canadian counterparts, however, despite his commitment at the level of theory to the void *ab intio* doctrine, Henchy J held that its effects could nonetheless be mollified through the use of public policy doctrines like *res judicata* to prevent retrospective claims.[20]

For the minority, O'Higgins CJ held that since the present tense language of Article 25.4.1° says that a bill becomes law upon signing by the President, then it follows that – to reconcile this provision with the text of Article 15.4.2° - a declaration of invalidity could only crystallise on the date it is handed down by the relevant court.[21]

There are problems with both the majority and minority views of unconstitutionality but what is particularly noteworthy about *Murphy* is the similarly limited practical retroactive effect of both the majority and minority holdings. Henchy J drew a distinction between, on the one hand, the void *ab intio* nature of the declaration itself and, on the other, the practical effect of that declaration. Using a mixture of private law principles drawn from the laws of equity and restitution, and broader constitutional values – at one point he referred to 'transcendent' considerations – Henchy confined the plaintiffs' relief to the period dating from the date of their objection to the payments and the date of the judgment.[22] He further restricted relief to the narrow category of persons who had previously raised the issue in correspondence and held that the State could defend other claims by relying on the restitutionary defence of alteration of position.

[18] ibid at 290 – 291.
[19] ibid at 307.
[20] ibid at 314.
[21] ibid at 298 – 299.
[22] ibid at 318.

It was clear that Henchy J was motivated by the potentially drastic consequences the State would face if it had to make restitution to all parties affected by the impugned legislation in *Murphy*. His rationale for limiting the remedial effects of his judgment as he did are to be found at page 322 of the report in *Murphy* where, having conducted a review of both domestic and international decisions, he said:

> "*[i]t has been found that considerations of economic necessity, practical convenience, public policy, the equity of the case, and suchlike matters, may require that force and effect be given in certain cases to transactions carried out under the void statute*."

Effectively, he held that significant public policy reasons necessitated against unwinding the clock in this instance as the statute, having been lawfully observed and affairs of state having been organised around it, had become 'favoured with constitutionality' prior to the Court finding otherwise.[23]

3.2.4 – The Shift from *Murphy*

Thus, in *Murphy* the Supreme Court expressed, like the Canadian Supreme Court and, as we shall see, the UK Supreme Court, approval at the level of theory for the void *ab initio* doctrine. It also took significant steps to limit the practical remedial effects of that doctrine. Noonan has observed that the essence of the judgment is that the *ab initio* ineffectiveness of legal instruments is the basic stance, but that this was being exceptionally deviated from in *Murphy* due to the factual complexities and far-reaching consequences of the case.[24]

However, in later cases the Court appeared to drift somewhat from its conclusion in *Murphy* about the void *ab initio* doctrine. In *McDonnell v Ireland*, a case which has echoes of the *Albashir* judgment discussed in Chapter 2, the plaintiff sought to rely on the earlier decision of *Cox v Ireland* where the Supreme Court declared section 34 of the Offences Against the State Act 1939 unconstitutional.[25] Section 34 provided that where a person who held office in the civil service was convicted of a scheduled offence, that person would forfeit their office and related pay and pension

[23] ibid at 320.
[24] Robert Noonan, *Declarations of Unconstitutionality in the Common Law Tradition: A Comparative and Theoretical Analysis* (Ph.D Thesis, Trinity College Dublin, 2019) at 127.
[25] *McDonnell v Ireland* [1998] 1 IR 134 and *Cox v Ireland* [1992] 2 IR 53.

entitlements. Mr McDonnell was convicted of a scheduled offence in 1974 and was held to have forfeited his position and pension entitlements. Following his release from prison, he twice applied for reinstatement and was rejected both times. The Supreme Court then declared section 34 unconstitutional in *Cox* in 1991. On foot of this, Mr McDonnell claimed his dismissal from the civil service under section 34 was of no legal effect as it had been done through a statute found, in *Cox*, to have been void *ab initio*.

The Court rejected the plaintiff's claim as it was out of time for the purposes of the Statute of Limitations. However, O'Flaherty J made some obiter remarks expressing dissatisfaction with the holding in *Murphy*. Echoing the minority judgment of O'Higgins CJ in *Murphy*, O'Flaherty J held that a bill became law on signature by the President and remains law until it is amended, repealed, or invalidated. In an approach which centred largely on the maintenance of the rule of law – or the "true social order" in the Irish context – O'Flaherty J concluded that:

> "*…laws must be observed until struck down as unconstitutional. The consequence of striking down legislation can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity*."[26]

O'Flaherty J went to state that 'this is what occurred in *Murphy*…' suggesting that he was giving more credence to the practical effect of the holding in *Murphy*, rather than the theoretical basis of Henchy J's conclusions about the void *ab initio* doctrine.

3.2.5 - *A v Governor of Arbour Hill*

The Supreme Court engaged in a major excurses on the precise effects of a finding of unconstitutionality and that finding's remedial effects in *A v Governor of Arbour Hill*.[27] *A* arose out of another Supreme Court case, *CC v Ireland*, where the Court struck down section 1(1) of the Criminal Law (Amendment) Act 1935 – the statutory prohibition on unlawful carnal knowledge – as it did not provide a defence of honest mistake as to the age of the complainant.[28]

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[26] ibid at 144.
[27] [2006] 4 IR 88.
[28] [2006] 4 IR 1.

Mr A had been imprisoned under section 1(1) of the 1935 Act and, after the finding in *CC*, launched habeas corpus proceedings challenging his detention as he was now being detained under a statue which had, theoretically, never been of any legal effect. The Court upheld the legality of his detention but each of the judgments reveal conflicting understandings of the effects of a declaration of unconstitutionality. However, the central holding of the judgment seems to be that - whatever about the correctness or otherwise of the void *ab initio* view - good constitutional governance will frequently require subsisting recognition of acts done on foot of laws later declared unconstitutional.

Murray CJ, appearing to prefer the approach suggested by O'Higgins CJ in *Murphy*, rejected the notion that Irish constitutional law countenances the possibility of 'absolute retroactivity', even at the level of theory, and seemed to take it that the earlier case law did not admit of such an approach.[29] He went on to set down a principle that:

> "…*final decisions of judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon because of its status of law considered or presumed to be unconstitutional, should not be set aside by reason solely of a subsequent decision declaring the Act unconstitutional*."[30]

Murray CJ, clearly motivated by rule of law concerns, then stated that to hold otherwise would be to render the Constitution dysfunctional and said that the Constitution never intended to unravel – on the basis of the void *ab initio* doctrine to the exclusion of competing principles – all acts done on foot of unconstitutional statutes.[31]

Denham J, with McGuinness J concurring, stated – somewhat surprisingly – that the general position in Ireland was that a declaration of invalidity applies retrospectively only for the successful litigant and applies prospectively for the rest of society.[32] While Denham J did accept that there had been a 'practice' of retrospectivity, it seems quite

[29] *A* (n27) at para 84.
[30] ibid at para 116.
[31] ibid at para 117.
[32] ibid at para 135.

clear that Henchy J in *Murphy* had, at the level of theory at least, laid down a principle that declarations would normally have retrospective effect due to the operation of the void *ab initio* doctrine:

> "*[o]nce it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it*."[33]

As Noonan has noted, Hardiman J offered a useful, five-point distillation of the previous Irish case-law on the issue:

> "*(1) Post-Constitution statutes that are found invalid are to be held invalid from the date of their enactment. (2) Not all legal action taken on foot of invalid statutes is null. (3) Considerations such as economic necessity, practical convenience, public policy, and the equity of the case may all require effect to be given to certain action taken under a void statute. (4) This effect can be justified: (a) by the difficulty of undoing the past; (b) the compulsion of public order and the common good; (c) acquiescence of the right-holder. (5) The court should not attempt to lay down a rigid rule as to what the effect of an unconstitutional statute might be*."[34]

Hardiman J particularly emphasised point (2) and the distinction between the voidness of a statute and the practical effects of that voidness.[35] However, he did not analyse the justification for that conclusion beyond forcefully rhetorically amplifying Henchy J's judgment in *Murphy* to the same effect in support of his own conclusion.

Each of the judgments in *A* address much the same case-law yet the judges reached conclusions that are difficult to reconcile with one another. As Doyle and Feldman have argued, the result in *A* entrenches three contentious distinctions.[36] First, there is a distinction between a legal measure being void on the one hand and providing near absolute legal authority for official action on the other. Second, there is the distinction

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[33] *Murphy* (n7) at 313.
[34] Noonan (n24) at 129 – 130.
[35] *A* (n27) at 237.
[36] Raymond Byrne and William Binchy, *Annual Review of Irish Law 2006* (Thomson Round Hall 2007) at 184 – 185.

drawn between the remedy granted to the litigant who has actually brought their case and the lack of remedy afforded to similarly situated litigants who did not bring a case. Finally, there is the distinction between giving continuing legal effect to official actions taken in reliance on the law but not giving any recognition to the extent to which private citizens might have ordered – sometimes detrimentally – their affairs in reliance on the law.

3.2.6 – The Contours of the Strike-Down

As in Canada, we can see the centrality, at the level of theory at least, of retrospective application of the void *ab initio* doctrine to the Supreme Court of Ireland's remedial practice. And the chief remedy which flows from that in respect of unconstitutional legislation is the declaration of invalidity, or strike-down. This section considers the operation of that remedy in Ireland in more detail, in particular the Supreme Court's recent restatement of its jurisprudence on the temporal effects of such declarations in *Heneghan v Minister for Housing*.[37]

The Supreme Court noted in *PC*, echoing observations on the Court's remedial practice made by academic commentators, that the judgments in *A* confirm that the primary remedy for immediate invalidation is the strike-down.[38] Since 1937, it has been used well over 100 times and it is undoubtedly the paradigmatic remedy for unconstitutionality.[39] However, as we shall see later, that paradigm may be shifting somewhat due to the judgments in *PC* and *Heneghan*.

As will be obvious from the previous section, the Supreme Court has gone to considerable lengths to limit the temporal effects of its judgments. Indeed, in *PC*, MacMenamin J said, albeit obiter, that declarations of invalidity should have prospective effect only.[40] O'Donnell J, on the other hand, preferred to leave that matter for another day and offered limited views on the void *ab initio* principle, preferring to confine himself to expressing approval of the practical limiting effects of *Murphy* and *A*. He concluded his judgment by noting that 'The past cannot, and I

[37] [2023] IESC 7 and [2023] IESC 18.
[38] *PC* (n3) at para 7 of the judgment of MacMenamin J.
[39] Gerard Hogan, David Kenny, and Rachael Walsh, 'An Anthology of Declarations of Unconstitutionality' (2015) 54(2) The Irish Jurist 1.
[40] *PC* (n3) at para 97 of the judgment of MacMenamin J.

would add should not, always be erased by a new judicial declaration.'[41] Littered throughout his judgment were general expressions of approval for nuanced remedies for complex constitutional problems.[42]

The judgments in *PC* formed a key building block of the Court's subsequent judgment in *Heneghan*. There, the applicant challenged the constitutionality of the legislation governing the election of members to the university panels of Ireland's upper house, the Seanad (or, roughly, the Senate). In basic terms, Ireland's upper house is comprised of several panels which are elected by various specified interest groups, alongside 11 direct appointees by the Taoiseach, Ireland's equivalent to the office of Prime Minister. The university panel franchise was confined by Article 18.4.1° of the Constitution and the Seanad Electoral (University Members) Act 1937 to graduates of Trinity College Dublin and graduates of the constituent institutions of the National University of Ireland.

The Court held that the impugned legislation was inconsistent with Article 18.4.2 ° of the Constitution, which had been approved of by the people in 1979 and allowed for the extension of the franchise to graduates beyond TCD and the NUI institutions. However, that amendment had never been acted on, and despite the fact that the amendment was framed in seemingly permissive terms – that the Oireachtas "may" extend the franchise – the Court held that it imposed a mandatory obligation on the Oireachtas to extend that franchise.

This conclusion posed two particular problems for the Court from a remedial perspective, problems which were similar to those which had confronted the Supreme Court of Canada in the *Manitoba Language Rights* reference. First, if the legislation governing the Seanad was unconstitutional, then, at the level of theory, that law had never been valid and the validity of everything which had previously been done on foot of that law – elections to the chamber and, consequently, the legislation which it passed (Irish legislation must be passed by the Seanad as well as the Dáil) – was also open to question. Second, given that the Seanad is an essential part of the legislative process, had the Court issued an immediate declaration of invalidity in respect of the

[41] ibid at para 46 of the judgment of O'Donnell J.
[42] ibid e.g. at para 21.

1937 Act, the Oireachtas would not have had the ability to pass any replacement legislation, with the consequence that the State's legislative process would effectively be shut down.

While the applicant did not challenge the validity of previous elections or other legislation, the Court, to avoid any such problems – for the first time – explicitly made the entire effects of its declaration prospective only in effect. It also suspended the effects of its declaration, and I return to that element of the Court's judgment below when considering the Irish jurisprudence on that remedy in detail.

Dealing with the temporal aspects of the judgment first, Murray J, for the majority in the substantive judgment – there was both a subsequent hearing and judgment on remedies – noted that until "*recently*" (we must assume that he had in mind the judgments in *A* and *PC* because he did not elaborate), the "*conventional*" understanding was that a declaration of invalidity operated in an *ab initio* fashion.[43] He treated it as axiomatic that the declaration simply had to operate prospectively only in the case, given the remarkably problematic consequences which would otherwise follow.

In a concurring judgment, Hogan J noted that the Irish courts have "*struggled to articulate fully coherent principles*" on the effects of findings of unconstitutionality.[44] And nor did Hogan J articulate any such principles in *Heneghan*. Instead, he reviewed the authorities outlined above such as *Murphy* and *A* where the courts had limited the retroactive effects of their judgments and, like Murray J, effectively held that the circumstances of the *Heneghan* case inexorably called for a prospective only declaration.

In the subsequent remedies hearing, O'Donnell CJ gave a unanimous judgment for the Court and re-iterated the orthodox view that the "*starting point*" for declarations of invalidity is that they had *ab initio* effect, [45] but he also acknowledged that this "*stark*" proposition had been modified in the case law because a declaration is a

[43] *Heneghan* (n37) at para 145.
[44] ibid, judgment of Hogan J at para 51.
[45] ibid, judgment of O'Donnell CJ at para 9.

potentially "*crude mechanism*" which, if not utilised with care, can cause widespread collateral damage to a State's legal order and can have potentially seismic effects.[46]

As well as the influence which they would exert over the findings in *Heneghan* about the temporal effects of declarations and – as we shall see below – suspended declarations – the judgments in *PC* also point to another interesting feature of the Irish use of the strike-down. Unlike Canada, where the norm is an 'as applied' declaration of invalidity, the strike-down in an Irish context is usually of general application. It is invalid, not only in its constitutionally repugnant applications, but in all its applications.[47] And although the judgments in *Murphy* and *A* express approval for limiting the retrospective effects of outright invalidity – with *Heneghan* removing any doubt that a formal, prospective only declaration is available to the courts – those judgments do nothing for the *erga omnes* application of that declaration.

In *PC,* however, the Court explicitly stated that there was room in the Irish constitutional order for 'as applied' declarations of invalidity.[48] Indeed, their use is arguably even called for due to the limited wording of Article 15.4.2º.[49] Something approximating an as applied declaration of invalidity was seen for the first time in the recent case of *O'Meara v Minister for Social Protection*.[50] There, the applicant challenged his exclusion from the ambit of a social welfare payment which was available to the surviving spouses and civil partners, but not to surviving cohabitants. The applicant had been in a relationship with his deceased partner for in excess of 20 years and they had three children. The Supreme Court held that his ineligibility for the payment breached the equality guarantee contained in Article 40.1 of the Constitution, and declared the legislation governing the payment in question unconstitutional, but only "*insofar as*" it did not extend to the applicant's status as parent of the three children he shared with his late partner.[51]

Thus, the law remained entirely in force with the Court's declaration reflecting the fact that the statute in question was only unconstitutional by reason of its under-

[46] ibid at para 10.
[47] Kenny 'As Applied Challenges' (n4) at 58.
[48] *PC* (n3) at para 21 of the judgment of MacMenamin J.
[49] For a full exploration of this point, see Kenny 'As Applied Challenges' (n4)
[50] [2024] IESC 1.
[51] ibid at para 159.

inclusivity. I return to *O'Meara* and as applied declarations more generally in Chapter 6 but, suffice it to say for the moment, that it seems where a declaration of invalidity is deemed necessary, there is a certain intuitive logic to the view that an as applied declaration ought to be the first option for the court because it leaves undisturbed the constitutionally compliant aspects of the statute.

3.3 – Suspended Declarations

The suspended declaration of invalidity has only recently been approved of as a remedy by the Supreme Court of Ireland and while the jurisprudence on it is still developing, there is no doubt it is a feature of the incrementally innovative approach of the Supreme Court in the last ten years.[52] And it is striking the extent to which the Court was influenced by the Canadian jurisprudence on the remedy. This section traces the evolution of the remedy, beginning in 1972, with some early hints Irish courts made about possibly suspending declarations and the ultimate adoption of the remedy in 2018. The section pays particular attention to the treatment of the remedy in the Court's recent judgment in *Heneghan*.

3.3.1 – Early Hints

In *Byrne v Ireland*, the Supreme Court held that the royal prerogative, previously thought to confer immunity on the State in tort actions, did not survive the enactment of the 1937 Constitution.[53] During the hearing of the case, the Court expressed the view in a preliminary way and then offered to adjourn the appeal if the State would give an undertaking to introduce legislation regulating citizens' right to sue the State. It was only when the State would not give such an undertaking that the Court proceeded to issue its far-reaching judgment. As MacMenamin J noted in *PC*, what the Court did in *Byrne* was something akin to a deferral of a declaration – certainly, it has echoes of the Canadian approach whereby judges expressly state they are

[52] For more on this and the Supreme Court's approach more generally, see Conor Casey and Oran Doyle, 'Charter or Higher Law: The Constitution under the New Supreme Court' (2024) 44(1) Dublin University Law Journal 1.
[53] [1972] IR 241.

suspending their declaration in order to give the state time to fix the constitutional problem.

The next early hint that the Court saw some value in suspension came in *Blake v Attorney General*.[54] The Court held that Parts II and IV of the Rent Restrictions Act 1960 were unconstitutional. But O'Higgins CJ pointed out that a range of persons might have relied upon the invalid legislation for protection of their tenancies. Thus, such persons would no longer have this protection, thereby depriving them of rights they could previously have availed of in legal proceedings. The Chief Justice suggested that the courts should either adjourn or stay applications for possession following a lacuna left by the striking down of parts of the 1960 Act 'in the reasonable expectation of new legislation.'[55] This approach can also be seen as, in effect, imparting a suspensory effect to the declaration of invalidity.

In *A*, Denham J, having pointed out the similarities between Articles 50.1 and 15.4.2° of the Irish Constitution and section 52(1) of the Canadian Constitution Act 1982, proceeded to outline the development of the Canadian jurisprudence on suspended declarations. She noted that suspended declarations could have a useful role to play in helping the Court to 'do justice' and that the possibility of issuing a suspension could be raised in Irish courts.[56] Ultimately, however, the Court did not reach any conclusions on suspended declarations as *A* was a habeas corpus application.

3.3.2 – *NHV v Minister for Justice* and Subsequent Case-Law

Despite some suggestions in a High Court case that suspended declarations could be a valuable remedial tool,[57] and the Court of Appeal being confronted with a prime opportunity to suspend a declaration in a case which led to the temporary legalisation of ecstasy,[58] the early hints made about suspended declarations lay largely dormant until the Supreme Court decision in *NHV v Minister for Justice*.[59]

[54] [1982] IR 117.
[55] ibid at 141 – 142.
[56] *A* (n27) 153 – 154.
[57] See the decision of Hogan J in *Kinsella v Governor of Mountjoy* [2012] 1 IR 467.
[58] *Bederev v Ireland* [2015] IECA 38 – the striking down of part of the Misuse of Drugs Act 1977 led to some drugs like ecstasy being technically legal for 24 hours.
[59] [2017] IESC 35.

That case concerned a constitutional challenge to section 9(4) of the Refugee Act 1996, which provided that asylum seekers could not work, or even seek work, until their asylum applications had been processed. O'Donnell, speaking for the Court, said that he would be prepared to hold, 'in principle', that the absolute bar on asylum seekers even seeking work was unconstitutional.[60] However, he did not make a formal declaration of invalidity, but instead delayed making an order for six months to allow the parties to make submissions on the situation obtaining at that later point in time.[61] The Court viewed an adjournment here as appropriate because the unconstitutionality stemmed from the interaction of several statutory principles, meaning that there were multiple ways in which the unconstitutionality could be remedied and that the choice of appropriate remedy was one for the executive and legislative branches.[62]

At the adjourned hearing six months later, the Court shed little further light on what exactly it had done in the original hearing, beyond stating that the approach it had taken was an exceptional one and that it had to be "*strongly emphasised*" that immediate invalidation was the "*general rule*" when it came to remedying unconstitutionality.[63]

It must be recognised that what happened in *NHV* was not a suspension of a declaration and the court did not refer to the Canadian case-law nor track its language. Instead, the Court delayed making any order in the first place.[64] As one judge of the Court later put it, in *NHV*, the making of the declaration itself was 'deferred' rather than its effects 'suspended'.[65] And O'Donnell J himself drew attention to this in *PC* when he pointed out that *NHV* itself was not authority for the use of more ambitious techniques like the suspended declaration.[66]

Nevertheless, the Court endorsed its 'deferral' in *NHV* in the first of two judgments in the *PC* litigation (the judgment I have been consistently referring to is the outcome

[60] ibid at para 21.
[61] ibid.
[62] ibid.
[63] [2017] IESC 82 at para 2.
[64] David Kenny, 'Remedial Innovation' (n8) at 92.
[65] *PC* (n3) at para 26 of the judgment of MacMenamin J.
[66] *PC* (n3) at para 17 of the judgment of O'Donnell J.

of the remedies hearing, while the first judgment was the hearing of the substantive action), and it was also interpreted as being authority for the use of outright suspensions by lower courts in subsequent cases.[67]

But the Court itself would not itself expressly approve of the use of suspended declaration until the second of its judgments in *PC*. That case concerned a challenge to section 249(1) of the Social Welfare (Consolidation) Act 2005 which prevented prisoners receiving any social welfare benefits, the old age pension in the applicant's case. The Court held that this was unconstitutional as it effectively amounted to the imposition of punishment other than by a court. However, in the first judgment, in July 2017, MacMenamin J endorsed the 'deferral' approach in *NHV* and adjourned the hearing to allow parties to make submissions on the appropriate remedy.

In November 2018, the Court returned to the remedy issue in *PC*. O'Donnell J, in giving a lead judgment which expressed considerable approval for remedial flexibility more generally, held that suspended declarations could be used in Ireland, stating that:

> "*The precise circumstances in which it is appropriate to make any other order, and in particular to suspend a declaration of invalidity, is however, a matter to be considered carefully, cautiously, and on a case-by-case basis, and will be exceptional. I would, however, reject the argument that it is in principle impermissible for a court to make any other order other than one of an immediate declaration of invalidity.*"[68]

Thus, the central point from *PC* is that Irish courts may suspend a declaration of invalidity but the precise circumstances in which this will be permissible were not delineated, save that they will need to be 'exceptional'.[69] The extent to which the Court in *PC* cited the Canadian jurisprudence and scholarship on suspended declarations is significant. And it is, perhaps, with the benefit of that experience in mind – recall from Chapter 2 that the Canadian approach to suspended declarations had been criticised for becoming unprincipled and lacking in transparency – that the Court in *PC* called

[67] For example, see the judgments of Hogan J in *AB v Clinical Director of St Loman's Hospital* [2018] IECA 123 and *Osinuga and Agha v Minister for Social Protection* [2018] IECA 155.
[68] *PC* (n3) at para 21 of the judgment of O'Donnell J.
[69] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) at 272.

for caution, restraint, and the presence of exceptional circumstances in the utilisation of suspended declarations. Indeed, in adopting the language of 'exceptional circumstances' the Court seems to have circumscribed the use of suspended declarations to a narrower range of situations than did the Supreme Court of Canada did in *Attorney General (Ontario) v G*, where 'compelling public interest' was deemed the standard required for their use.[70]

PC was central to the Court's subsequent decision to suspend the declaration of unconstitutionality in *Heneghan*. Murray J, having reviewed both *PC* and key Canadian cases on suspended declarations such as *Manitoba* and *Schachter*, held that the case for suspension in *Heneghan* was "*unanswerable*",[71] with Hogan J terming it "*well-nigh overwhelming*". And given the possible consequences of an immediate declaration of invalidity – chiefly the inability of parliament to enact any legislation and the resulting instability of the democratic system – that analysis seems correct.

In the remedies judgment, O'Donnell CJ returned to several of his themes from *PC*, in particular comments where he had expressly adverted to the potential value of suspended declarations in the field of electoral law.[72] He also reviewed the Canadian authorities, and concluded that – whatever about the proper range of cases where suspended declarations could be deployed – there is a "*core of cases*" where the remedy may be deployed to avoid the chaotic consequences of immediate invalidity.[73]

As to the appropriate length of suspensions, O'Donnell CJ did not attempt to give any meaningful guidance, holding instead that the length of the suspension should be limited to the minimum time necessary to that which was necessary to achieve the suspension's objective; that is, the prevention of a constitutional crisis.[74]

Following the judgments in *Heneghan* and *PC*, it seems that Irish courts can, similar to their Canadian counterparts post *G*, issue suspended declaration in rare cases where the rule of law may be threatened. The judgments recognise the utility of suspension

[70] [2020] SCC 38.
[71] *Heneghan* (n37), judgment of Murray J at para 167.
[72] ibid, judgment of O'Donnell CJ at para 15.
[73] ibid at para 23.
[74] ibid at para 29.

as part of the Irish courts' remedial toolkit, but it seems that their use will be confined to extremely rare circumstances.

3.4 – Tailored Remedies Avoiding or Curtailing Unconstitutionality

Arguably, given that *Heneghan* in many ways seemed to confirm states of affairs which were adverted to in *PC*, the judgment in *PC* is the more important judgment. Whatever about that, it certainly represents a landmark moment in the remedial jurisprudence of the Supreme Court of Ireland. And the Court made a number of significant, if characteristically incremental, additions to that jurisprudence. First, it definitively brought suspended declarations into the Court's remedial toolkit. Second, it encouraged the bringing of 'as applied' constitutional challenges, indicating that, as we saw in *O'Meara* though the Court did not expressly recognise it as such, it is likely comfortable with issuing corresponding 'as applied' declarations of unconstitutionality. Third, the Court seemed to move further away from its historical commitment to the void *ab initio* doctrine. MacMenamin J explicitly stated that declarations of invalidity should be prospective only and O'Donnell J, though considerably more guarded, cautioned against unravelling past actions which were done on foot of laws previously thought to be constitutional. Finally, O'Donnell J referenced the text of Article 15.4.2º of the Constitution and noted that remedies for unconstitutionality ought to be 'precisely tailored to exorcise the offending element and no more.'[75] He also seemed to encourage the use of further alternative remedies to the strike-down, noting the desirability of nuanced solutions to complex constitutional problems,[76] and that many situations which might come before the Court could require complex and measured solutions.[77]

Despite these important additions to the remedial jurisprudence of the Court, it remains far more limited than in Canada and the impact of *PC* has yet to be seen in the remedial arguments made before the courts. In particular, we will see that the use of 'tailored' remedies in Ireland is highly circumscribed.

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[75] *PC* (n3) at para 20 of the judgment of O'Donnell J.
[76] ibid.
[77] ibid at para 21 of the judgment of O'Donnell J.

3.4.1 – The Presumption of Constitutionality and the Double Construction Rule

As in Chapter 2, the discussion on tailored remedies begins with the presumption of constitutionality. While the picture on this front is somewhat less clear in Canada, Irish legislation passed after the enactment of the 1937 Constitution enjoys a presumption of constitutionality. This was emphatically stated in *Pigs Marketing Board v Donnelly*, one of the earliest cases decided under the post-1937 regime.[78] There, Hanna J held that it must:

> "*[b]e accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established*."[79]

He said the presumption flowed from the democratic mandate of the Oireachtas and in later cases the Supreme Court held that it was justified due to the respect which one great organ of the State owes to another.[80] Thus, contrary to the situation in Canada, we can definitively say that post-1937 Irish legislation enjoys a presumption of constitutionality.

The presumption has considerably influenced how the Supreme Court has exercised its power of constitutional review, particularly in respect of the Court's remedial practice. This can be seen most clearly with the first of two alternative remedies that the Irish courts have traditionally used in addition to the strike-down, namely, the 'double construction rule'. It was set down by the Court in *McDonald v Bord na gCon* and provides that if there are two competing interpretations of a statute, where one is constitutional and the other is not, the Court will give effect to the constitutional reading.[81] Both interpretations do not need to be equally plausible, but the possibility of the alternative meanings must be open to the Court.[82] However, in *Re Haughey*, the

[78] [1939] IR 413.
[79] ibid at 417 – 418.
[80] See Doyle and Hickey (n69) at 247 and *Buckley v Attorney General* [1950] IR 67.
[81] [1965] IR 217.
[82] Noonan (n24) at 120.

Court was at pains to point out it would not 'do violence' to the plain meaning of a statute's words to arrive at a constitutionally compliant outcome.[83]

Unlike the powerful interpretative mandate afforded to UK courts under section 3 of the HRA, the double construction rule has generally operated in a highly limited and circumscribed way.[84] *Re Haughey* concerned the investigation by the Oireachtas's Public Accounts Committee into the applicant's conduct. The impugned statute purported to allow the Committee to certify cases to the High Court for punishment of individuals in a like manner to contempt of court. The applicant was so certified by the Committee and was sentenced to 6 months' imprisonment. The applicant challenged this detention and the question the Court had to decide whether the impugned statute was unconstitutional.

Mr Haughey claimed that the section effectively empowered the Committee to try and convict him of an offence despite its members not being members of the judiciary carrying out their traditional role in the courts. The Court acknowledged that this might be the case but, on an application of the double construction rule, held that the Committee's role was limited to the preliminary stages of the investigation and that the High Court remained responsible for trying and convicting the applicant. However, the Court refused to go further and hold that the rule allowed the High Court to try the applicant by jury, something which is no more inherently implausible or at variance with the statute than reading it as limiting the Committee's role to the preliminary stage of the investigation.

Its benefit has been seen in several cases, however, where its operation effectively allowed the Court to save statutes by reading-in procedural protections mandated by the right to fair procedures.[85] A high profile example of this was the Court's judgment in *Dellaway Investments v Nama*, where the Court read the NAMA Act 2009 as

[83] [1971] IR 217.
[84] David Kenny, 'The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012).
[85] See, for example, *The State (Healy) v Donoghue* [1976] IR 325 and *East Donegal Co-Op v Attorney General* [1970] IR 317.

demanding that fair procedures be provided to those individuals whose loans NAMA planned to acquire from participating banks.[86]

Nonetheless, despite the potential value of the remedy, the Court has been reluctant to even consider it in most cases due to the potential of it leading to intrusion on the legislative sphere. As we shall see in Chapter 4, the double construction rule has some analogous features to section 3 of the HRA, which requires UK courts to interpret legislation in a manner compatible with the European Convention on Human Rights. However, it will be seen that the courts in the United Kingdom have taken a much more expansive approach to the construction of statutes than their Irish counterparts.

3.4.2 – Severance

The second alternative tailored remedy which the Supreme Court of Ireland has used is severance. However, despite the similarities in the relevant textual constitutional provisions in the two jurisdictions, its operation in Ireland is far more limited than in Canada.

The language of Article 15.4.2º, which provides that a law is invalid 'to the extent only of its repugnancy', has been interpreted as allowing language to be 'severed' from sections of statutes, as if crossed out with a pencil. Thus, the remedy will only be available where the constitutional problem flows from a particular form of words.

The remedy was first used by the Supreme Court in 1963 in *Deaton v Attorney General* where the Court, with little discussion as to what it was doing, simply deleted words from a statute.[87] It was not until nearly 10 years later that the Court would set down a test for the remedy's operation. In *Maher v Attorney General*, the Court offered guidance on the types of situations where words could be severed from a statute:

> "*[I]f what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity*."[88]

[86] *Dellaway Investments v Nama* [2011] IESC 14.
[87] [1963] IR 170.
[88] [1973] IR 140 at 147.

Two conditions are therefore required for the remedy to operate. The law must be able to survive independently of the deleted words and the tailored version of the statute must continue to reflect the intention of the legislature.

Maher itself is a good example of severance's limited nature in Ireland. There, the constitutionality of section 44(2)(a) of the Road Traffic Act 1968, which allowed the admission of a certificate of blood alcohol level as *conclusive* evidence of guilt of certain road traffic offences, was challenged. This meant that the ability to assess the weight to attach to that evidence was removed from the trial judge, something the Court held was an impermissible intrusion on the judicial power. However, the Court declined to sever the word 'conclusive' and the entire provision fell instead.

The test in *Maher* is onerous and has rarely been met, with the Court generally not even considering severance in most cases.[89] As such, it has played a limited role in the Supreme Court of Ireland's remedial practice. Additionally, severance will not be used where it would have resource implications for the exchequer.[90] However, on rare occasions, the Court has been willing to use complex severance to save a statute. In *Desmond v Glackin (No 2)*, the Court was willing to sever multiple subsections in order save the main statutory provision.[91] And given the recent comments of the Supreme Court in *PC* about the value of nuanced remedies, it is possible severance may become a more common remedy in Ireland.[92]

3.4.3 – Reading-In and Reading-Down

While both the double construction rule and severance are generally used in a highly limited fashion, they are nonetheless definitively part of the Supreme Court's remedial toolkit. Remedies which have a less certain status, however, are reading-in and reading-down which, as we saw in Chapter 2, are regularly utilised in Canada and, as we will see in Chapter 4, are the primary remedial tools of the UK courts under section 3 of the HRA.

[89] Kenny 'As Applied Challenges" (n4) at 58.
[90] *Greene v Minister for Agriculture* [1990] 2 IR 17.
[91] [1993] 3 IR 67.
[92] For example, the Court used it in *Damache v Minister for Justice* [2021] IESC 6.

In *PC*, MacMenamin J, evidently with Article 15.2.1º in mind, which provides that the 'sole and exclusive' law making authority of the Irish State shall be vested in the Oireachtas, said that the remedy of reading-in was not available in Ireland.[93] But that is, perhaps, not the full picture. For example, the double construction rule has seen the Court, on occasion, read things which were not in the text into the statute. And while this has not necessarily involved the Court explicitly adding words in – as happens in Canada and the UK – the line between these two interpretative processes is not immediately obvious.

The Court has traditionally eschewed reading-in as a remedy on the basis that it could amount to judicial law-making. And there is undoubtedly some merit to this view given that, on its face, the addition of words into a statute potentially brings the judiciary much closer to the legislative domain than severance and reading down. But there does not seem to be any principled bar to its use in Ireland. From a separation of powers perspective, the practical effects of what courts do when they sever words from legislation, as opposed to add words into legislation, could end up being much the same. This issue is explored in more detail in Chapter 6.

As for reading-down, again, the line between that remedy and the double construction rule is not altogether clear and, to my knowledge, the courts have never addressed its potential use one way or the other. This may simply be a matter of terminology – in the scholarly literature, for example, the terms 'reading-in' and 'reading-down' are sometimes used interchangeably, and the double construction rule often applies in a less than explicit fashion. However, as an example, the restrictive reading of the statute at issue in *Re Haughey* seems like an exercise of a power like reading-down – the Court there limited the Committee's potential powers to save the statute. Additionally, given the Court's stated approval of the possibility of "as applied" challenges, it is possible that 'reading-down' will become part of the Court's remedial arsenal.

[93] *PC* (n3) at para 21 of the judgment of MacMenamin J.

5.5 – Conclusion

The Irish courts' approach to remedies can be summarised as follows. As in Canada, the Irish courts conceive of unconstitutional statutes as being void *ab initio*, but recognise that full, immediate, and retrospective invalidation must often give way to broader constitutional principles.

It is possible to suspend the effects of declarations of unconstitutionality, but such suspensions should only be granted in exceptional circumstances and the Supreme Court has not turned its attention to whether individualised exemptions from the effects of a suspension would be possible.

The use of tailored remedies, such as reading-in, reading-down, and severance has been highly circumscribed, albeit that there have been recent judicial comments noting the desirability of nuanced solutions to complex constitutional problems. Consequently, in years to come we may see a considerable shift in the Court's remedial practice, particularly given that the current Chief Justice, O'Donnell CJ, has been to the fore of the development of that practice and Hogan J has expressed approval in both his judgments and his academic writing for the use of alternative remedies to the strike-down.[94]

[94] Gerard Hogan, 'Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath in Bradley et al (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014).

Chapter 4 | Remedial Practice in the Supreme Court of the United Kingdom

CHAPTER OVERIVIEW

4.1 – Introduction

In the United Kingdom, constitutional review of legislation primarily takes place under the Human Rights Act 1998 (the "**HRA**"). Since it came into force at the turn of the 20th century, the HRA has been the subject of fervent disagreement. This disagreement has included the merits of the 'new' powers the HRA gives to judges; the merits of the court decisions reached under those new powers; whether the HRA is a 'constitutional' statute; and, indeed, whether the HRA gives any new powers to judges at all. However, both its critics and admirers have, broadly speaking, been content to characterise the HRA as something which, at the very least, approximates a bill of rights. And, while they have disagreed over the legitimacy of the reviewing powers it gives to judges, all tend to be agreed on the special status it has in UK domestic law.[1]

On one reading, the HRA grants UK subjects no new rights in that it merely gives 'further effect', in domestic law, to rights already protected in the UK since the European Convention on Human Rights (the "**Convention**") came into force in 1953.[2] However, there is no doubt but that the HRA marks a 'constitutional milestone' in that, for the first time, it explicitly empowers UK courts to review primary legislation for compliance with a codified set of fundamental rights.[3]

As I will draw out in this chapter, though there are considerable similarities between Canada, Ireland, and the United Kingdom's respective constitutional orders and remedial practices, there are also several important distinguishing features of the UK system. Most obviously, UK courts do not possess the power to invalidate legislation in the way that Irish and Canadian courts do. Instead, the HRA gives UK courts the strong interpretative powers to make legislation compatible with Convention rights. And if the courts cannot interpret legislation in a Convention compliant manner, they have a discretionary power to issue a declaration that the legislation at issue is incompatible with Convention rights. Nonetheless, as I hope to demonstrate, when we see the way UK courts have exercised their reviewing powers under the HRA, the

[1] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) at 2; Tom Hickman, *Public Law After the Human Rights Act* (Hart Publishing 2010) at 48.
[2] Robert Leckey, *Bills of Rights in the Common Law* (CUP 2015) at 44.
[3] Kavanagh, *Constitutional Review* (n1) at 5.

similarities in the strength of review powers exercised – and the resulting remedial powers – in each of the three jurisdictions is more similar than might initially be thought. Thus, the theoretical arguments I will make in Part III of this thesis about the proper scope of remedial judicial powers are applicable in each of the three jurisdictions examined in this study.

The remainder of this chapter proceeds in the following way. It starts by briefly describing the UK courts' powers of judicial review outside the Human Rights Act and consequent remedial powers. It does this to highlight that the remedial powers which HRA gives to judges in sections 3 and 4 are better conceived of as significant, yet consistent, constitutional developments of the remedial powers which courts have historically exercised, rather than – as some commentators argue – a novel expansion of the remedial powers available to the judiciary.

The chapter then outlines the structure and operation of the HRA and the constitutional review powers it gives to courts. After that, it discusses the strong remedial powers of UK courts under section 3 of the HRA before turning to the discretionary declaration of incompatibility remedy under section 4 of the HRA. It then moves to a discussion of the argument that UK courts could strike down primary legislation where the nature of the statute threatens the UK's constitutional order. Finally, the chapter closes with a summary of the UK courts' remedial jurisprudence.

4.2 – Judicial Review of Legislation Outside the Human Rights Act

Keith Ewing famously described the HRA as 'an unprecedented transfer of political power from the executive and the legislature to the judiciary.'[4] And there is undoubtedly an intuitive appeal to this claim given that the defining features of the UK's constitutional order have traditionally been (1) the sovereignty of the Westminster parliament and (2) the absence of a judicial power to review primary legislation for compatibility with fundamental rights. However, a potentially more accurate view is that while the HRA has evolved the judicial power – specifically the

[4] Keith Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) Modern Law Review 79.

judicial law-making function – to a considerable degree in the United Kingdom, it has done so, as Aileen Kavanagh has claimed, in a manner 'continuous with the methods employed by the courts in the past.'[5] Trevor Allan and David Dyzenhaus have made similar arguments as has Robert Leckey who, while acknowledging the distinctive and novel *elements* of HRA review, offers three examples of how UK courts had previously reviewed legislation for compatibility with higher laws.[6]

4.2.1 – Historic Judicial Review

The first example is review of different types of colonial legislation for compatibility with imperial law.[7] One example is English corporation law which, as Bilder has noted in an essay on the corporate origins of judicial review, allowed for the review of acts of English corporations operating in the colonies for compatibility with the laws of England.[8] Indeed, some scholars have argued that while there was disagreement on the precise contours of the limits of the powers of colonial legislatures and institutions, by the end of the 19th century there was broad agreement that conflict between imperial laws and colonial laws resulted in the latter's voidness.[9] This can be seen clearly in the Colonial Laws Validity Act 1865. The primary purpose of this Act was to remove doubts about the validity of colonial laws which conflicted with imperial legislation.[10] Essentially, the Act provided that colonial laws which conflicted with imperial laws would remain valid and operative unless they conflicted with some imperial statute specifically designed to regulate that colony. And the power to decide whether there was a conflict rested with the House of Lords. Thus, while the Act was designed primarily to liberalise the powers of the colonies, it confirmed a reviewing role for the House of Lords of colonial legislation.

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[5] Kavanagh, *Constitutional Review* (n1) at 116.
[6] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003); David Dyzenhaus, 'The Unwritten Constitution and the Rule of Law' in Grant Huscroft and Ian Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004); and see generally chapter 2 of Leckey, *Bills of Rights* (n2).
[7] ibid at 56.
[8] Mary Sarah Bilder, 'The Corporate Origins of Judicial Review' (2006) 3 Yale Law Journal 116.
[9] See Leckey, *Bills of Rights* (n2) at 56; Barry L Strayer, *Judicial Review of Legislation in Canada* (TUP 1968) at 6; and DB Swinfen, *Imperial Control of Colonial Legislation, 1813 – 1865: A Study of British Policy towards Colonial Legislative Powers* (Clarendon Press 1970) at 53.
[10] Swinfen (n9) at 167.

Leckey's second example of UK courts historic powers of judicial review is the functions of the Privy Council. He points out that, potentially influenced by the advent of the Convention, since 1949 all newly independent former UK colonies in the Caribbean have included protection for fundamental rights and freedoms in their constitutions.[11] And the final authority for reviewing legislation and governmental acts for some of those jurisdictions (though this is the case for a decreasing number of jurisdictions) rests with the Privy Council which has, on occasion, invalidated legislation for compatibility with those rights instruments.[12] Additionally, the Privy Council also historically sat as the court of final appeal in cases from colonies where the local colonial supreme court reviewed legislation for its compliance with the distribution of powers under that state's federal constitution.[13]

The final example Leckey gives is judicial review of secondary legislation. Courts can strike down laws where they consider that government ministers have gone beyond the power given to them in the primary act to make secondary legislation. Though there are considerable differences from a parliamentary sovereignty perspective in reviewing primary as opposed to secondary legislation, the judge exercises a similar function in both cases in that they are reviewing enacted rules of general application for compatibility with higher laws.[14]

Each of these powers have their roots in the ordinary common law judicial function, though, as Paul Daly has noted, the concept of the declaration itself only emerged as a powerful public law remedy in the 20th century.[15] He further notes that it quickly became a favoured means through which courts could vindicate a litigant's rights, pronounce on the state of the law on a given issue, and provide guidance for public bodies in the exercise of their powers.[16]

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[11] Leckey, *Bills of Rights* (n2) at 59.
[12] ibid.
[13] Rose Marie Bell, Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn Routledge-Cavendish 2008) at 307-27.
[14] Leckey, *Bills of Rights* (n2) at 63.
[15] Paul Daly 'Constitutionally Conforming Interpretation in Canada' in Matthias Klatt (ed) *Constitutionally Conforming Interpretation – Comparative Perspectives* (2023 Bloomsbury).
[16] ibid.

4.2.2 – Two Other Types of Judicial Review

Two other types of judicial review – where courts *do* have the power to disapply primary legislation – bear mention here. The first is the ability of UK courts to disapply primary legislation which conflicted with EU law. Prior to its repeal by the European Union (Withdrawal) Act 2018, the European Communities Act 1972 (the "**ECA**") made the then European Communities treaties and body of laws – and later EU treaties and body of laws – part of UK domestic law. Sections 1,2, and 3 of the ECA recognised the supremacy of EU law, made it directly effective in the UK, and required domestic UK courts to apply EU law. Thus, to give effect to EU law, UK courts could disapply domestic UK law where it conflicted with EU law, though courts frequently utilised strong interpretative powers to avoid having to make such findings.[17]

The second is in respect of devolution matters. The establishment of the devolved Northern Irish, Scottish, and Welsh assemblies has created what one justice of the Supreme Court recently termed 'the potential for disputes about the limits of the competence' of those assemblies.[18]

Two principal forms of review arise in respect of devolution matters. The first is the ability of the law officers in each of the devolved settlements to refer proposed legislation of the assemblies to the UK Supreme Court. The Court then assesses whether the proposed legislation was within the competency of the devolved assembly.[19] As Lord Hodge previously noted writing extra-judicially, such referrals are comparatively rare.[20]

The second form of review is where any litigant challenges either a statute made by a devolved assembly or some action of a devolved executive as exceeding the competence of that assembly or executive. However, even this latter type of challenge

[17] *R v Secretary of State for Transport Ex p. Factortame Ltd (No.1)* [1990] 2 AC 85 and *R v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 AC 603.
[18] Lord Hodge, 'The Scope of Judicial Law-making in Constitutional Law and Public Law' (2021) 26(2) Judicial Review 146 at 151.
[19] ibid.
[20] ibid.

rarely makes it to the Supreme Court.[21] In both forms of review, where legislation is at issue, the Supreme Court can declare that legislation invalid.

Such is the backdrop to judicial review of legislation in the United Kingdom. While the types of judicial review discussed are different to the judicial review process UK courts are empowered to do under the HRA, we can see that, historically – and quite apart from their long and storied history of reviewing administrative acts – UK courts have exercised significant powers of judicial review of primary legislation.

4.2.3 – The Orthodox UK Remedial Approach

The orthodox remedial practice which flowed from these powers of review will be familiar to many common lawyers and chimes with much of the orthodox jurisprudence of both the Canadian and Irish courts which we saw in Chapters 2 and 3. That is, it is the province of courts to identify flaws in legislation and leave it to parliament to fix those flaws. Similarly, when a court finds some form of governmental action or secondary legislation unlawful, at the level of theory at least, they are deemed to be void *ab initio* – i.e., they have never had any legal force or effect as they never came into existence.[22] As Lord Diplock noted in *Hoffmann-La Roche v Secretary of State for Trade and Industry*, invalid acts are to be treated as being 'incapable of ever having had any legal effect upon the rights and duties of the parties to the proceedings.'[23]

These views of invalidity shape the remedial powers which the courts believe they possess, including under the HRA. And there has been a long-standing debate in English common law between the 'theoretical voidness and functional voidability' of invalid acts.[24] In *Smith v East Elloe Rural District Council*, Lord Radcliffe held that:

> "*An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are*

[21] ibid at 152 (footnote 26).
[22] *Wood v Wood* (1874) L.R 9 Ex. 190.
[23] *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 365.
[24] Christopher Forsyth, 'The Metaphysic of Nullity' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Clarendon Press 2001) at 141 – 143.

taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."[25]

In *Boddington v British Transport Police*, the applicant was convicted of smoking on a train.[26] He challenged the validity of the byelaw under which he had been convicted. The House agreed with his claim that it was invalid, and his conviction was ultimately set aside. However, in respect of reliance on unlawful acts which were previously thought to be valid, speaking for the majority, Lord Irvine said that it would be necessary:

"*in every case…to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely*."[27]

Similarly, Lord Browne-Wilkinson held that:

"*I am far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity*."[28]

Thus, both law lords recognised – as their counterparts in the Canadian and Irish Supreme Courts have done – that, sometimes, the retrospective effects of a finding of invalidity could be limited.

Two significant and relatively recent Supreme Court decisions, however, appeared to rigidly adhere to the void *ab initio* view. In *HM Treasury v Ahmed No 2*, the Supreme Court, in declining to suspend a quashing order, said that it could not do so as

[25] [1956] AC 736 at 769.
[26] [1998] 2 WLR 639 (HL).
[27] ibid at 215.
[28] ibid at 218.

unlawful acts are invalid and of 'no effect in law' – in other words, void *ab initio*.[29] And in *R (Unison) v Lord Chancellor*, the Court held that the regulations at issue were void *ab initio*.[30] Finally, in the seminal case about the prorogation of parliament, R *(Miller) v The Prime Minister*, the Supreme Court seemed to suggest that as the Prime Minister's advice to the Queen to prorogue parliament was unlawful, the subsequent prorogation was itself a nullity.[31] The conclusion that some commentators drew from these decisions was that the Court would have no discretion as to whether an unlawful action was void or merely voidable.

Importantly, however, these judgments did not expressly address 'head-on' the distinction between voidness and voidability. As Mark Elliot has noted in the context of *Ahmed*, while there is a certain 'rigid logic to this [the void *ab initio*] position', it is difficult to reconcile with the inherent flexibility of judicial review remedies.[32] Similarly, whilst discussing *Boddington*, Paul Daly has suggested that there is nothing inherently problematic in drawing the distinction between voidness and voidability and making remedies prospective only in certain circumstances.[33] And, as we saw in Chapters 2 and 3, this seems to reflect the concerns and problems which confront the Canadian and Irish courts confronted in *Manitoba* and *Albashir* and *Heneghan* respectively.

In 2021, the Court seemed to resile from the rigidity of the views it expressed in *Ahmed* and *Unison*. In *R (Majera) v Home Secretary*, Lord Reed made four important obiter observations about the nature of findings of unlawfulness and the practical consequences which flow from such findings.[34] First, he described the Court of Appeal's holding in *Majera* itself that 'when an act or regulation has been pronounced by the court to be unlawful, it is then recognised as having had no legal effect at all'

[29] [2010] UKSC 5 at paras 1 and 4.
[30] [2017] UKSC 51.
[31] [2019] UKSC 41.
[32] Mark Elliot, 'Judicial Review Reform I: Nullity, Remedies and Constitutional Gaslighting' (6 April 2021). Available at https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/amp/ - last accessed 17/01/2022.
[33] Paul Daly, 'The Concept of Nullity in Administrative Law: the UK Government's Judicial Review Reform Project' (24 May 2021). Available at https://www.administrativelawmatters.com/blog/2021/05/24/4936/ - last accessed 17/01/2022.
[34] [2021] UKSC 46.

as an 'oversimplification'.[35] Second, he said that a decision which is allegedly unlawful cannot be said to be so before a competent court has authoritatively spoken to the alleged unlawfulness.[36] Third, he said that even where a finding of unlawfulness is made, a court may decline to grant relief in light of the discretionary nature of public law remedies.[37] Finally, and echoing observations made by Canadian and Irish courts in multiple judgments, Lord Reed held that unlawful legal measures are capable of having legal effect where countervailing public interest considerations such as the avoidance of chaos, legal certainty, and the rights of innocent third parties so require.[38]

Thus, we can say that like Canadian and Irish courts, while at the level of theory UK courts generally treat unlawful legal measures as being void *ab initio*, they have recognised a distinction between declaring them invalid and the practical consequences which flow from that declaration. As Paul Daly recently put it, the UK courts take the view that 'remedial consequences are separate from conclusions about unlawfulness.'[39]

4.3 – The Structure and Operation of the Human Rights Act

We have seen that UK courts have historically been comfortable reviewing certain types of legislation for compatibility with higher laws. We have also seen that, like their Canadian and Irish counterparts, they have recognised a distinction between making findings of unlawfulness and not undoing everything done on foot of previously valid legal measures.

But even though UK courts have a history of reviewing legislation and of deploying remedies like declarations, the type of review of legislation which takes place in the

[35] ibid at para 27.
[36] Paul Daly, 'The Relativity of Nullity: R (Majera) v Home Secretary [2021] UKSC 46; R (TN(Vietnam)) v Home Secretary [2021] UKSC 41' (19 January 2022). Available at https://www.administrativelawmatters.com/blog/2022/01/19/the-relativity-of-nullity-r-majera-v-home-secretary-2021-uksc-46-r-tnvietnam-v-home-secretary-2021-uksc-41/ - last accessed 11/02/2022.
[37] *Majera* (n34) at para 29.
[38] ibid at para 32.
[39] Daly, 'The Relativity of Nullity' (n36).

United Kingdom since the advent of the HRA is undoubtedly an evolution of what has occurred in the past. Perhaps the most important aspect of this evolution is that the HRA marks the first time UK courts have been empowered to review primary legislation of the Westminster parliament against a codified series of fundamental rights.

Though there is some dispute as to whether the HRA constitutes an entrenched bill of rights,[40] I am inclined to side with those theorists who claim that the HRA does entrench a bill of rights in the constitutional order.[41] The precise contours of what the HRA may or may not be is not essential for the purposes of my argument. What matters for the purposes of this thesis is how judges exercise their reviewing powers and, more importantly, how they exercise their remedial powers. And, as we shall see below, while there are important points of difference between the way UK judges go about their business under the HRA when compared with what Canadian and Irish judges do under their respective bills of rights, there is enough convergence across the three jurisdictions to draw relatively generalisable conclusions about the proper scope of remedial practice in each of them.

The purpose of this section, then, is to sketch out the key provisions of the HRA so that we might understand the background context under which judges make their remedial decisions. To that end, it offers an overview of the HRA's general structure before going on to discuss the operation of HRA's two key remedial provisions, sections 3 and 4, in some detail.

4.3.1 – General Structure

The long title of the HRA provides that its aim is to give further effect to the rights and freedoms guaranteed by the Convention. Section 1 specifies which Convention rights the HRA applies to and includes, much like the Irish Constitution and Canadian Charter, many rights protected in common law constitutional democracies such as the

[40] Richard Bellamy, for example, characterises it as an 'ordinary statute' and 'not an entrenched part of the constitution. See Richard Bellamy, 'Bills of Rights' in Richard Bellamy and Jeff King (eds), *Cambridge Handbook of Constitutional Theory* (CUP 2022).
[41] See, e.g., Kavanagh, *Constitutional Review* (n1) and David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 3 Law Quarterly Review 129.

right to life, right to a fair trial, right to privacy, and various rights relating to freedom of expression, conscience, and religion.

Section 2 of the HRA provides that when interpreting what the rights referred to in section 1 require, UK courts are obliged to 'take into account' Strasbourg jurisprudence. Historically, this was understood as meaning that UK courts would 'mirror' Strasbourg jurisprudence.[42] However, it has since been clearly established that UK courts can depart from Strasbourg jurisprudence where warranted.[43] Circumstances where UK courts have felt entitled to deviate from Strasbourg include: where there is no coherent answer offered in the Strasbourg case law which is directly analogous;[44] where the issue is governed by the common law and the common law points in a different direction to the Strasbourg authorities;[45] where the Strasbourg case law may be antiquated or has been overtaken by events;[46] where the legislative framework points in a different direction to the Strasbourg jurisprudence;[47] and where it is determined Strasbourg would consider the matter one the State is better able to determine locally (i.e. it would be within the State's margin of appreciation).[48] The courts can also decline to follow Strasbourg where it appears the Strasbourg jurisprudence on an issue is inconsistent with a fundamental aspect of domestic law or appears to be based on a misunderstanding or misconception of domestic law.[49] A clear and consistent line of settled Strasbourg jurisprudence will generally be followed, but, as Colm Ó'Cinnéide has noted, 'even this rule of thumb is not absolute'.[50] Thus, as Lord Reed, the President of the United Kingdom Supreme Court recently put it 'in interpreting and applying the Convention rights…domestic courts should ordinarily, but not invariably, follow the…ECtHR.'[51]

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[42] *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323.
[43] Doughty Street Chambers, 'Independent Human Rights Act Review Call for Evidence: Public Law Team Response' (March 2021) at 6 – copy on file with author.
[44] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2 at para 90.
[45] *Rabone v Pennine Care Foundation NHS Trust* [2012] 2 AC 72 at para 113.
[46] *R (on the application of Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 43.
[47] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at para 33.
[48] *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 at para 70.
[49] *R v Abdurahman (Ismail)* [2020] 4 WLR 6 at 110.
[50] Colm Ó'Cinnéide, 'Written Evidence to the Independent Human Rights Act Review' (March 2021) at para 11 – copy on file with author.
[51] Lord Reed, 'Response to a Call for Evidence Produced by the Independent Human Rights Act Review' (March 2021) at para 8 – copy on file with author.

Section 3, discussed in much more detail below, is 'arguably the foundational provision' of the HRA and imposes a binding obligation on courts to, in so far as it is possible to do so, read and give effect to primary and secondary legislation in a manner which is compatible with Convention rights. If there is a preference for tailored remedies in Canada, and if the strike-down is viewed as the primary remedy in Ireland, then a remedy under section 3 is the primary remedy for litigants under the HRA.

If a court cannot interpret legislation in a manner compatible with Convention rights, and the court deems the legislation to be incompatible with the Convention, then section 4 of the HRA, also discussed in more detail below, equips the court with a discretionary power to issue a declaration to that effect. Importantly, a declaration under section 4 does not affect the ongoing validity of the legislation and is not even binding on the parties to the proceedings in which it is made, thereby arguably leaving the successful party without a remedy. Thus, judges are not empowered to 'strike-down' legislation, a feature of the HRA which is frequently cited in support of the UK being a jurisdiction of 'weak form' judicial review.[52] However, under section 10(2) of the HRA, a minister of the Crown may use a ministerial order to remedy the incompatibility – without having to resort to ordinary legislative amendment – if they believe there are compelling reasons to do so. Additionally, if parliament fails to respond to section 4 declaration, litigants may apply to the Strasbourg court for relief. Though, as we shall see below, parliament has an almost perfect record of complying with section 4 declarations.

Section 8 of the HRA provides, similarly to section 24(1) of the Canadian Charter of Rights and Freedoms, that where a court concludes that a public authority has acted unlawfully, it may grant such relief, remedy, or make such an order within its powers as it considers just and appropriate. Public authority under the HRA includes courts, tribunals, and any persons exercising functions of a public nature but, crucially, does not include parliament. While there are similarities of form between section 8 of the HRA and section 24(1) of the Charter, the two provisions do not seem particularly

[52] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (PUP 2008).

comparable in terms of function due to the expansive way Canadian courts have interpreted section 24(1), specifically in respect of allowing it to include offering remedies for litigants for unconstitutional legislation in addition to a remedy under section 52(1) of the Constitution Act 1982. Section 8 of HRA, on the other hand, does not apply to things done by parliament.

An important provision of the HRA, though not necessarily relevant to its remedial operations, is section 19 which requires that, when introducing a bill before parliament, a minister must make a statement as to the compatibility of that bill with the Convention rights. If the minister does not believe the bill is compatible with Convention rights and he cannot make such a statement, he must declare that the government nonetheless wishes parliament to proceed with the bill.

4.4 – Section 3 of the Human Rights Act Considered

In the leading case on section 3 of the HRA, the House of Lords described the interpretive mandate imposed on courts by section 3 as the HRA's 'prime remedial measure'.[53] While some scholars do not view section 3 as remedy, instead viewing it as an 'interpretative guide to the statute's true meaning',[54] the overwhelming majority of scholarly and judicial opinion views it as a remedy and I follow that view here.

Though section 3 may be the primary remedy under the HRA, some empirical research suggests that it has been used relatively infrequently.[55] From the inception of the HRA in 2000 until 2013, David Crawford estimated that it had been used just 59 times across all superior courts in the United Kingdom,[56] with Robert Leckey suggesting in 2015 that the UK Supreme Court and its predecessor, the House of Lords, had ordered section 3 remedies in just over a dozen cases.[57] More recent research suggests that between 2013 – 2021, all superior courts in the UK mandated

[53] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at para 46.
[54] TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) at 202.
[55] JUSTICE, 'Response to Call for Evidence to Independent Human Rights Act Review' (March 2021) – copy on file with author.
[56] David Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 King's Law Journal 34 at 36.
[57] Leckey, *Bills of Rights* (n2) at 95.

the use of section 3 remedies in just 25 cases.[58] While this empirical analysis is not necessarily completely accurate given how section 3 is often referenced in support of deciding a case in a particular way without it being determinative of the issue, it does nonetheless suggests that it is used infrequently relative to how many rights cases come before the courts.[59]

4.4.1 – In so far as Possible?

UK courts have carried out the interpretative mandate given to them under section 3 in a 'reasonably aggressive fashion',[60] with some commentators even suggesting that it allows for 'radical interpretations' of statutes.[61] At the very least, it is common ground that the courts have settled on an expansive reading of the power given to them by section 3. The crucial question, of course, is how far courts can legitimately go when exercising that power, particularly when the text of section 3 is silent on the appropriate limits.[62]

Section 3 involves the courts using a two-stage process which has, on occasion, seen them displace the otherwise clear meaning of a statute.[63] First, the courts see if the ordinary meaning of the statute infringes Convention rights. If it does not, then no issue arises. If it does, then the courts go on to see if they can interpret the statute in such a way that the infringement could be removed or 'cured'.[64] The courts have held that, at this point, section 3 allows them to adopt an interpretation of the statute, chiefly through the remedies of reading-in and reading-down (both of which are discussed below), which 'linguistically may appear strained'.[65]

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[58] Florence Powell and Stephanie Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?', UK Constitutional Law Blog (March 2021). Available at https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/ - last accessed 11/02/2022.
[59] JUSTICE, 'Response to the HRA' (n55) at 20 and Durham Centre for Human Rights, 'Evidence to the Independent Human Rights Act Review' (February 2021) – copy on file with author.
[60] Mark Tushnet, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) at 330.
[61] Richard Ekins and Graham Gee, 'Submission to the Joint Committee on Human Rights: 20 years of the Human Rights Act' (Policy Exchange, September 2018) at 8 – copy on file with author.
[62] Aileen Kavanagh, 'What's so Weak about Weak-Form Review? The Case of the Human Rights Act 1998' (2015) 13(4) International Journal of Constitutional Law 1008 at 1015.
[63] Conor Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 Law Quarterly Review 248.
[64] Kavanagh, 'What's so Weak?' (n62) at 1016.
[65] *R v A* [2002] 1 AC 45 at para 44.

The leading case on the section 3 remedy is *Ghaidan v Godin Mendoza*.[66] The Rent Act 1997 granted a right of succession to a surviving spouse of a deceased tenant. "Spouse" was defined in the Act as a person who had been living with the original tenant "as his or her husband or wife." The question the applicant, who had been in a same-sex relationship with a since-deceased original tenant, asked the House of Lords was whether this definition included same-sex partners. The Court held that it did not with the result that the applicant's Convention rights had been infringed. To cure this infringement, the House declared that the definition of spouse in the Rent Act should be read as including same-sex couples. The House said its interpretation was justified on the basis that the purpose of the Act was to give succession rights to couples who were in stable committed relationships. Thus, the House's extension of the Act's protections to same-sex couples cohered with the legislation's underlying social policy.[67]

The Court was live to the striking nature of its decision and noted that the section 3 power was of an 'unusual and far-reaching character' and that it was not merely confined to resolving ambiguities within legislation.[68] In a famous passage, Lord Nicholls held that:

> "*even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning . . . Section 3 may require the court to depart from the legislative intention, that is, depart from the intention of the Parliament which enacted the legislation…*"[69]

Lord Nicholls's dicta in *Ghaidan* now represents the settled understanding of the nature of the section 3 obligation. In *R (Al-Skeini) v Secretary of State for Defence*, Lord Bingham held that:

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[66] *Ghaidan* (n53).
[67] Kavanagh, 'What's so Weak? (n62) at 1016.
[68] *Ghaidan* (n53) at paras 29 – 30.
[69] ibid at para 32.

> "*section 3 provides an important tool to be used where it is necessary and possible to* ***modify domestic legislation*** *to avoid incompatibility with the Convention rights protected by the Act*."[70]

He later emphatically endorsed this view in *Sheldrake v Director of Public Prosecutions*, where he stated that there was 'no room for doubt' that the interpretative mandate under section 3 is 'a *very strong and far-reaching one and may require the court to* ***depart from the legislative intention*** *of Parliament*.'[71]

This understanding of section 3 has been met with considerable criticism,[72] but it is the approach that the House of Lords and, latterly, the UK Supreme Court have unequivocally adopted. However, what it means in practice and the point at which interpretation under section 3 illegitimately slides into the legislative domain is not immediately obvious. In *Sheldrake*, Lord Bingham held that point would be reached where section 3 was being used to read legislation in a manner which:

> '*would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation*'.[73]

Inevitably, whether Lord Bingham's threshold for illegitimate interpretation under section 3 has been met will be a matter of degree. Indeed, cases where it has been used to both read-in and read-down legislation to remedy rights violations could equally plausibly be 'one person's illegitimate stretching of statutory language' or 'another person's clear application of Lord Bingham's cautious approach in *Sheldrake*.'[74]

4.4.2 – Reading-In under Section 3

Ghaidan is the archetypal example of reading-in under section 3 of the HRA. However, a controversial earlier case shows how judges can often struggle to tread the 'elusive

[70] [2008] 1 AC 153 at para 15.
[71] [2005] 1 AC 264 at para 28.
[72] Ekins and Gee, 'Submission to the HRA' (n61).
[73] *Sheldrake* (n71) at para 28.
[74] Colm Ó'Cinnéide, 'Written Evidence to the Independent Human Rights Act Review' (March 2021) at para 19 – copy on file with author.

divide' between correct interpretation and illegitimate law-making when ordering the reading-in remedy.[75] In *R v A (No 2)*, the House of Lords examined the 'rape shield' provision of the Youth Justice and Criminal Evidence Act 1999 which, subject to narrow exceptions, made evidence regarding the plaintiff's sexual history inadmissible.[76] As Kavanagh recounts:

> "*Although the relevant statutory provision was extremely detailed and clearly excluded the admissibility of such evidence (indeed was enacted specifically in order to curb judicial discretion to admit such evidence), the court read an entire subsection into the Act in order to give judges the discretion to decide whether such evidence was "so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention*."[77]

Whatever about its substantive merits, the reading-in conducted by the House in *R v A* seemed to go well beyond the cautious approach advocated by Lord Bingham in *Sheldrake*.

The approach of the House in *Ghaidan* is the one which has prevailed in the case-law on section 3, albeit that it has sometimes appeared that the principles enunciated in it have been retrenched somewhat.[78] *In Wilkinson v Inland Revenue Commissioners*, the House of Lords refused to interpret the word 'widow' for the purposes of section 262(1) of the Income and Corporation Taxes Act 1988 (the "**ICTA**") as including the word 'widower' to avoid sex discrimination under the Convention.[79] That section of the ICTA allowed widows, but not widowers, to receive a particular tax credit. The House rejected the applicant's argument on the basis that, while parliament had used gender neutral language in other sections of the Act, it was clear on a reading of the statute as whole that the section 262 benefit was clearly confined to widows. Lord Hoffman said that while there had been scope in *Ghiadan* to read-in words 'to construe a statutory provision as referring to, or qualified by, some general concept implied rather than expressly mentioned in the language used by parliament', such an

[75] Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) Oxford Journal of Legal Studies 259.
[76] [2002] 1 AC 45.
[77] Kavanagh, 'What's so Weak?' (n62) at 1018.
[78] Kavanagh, *Constitutional Review* (n1) at 91.
[79] [2006] All ER 529.

approach was not available in *Wilkinson*.[80] In *Ghaidan*, the words "*as* his or her wife or husband" were interpreted to refer to a relationship of social and sexual intimacy exemplified by, but not limited to, the heterosexual relationship of husband and wife.[81] In *Wilkinson*, however, Lord Hoffman concluded that there was no way in which the reasonable reader could read the word widow as including the surviving spouse because the 'contrary indications' in the statute were too strong.[82]

As *Wilkinson* demonstrates, what constitutes permissible reading-in under section 3 will be a matter of degree. In another case dealing with the word 'widow', it may very well be possible for the court to read it in a gender-neutral way. However, on the facts of *Wilkinson*, the court considered this was simply not possible due to the overwhelming evidence that the section 262 benefit was to be given only to widows. Thus, the House considered that a fundamental feature of the legislation would have been violated had the court extended it to widowers.

4.4.3 – Reading Down under Section 3

The general section 3 principles discussed above are applicable to both reading-in and reading-down under section 3. The use of the reading-down remedy under section 3 has been no less controversial than the jurisprudence on reading-in.

R v Lambert is a good example.[83] In that case, the House of Lords had to decide whether the imposition of the more onerous *legal* burden of proof – rather than the less onerous *evidential* burden – on defendants by sections 5 and 28 of the Misuse of Drugs Acts 1971 violated the applicant's right to a fair trial under article 6 of the Convention. In effect, these 'reverse onus' provisions allowed defendants to be convicted unless they could explain satisfactorily why they were in possession of specified quantities of drugs. The House acknowledged that parliament clearly intended to impose a legal burden on defendants and that the legislative aim served in doing so – to penalise the unauthorised possession of drugs – was legitimate. However, it held that the imposition of a legal burden, rather than an evidential one,

[80] ibid at para 18.
[81] ibid.
[82] ibid at para 19.
[83] [2002] 2 AC 545.

on defendants was a disproportionate means of achieving the legislative objective. Thus, the court decided to read-down the provision from a legal burden to an evidential one.

Another example of reading-down is *R v Offen*.[84] Section 2 of the Crime (Sentences) Act 1997 – a so-called 'two-strikes and you're out' provision – required the imposition of a mandatory life sentence where a defendant was convicted of two or more serious offences, save where there were 'exceptional circumstances' for not doing so. 'Exceptional circumstances' was not defined in the statute and the leading pre-HRA authority on it had interpreted it in such a way that judges generally felt compelled to impose life sentences regardless of the circumstances which various accused persons had said met the exceptional threshold.[85] The court read-down the provision as only requiring the imposition of mandatory sentences in circumstances where the accused person posed a danger to the public.[86]

Similarly, in *R (Hammond) v Home Secretary*, schedule 22(1) of the Criminal Justice Act 2003 provided that a life prisoner's tariff was to be determined by a single judge of the High Court without an oral hearing.[87] The House of Lords read the provision down to give the judge a discretion to hold an oral hearing where fairness required it, thereby making the provision compatible with the Convention right to a fair trial.

4.4.4 – Conclusion on Section 3

It might be theoretically unsatisfactory to say so, but whether the courts have exceeded their competence under section 3 can only be considered on a case-by-case basis. As we have seen, the types of case which make it to the Supreme Court will very often be finely balanced. It is rare that a singular, clear conclusion to the interpretative conundrum faced by the Court will be obvious.

In *Ghaidan*, Lord Steyn repeatedly emphasised the fact that section 3 is the HRA's 'prime remedial measure'.[88] Conversely, the House in *Ghaidan* described the

[84] [2001] All ER 154.
[85] Kavanagh, *Constitutional Review* (n1) at 23.
[86] *Offen* (n84) at para 99.
[87] [2005] UKHL 69.
[88] *Ghaidan* (n53) at paras 46 and 50.

discretionary declaration of incompatibility remedy under section 4 of the HRA as a 'measure of last resort.' And it is a measure of last resort which is 'inextricably linked' with section 3 as it does not come into play until the limits of section 3 have been reached.[89]

In *Ghaidan*, the House set down two core limits to the section 3 power. The first is that courts should not order the remedies of reading-in or reading-down where to do so would make the statute's new meaning inconsistent with a fundamental feature of the legislation. The second is that courts should not make decisions for which they are not equipped. The argument is that if there are several different ways of making a provision comply with the Convention such choices are better left to the legislature. Thus, it is at the point where a 'rights-consistent interpretation would cause too much discordance with the legislative scheme or require comprehensive legal reform' that the courts will consider the use of the declaration of incompatibility under section 4.[90]

4.5 – Section 4 of the Human Rights Act Considered

While the UK courts have not set down definitive rules on when the permissible limits of the section 3 remedial power will be reached, they have said that, in practice, it will be relatively easy to identify.[91] The decision in *Bellinger v Bellinger* is one such example.[92] The applicant, a post-operative male to female transsexual, claimed that the Matrimonial Causes Act 1973 violated her right to a family life as it only permitted males and females to marry, with the statute providing that gender could only be determined at birth. The House of Lords agreed that the 1973 Act violated her Convention rights but declined to remedy that violation using section 3. Instead, the Court held that as an issue like this raised issues which called for the widest possible public discussion and consultation – and for comprehensive legislative reform – a declaration of incompatibility was the most appropriate order.

[89] Kavanagh, 'What's so Weak?' (n62) at 1020.
[90] ibid.
[91] *Ghaidan* (n53) at para 50.
[92] [2003] 2 AC 467.

4.5.1 – To Declare or Not?

Mallory and Tyrrell argue that three key factors influence judges in deciding whether to grant a declaration of incompatibility.[93] Namely, 'the outcome of the instant case, the operation of the legislation is in question and the legitimacy of the judicial role.'[94] They also argue that the courts have interpreted these three considerations in a restrictive manner 'thus shrinking the power afforded to them under the declaration regime.'[95]

On the first factor, they point out that judges will generally not issue a declaration – even where they have identified a Convention violation – where a declaration is not necessary to dispose of the case.[96] For example, in *Walker v Innospec Limited*, a case about the discriminatory application of a spouse's pension to a same-sex couple in a civil partnership, the Court held that it was unnecessary to issue a declaration because it had already found the relevant section of the impugned legislation incompatible with EU Law.[97]

However, the courts will sometimes issue a declaration even where there is no strict need for one. In *R (Johnson) v Secretary of State for the Home Department*, the applicant challenged his deportation.[98] Although the applicant got an immediate remedy in the form of an order quashing his deportation, the Supreme Court also issued a section 4 declaration because the statutory scheme which enabled him to be deported in the first place would also likely affect many other similarly situated people. Thus, we can see the potential strength of section 4 for remedying what Kent Roach has termed 'systemic' violations of rights.[99]

On the second factor, the courts will weigh up whether to issue a declaration where a question mark already exists over the legislation. There are two types of case here. The first is where the legislation has the potential to be incompatible with the

[93] Conall Mallory and Hélène Tyrrell, 'Discretionary Space and Declarations of Incompatibility' (2021) 32(3) King's Law Journal 466 at 469.
[94] ibid.
[95] ibid.
[96] ibid at 476.
[97] [2017] UKSC 47.
[98] [2016] UKSC 56.
[99] Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (CUP 2021).

Convention in a given case but an incompatibility does not arise due to the particular factual circumstances of the applicant. In *R (Animal Defenders International) v Culture Secretary*, Lord Scott summarised the position for such cases when he said that declarations should not be granted unless:

> "*the circumstances of the case in which the question of making the declaration arises show that the legislative provision in question has affected a Convention right of the applicant for the declaration in a manner that is incompatible with that right*."[100]

This is the normal rule, but the courts have held that there may be 'borderline' cases where declarations can be granted in such circumstances.[101]

The second type of case is where the legislation is capable of being operated in a Convention compliant manner by the body tasked with applying it. In *Christian Institute v Lord Advocate*, the Supreme Court held that:

> "*if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with [those] rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights*."[102]

This reflects the duty of public authorities to act in a Convention complaint manner.

The final factor Mallory and Tyrrell suggest courts weigh up when deciding whether to grant a declaration is the legitimacy of the judicial role. Two concerns operate here. The first is institutional competence. The best example is the Supreme Court's seminal decision in *R (Nicklinson) v Ministry for Justice*, the UK's assisted suicide case.[103] Four of the nine judges held that while the Court did have the power to determine whether the ban on assisted suicide infringed the applicant's Convention rights, they would exercise restraint on the basis that the question involved considering issues that were moral in nature and that parliament was in principle better qualified to decide.[104] Three of the nine judges found went further and held that the impugned legislation

[100] [2008] UKHL 15 at para 42.
[101] *R (Chester) v Justice Secretary* [2013] UKSC 63 at para 102.
[102] [2016] UKSC 51 at para 88.
[103] [2014] UKSC 38.
[104] *Nicklinson* (n48) at paras 228, 267, 293, and 297.

was incompatible with the Convention but did not issue a declaration to that effect.[105] The final two of the nine, Lady Hale and Lord Kerr, would have issued a declaration.[106]

This case neatly encapsulates the institutional competence dilemmas faced by judges in deciding whether to issue section 4 declarations. For example, Lord Neuberger said that *Nicklinson* was not a case where the incompatibility was easy to identify and cure.[107] If the Court was going to issue a declaration, he said that 'the Court would owe a duty, not least to Parliament, not to grant a declaration without having reached and expressed some idea of how the incompatibility identified by the court could be remedied.'[108] Lady Hale, on the other hand, said that an incompatibility had been found and that there was 'little to be gained, and much to be lost, by refraining from making a declaration of incompatibility', further noting that parliament could simply do nothing if it wished.[109] As *Nicklinson* shows, the picture on whether institutional competence weighs in favour of granting a declaration or not is not altogether clear. Indeed, institutional points have weighed in favour of granting a declaration in several cases.[110] As with section 3 remedies, then, whether a declaration will be issued seems to be a matter of degree to be decided on a case-by-case basis,

There are some other features of the jurisprudence on section 4 which are worth highlighting at this point. For example, the House of Lords, in *Rusbridger v HM Attorney-General*, held that it would not issue a declaration of incompatibility in a case where it was unnecessary to do so.[111] Similarly, in emphasising its credentials as a discretionary remedial measure of last resort, the Supreme Court, in *Kennedy v Charity Commission*, held that a section 4 declaration was unlikely to be granted where rendering a statute compatible with the Convention could be achieved through the application of another statute or by resorting to common law powers.[112]

[105] Mallory and Tyrrell (n93) at 486.
[106] ibid.
[107] *Nicklinson* (n48) at para 116.
[108] ibid at 127.
[109] ibid at 300.
[110] Mallory and Tyrrell (n93) at 486.
[111] [2003] UKHL 38.
[112] [2014] UKSC 20.

4.5.2 – The Inter-Play between Section 3 and Section 4

If the courts believe that they can cure a rights violation through reading-in or reading-down under section 3 without causing unwarranted disruptions to the legislative scheme, then they will usually do so.[113] However, if comprehensive reform of an area is required or the courts believe that they lack the institutional competence to deal with an issue, then they will usually opt for a section 4 declaration. As Lord Bingham observed extra-judicially, if '…faced with the incompatibility, ministers and parliament would have practically effective options of how to cure it…they should be given the opportunity to find the best remedy; if not, s.3 provides the neatest and most final conclusion.'[114]

In addition to the language of section 3 which mandates courts to attempt to interpret legislation compatibly with convention rights in so far as it is possible to do so, the courts have been content to treat section 4 as an exceptional measure due to its so-called 'remedial emptiness'.[115] In other words, it is the very fact that the section 4 declaration – the much touted remedial measure hailed as a 'masterpiece of respect for parliamentary sovereignty'[116] – confers no immediate remedial benefit on litigants that courts have resorted to expansive use of reading-in and reading-down under section 3.

An intriguing feature of the interplay between the two provisions, however, is that this expansive use of section 3's remedial powers has, in the words of Lord Phillips, 'suited government ministers rather well.' The former President of the Supreme Court, writing extrajudicially, noted that, in his experience, ministers are generally happy – and instruct their counsel to say as much – to let the courts make legislation Convention compliant creatively so long as the overall thrust of the legislation is not impaired.[117]

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[113] Sujit Choudry and Kent Roach, 'Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies' (2003) 21 Supreme Court of Canada Law Review 204 at 243.
[114] Tom Bingham, 'The Human Rights Act' (2010) European Human Rights Law Review 568 at 572.
[115] Kavanagh, 'What's so Weak?" (n62) at 1022.
[116] Dominic Grieve, Joint Committee on Human Rights, Oral evidence: The Government's Independent Human Rights Act Review, HC 1161, (27 January 2021) 10.
[117] Lord Phillips, 'The First Lord Alexander of Weedon Lecture - The Art of the Possible: Statutory Interpretation and Human Rights' (22 April 2010) at 44 – copy on file with author.

4.5.3 – The Declaration of Incompatibility: Remedially Empty?

Thus, section 3 appears to have considerably more remedial bite than section 4. But, as we shall see, the UK government has an almost perfect record of acting in response – despite having no obligation to do so – to a section 4 declaration. As of February 2022, parliament had responded to 23 out of 32 declarations of incompatibility issued by the Supreme Court.[118] In five of those cases, parliament had already taken some form of remedial action prior to the declaration and four, at the time of writing, remain under consideration.[119] Consequently, while the section 4 declaration undoubtedly leaves a lot to be desired from the perspective of the individual, its operation in the UK suggests that it has at least *some* value for remedying systemic violations of rights, albeit that the systemic reforms it leads to are often minimal.

As we have seen, a key feature of the declaration of incompatibility is that it does not bind the parties to the proceedings in which it is ordered and confers no immediate remedy on the litigant. But two of the HRA's distinctive features mean that the declaration of incompatibility is not as 'remedially empty' as might first be thought. First, there is the pressure – both international and domestic – which the government will face if it does not take remedial action. If the government does not do anything in response to the declaration, it is always open to the litigant to go to Strasbourg. And if the UK Supreme Court has found for the litigant, it is highly likely that the Strasbourg court will too, thereby placing the UK under international pressure to do something about a Convention violation.[120] Additionally, declarations of incompatibility are a useful stick with which opposition MPs may choose to beat the government, not to mind the more considered pressure the government may come under before the Joint Committee on Human Rights.[121] Therefore, there is limited political incentive, and much potential political cost, for the government if it fails to comply with a declaration of incompatibility.

[118] Jeff King, 'Submission to the Independent Human Rights Act Review' (3 March 2021) at 1.
[119] ibid at 11.
[120] Kavanagh, 'What's so Weak?' (n62) at 1023.
[121] Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' at 115 in Murray Hunt, Hayley Hooper, and Paul Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

Second, there is something approximating a constitutional convention that government is bound to act following a section 4 declaration, with some commentators referring to a 'constitutional expectation' that government will act.[122] Indeed, the Lord Chancellor at the time of the HRA's introduction, Lord Irvine, stated that 'we expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility.'[123] And the Lord Chancellor's expectation has been largely correct.[124] To be sure, this compliance has not always been perfect – it has often been characterised by its grudging nature, delays, and has been frequently accompanied by negative political rhetoric about 'activist' courts.[125] Nonetheless, parliament has almost always taken *some* action on foot of a section 4 declaration.[126] One notable exception to this is the prisoner voting rights case, *Hirst v United Kingdom*, where despite the issuance of a declaration, and multiple rulings from Strasbourg that the UK's blanket ban on prisoner voting violates the Convention, parliament is yet to take any action.[127]

4.5.4 – The Nature of Parliament's Responses

If parliament has generally always responded to declarations of incompatibility, and arguably feels constitutionally bound to take some action, then to properly assess the remedial contours of the declaration of incompatibility, we need to consider the *nature* of parliament's responses.

Jeff King, in the leading work on the topic, has summarised parliament's responses to section 4 declarations as follows:

> "*The parliamentary record displays an attitude that has been predominantly accepting of and collaborative with the courts' role, though also minimalist in some responses and on the whole manifesting delays by the Government that have no principled defence.*

[122] Jeffrey Jowell and Jonathan Cooper, 'Introduction' at 3 in Jeffrey Jowell and Jonathan Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing 2003).
[123] Keith Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 Modern Law Review 79 at 92.
[124] King 'Submission to the HRA' (n118) at para 39.
[125] Kavanagh, 'What's so Weak?' (n62) at 1025 – 1026.
[126] Alison Young, 'Is Dialogue Working under the Human Rights Act 1998?' (2011) Public Law 773 at 779
[127] Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) Human Rights Law Review 1.

> *Lastly, it appears that there is, indeed, evidence of an emerging constitutional convention of response by the Government and Parliament to section 4 declarations of incompatibility.*"[128]

Essentially, parliament almost always complies with section 4 rulings, though sometimes grudgingly. Kavanagh and Sathanapally have made similar arguments, pointing about how the statements of parliamentarians themselves about courts 'overturning' or 'striking down' laws is reflective of a consensus that parliament must comply with section 4 declarations.[129] Indeed, Kavanagh has gone so far as to say that while often held up as the archetypal system of weak-form constitutional review 'given that the UK Parliament rarely (if ever) responds in a way which rejects court rulings outright, we may view the UK system as 'effectively strong-form' within a nominally 'weak-form' system.'[130]

There are three ways in which the government can respond to section 4 declarations. First, it can simply do nothing. Second, it can ask parliament to introduce amending legislation. And third, it can use the fast-track procedure under section 10 of the HRA which allows the relevant minister to amend the impugned legislation by ministerial order. King notes that the most popular method of response is, by some distance, ordinary parliamentary amendment.[131] However, he also points out that there can often be considerable delays – an average of 26 months – between the court's judgment and parliament doing anything about it.[132]

We know, then, that parliament generally complies with section 4 declarations through ordinary legislative processes, albeit not particularly promptly. An equally important question is the substance of how parliament responds to the declaration. The Joint Committee on Human Rights has consistently criticised parliament for

[128] Jeff King, 'Parliament's Role Following Declarations of Incompatibility Under the Human Rights Act' in Hayley Hooper, Murray Hunt, and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) at 168.
[129] Kavanagh, 'What's so Weak?' (n62) at 1027 and Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) at 154, 168, and 192.
[130] Kavanagh, 'What's so Weak?' (n62) at 1030.
[131] King, 'Parliament's Role' (n128) at 170.
[132] ibid.

complying with section 4 declarations in a minimal way.[133] Additionally, the length of time it takes parliament to respond rarely translates into a thoughtful, considered response. Apart from two notable examples,[134] King points out that in most cases:

> "*…there is very little, if any, direct engagement with the rights issues raised in the courts' judgments and almost no engagement with the judicial reasoning itself. In a number of instances, the judgments are not mentioned by name and the issue gets only fleeting mention in the general debates of either House*."[135]

4.5.5 – Conclusion on Section 4

What conclusions can we draw from this about the nature of the section 4 power? It is difficult to say for certain, but the declaratory nature of the remedy does not appear to have made courts any more assertive than if they had the power to invalidate legislation. However, the declaration can play an important role in remedying systemic harms. For example, in *Bellinger*, the declaration of incompatibility directly precipitated wide-ranging societal and parliamentary discussions on transgender issues which ultimately culminated in the Gender Recognition Act 2005. This statute gives people the legal entitlement to change their gender, the previous inability to do which was what the applicant in *Bellinger* had challenged. Thus, whether it is a stronger or weaker power than a strike-down is difficult to say, but it is indisputable that the section 4 declaration has considerable normative force and can lead to significant changes in the law.

4.6 – Invalidation of Primary Legislation in the UK?

We have seen that UK courts have historically reviewed legislation in several ways. Namely, in respect of colonial legislation, secondary legislation, EU law, and through the functions of the Privy Council. And we have seen that the power under section 3 of the HRA is significant in that it allows courts to change the wording of statutes. We have also seen that the power contained in section 4 of the HRA, given the near perfect

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[133] Joint Committee on Human Rights, '*Making of Remedial Orders*' (2001–02, HL 58, HC 473) at paras 160 – 170.
[134] The *Belmarsh* and *Bellinger* cases.
[135] King, 'Parliament's Role' (n128) at 186.

rate of compliance with declarations issued under it by parliament, is stronger than might appear at first glance. Indeed, that compliance rate has led some commentators and politicians to claim that UK courts now possess something like a *de facto* power to invalidate primary legislation.[136]

In addressing this argument, King has pointed out that, unlike a declaration of invalidity which generally has immediate effect, the delays in responding to declarations of incompatibility are often considerable, with an average of 26.5 months.[137] Thus, it is undoubtedly different to the strike-down. Of course, it is important not to overstate the significance delayed responses given the prevalence of suspended declarations and other limiting effects courts place on their findings of invalidity. If the declaration of incompatibility is ultimately always complied with, then, albeit in a limited sense, it does play a similar role to a strike-down in that it secures change to legislation following a judicial pronouncement.[138] However, the absence of any ability to immediately disapply legislation from the statute books is of considerable significance when it comes to characterising the section 4 declaration.

But a question has arisen as to whether – outside of the reviewing powers discussed already in this chapter – judges in the UK have the power to invalidate or ignore *primary* legislation of the Westminster parliament. Some senior judges have occasionally suggested that they may where parliament legislates contrary to some fundamental right or some fundamental constitutional principle. These suggestions first appeared in the speeches of Lady Hale, Lord Steyn, and Lord Hope in the seminal case of *Jackson v Attorney General*.[139] The applicants claimed that the Fox Hunting Act 2004, which banned fox hunting, had the status of secondary legislation and could therefore be the subject of a quashing order. The Act was made under the Parliament Acts which allows the House of Commons, in certain areas, to make legislation without the consent of the House of Lords. Thus, the applicant claimed that it was more properly characterised as secondary legislation and could therefore be quashed.

[136] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention,' (2002) 22 Legal Studies 340 at 349.
[137] King, 'HRA Submission' (n118) at 15.
[138] Kavanagh, 'What's so Weak?' (n62) at 1028.
[139] [2006] 1 AC 262.

The House of Lords unanimously rejected this argument and discussion in the case also concerned the extent to which the procedure in the Parliament Act could be subject to scrutiny by the courts. Lord Steyn suggested that the notion of unbridled legislative supremacy was not consistent with the UK's modern constitutional arrangements and that 'exceptional circumstances' – such as attempts to abolish either judicial review or the ordinary role of courts – might exist which could justify the courts refusing to apply primary legislation.[140]

Lord Hope was more emphatic and held that it 'is no longer right to say that [Parliament's] freedom to legislate admits of no qualification whatever'.[141] He went on to say that parliamentary sovereignty would be an empty principle if 'legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law'.[142]

Lady Hale said that the 'courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.'[143] Hooper has summarised the remarks in *Jackson* as 'suggest[ing] that the principle of parliamentary sovereignty may be called into question by the common law if an Act of Parliament enacted sufficiently serious restrictions upon access to the courts.'[144]

Building on his comments from *Jackson*, Lord Hope said in *AXA General Insurance v Lord Advocate* that courts might refuse to apply legislation which sought 'to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual.'[145] Lord Hope went on to say that:

> "*Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.*"[146]

[140] ibid at para 102.
[141] ibid at para 107.
[142] ibid at para 120.
[143] ibid at para 159.
[144] Hayley Hooper, 'Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review' (2021) 41(1) Oxford Journal of Legal Studies at 143.
[145] [2012] 1 AC 868 at para 51.
[146] ibid.

Similar 'exceptional circumstances' concerns were evident in the judgment of Lord Carnwath in *Privacy International v Investigatory Powers Tribunal*.[147] There, his Lordship considered what the courts might do when faced with the hypothetical situation of a 'decision of parliament to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.'[148] Ultimately, Lord Carnwath said that legislation of that nature would not be given 'binding effect.'[149]

An example of what these 'exceptional circumstances' might be was discussed in *Moohan v Lord Advocate*.[150] The applicant, a serving prisoner, challenged provisions of the legislation governing the conduct of the Scottish independence referendum in 2014. The impugned provision prevented serving prisoners – such as the applicant – from voting in the referendum. He claimed that this was unlawful as it violated the principle of universal suffrage inherent in the common law. The Supreme Court rejected this argument on the basis that universal suffrage did not inhere in the common law as suffrage had always been governed by legislation. However, Lord Hodge did not discount the possibility that suffrage might be restricted in such a way to force the Court to intervene:

> "*in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful*."[151]

Hooper, in making the case that judges in the UK do have the power to invalidate legislation in exceptional circumstances, has argued that:

> "*exceptional circumstances review is an organic outgrowth of pre-existing elements of the common law approach to judicial review of various forms of legislation. It merely represents the end point on a spectrum of control that begins with statutory*

[147] [2019] 4 ALL ER 1.
[148] ibid at para 144.
[149] ibid.
[150] [2014] UKSC 67.
[151] ibid at 35.

interpretation and ends with the potential for courts to refuse to recognise the effect of legislative provisions."[152]

Ultimately, whether judges have this power is an open question and it is uncertain what would happen if judges went so far as to strike-down primary legislation or declare it invalid. Mark Elliott has characterised the statements in the above line of cases as warning shots across the bows of parliament, where the courts are effectively telling parliament not to test the extent of judges' ultimate commitment to parliamentary sovereignty.[153] And, as we have seen in the earlier sections of this chapter, UK courts can use aggressive interpretative techniques to avoid finding themselves in situations which might call for invalidation in other jurisdictions. Given the UK's particular constitutional order, such an approach is probably wise.

4.7 – Conclusion

In conclusion, the UK's remedial approach can be summarised as follows. Section 3 of the HRA allows courts to conduct aggressive interpretation when reading-in words to legislation or reading-down a statute's affect. Occasionally, this has led to courts appearing to effectively re-write statutes, thereby frustrating the intention of parliament. Generally, however, courts will stop their interpretative endeavours at the point where they run the risk of changing the overarching purpose of the statute. Of course, whether that point is reached will not always be obvious and may be the subject of reasonable disagreement.

If courts cannot interpret legislation under section 3 in a manner compatible with the Convention, then courts may proceed to issue a discretionary declaration of incompatibility under section 4. This is like the Canadian Supreme Court's preference for tailored remedies such as reading-down and reading-in, albeit that preference is a judicial innovation whereas courts in the UK are required by the HRA to use section 3's powers before turning to section 4. The section 4 declaration provides no immediate remedy to the litigant but given parliament's almost perfect record of

[152] Hooper (n144) 'Legality, Legitimacy, and Legislation' at 168.
[153] Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Sir Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).

compliance with such declarations, it does play a significant role in remedying systemic legislative harms. However, claims from some scholars and judges that it amounts to a de-facto strike-down power are probably inaccurate due to the significant differences between a declaration of invalidity and one of incompatibility.

Despite this, there is but no doubt that the UK's courts remedial powers are considerable. The normative force of a section 4 declaration should not be underestimated, and the section 3 interpretative powers are potentially even stronger than a declaration of invalidity. Thus, as Aileen Kavanagh has argued, perhaps the archetypal weak-form system of review which the UK is said to possess is not all that weak after all.

There is a question as to whether, in exceptional circumstances, UK courts could declare primary legislation invalid or refuse to apply it. The orthodox view is that they could not, but some judicial pronouncements seem to cast doubt on this orthodoxy. However, it would likely take some extraordinary and bad faith legislative activity by parliament for the courts to even consider such a course of action. And even then, it is likely that the courts would use all other powers at their disposal to avoid making a finding of invalidity. or to refuse to apply it. To be sure, though, UK courts have exercised powers of invalidation without controversy in respect of secondary legislation, conflicts with EU legislation, through the functions of the privy council, and in respect of devolution matters. And when exercising these powers, like their Canadian and Irish counterparts, UK courts have adopted the pragmatic distinction between voidness and voidability.

Chapter 5 | Remedial Discretion, Problems of Constitutional Theory, and Reimagining the Separation of Powers

CHAPTER OVERVIEW

5.1 – Introduction

The preceding three chapters primarily engaged in a doctrinal examination of remedial judicial practice for unconstitutional legislation in Canada, Ireland, and the United Kingdom. The thesis now moves into the core of its theoretical and analytical stages.

This chapter has three broad purposes. The first is to address the major issues of constitutional theory which the remedial practice outlined in Chapters 2 – 4 raises. Namely, separation of powers and rule of law based concerns.

Essentially, scholars and judges argue that the kind of remedial discretion outlined in Chapters 2 – 4 raises separation of powers concerns as enhanced remedial powers can lead to judges sliding impermissibly into the legislative domain.[1] On the rule of law, the argument is that remedial judicial discretion can undermine certainty and predictability in the law.[2] As the discussion below will show, novel remedies which deviate from the traditionally understood judicial role – that is, simply identifying constitutional flaws with legislation – can bring concern about the proper application of those two concepts sharply into focus.

However, a core argument of this thesis is that these concerns, while not without merit, arguably rest on descriptively inaccurate and normatively undesirable accounts of the separation of powers and, more specifically, the role of the judge in constitutional review of legislation. Thus, the second purpose of this chapter is to critique in detail those accounts which subtend these criticisms.

Of course, this thesis is an attempt to bring some conceptual clarity and consistency to the field of judicial remedies in constitutional review of legislation. The final purpose of this chapter, then, is to provide a descriptively accurate and normatively appealing account of the separation of powers – an account which, for the reasons outlined in Chapter 1 – is informed by a neo-republican account of freedom and government. It does this to lay the groundwork for the ultimate purpose of this thesis;

[1] See, for example, Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14(3) International Journal of Constitutional Law 584.
[2] See, for example, the dissenting judgments in *Ontario (Attorney General) v G* [2020] SCC 38.

which is to offer a normative basis for a series of suggested principles which may serve as a guide for judges in the exercise of their remedial powers.

An important preliminary point must be made at the outset of this chapter, however. This thesis is not, primarily, a work of political theory. It is therefore entitled to make design choices which operate on the basis of certain assumptions, so long as it makes a reasoned and defensible case for those choices and acknowledges those assumptions. And chief amongst those assumptions is that Philip Pettit's theory of freedom and government – in particular its account of freedom as non-domination which underpins the majority of the theory's salient features – is a plausible background theory of the State. So, what follows is necessarily not an exhaustive analysis of the weaknesses of, for example, freedom as non-interference and the corresponding strengths of freedom as non-domination. That is a background debate which need not detain us unduly here. But it is nonetheless important to highlight some of the key flaws with the freedom as non-interference thesis given the extent to which they appear to underpin orthodox accounts of the State which, in turn, underpin those orthodox accounts of the separation of powers which raise difficulties for the type of remedial judicial practice which this thesis seeks to defend.

The same point also applies, albeit with less force, to the account of the separation of powers which this chapter outlines. Theory can only do so much in a thesis like this and, as with the background political theory which informs the thesis, I do make certain assumptions about the plausibility of the "collaborative constitutionalist" accounts of the separation of powers over other accounts. I am entitled to less leeway with respect to that aspect of the thesis, however, given the intimate connection between the separation of powers with constitutional review generally and with judicial remedies for unconstitutional legislation specifically.

That point aside, the remainder of this chapter proceeds in the following way. It begins by outlining orthodox accounts of the separation of powers which both judges and scholars seem to employ when they criticise remedial discretion. It then sets out, from the perspective of those orthodox accounts, the separation of powers issues scholars and judges suggest are posed by the different remedies discussed in Chapters 2 – 4. It then moves to a discussion of the accounts of the rule of law which, again,

seem to form the basis for judicial and scholarly critiques of remedial discretion from a rule of law perspective. As with the separation of powers, the chapter then outlines the rule of law issues associated with the remedies discussed in Chapters 2 – 4.

In building its more plausible account of the separation of powers, the chapter then outlines the core tenets of neo-republican thought, chiefly the articulation of that thought by Philip Pettit.[3] As I hope to demonstrate, this republican theory of government tends to suggest that a more fluid account of the separation of powers is appropriate in modern constitutional democracies such as the three I examine in this thesis. Consequently, the chapter moves to critique the 'pure view' of the separation of powers which seem to underpin remedial discretion. Mindful of the implications of republicanism for the separation of powers, the chapter outlines the key features of the "collaborative constitutionalist" theory of the separation of powers which, I argue, is not only a more descriptively accurate account of the separation of powers, but is also one which is capable of meeting the demands of the republican state. It also highlights the implications of this account of the separation of powers for remedial judicial practice. Finally, the chapter concludes with a summary of the arguments made.

5.2 – The Separation of Powers

When judges and scholars invoke the separation of powers as a reason for taking or not taking a particular course of action in cases of constitutional review, it is not always obvious what exactly they have in mind. For example, in a famous Irish case on the separation of powers, *TD v Minister for Education*, where the Supreme Court refused to issue a mandatory order against the government compelling it to build a secure detention centre for vulnerable children, substantially different views of the separation of powers were evident in the minority and majority judgments.[4] For the minority, Denham J conceived of the separation of powers as a *subordinate*

[3] See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012); and Philip Pettit, *The State* (PUP 2023).
[4] [2001] 4 IR 259.

constitutional value, the primary purpose of which was as a functional doctrine to facilitate good constitutional governance, but which could ultimately be trumped by a concern for the efficacy of constitutional rights.[5] Denham J would have granted the mandatory order against the executive.

For the majority, on the other hand, Hardiman J conceived of the separation of powers as a *superordinate* constitutional value, one with clear delineations and which, contrary to Denham J's view, could trump any other constitutional concern, including a concern for the efficacy of constitutional rights.[6] He refused the mandatory order and endorsed the view of Murray J in holding that mandatory orders against the executive could only be granted in 'exceptional circumstances' where the executive had acted in 'clear disregard' of its constitutional obligations, with 'clear disregard' requiring a deliberate decision by the executive – accompanied by bad faith or recklessness – to act in breach of those obligations.[7]

Although it was a case about review of executive rather than legislative action, what the differing positions expressed in *TD* show is that the separation of powers is a contested concept, and differing views of it will have different implications for the proper scope of remedial powers of judges.[8] Thus the purpose of this section is to outline some of the key tenets of orthodox conceptions of the separation of powers – such as that outlined by Hardiman J in *TD* – which often appear to underpin judicial and scholarly critiques of remedial discretion. It does this as it is important to be clear on the exact principles being invoked to defend or criticise a particular course of remedial action.

Of course, no account of the separation of powers could truly be said to be authoritative. And I do not pretend that what follows below is such an account.

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[5] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) at 229 – 235.
[6] ibid.
[7] *TD* (n4) at 337.
[8] In *Burke v Minister for Education* [2022] IESC 1, the Supreme Court appeared to row back from the high bar set in *TD* in circumstances where individual constitutional rights had been violated by executive action. And the decision to do this seems to have been based on a different view of the separation of powers than that expressed by the majority in *TD*. But the point still holds – different conceptions of the separation of powers will have different remedial consequences.

Nonetheless, it is possible to discern some common principles which seem to form part of orthodox views of the separation of powers.

5.2.1 – Orthodox Accounts

The classic view of the separation of powers is generally – and rightly or wrongly – most closely associated with Montesquieu.[9] It is also known as the 'pure view' of the separation of powers, and it envisages a tripartite distribution of powers and functions between the legislative, executive, and judicial branches of government.[10] According to this view, the functions of the state are dispersed in a mutually exclusive way in a system of checks and balances to maintain individual freedom.[11] The purpose of the separation of powers, on these accounts, is 'not to avoid friction, but, by means of the inevitable friction incidental to the distribution of governmental powers among three departments, to save the people from autocracy.'[12] As Vile put it:

> "*the government should be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agents of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.*"[13]

In these accounts of the separation of powers, then, the state is seen as a Leviathan from which citizens need protection. And although Vile himself admitted that this 'pure view' had rarely, if ever, been instantiated in any state, it has, as Kavanagh suggests, been 'widely invoked as an ideal-type or a benchmark against which

[9] Charles Montesquieu, *The Spirit of the Laws* (CUP 1989).
[10] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (OUP 1967).
[11] Eric Barendt, 'Separation of Powers and Constitutional Government (1995) Public Law 599.
[12] *Myers v U.S.* (1926) 272 U.S 52 at 293. See also Montesquieu (n9), Book 19, Chapter 27.
[13] Vile (n10) at 13.

alternative conceptions of the separation of powers are assessed.'[14] For example, in *TD*, Hardiman J articulated a rigid conception of the separation of powers and stated that the boundaries between the three branches of government were not 'porous'.[15] Similarly, in *R (Anderson) v Home Secretary*, Lord Bingham endorsed the view that the rule of law depends on a 'complete functional separation' of the branches of government from one another, with Lord Steyn also describing such a separation as an 'essential element of a democracy.'[16]

Thus, the pure view of the separation of powers seems to envisage three key elements.[17] First, separation of institutions. Second, separation of functions. And third, separation of personnel. And it is the separation of functions which seems to lie at the heart of the 'pure view' of the separation of powers – the notion that each branch of government carries out its own function and does not encroach on the functions of the other branches.[18]

5.2.2 – The Separation of Powers and Remedies

Such are the broad outlines of the accounts of the separation of powers upon which critiques of remedial discretion frequently appear to rest. I leave aside for the moment the plausibility of those accounts. I return to them in much greater below but, suffice it to say for now, I do not think they represent either a descriptively accurate account of how the separation of powers functions in practice, or a normatively desirable account of how the doctrine ought to be understood. Instead, I suggest that the demands of the modern state seem to call for a more fluid view of the separation of powers, such as that offered by the emerging 'collaborative constitutionalist' school, chiefly associated with scholars such as Aileen Kavanagh, Dmitrios Kyritsis, and Eoin Carolan.[19] For these theorists, the point of the separation of powers is to structure the

[14] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) at 224.
[15] *TD* (n4) at 367 – 371.
[16] [2003] 1 AC 837 at 882 and 899 respectively.
[17] Kavanagh (n14) at 225.
[18] ibid.
[19] Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) King's Law Journal 43 and *The Collaborative Constitution* (CUP 2024); Dmitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017); and Eoin Carolan, *The New Separation of Powers: A Theory of the Modern State* (OUP 2009).

allocation of public power in a way that tracks the demands of justice and promotes good government, thereby strengthening the legitimacy of political institutions. And to do this, institutions must interact in a manner which respects each-other's functions so that instead of automatically being pitted against one another as adversaries, they relate to one another in a mutually responsive way to serve the common good. As Kavanagh suggests, the inter-institutional dynamic might be 'recast' from one of 'rivalry', to one of 'collaboration'.[20] This duty of respect and collaboration mandates that parties give one another leeway to do their share.[21] But it also seems to require that, as well as giving leeway to one another, institutions must, on occasion, positively support one other.[22]

That said, I highlight the key features of the orthodox accounts to illustrate the conceptual basis from which the following critiques of remedial discretion are frequently made. From a separation of powers perspective, the core critique of increased remedial discretion is that it has the potential to increase the power afforded to judges, with the ultimate consequence of that increase in power being that judges could stray into the legislative or executive role. As Leckey has put it, if judges have more remedial options available to them, there is a corresponding increase in the choices judges can make about how to exercise their powers.[23] And, according to Leckey, these choices will, inevitably, be political – in the sense of values-based – choices. His particular concern is that increased remedial discretion could lead to judges being seen to have engaged in a deliberate or non-deliberate 'grab for power', with an increasing number of issues subjected to constitutional review, and the remedies for those issues changing on an 'opaque and shifting' basis.[24] And any such 'grab for power' could undermine the distinctiveness of inter-branch roles and responsibilities within the constitutional order.[25] Indeed, as we have seen in Chapters 2 -4 and now return to again, it is not difficult to see how the operation of the different remedies can illustrate these concerns.

[20] Kavanagh, 'Recasting the Political Constitution' (n19).
[21] Kyritsis (n19) at 45.
[22] ibid at 46.
[23] Leckey (n1) at 597.
[24] ibid.
[25] ibid.

5.2.3 – Declarations

Declarations of invalidity (the so-called "strike-down") declarations of incompatibility, and the temporal limits courts may put on these declarations – be it through suspension, or prospective and retroactive effect – can all potentially engage the separation of powers.

Beginning with the strike-down itself, whether unelected judges should have the power to declare primary legislation invalid has been a central debate in constitutional theory for the past several decades.[26] Defenders of the strike-down remedy argue that it is necessary to protect rights, especially minority rights from potentially tyrannical or prejudiced majorities,[27] while its critics decry it as a fundamentally undemocratic device, which undermines the principle of self-government.[28] In particular, opponents of the strike-down contend that because of the contestable and political nature of rights which may be the subject of 'reasonable disagreement', it is inappropriate for unelected and unaccountable judges to have the final say or the last word on questions of rights adjudication.[29] Rights, as contestable moral and political claims, it is argued, ought to be debated and decided upon democratically, rather than being determined by judicial elites.[30] These concerns are potentially also applicable to section 4 declarations of incompatibility in the UK, given, as we saw in Chapter 4, the normative force that these declarations seem to possess (albeit the section 4 declaration doesn't leave the immediate lacuna in the law which the strike-down does and parliament is not obliged to take any action).

Turning to the temporal limits that courts place can declarations, suspended declarations are potentially problematic from a separation of powers perspective in two primary ways. First, they could force the legislature to confront an issue at a time not of its choosing.[31] If courts – as they frequently do – impose a time limit on the

[26] See, for example, Jeremey Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) Yale Law Journal 1346.
[27] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (PUP 2008) at 16.
[28] ibid.
[29] Jeremy Waldron, *Law and Disagreement* (OUP 1999).
[30] ibid.
[31] Robert Leckey, *Bills of Rights in the Common Law* (CUP 2015) at 137.

suspension, legislatures may feel obliged to deal with the issue within that time. It is arguable, then, that the legislature is being mandated to exercise its law-making powers at the behest of another body.

Second, suspended declarations have the potential for courts to exercise some degree of ongoing supervisory role over the legislature. In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, the Supreme Court of Canada held that a trial judge could retain supervisory jurisdiction in relation to constitutional cases and could require the State to report back on the progress of the government's compliance with the court's order.[32]

Each of these points raise a connected problem – that in either deciding on whether to suspend in the first place, or on the length of a proposed suspension, courts may be invited to consider issues which it is not at all obvious are within their proper competence. Take the *Heneghan* case from Chapter 3. In asking the parties involved in that case for submissions on what the length of the suspension ought to be, the Supreme Court of Ireland found itself presented with an indicative timeline of how long the State parties thought it might take to enact replacement legislation for elections to the university panels of Ireland's upper house. Supervising that process, or indeed expressing a view on its merits, seems difficult to square with the traditional view of the judicial role. In other words, in attempting to offer a coherent explanation for why it has chosen to suspend a declaration's effects – and therefore, (as we saw in Chapter 2) as the Supreme Court of Canada noted in *Albashir*, automatically do some form of "*harm*" to a State's constitutional order – there is a significant risk that the court will be drawn into the political sphere. Conversely, if the court does not engage with whatever reasons are put forward to justify the length of a suspension, the court risks not providing a coherent, principled, and transparent ruling on that question. And, as we have seen in each of Chapters 2 – 4, these are the types of issues which have dogged remedial practice and which this thesis attempts to help courts plot a route through.

[32] [2003] 3 SCR 3 and Po Jen Yap, 'New Democracies and Novel Remedies' (2017) Public Law 30 at 31.

5.2.4 – Tailored Remedies

Reading-in, reading-down, and severance – termed 'tailored' remedies in the Irish and Canadian context with the section 3 power being their equivalent in the UK context – seem highly susceptible to the charge of being remedies which allow judges to stray beyond the proper boundaries of their role. After all, these remedies effectively allow courts to rewrite statutes through the removal or addition of words.

For example, as we saw in Chapter 4, in *Ghaidan v Godin Mendoza*, the House of Lords used its power under section 3 of the HRA to read-in same-sex couples as forming part of the definition of "spouse" in a particular section of the Rent Act 1997.[33] And, as we also saw, Lord Nicholls clearly stated that section 3 entitles and sometimes requires courts to "depart from the intention of the Parliament" which enacted the legislation.[34] Similarly, in *R v A (No 2)*, the House of Lords read an entire subsection which allowed a complainant's sexual history to be examined in certain circumstances into a statute, despite the original statute clearly prohibiting any such examinations.[35]

Criminal statutes more generally have seen considerable use of reading-down and severance to cure their unconstitutionality. As we saw in Chapter 4, in *R v Offen*, the House of Lords read-down section 2 of the Crime (Sentences) Act 1997 which required – unless exceptional circumstances existed – the imposition of mandatory life sentences if an accused had been convicted of two or more serious offences.[36] The House read-down the provision as only requiring the imposition of a life sentence where the accused posed a danger to the public, effectively reversing the underlying thrust of the statute. And as we saw in Chapter 2, in *R v Hess*, the Supreme Court of Canada severed words from a statute which precluded the accused of availing of the defence of honest mistake as to the age of the victim and ordered a retrial under the newly constitutionally compliant section.[37]

Whatever one might think of the political desirability or otherwise of the outcome of these cases, they undoubtedly involve unelected judges re-writing primary

[33] [2004] 2 AC 557.
[34] ibid at para 32.
[35] [2002] 1 AC 45.
[36] [2001] All ER 154.
[37] [1990] 2 SCR 906.

legislation. And according to 'pure' views of the separation of powers, this is potentially a significant intrusion by the courts into the legislative domain and seems to involve judges going beyond the proper boundary of their own role – which is to identify flaws in legislation and leave it to parliament to decide how to fix those flaws.

5.3 – The Rule of Law

Along with the separation of powers, the rule of law is the other major concept invoked by scholars and judges when criticising remedial judicial discretion. But, again, like the separation of powers, it is not obvious precisely what critics of remedial discretion mean when they invoke the rule of law in opposition to a particular course of remedial action.

As with the separation of powers, the rule of law is a contested concept.[38] But, again much like the separation of powers, it is possible to outline some key minimum features of the concept which are generally accepted, or at least constitute minimum necessary requirements for it to be said that the 'rule of law' exists in a given polity. Again, what follows here is not presented as an authoritative account of the rule of law. Rather, as with the discussion of the separation of powers above, the below outline of the rule of law is intended to illustrate the rule of law concerns scholars and judges have in mind when critiquing remedial discretion from the perspective of the rule of law.

5.3.1 – The Essential Features

It is often said that debates about the rule of law centre on whether the rule of law is a purely 'formal' political ideal or whether it requires adherence to more 'substantive' values.[39] Formal conceptions of the rule of law are often associated with scholars such as Lon Fuller and Joseph Raz. In his famous tale about King Rex, Fuller identified eight principles of legality which are generally understood to capture the essence of

[38] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.
[39] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467.

the rule of law.[40] According to Fuller, laws must: (1) be of general application; (2) be publicly available; (3) be prospective; (4) be clear; (5) be non-contradictory; (6) not ask the impossible; (7) not be constantly changing; and (8) display congruence between the law as it is written down and as it is applied by legal officials.[41] Famously, Fuller said that where any one of these eight criteria is not satisfied, such a failure:

> "*does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of a contract*."[42]

Similarly – and heavily influenced by Fuller – Raz identified a list of eight (non-exhaustive) principles which legal systems devoted to the rule of law ought to possess.[43] They can be grouped into two categories.[44] The first is a series of requirements of the form that laws should take, including that they be clear, stable, and prospective. The second category relates to the enforcement of laws and includes requirements that judges be independent, courts accessible, and that the discretion of enforcement agencies should not be permitted to pervert the law.

Accounts like Fuller's and Raz's are generally understood to represent the minimum features necessary for the rule of law to exist and are also generally understood to constitute 'formal' or 'thin' conceptions of the rule of law.[45] Essentially, stripped of technicalities, these accounts define the rule of law as simply meaning that government officials and citizens are bound by and abide by the law.[46]

These thin accounts can be contrasted with 'thicker' accounts of the rule such as those articulated by Lord Bingham, TRS Allan, and many more besides.[47] It is beyond the scope of this chapter to provide an overview of the many and varied substantive

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[40] Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2006) 24 Law and Philosophy 239 at 240.
[41] Lon Fuller, *The Morality of Law* (2nd edn, YUP 1969) at 39.
[42] ibid.
[43] Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) at 214 – 218.
[44] N.W. Barber, *The Principles of Constitutionalism* (OUP 2018) at 94 – 95.
[45] Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) Singapore Journal of Legal Studies 232 at 233.
[46] ibid.
[47] Tom Bingham, *The Rule of Law* (Penguin 2010); T.R.S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003); and Barber (n44).

iterations of the rule of law which exist in the literature, but theorists working in this thicker tradition have variously argued that rule of law is only satisfied where international human rights norms are respected, where substantive political equality is pursued, or where there is a meaningful welfare state.[48]

Again, as with the separation of powers, I return below to how I think we can understand the rule of law as a concept – through the prism of the collaborative account of the separation of powers – as one which allows for more flexibility in how judges exercise their remedial powers, even where a supposedly 'thin' conception of the rule of law is adopted. It seems that so long as the Fullerian and Razian requirements are satisfied such that the legal system is generally in 'legally good shape',[49] a degree of flexibility and indeterminacy and flexibility in the law is permissible to ensure good government.[50] And so on one reading of the rule of law, it may seem unconscionable to allow an unconstitutional statute to remain in force – which, as we have seen, is frequently what happens when courts suspend declarations of invalidity. But, on another reading, where striking that statute down would lead to a legally chaotic situation – like in the *Re Manitoba Language Rights* case discussed in Chapter 2 – allowing that statute to remain in force might vindicate the rule of law.[51]

5.3.2 – The Rule of Law and Remedies

We know, then, that the rule of law is, at a basic level, generally understood to mean that government, in all its actions, shall be bound by publicly announced, previously fixed rules – rules which enable citizens to plan their affairs based on knowledge of how government will use its coercive force.[52] It is a political ideal which requires that people should obey the law and be ruled by it, while also requiring that governments shall be ruled by law and subject to it.[53] The virtue underpinning all of these points is

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[48] ibid.
[49] John Finnis, *Natural Law and Natural Rights* (OUP 1980) at 270. Finnis was referring here to the types of features outlined by Raz and Fuller.
[50] Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 1.
[51] [1985] 1 SCR 721. See, for example, Gerard Hogan, 'Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath' in Kieran Bradley, Noel Travers, and Anthony Whelan (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014) at 247 – 249.
[52] Friedrich Hayek, *The Road to Serfdom* (Routledge 1944) at 54.
[53] Raz (n43) at 211- 212.

legal certainty: those subject to the law need be certain of what the law is, and how it will be enforced, in order to plan their affairs and pursue their own ends. (Of course, it can mean more than that depending on who you ask, but even those broader accounts seem to be contingent on a legal system possessing the 'thin' features outlined by the likes of Fuller and Raz.)

The key problem with the exercise of remedial discretion, from the point of view of the rule of law, then, is that this value of legal certainty might be undermined. Indeed, remedies which undermine any of the eight principles outlined by Fuller, on his reading of the rule of law, have the potential to seriously undermine the legal system. And, as we saw in Chapters 2 – 4 and now return to again, it is not difficult to see how the operation of the individual remedies discussed in those chapters can raise rule of law concerns.

5.3.3 – Declarations

The striking down of legislation has the potential to cause significant rule of law problems. For example, as we saw in Chapter 3, had the Supreme Court of Ireland not limited the retroactive effects of its decision in *Murphy v Attorney General*, the Irish state could have faced a major public finances problem.[54] Or in Canada, as we saw in the *Manitoba* case, an entire province could have been left without *both* any state level laws *and* a state legislature to enact replacement laws had the Supreme Court immediately struck down the impugned enabling statute.

Concerns such as these are some of the reasons which motivated judges to suspend declarations in the first place. But suspended declarations can also be problematic from a rule of law perspective. As outlined in Chapter 2, where this remedy is deployed, a court has found that a law is unconstitutional. However, the court delays that declaration's effects to allow the legislature time to fix the constitutional flaw. The obvious problem, then, is that a law which has been the subject of a definitive finding of unconstitutionality is allowed to remain on the statute-books. This brings with it the potential for confusion around enforcement of that law – confusion which arose in a particularly acute context in *Albashir*. Is the law still to be obeyed, or are

[54] [1982] IR 241.

legal officials to take pre-emptive steps and alter how they treat people who, absent the finding of unconstitutionality, would ordinarily be bound by the law? Furthermore, the individual litigant who has brought the constitutional challenges does not receive any remedy for the violation of their constitutional rights.

A potential solution to these problems is to allow for individualised exemptions to the effects of the declaration of invalidity. Canadian courts frequently grant such exemptions, as demonstrated in *Attorney General (Ontario) v G*.[55] As we saw in Chapter 2, in that case the Supreme Court of Canada delayed a declaration of invalidity but granted the individual applicant an exemption from that declaration. But such individualised exemptions arguably not only undermine legal certainty, but also equality before the law, and the principle that laws be of general application. They potentially undermine legal certainty in that it may be unclear whether other similarly situated subjects would be able to avail of an exemption. They potentially undermine equality before the law in that similarly situated classes of people are treated differently based on whether they had the means, time, or knowledge to take a case. And they potentially undermine the principle that laws be of general application in that different groups of people will be subject to different laws.

The imposition of other temporal limits on declarations of invalidity, such as the extent to which declarations have retrospective or prospective effect, also raise similar rule of law concerns. For example, as will be recalled from Chapter 3, in *A v Governor of Arbour Hill*, the applicant remained in prison even though the statute under which he had been convicted had been declared unconstitutional in the earlier case of *CC v Ireland*.[56] In *A*, the Supreme Court of Ireland limited the retrospective effect of its decision in *CC* with on the basis of the rule of law, reasoning that the past could not and should not always be undone. I return to *A* in Chapter 6 on what the proper scope of remedial discretion ought to be, but – and despite the Supreme Court's concerns that allowing Mr A's release would imperil the rule of law – there is no doubt but that keeping a person in prison on foot of an unconstitutional statute sits uncomfortably with generally accepted principles of the rule of law.

[55] [2020] SCC 38.
[56] [2006] 4 IR 88 and [2006] 4 IR 1 respectively.

5.3.4 – Tailored Remedies

Tailored remedies may also engage the rule of law, albeit to a lesser extent than they engage the separation of powers. Again, it is the principle of certainty and predictability of the law which is in play. As we have seen, different remedial choices courts make can change the law in different ways. Even those remedies which are deployed in service of the separation of powers and the rule of law as more modest alternatives to the strike-down can change the law significantly. And if there are a range of different remedial options open to courts which can change the law in different ways, then the value of certainty and predictability in the law could, arguably, be undermined.

5.4 – The Republican Separation of Powers

The separation of powers and rule of law concerns I have discussed in this chapter are not exhaustive, and different scholars may place different emphasis on the ways in which the remedies outlined in Chapters 2 – 4 engage both concepts. But the concerns outlined do represent the major challenges remedial discretion pose to those of us who argue that judges should have a range of remedial options at their disposal in pursuit of good constitutional governance.

And those challenges can be summarised as follows. On the separation of powers front, the major concern is that increasing the remedial toolkit available to judges could increase judicial power and could potentially see judges straying into the legislative or executive domains. As for the rule of law, the major concern is that an increased remedial toolkit has the potential to undermine certainty and predictability in the law, thereby affecting the ability of those subject to the law to plan and regulate their affairs accordingly.

However, as I have said briefly earlier in this chapter, I believe that these concerns are based on inadequate accounts of both the separation of powers and the rule of law, and what it is courts are doing – and, indeed, ought to do – when confronted with remedial problems. The next section of this chapter, then, investigates whether, if we adopt a more descriptively accurate and normatively desirable account of

constitutional governance – in particular by re-examining how we think about the separation of powers, those concerns can, to some extent at least, be overcome.

5.5 – Republicanism

The starting point in that task is a brief discussion of the key aspects of Philip Pettit's neo-republican theory of freedom and government. As explained in Chapter 1, the need for this arises from the primary exercise of this thesis; which is to provide a series of principles which can serve as a guide judges in the exercise of their remedial powers. In other words, because I am making claims about how judges should exercise their powers, the *ends* towards which those powers should be directed are necessarily engaged. I also argue that the concerns about the exercise of those powers stem from problematic visions of the separation of powers which, as I discuss below, seem to have their roots in narrow accounts of theories of the state. Thus, it seems – to make the claims about this discrete aspect of judicial power – I need some form of background theory of the State. As Carolan has put it:

> "*Of itself, the doctrine* [of the separation of powers] *is devoid of determinate details. The theory can only provide guidance on issues of power allocation if it is allied to some broader political conception of the state*."[57]

This thesis is ultimately focussed on the practical question of remedies, and no matter the sophistication of the theory or the practical instantiation of that theory at the level of institutional governance, a considerable amount of discretion will need to be left to individual actors – for example, the courts – as it is simply not possible to account for all the circumstances and contingencies which might arise. But republican theory provides a normative basis to explain why the question of remedies ought to be viewed through the lens of the collaborative account of the separation of powers. One cannot hope to work out a coherent set of remedial principles which seek to respect a core constitutional doctrine – the separation of powers – without offering at least some insight on the broader ends to which that doctrine is being put.

[57] Carolan (n19) at 254.

5.5.1 – Republican Freedom

To be free, on the republican account of freedom, is to be free from domination. That is, to have the freedom to regulate one's own affairs in the absence of *arbitrary* interference from another. Other parties – be it fellow subjects of the State or the State itself – will sometimes interfere in our choices, often in a coercive way. Indeed, this is implicit in the republican account of freedom. What matters is that this interference happens in a non-arbitrary fashion. For republicans, then, freedom is best understood as freedom as *non-domination*.

This can be contrasted with the perhaps more intuitively appealing freedom as *non-interference* thesis. On this account, we are free so long as we are left alone to do as we please. And we should, therefore, pursue as a society those policies which tend to maximise non-interference and thus maximise "as far as possible the sphere of uninterfered-with choice."[58] On the freedom as non-interference account, any interference beyond a certain threshold is inimical to freedom, irrespective of whether that interference is arbitrary or founded on good reasons.

The core problem with the non-interference thesis – and essence of the ability to arbitrarily interfere – is neatly illustrated by Pettit's 'kindly master' allegory.[59] Suppose there is a slave who has a generally kindly master. The master treats the slave well, provides her with good living conditions, and rarely – if ever – punishes her for the slave's perceived wrongdoing. She thus "*tends not to exercise*" her powers of interference over her slave's choices.[60]

Or the slave might have learned, over time, how to read her master's moods so as to avoid doing things which anger her. It may also be that through a mixture of 'fawning and toadying' or 'bowing and scraping', she may have learned how to keep her master sweet, such that she enjoys relative non-interference in her day to day activities.

[58] Pettit, *Republicanism* (n3).
[59] ibid.
[60] Tom Hickey, 'The Republican Core of the Case for Judicial Review' (2019) 17(1) International Journal of Constitutional Law 288 at 294.

But, in both instances, the kindly master always retains the power to interfere in the slave's choices; both the slave and the master know it. So, can it be said that that the slave in either situation outlined above is truly free?

For Pettit, the answer to this question is no. If another person has the capacity to interfere in our choices based on nothing more than a whim, we: "*suffer an extra malaise over and beyond that of having [our] choices arbitrarily curtailed. It is to endure a high level of uncertainty, since the arbitrary basis on which the interference occurs means that there is no predicting when it will strike.*"[61] As Pettit puts it, the slave cannot look her master "*in the eye*", as an equal could – that the state of affairs fails what Pettit calls "*the eyeball test*".[62] In a critical passage, he continues:

> "*In the received republican image, free persons can walk tall, and look others in the eye. They do not depend on anyone's grace or favour for being able to choose their mode of life. And they relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence. Thus, in the established terms of republican denigration, they do not have to bow or scrape, toady or kowtow, fawn, or flatter; they do not have placate any others with beguiling smiles or mincing steps. In short, they do not have to live on their wits, whether out of fear or deference. They are their own men and women, and however deeply they bind themselves to one another, as in love or friendship or trust, they do so freely, reaching out to one another from positions of relatively equal strength.*"[63]

But how to attain this compelling vision? For Pettit, the starting point is that subjects of the State must be protected by it in three key ways to ensure that they are not subject to the arbitrary will of others.[64] First, each subject must enjoy the benefit of certain basic liberties, which correspondingly limit the freedom of choice which other subjects might otherwise be able to exercise. For example, we are each entitled to protection

[61] Pettit, *Republicanism* (n3) at 85.
[62] Pettit, *On the People's Terms* (n3) at 84 – 87.
[63] ibid at 82.
[64] ibid at 82-84.

from violent action from others, and are required to refrain from such violent action ourselves. Nor are we entitled to appropriate as much resources as we might like.

Second, to ensure that we are all able to enjoy these basic liberties, public laws and norms must be promulgated which acknowledge and recognise our status in relation to others. As Pettit argues: "*Within the sphere of those [basic] liberties people should be entrenched on a public basis against the incursions of others. They ought to enjoy objective safeguards that apply regardless of the will of others as to how they should choose in that domain*."[65]

And finally, given the differing status and capabilities which we are all likely to possess, we must each enjoy protections and resources sufficient to our need such that we may properly be said to satisfy the eyeball test.

Of course, the involvement of the State in the lives of its subjects in this way raises the classic question of how to ensure that the State itself does not become a dominating presence, a problem which Pettit's work devotes a great deal of time to addressing.

5.5.2 – The Institutional Consequences of Republican Freedom

Interference, then, on the republican account, is not automatically inimical to freedom. Indeed, on the republican account, it may often be constitutive of it. It is essential, however, to ensure that the State does not become the Leviathan from which the non-interference supporters argue the State's subjects need protection.

Pettit's work on democratic theory provides a roadmap for how this may be achieved. Crucially, on the basis that it is also possible to consent to the type of domination outlined in the master slave example, he rejects classic notions of consent, insisting instead that subjects must enjoy sufficient ongoing control over the agents – both State and otherwise – who possess the ability to interfere in their lives.[66] That is not to say that every citizen enjoys total control over everything that the State does – that would be implausible. Instead, as Hickey outlines, Pettit's eyeball test requires that citizens enjoy an "*equal share in a system of joint control*" over State action.[67]

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[65] ibid at 83.
[66] Hickey (n60) at 294, citing *On the People's Terms*.
[67] ibid.

To attain this system of joint control, Pettit says that two key features must be present in the system of government. The first is popular influence and the second is popular direction.[68] Subjects of State must jointly influence government towards a direction – in policy or outcome terms – that each subject is disposed to find acceptable.[69] This seems to have two aspects – that subjects find the outcomes reached 'just' from a values based perspective but, also, that they find the outcomes of the State's political processes 'legitimate' from a process-based perspective, even if they have 'lost' on the substantive question. In other words, subjects will feel, if the right institutional features are present, that the 'defeat' they have suffered is nonetheless a legitimate result such that it satisfies Pettit's 'tough luck' test. That is to say, they might be frustrated at the outcome, but they are also likely to feel that their voice counted, that their defeat was not inevitable, and that they might well win on another issue in the future.

5.6 – The Implications of Republicanism for the Separation of Powers

For the purposes of this thesis, the key institutional implication of these features for Pettit is the necessity for common law constitutional democracies to possess what Hickey has termed "*editorial mechanisms*."[70] These are non-voted based institutions which can challenge and supplement, usually under certain conditions, voted based majoritarian political processes. They include institutions such as ombudsmen, regulatory bodies across a range of spheres, and the institutions of ordinary judicial review of administrative action as well as of constitutional review of legislation. They are not only sites of contestation for vote-based mechanism, but they may also *complement* more traditional majoritarian processes.

Pettit does not appear to conceive of these editorial mechanisms as being contestatory alone. Recall that what matters for Pettit is the notion of *control* rather than consent, with control being understood the ability of a State's subjects to both *influence* and

[68] Pettit, *On the People's Terms* (n3) at 167
[69] ibid at 170.
[70] Hickey (n60) at 295.

direct the State in a direction which each subject will, hopefully – for both outcome and process based reasons – be predisposed towards accepting.

A related feature of the need for the exercises of state power to be contestable is that state entities will have to explain in an open forum the reasons why they arrived at the impugned decision, and the policy considerations underpinning it. The State will therefore be answerable to a public understanding of the ends to which the contested measure was aimed, and the means through which the State was prepared to employ to achieve it. Viewed in this way, the discretionary power of public officials becomes amenable to public control, with control understood in the sense outlined above such that republican liberty can be attained.

In turn, whatever site of contestation is chosen by the citizen, the actors in that forum – the adjudicating officer of the ombudsman, the chair of an administrative appeals panel, or, most pertinently, judges in courts – must themselves offer reasoned decisions in respect of the outcome of the challenge to the impugned measure.

This twin facing reason giving process contributes to what Pettit has called the "norm of deliberative public reasoning", where reasons for decisions made by public actors are subject to scrutiny in open forums. Ideally, the more decisions are subject to deliberative public reasoning, the more citizens will be positively disposed towards accepting whatever policy decision is ultimately made. This is for familiar legitimacy based reasons, but also because the decisions which are arrived will, over time, be decisions which are made in accordance with what Pettit terms commonly avowable norms – that is, a series of propositions and / or principles which have developed in a polity, and which the polity has accepted and has come to see as lodestar type guides of conduct.

In the sphere of judicial power specifically, Pettit leaves open the precise implications of his theory, and scholars read his work as applying in different ways to judicial power. Adam Tomkins and Richard Bellamy, for example, who both work from an explicitly republican perspective, locate their political constitutionalist view in opposing "strong form judicial review" – in the traditional sense of that term, i.e., that judges have the power to disapply primary legislation by means of a court order (the

strike down) – in Pettit's work.[71] While Tom Hickey, on the other hand, though not expressing a concluded view on what the strength of courts' reviewing powers ought to be, is less sceptical than each of those scholars of the possibility of courts striking down legislation.

As noted at the outset of this thesis, the remedy a court uses is one of the most important aspects of its judgment. Indeed, for the citizen who has brought their case through the often years long court process – with all of the time, costs, and stress that involves – it will inevitably be *the* most important part. Viewed in this light, alongside the centrality of deliberative public reasoning to Pettit's work, a republican theory of freedom and government appears to demand that the courts produce, and in turn abide by, a coherent set of reasons for deploying one remedy over another in a given case – something which, again noted at the outset of this thesis, has proved difficult to achieve.

Though the complete practical implications of republicanism for judicial power are a subject for debate, there is no doubt but that a republican account of the state requires dispersal of power between different governing entities to prevent the exercise of arbitrary power, and to ensure that power is exercised "on the people's terms".

But a dispersal of power is only part of the republican analysis. Institutions must be designed in way which enables the broader flourishing of citizens in the sense which Petit outlines – that they are free from domination; that they can walk tall; and that they can look one another in the eye as equals.

In other words, the republican state necessitates a rich set of institutional demands to achieve a rich set of political aims. That seems to suggest the need for a system of governmental powers which operate in collaboration – rather than in competition – with one another, though competition will of course sometimes be necessary. Indeed, as Carolan has shown through a detailed historical analysis of republican thought,[72] a central tenet of republicanism has been that a universality of values can be achieved

[71] Adam Tomkins, *Our Republican Constitution* (Hart 2005) and Richard Bellamy, *Political Constitutionalism* (CUP 2007).
[72] Carolan, (n19) at 258 – 261.

through a pooling of interests.[73] As I read that argument, it is not only that citizens would pool their interests to achieve certain aims, but also that the labour of institutions ought to be pooled and / or organised along lines which might best be suited to attaining the common good. This latter aspect would seem to involve institutions carrying out those tasks which they are best suited to performing.

At the very least, then, the requirements of neo-republicanism – with its emphasis on ensuring a form of what Isaiah Berlin would call "positive liberty" – seem to point away from the plausibility of the orthodox or 'pure' accounts of the separation of powers gestured at the start of this chapter, as well as 'thin' accounts of the rule of law. These accounts have their roots in the negative, freedom as non-interference thesis, a thesis and corresponding theory of the separation of powers which – as we shall now see – seem difficult to square with the demands of the modern state.

5.6.1 – Orthodox Accounts of the Separation of Powers Considered

The 'pure view' of the separation of powers seems to envisage three key elements.[74] First, separate institutions. Second, separation of functions. And third, separation of personnel. And it is the separation of functions which seems to lie at the heart of the 'pure view' of the separation of powers – the notion that each branch of government carries out its own function and does not encroach on the functions of the other branches.[75]

There are, however, at least four reasons why the pure view of the separation of powers is problematic. First, and most significantly, it has quite simply never been meaningfully instantiated in any modern State.[76] Indeed, were it actually the case that the branches of government be hermetically sealed from another as the pure view seems to require, it is very likely that the State – particularly modern, western, welfare states like those examined in this thesis – would be extremely difficult to govern. This is because a multiplicity of different institutions and actors participate in almost all decisions of government – broadly defined – and separating out their functions in the

[73] ibid at 261.
[74] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 225.
[75] ibid.
[76] Carolan (n19) at 18.

manner seemingly required by the pure view would appear to ignore the operational realities of day to day governance.

Second, and very much related to the first point, the pure view does not account, in any meaningful way, for modern sources of State power such as the administrative arm of the State and the various institutionally grey areas in which this branch – or sub-branch – of government must operate.[77] Martin Loughlin has termed this potentially fourth branch of government the 'new ephorate'.[78] It consists, he and others argue, of the various regulatory and administrative agencies which, while often quite distant from democratic authority (and even – often deliberately – political control), nonetheless carry out the majority of the work which impacts in a meaningful way on subjects' lives. These agencies are, generally, primarily concerned with ensuring good governance and are usually characterises by some degree of technocratic expertise.[79] They frequently exercise a combination of adjudicatory, rule-making, and executive functions,[80] and even quasi quasi-private enterprises may be counted among their number.[81] And the range of areas over which this new ephorate has authority is enormous and ever expanding.

Third, the pure view does not explain why different branches are assigned particular functions, and nor does it account for the fact that each branch will, inevitably, be required to exercise functions which are more properly reserved – under the pure view at least – for the other branches. To take the executive and courts as examples, in each of the jurisdictions examined in this thesis, the executive carries out a significant law-making function through delegated legislation. That is to say nothing of, in the Westminster system utilised by each country examined, the significant – and often determinative – role that the executive plays in the legislative process. Indeed, such has been the historic strength of the executive power in the Irish constitutional order that Oran Doyle has described Ireland as having a "bipartite" separation of powers, with the executive and the courts being the primary actors, and the legislature

[77] Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1971).
[78] Martin Loughlin, *Foundations of Public Law* (OUP 2010) at 448.
[79] ibid at 449.
[80] Adrian Vermeule, 'Optimal Abuse of Power' (2015) 109 Northwestern University Law Review 673 at 680.
[81] Carolan (n19) at p.257.

playing a subordinate role.[82] Similarly, the courts frequently exercise what are quasi-legislative and/or executive functions in the necessary administration of the courts system. Devices such as procedural rules of courts, practice directions of judges in charge of specific courts, and the proper interpretation and application of those devices will, depending on the context, frequently involve the courts performing legislative and executive functions.

Fourth, the rigid separation and independence so desired by the orthodox account is arguably undermined by any system of checks and balances, as such a system will inevitably require substantial interference by the branches in each-other's functions. Take, for example, the paradigmatic judicial remedy – or primary tool as the Irish courts have put it – for a law that is unconstitutional; the declaration of invalidity. At a practical level, that essentially involves the courts removing an otherwise validly enacted democratic law from the statute books. It is hard to imagine a more invasive example of an interference by one branch with another's functions. And yet, it is frequently invoked as a perfectly acceptable form – indeed the paradigmatic method – of the courts acting as a 'check' on the legislative branch. Put another way, it is a manifestation of the idea that the proper role of courts is to identify constitutional flaws with legislation.

Overriding each of these descriptive issues is a key conceptual flaw to which pure view accounts are susceptible. That is, as noted in Chapter 1 and gestured at again briefly above, that State action beyond a certain threshold is presented as something against which citizens need protection. But that ignores that modern states – particularly the states examined in this thesis – are, to admittedly varying degrees, welfare states designed to enable human flourishing.

5.6.2 – The Collaborative Constitutional Separation of Powers

The problems highlighted above are what the scholars writing in the "collaborative constitutionalist" school generally identify as being fatal to the project of the pure

[82] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018).

view. That school is generally associated with Aileen Kavanagh in particular,[83] but also scholars such Dmitrios Kyritsis,[84] Eoin Carolan,[85] and more besides.

The articulation of the collaborative constitutional separation of powers by these scholars operates at two levels. First, it more accurately describes how the separation of powers functions in reality. And second, it offers what I suggest is a more appealing version of the concept – a version which is arguably necessitated by the core tenets of republicanism outlined above.

5.6.3 – The Key Features of the Collaborative Account Considered

As has been noted at several junctures throughout this thesis, the collaborative constitutionalist – or 'new' – theory of the separation of powers is still emerging. But it is nonetheless possible to discern several key features, each of which, I suggest, help chart a plausible vision of a republican separation of powers.

The first is what the collaborative constitutionalists have to say about a division of labour. One of the problems with the pure view of the separation of powers is that, as noted above, it does not explain why it is that different roles are assigned different functions. If all that mattered was the dispersal of power to avoid the unitary ruler which mixed constitutional government is explicitly designed to prevent, it would not much matter what branch of government was assigned particular roles. But it seems unappealing to accept that powers should be allocated on such a "random basis".[86]

The new theory of the separation of powers accounts for this issue in what is has to say about the nature of governing and the multitasking which this requires.[87] Good government in modern, hyperregulated societies – like Canada, Ireland, and the United Kingdom – requires multiple institutional actors to perform a 'multiplicity' of institutional roles.[88] There must be an executive to initiate and carry-out policies. And there must also be a law-making body to make the clear, open, prospective, and stable

[83] Kavanagh, *The Collaborative Constitution* (n19); Kavanagh, 'Recasting the Political Constitution' (n19), and Aileen Kavanagh, 'The Constitutional Separation of Powers' (n14).
[84] Kyritsis, *Where Our Protection Lies* (n19).
[85] Carolan (n19).
[86] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 230.
[87] Les Green, 'The Duty to Govern' (2007) 13 Legal Theory 165.
[88] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 230.

rules which are the bare minimum public norms a society needs to regulate its affairs.[89] That will generally, though not necessarily, be done through a democratically elected, deliberative, and representative legislature. And any system of governance which possesses these two institutions must also possess a means of resolving disputes about the interpretation and application of the rules and policies to which citizens are subject.[90]

Thus, we can see that the point of the separating powers in this way is not merely to disperse power, but to assign particular powers to particular institutions which might be best suited to carrying them out. This is sometimes termed the 'institutional' justification for the separation of powers,[91] and is also closely associated with notions of 'efficiency' of constitutional governance.[92] Of course, another aspect of separating powers in this way is still to disperse power between two other distinct branches of government – the courts and the legislature – such that the important checks and balances function is still fulfilled.[93] But the key difference between this view of the separation of powers and the pure view still remains; what is most important is not the dispersal of institutional power for its own sake – rather, it is the division of labour between different institutions according to their own specific institutional capacities.[94]

The second – and crucial – core feature of the new theories of the separation of powers is what they have to say about the collaboration in which the different branches must engage. The branches must do this, as the collaborative constitutionalists argue, to serve the "*deeper value of coordinated institutional effort in the service of good government*."[95]

We have already seen how the different branches, in carrying out their own functions, necessarily exercise powers which could more properly be described as belonging to

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[89] Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) at 214.
[90] HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012).
[91] Jeff King, 'Institutional Approaches to Judicial Restraint (2008) 28(3) Oxford Journal of Legal Studies 409.
[92] N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59.
[93] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 230.
[94] Raz, *The Authority of Law* (n28) at 105 – 111.
[95] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 235, Dmitrios Kyritsis, 'What is Good about Legal Conventionalism?' (2008) 14 Legal Theory 135 at 154 and Dmitrios Kyritsis, 'Constitutional Review in a Representative Democracy' (2012) 32 Oxford Journal of Legal Studies 297 at 303; and Carolan (n19) at 186.

the other. Additionally, the different branches must also necessarily take account of the measures other branches have taken when carrying out their own functions. As Kavanagh puts it, each branch "*makes a (necessarily) partial contribution to the joint enterprise*."[96] Considering that this thesis is primarily concerned with the remedies that judges can use when they find that legislation is unconstitutional, it is perhaps best to consider this point through the prism of the interaction between the courts and the legislature through the courts' adjudicative and interpretative function (though the fact that this is the example chosen does not lessen the force of the point with respect to the interaction of the other branches of government).

The legislature makes rules which are – hopefully – clear, open, publicly available, stable, and of general application. It thus provides the broad statutory frame work by which the rest of us may order and regulate our affairs. However, it is for the courts to decide what those rules of general application mean when applied to specific contexts. This will frequently involve "*resolving indeterminacy in meaning, filling in gaps in the framework, and integrating particular statutory provisions into the broader fabric of legal principle*."[97] Thus, as Kavanagh neatly puts it in her summation of the position:

> "*…we see law-making as a collaborative enterprise, where each branch contributes different elements in ways which reflect their particular institutional structures, skills, competence, and legitimacy. Thus, when making decisions as part of the scheme of governance, each branch must recognize what Jeremy Waldron called 'the collective action structure' of the problems they face and the decisions they have to make. On this view, the separation of powers is not just a principle which informs the distribution of power and the division of labour, but also the relationships between the three branches when carrying out their distinct roles as part of a joint enterprise*."[98]

Implicit in the concept of collaboration in this context is the notion of inter-institutional comity or, as the Irish Supreme Court put it in *Buckley v Attorney General*,

[96] Kavanagh, 'The Constitutional Separation of Powers' (n14) at 235.
[97] ibid.
[98] ibid.

the "*respect which one great organ of state owes to one another*".[99] That respect brings with it requirements of support and, where appropriate, leeway.

Kavanagh frames these requirements as "*mutual self-restraint*" and "*mutual support*". She says that:

> "*In order to treat each other with comity and respect, the branches of government must remain vigilant to avoid interfering with the others' ability to carry out their respective roles; but they may also be required to actively support each other in various ways, in order to realise the common goal of good government under the constitution*."[100]

At the level of principle, the connection between these requirements and the remedies judges use in constitutional review of legislation seems immediately apparent in several respects. First, courts in such cases are very often faced with important choices about how to exercise their remedial powers. The remedy the court chooses may have the effect of setting at nought the course of action adopted by the legislature or the executive, or it may have an editorialising effect, or it may have a limited effect and, in rare cases, no effect at all.

Second, the requirements identified suggest that, in the first instance, judges should opt for nuanced and calibrated remedial responses to constitutional flaws. This chimes with Kavanagh's metaphor of the "judge as partner" in the joint enterprise of governing, whereby the courts assume a robust – but necessarily – subsidiary role. The precise form that these remedial responses will take will, inevitably, depend on the specific circumstances of the case. But the need for branches to give one another leeway seems to point, in the right circumstances such as those present in the *Re Manitoba Language Rights Reference* from Chapter 2, and the *Heneghan* case from Chapter 3, to the need for things such as suspended declarations of invalidity, deferred findings of invalidity, and indications of constitutional infirmity rather than full, immediate, and retroactive invalidity.

[99] [1950] IR 67 at 80.
[100] Kavanagh, *The Collaborative Constitution* (n19) at 98.

Third, in keeping with the metaphor of the "judge as partner", the requirement of support tends to suggest the need, again where the context requires, for tailored remedies such as reading-in, reading-down, and severance, rather than outright invalidity. That the courts should, on occasion, play – in republican language – an editorialising role. As noted in previous chapters, and as will be discussed presently in more concrete terms in Chapter 6, the proper boundary line boundary between playing this role and impermissibly straying into the legislative role will be one of degree, but the use of these remedies is, at the level of principle at least, compatible with judicial practice as that practice is described under the collaborative constitution. That is, judges can develop the law incrementally – admittedly with some creativity – but always within the bounds of constitutional and institutional constraint.[101]

Indeed, as we saw in Chapter 4, the United Kingdom has, in many ways, made a conscious decision to reflect each of these three ideas in primary legislation. The remedial powers afforded to courts by sections 3 and 4 of the HRA, alongside the role envisaged for both the executive and parliament under that Act, deliberately establish a remedial scheme whereby all three branches of government have a specific role to play in the protection of rights. It is difficult to conceive of how that constitutional scheme, particularly when the case law and debates on section 3 and section 4 are considered, could be described in anything other than collaborative terms.

Similar points can also be made about the rule of law related concerns associated with remedial discretion. Certainty and predictability in the law seem to serve the overarching rule of law concern that citizens be protected from arbitrary governmental decision making, a mischief which the republican theory of freedom and government is also particularly keen to guard against. This is where the public reason giving requirement becomes essential for the questions which this thesis addresses; concerns about the arbitrary exercise of remedial judicial powers have less force so long as those powers are exercised according to a series of publicly assessable remedial guidelines. As we have seen, what the rule of law requires depends on the

[101] See Kavanagh, *The Collaborative Constitution* (n19) Chapter 8, 'The HRA as Partnership in Progress'.

context, such that a degree of indeterminacy and flexibility on the part of the judiciary seems necessary for its realisation.

5.7 – Conclusion

In summary, this chapter has sought to highlight the key critiques of increased remedial discretion and explain how those ideas are underwritten by unrealistic visions of the separation of powers.

It has also articulated the basis of a republican informed account of the separation of powers which rests on the key aspects of Philip Pettit's neo-republican theory of government. This theory, I argue given the rich set of institutional and political demands it makes of states, requires a more fluid and cooperative account of the separation of powers.

As applied to the specific instance of judicial power at issue in this thesis – remedies for unconstitutional legislation – the key point which emerges from this analysis is that the branches of government must, more often than not, act in collaboration with one another in service of good government, with the result that rigid adherence to particular remedial courses of action by judges serves to undermine, rather than to vindicate, the concept.

Chapter 6 | A Roadmap for Remedies

CHAPTER OVERVIEW

6.1 – Introduction

To this point, we have seen, in Chapters 2 – 4, how judges in three jurisdictions exercise their remedial powers in constitutional review of legislation. In Canada, those powers have frequently been exercised in a broad and expansive way, with judges frequently failing to observe the boundaries of remedial discretion laid down by the Supreme Court in the seminal *Schachter* judgment.[1] This led to a concerted effort on the part of the Supreme Court in *G v Attorney General (Ontario)* to call for a retrenchment of Canada's remedial judicial practice.[2] In particular, the Court in *G* called, on the one hand, for "calibrated" remedies such as suspended declarations to be restricted to exceptional cases, while, on the other, it called for greater use of "tailored" remedies such as reading-in, reading down, and severance.

In Ireland, the Supreme Court is perhaps somewhat closer to the start of its remedial journey than its Canadian counterpart. The judgments in *Heneghan No 1* and *Heneghan No 2* have cemented the place of the suspended declaration in the Irish courts' remedial toolkit, building on several judgments' worth of suggestions which – while stopping short of making a formal declaration of invalidity and then suspending it – highlighted that suspended declarations could be a valuable remedial technique.[3] Additionally, the Court in Heneghan also expressly made the effects of its declaration prospective only. Thus, *Heneghan* marks a significant development in the Irish courts' use of "calibrated" remedies. Notably, however, the Irish jurisprudence on "tailored" remedies – such as reading in, reading down, and severance – remains limited when compared with its Canadian peer.

As for the UK, though possessing an admittedly different form of constitutional review than that which obtains in Canada and Ireland – at least as that term is traditionally understood in the literature – the Supreme Court is expressly authorised to use powerful constitutionally conforming interpretation under section 3 of the HRA and, under section 4, to identify but leave in place constitutional flaws with legislation. And the jurisprudence in that jurisdiction has historically been marked by a judicial

[1] [1992] 2 SCR 679.
[2] [2020] SCC 38.
[3] [2023] IESC 7 and [2023] IESC 18 respectively.

willingness to perform a significant editorial function on primary legislation,[4] alongside an almost complete rate of "compliance" by parliament with section 4 declarations, in that such declarations are almost always addressed by some form of policy response.[5]

As even the above shorthand summary demonstrates, in analysing remedial judicial practice in each of those jurisdictions, we have also seen that when judges exercise their remedial powers, the separation of powers is almost inevitably engaged. When a court strikes down legislation, they leave a gap in the legislative framework and leave parliament to deal with the fallout. When a court delays making a finding of invalidity or suspends a declaration, it allows a statute which is otherwise unconstitutional to remain on the statute books. Indeed, as we saw in Chapter 2, the Supreme Court of Canada in *Albashir* took the view that a suspended declaration will almost always cause some form of harm to a state's constitutional order for the simple reason that it involves leaving an unconstitutional law in existence. Similarly, when a court does any of: reading words into a statute: reading down a statute's effects; or severs words form the text of a statute to ensure constitutional compliance, it is undoubtedly changing the law from the original textually expressed meaning adopted by parliament.

But we have also seen how, in Chapter 5, when measured against more descriptively accurate and normatively desirable accounts of the separation of powers – accounts informed by a background republican theory of the state – such as those presented by the "collaborative" school of scholars, these concerns appear somewhat overstated or, at least, subtended by unrealistic views of the separation of powers.[6] The watchwords of the collaborative school are collaboration and cooperation: collaboration and cooperation between the different branches of government to ensure good

[4] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[5] United Kingdom 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 2022–2023 (November 2023) at 43.
[6] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2024); Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017); and Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009).

constitutional governance. Restraint on the part of each branch is also a core feature.[7] And running throughout the collaborative constitutionalist theory of the separation of powers is that it is not necessarily problematic when judges change the law – even where those changes occur by virtue of the remedial devices outlined above – so long as that change happens within the appropriate confines of the judicial role. In fact, on occasion, the collaborative theory may *require* judges to act in this way in order to assist the other branches in ensuring "just constitutional governance."

Similarly, the rich set of institutional and political demands required by a republican view of the state also seem to call for a certain type of collaboration between the branches of government to ensure freedom from domination and that power is exercised on the people's terms. Those goals would appear difficult to attain if the institutions of state were constantly in conflict with one another, or if their role is viewed as combative rather than cooperative. That consideration seems particularly acute in the context of the relationship between the courts and the legislative and executive branches, where unelected courts – depending on how they decide a case and the resulting remedial choice they make – have the power to significantly stifle the actions of the democratically credentialled branches.

6.2 – The Remedial Touchstones Introduced

The purpose of this chapter, then, is to offer a series of suggested remedial "touchstones" which can serve as a guide for judges as to how they might exercise their remedial powers while remaining within the proper boundaries of their role – as that role is understood under the republican informed account of the collaborative constitution.[8]

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[7] Stephen Gardbaum, 'Collaborative and Abusive Constitutionalism' available at https://balkin.blogspot.com/2024/09/collaborative-and-abusive.html?m=1 (last accessed 16 September 2024).

[8] The modest term "touchstone" is deliberate. While the Supreme Court of Canada in *G* spoke of guiding remedial "principles" – as have the courts in Ireland and the UK and several scholars, I think it is more appropriate to speak of touchstones – something that provides a standard against which other things are compared and/or judged – or guidelines given that the concepts which I discuss below represent a mixture of "ought" and "is" propositions, whereas principles generally denote "ought" propositions alone.

Notwithstanding the influence that the collaborative thesis has on the touchstones identified, the approach adopted here is also in keeping with the internal legal perspective which this thesis adopts – i.e., that the claims I make about this aspect of judicial power are rooted in analysis of the realities of legal practice and what it is courts *actually* do when they make their remedial choices. The touchstones identified recognise that cases are determined based on the facts before the court, the strategic choices made by the parties in pleading their case and, indeed, also by reference to the case law opened to the court, the way the case evolves at hearing, and how the issues which arise during the hearing are addressed.[9]

Ultimately, I suggest that the following broad remedial touchstones ought to serve as a guide for judges in the exercise of their remedial practice – principles which ought to both ground and constrain a more fluid vision of remedial judicial powers seemingly necessitated by a republican vision of the separation of powers:

1. Courts play a different institutional role to the democratically accountable branches of government;

2. There should be a presumption for tailored remedies, such as reading-in, reading down, and severance; or, if a declaration of invalidity is required findings of unconstitutionality should be tailored to the extent of the unconstitutionality only;

3. Suspended declarations should be rare; and

4. Individual rights must be protected.

Taking each of these in turn, I suggest that the first concept is the most important and ought to inform the exercise of each of the subsequent remedial touchstones outlined. The reason for its pre-eminence is that the conception of the proper remedial role of

[9] Brendan Kirwan, 'A Consideration of Power v HSE' (2020) 17(3) Irish Employment Law Journal 64 at 66.

the judge gestured at in this thesis, which, in turn, is grounded on the more fluid conception of the separation of powers seen in the collaborative account, does, undoubtedly, leave scope for judges to stray into the legislative domain. In that regard, the Canadian remedial experience is instructive of how, unless grounded in constitutional principle, remedial practice can become unprincipled and lacking in both transparency and clarity.[10] Indeed, the majority of the Canadian Supreme Court appeared to implicitly acknowledge as much in *G*.[11]

As highlighted in Chapter 5, however, the collaborative constitutional account of the separation of powers does seem to call for a more fluid conception of remedial powers than has heretofore been the case. To that end, then, the second remedial touchstone which this thesis suggests is that, where possible, courts ought – so long as due weight has been given to the different institutional roles played by the different branches – seek to deploy "tailored" remedies such as reading-down and severance, rather than reach for a declaration of invalidity. Or, if a declaration of invalidity is required, that it be precisely tailored to the extent *only* of the law's unconstitutionality. This more measured approach is expressly authorised by the terms of section 3 and section 4 of the HRA, and also seems to fit better with constitutional text in both Ireland and Canada, where laws are expressed to be invalid only to the extent of their repugnancy to the constitution. Additionally, at the level of theory, employing tailored remedies seems to better facilitate the virtue of collaboration than the removal of laws, or parts of laws, from the statute books and leaving the legislature to "clean up the mess".[12] Again drawing on the internal legal perspective which this thesis adopts, this approach also builds on classic filtering mechanisms such as pleading requirements, potential preliminary hurdles like standing and mootness, and doctrines such as judicial avoidance and reaching constitutional issues last. Each of these ideas reflect

[10] Robert Leckey, Bills of Rights in the Common Law (CUP 2015), Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14(3) International Journal of Constitutional Law 584, and Robert Leckey 'Remedial Practice Beyond Constitutional Text' (2016) 64(1) American Journal of Comparative Law 1.
[11] *G* (n2) at para 81.
[12] David Kenny, 'The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) at 110.

the fact that striking down legislation is, where possible, to be avoided because it tends to upset the structure of government.

The tailored remedy of reading-in does not fit in quite so neatly with reading-down and severance. Adding words into a statute seems to come much closer to the judge "stepping in" to the legislative role than either reading-down or severance does.[13] Therefore, its use ought to be restricted to rare cases given the very real separation of powers concerns it potentially poses.

Similar considerations apply to the remedy which I take as the starting point in the scholarly and academic debates on remedial judicial discretion: the suspended declaration. Consequently, the third remedial touchstone this thesis suggests is that the use of the suspended declaration of invalidity should, much like the use of reading-in, be restricted to rare cases. This, again, is because of the very real separation of powers concerns it poses. In particular, the length of time for which a declaration may be suspended presents several thorny separation of powers issues which have no obvious answer.

The fourth key idea which I suggest ought to guide judges is that individual rights must be protected. The use of this principle may act as a counterweight to the fact that "tailored" and "calibrated" remedies are, undoubtedly, "state friendly" mechanisms which enable the impugned legal regime to continue to operate. In that sense, these remedies fulfil the value of collaboration. But if the courts are to act as a meaningful site of republican contestation – a core aspect of the stringent demands of the republican state, then they cannot lose sight of the fact that, as the Supreme Court of Canada stated in *Nelles v Ontario*, granting remedies is the courts': "…*most meaningful function under the Charter*…",[14] a consideration which, in turn, reflects the view which O'Donnell J expressed in *PC v Minister for Social Protection* that: "*Part of the appeal of constitutional guarantees of rights is the belief that they contain enduring truths which cannot and should not be compromised*."[15]

[13] ibid at 103.
[14] [1989] 2 SCR 170 at 196.
[15] [2018] IESC 57 at para 15.

The need to protect individual rights has several practical consequences. In particular, it seems to call for something along the lines of what Kent Roach has termed the "twin track" remedial approach.[16] That is, depending on the nature of the rights violation at issue, and notwithstanding there may be significant countervailing considerations which warrant a calibrated or tailored remedy which affords a measure of space to the other branches of government, the courts may nonetheless need to fashion some form of remedy for the individual who has brought the case. This may, for example, lead to individualised exemptions from the effects of suspended declarations being granted.

Of course, the touchstones outlined here will not necessarily lead to a clear answer as to the precise remedy in a given case. Rather, in addition to the broader collaborative purpose they serve, a significant part of their value is in the potential transparency they could bring to the remedial process;[17] they can act as a starting point as to the factors courts must weigh into the balance in making a remedial choice, such that whatever choice is ultimately made, it will be robustly reasoned. These transparency and reasoning points are important of themselves as a matter of doctrinal law, but as we saw in Chapter 5, such public reason giving mechanisms are also an essential part of the republican project of governance for the contribution they make to the overall sense of legitimacy surrounding a polity's decision making processes.

In summary, then, judges ought to feel comfortable in the knowledge that they have a wide range of remedial options available to them to meet the often complex challenges which constitutional review will pose. There is significant force in O'Donnell J's sentiment from *PC v Minister for Social Protection*,[18] which was that where a constitutional problem is complex, then there is no good reason why the remedial solution cannot be equally nuanced.[19] Certainly, when the more fluid conception of the separation of powers outlined in Chapter 5 is considered, and the republican ends which I have suggested that account must ultimately serve, it is difficult to argue that

[16] Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021).
[17] *G* (n2) at para 82.
[18] [2018] IESC 57.
[19] ibid at para 20 of O'Donnell J's judgment.

courts should be hamstrung by traditional views of the effects of the finding of invalidity when it comes to dealing with an intricate problem.

However, a significant note of caution about even the modest guidelines which this chapter recommends is appropriate at this juncture. Though the collaborative account of the separation of powers is, in my view, a more plausible and richer account of the separation of powers than the orthodox or traditional accounts, implicit within its framework – in particular in Kavanagh's work – is, as Tom Hickey has argued, a classic "Dworkinian" view of the role of the judge.[20] That is, judges, given the particular institutional qualities of constitutional review, are perhaps better placed than legislatures to ensure "just constitutional governance".

Taken to its logical conclusion or, at the very least, applied and interpreted in a particular way, the collaborative constitutional view of the separation of powers seems to leave scope for a notably wide-ranging application of the various remedial devices discussed in this thesis. While the concept of "collaboration" and, in turn "calibrated" and "tailored" remedies undoubtedly appeal to those of us concerned with securing good constitutional governance, it is not difficult – particularly when the Canadian remedial experience in the post *Schachter* era is considered – to see how these metaphors and labels could be apt to tempt judges to stray beyond the proper boundaries of their role. Indeed, Kavanagh herself has made arguments in a similar vein in the context of the famous "dialogue" metaphor, where the suspended declaration of invalidity was often cited as the prime – and normatively desirable – example of that metaphor in practice.[21]

Consequently, in addition to providing its suggested modest principles of how remedial judicial discretion ought to be exercised, this chapter counsels significant restraint on the part of courts in making their remedial choice. Yes, courts ought to be comfortable in knowing that they have a broad remedial toolkit at their disposal which can be called in an appropriate context. And this must, where necessary, encompass the ability to develop and / or extend a remedy in a somewhat novel direction.

[20] Tom Hickey, 'Beware these Dworkinian Wolves (in "Neo-Elyian" Clothing)' (2024) 20(2) European Constitutional Law Review 329.
[21] Aileen Kavanagh, 'The Lure and Limits of Dialogue' (2016) 66(1) University of Toronto Law Journal 83.

However, that core principle of the fact they play a different role to the executive and legislative branches of government must be at the forefront of the court's mind in making a remedial choice.

The remainder of this chapter proceeds in the following way. To properly situate its four suggested principles on how judges should approach questions of remedies, the chapter begins by highlighting certain aspects of the collaborative account of the separation of powers which suggest that it leaves scope for judges, when making their remedial choice, to stray beyond the proper boundaries of their role. It does this exercise to frame the most important touchstone this chapter recommends – the essential idea that courts and legislatures play different institutional roles. Second, having highlighted the particular separation of powers based concerns related to the role of the potentially unduly "collaborative" judge, it delineates in detail the remedial touchstones I suggest ought to serve as a guide for judges in their remedial practice. As part of that, it counsels modesty, restraint, and a keen sense on the part of the judiciary that they play a different role – to the legislative and executive branches. Finally, the chapter concludes with a summary of the arguments made.

6.3 – The Remedial Spectre: The Collaborative Remedial Judge

In a recent article on Aileen Kavanagh's collaborative account of the separation of powers, Tom Hickey opines that Ronald Dworkin's Hercules is still living "rent free" in the heads of constitutional theorists.[22] For Hickey, then, it appears that a spectre continues to haunt those of us concerned about the permissible bounds of judicial power.

As we have already seen, the collaborative constitutional theory of the separation of powers operates at two levels. First, it makes a normative claim about how the different branches of government ought to relate to one another – they *ought* to collaborate, they *ought* to cooperate, and they ought to respect each other's roles in the

[22] Hickey (n20) at 329.

joint enterprise of governing. Second, Kavanagh argues that the United Kingdom is the instantiation of the collaborative ideal.

As outlined in Chapter 5, I find each of these claims – broadly speaking – persuasive. Orthodox accounts of the separation of powers – or, the "pure view" – focussing on the tripartite division of the separation of powers which dominated judicial discourse in the 20th and early part of the 21st centuries – and indeed still appear from time – seem to lack both a basis in reality and paint a distinctly unappealing view of constitutional governance. On those accounts, the point of the separation of powers is to ensure "individual liberty" – because the State is viewed as a Leviathan against which citizens must be protected. And while the protection of liberty is certainly an aspect of the checks and balances which institutions may impose on each other, it misses so much of the remainder of the functions the separation of powers is designed to serve, particularly when – as we also saw in Chapter 5 – that view of the separation of powers rests on an exceptionally narrow analysis of what it is the State is *for*.

But, for all its descriptive and normative merit, the collaborative constitutionalist school seems to pose a particular problem for the type of remedial discretion discussed in this thesis. That is, it could potentially leave judges somewhat "at large" in making their remedial choice so long as "just constitutional governance" is ensured – that, even more so than the institution of constitutional review itself does, it could lead to a privileging of the judge's own view of what justice demands in that particular instance.

To this charge, Kavanagh would likely offer four responses. First, the purpose of focussing on the collaboration required of the different branches of government is to move beyond the traditional dichotomy between the courts and political branches which has tended to dominate much of constitutional theory scholarship in the past half century.

Second, that while her work could be read in the Dworkinian way that Hickey suggests, it can only do so much as a work of normative constitutional theory and the precise institutional arrangements and dynamics will need to be figured out on a case by case basis.

Third, Kavanagh devotes much space in her work to the practical effect of various different remedies – though she is obviously not concerned with remedies *per se* – such as the strike-down, s.3 and s.4 of the HRA, and suspended declarations. And I take her to argue for a remedial approach to something along similar lines to that suggested in this thesis – that an appropriate remedial choice will be context specific but that some degree of flexibility is required.

Fourth, Kavanagh would also highlight that she is at pains throughout her work to emphasise that courts play a subsidiary role in the constitutional order.

I am sympathetic to each of these potential responses, in particular the final one, but it is worth exploring Hickey's critique in more detail to see where the collaborative theory of the separation of powers may pose *particular* problems for remedial judicial discretion. Certainly, several of the metaphors Kavanagh offers about the role of the judge in constitutional review seem to leave scope for a remedial judicial practice along the post-*Shachter* Canadian Supreme Court lines to develop. And, as I have argued throughout this thesis, while I think a degree of remedial innovation to meet the demands of complicated modern states is desirable, it must be grounded in something other than an undue latitude afforded to the judiciary.

Hickey makes his claim that Kavanagh's argument ends up "*landing in a broadly Dworkinian space*"[23] primarily because he sees Kavanagh's theory as, ultimately, being concerned with ensuring "just constitutional governance", with "*just government understood as government which acts justly and fairly on behalf of the community, informed by key constitutional principles including democracy, the rule of law, justice, and the protection of rights*."[24] And it is true that this idea permeates Kavanagh's earlier work and *The Collaborative Constitution* itself. For example, as Hickey notes, Kavanagh described the central claim of her seminal *Reply to Jeremey Waldron* piece as being that the right to democratic participation on which Waldron grounded his argument, while important, could not trump the "*instrumental condition of good government*."[25] Similarly, in 2019, Kavanagh, in a paper in which she both called for constitutional

[23] ibid at 330
[24] ibid at 330 – 333, citing Kavanagh.
[25] ibid at 332. Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451.

theorists to move beyond what she termed unnecessarily polarised debates on the proper boundaries of the judicial role and sketched the core tenets of her theory, stated:

> "*…the branches of government are viewed, not as entirely separate entities pursuing their own goals, but as interconnected 'partners in authority' engaged in the 'joint-enterprise of governing'* ***for the betterment of society***."[26]

In other words, at its core, the collaborative theory of the separation of powers is ultimately a theory concerned with organising the institutions of government in such a way as to ensure morally just outcomes. And Hickey argues that Kavanagh, and by extension other theorists in that school, have picked the wrong battle. Instead, they should have pitched their argument about the proper boundaries of the judicial role as being concerned with legitimacy, not justice – that is:

> "*I would say that in the case of judicial decision-making, specifically, questions pertaining to it are to be approached less in the light of ideas around how we might get to the right kinds of outcomes on constitutional-democratic matters, and more in the light of ideas around how it might be that citizens will come over time to accept judge-imposed constitutional-democratic outcomes even when they disagree with those outcomes in substantive moral-political terms*."[27]

Whether Hickey is right or wrong in his view of the ultimately Dworkinian character of the collaborative constitution need not detain us unnecessarily here. Rather, it is the specifics of Kavanagh's theory regarding the role of the judge to which he draws attention that shed light on how the collaborative theory of the separation of powers seems to leave scope for a somewhat overly judicial centric remedial practice of the sort which scholars and judges have railed against in recent years. Indeed, in the right case, the remedy the court chooses may represent the sharp end of what Hickey terms the "*judge-imposed constitutional-democratic outcome*."

[26] Aileen Kavanagh, 'From Rivals to Relationships: Recasting the Political Constitution' (2019) 30 (1) King's Law Journal 43 at 66.
[27] Hickey (n20) at 330 – 331.

6.3.1 – A Critique of Collaboration

As explored in detail in Chapter 5 and highlighted again in this chapter, the values of collaboration, comity, cooperation and respect are central to the collaborative view of the separation of powers. This necessitates that, on occasion and in the right context, each branch of government will perform functions more traditionally thought of as being the province of other branches or, at the very least, assist those other branches with the performance of their functions. We also saw in Chapter 5 how this element of collaboration may be required to ensure that the aims of the republican project are meaningfully secured.

The collaborative constitutionalists therefore see the role of the judge as a "partner" in the joint enterprise of governing, with governing I suggest capable of being understood in the republican sense of that term. While the legislature or executive may be better placed to take a step back to see the bigger policy picture, the judge – for various institutional reasons which are familiar to constitutional theorists – is well placed to resolve an individual dispute about what the law demands in a particular case. As Hickey has noted in outlining Kavanagh's account of the judicial role, in doing that, the judge may need to take an active part in the joint enterprise, by filling in the "gaps" in the legislative framework or by "fleshing out the detail in an ongoing process of application and elaboration." A judge, according to Kavanagh, may adapt the law "to fit with changing circumstances and different social needs." And she also "integrates disparate legislative measures into 'the general constitutional and systemic fabric' of the law, thus helping to ensure 'coherence, stability and 'normative harmony within the system.'" Of course, the judge owes her legislative partners "a duty of respect." But her "ultimate fealty and larger loyalty" is "owed to the constitution."

As I suggested at the outset of this thesis, this picture of judicial practice is not necessarily problematic for the reasons which John Gardner and others have outlined – of course courts make law, what matters is that they do so in the judicial way, i.e., by developing new legal rules – or altering existing ones – with reference to pre-existing rules and principles as distinct from making law in the legislative way: coming up with new norms without any need to have recourse to pre-existing rules

and principles.[28] Whether they have strayed beyond their role is a context specific question. As we have seen, this consideration bears particularly heavily on courts' remedial practice given the ad-hoc and piecemeal development by judges themselves of their own remedial toolkits. While a remedial innovation is generally going to arise out of necessity from a judge's view of the justice of the case and therefore – to some extent – will always develop within existing frameworks, experience has shown that judges may find themselves developing new remedial doctrines in a relatively unrestrained fashion.

In general, though, Hickey accepts that the image Kavanagh offers of judicial practice is broadly uncontroversial. Where he begins to "*get uneasy*" with Kavanagh's theory is in her use, drawing on the work of Larry Sagar, of the metaphor of the judge as "*quality controller*" in the law-making process – that the judge is akin to a mechanic at the end of the production line in a car factory.[29] In essence, that the judicial role is to come in at the conclusion of the law-making process to ensure that the finished legal rule measures up to the standards of "*fundamental political justice*."[30]

Hickey's particular concern, then, is that constitutional review might become less of a specifically *legal* institution, and that it would become more like "*a forum of policy review analogous to auditing*" or like a generic "*quality control inspection*" of the "*kind implied (not always intentionally) in some of the contemporary literature*." And accentuating this concern about a potentially problematic role for the judge in the collaborative constitution is the absence of specific legal constraint on judges and the converse need for courts to exhibit, as Kavanagh repeatedly emphasises, judicial "*self-restraint*".

In other words, to borrow a metaphor from the field of EU law, an aspect of Hickey's critique seems to be that it is the judiciary who hold the ultimate *kompetenz-kompetenz* in deciding where the balance of power lies between the courts and other institutions under the separation of powers. And the chief concern here is that all that is stopping

[28] John Gardner, 'Legal Positivism: 5 and a ½ Myths' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).
[29] Hickey (n20) at 341.
[30] ibid.

the judiciary from arrogating more power to themselves than is legitimate is their own sense of what the proper role of the courts in constitutional review is or ought to be.

6.4 – The Remedial Touchstones Considered

Hickey's critique of the collaborative account of the separation of powers sheds light on the problems that theory of constitutional governance potentially poses for the discrete question of judicial remedies. An overly expansionist view of judicial power – which is arguably heightened by increasing the range of remedial options available to judges – potentially privileges judges' sense of what a morally just outcome is on a particular question. This is because the remedy which the court deploys will have a significant bearing on the extent of the change in the law flowing from the court's decision.

Recall that, in the first part of Chapter 5, this thesis outlined some of the major critiques scholars have made of remedial discretion. The second part of Chapter 5 argued that while these concerns are by no means invalid, they must be considered in light of more descriptively accurate and morally desirable accounts of the separation of powers. And these accounts with their emphasis on the collaboration between different branches seem to call for judicial remedies which, where possible, avoid the harms that an immediate and *ab initio* declaration of invalidity may do a State's constitutional order.

But while I find Kavanagh's account both descriptively and normatively persuasive, Hickey's argument does reveal that the collaborative theory of the separation of powers cannot function as a panacea to the problems of constitutional theory which remedial discretion poses.

What is needed, then, is some form of remedial approach which both embraces the more realistic view of the separation of powers directed towards republican ends discussed in this thesis, but which also guards against the spectre of a "freewheeling" remedial approach seen in Canada post-*Schachter* – or even simply the spectre of poorly reasoned remedial choices – and meets the concerns of theorists concerned about an expansion of the role of the judge which increased remedial discretion may

bring – an increase which seems, to some extent, mandated by the picture of judicial practice Kavanagh presents and which Pettit's theory of republicanism can, at the very least, be read as capable of encompassing.

In turn, this seems to point to the need for a series of remedial touchstones which can guide judges in their remedial practice. In other words, a series of concepts which both ground and constrain the remedial discretion enjoyed by judges in constitutional review of legislation. This argument has echoes of Kent Roach's rich work on "principled" remedial discretion, which seeks to chart a middle course between "strong" or "pure" discretion, which would give judges free rein to fashion remedies as they see fit, and "rule-based" discretion, which would tightly circumscribe judges in their remedial practice with unbending rules.[31]

To that end, I outline below a series of suggested remedial guidelines for which the republican informed collaborative theory of the separation of powers tends to lend support – as I read that theory in any event. Additionally, these suggested touchstones hopefully go some way to meeting the "justice over legitimacy" objection that scholars such as Hickey may raise against the collaborative account and its potentially troubling implications for remedial judicial practice.

A word of caution; given the inherently context specific nature of how judges decide cases – common law judicial practice requires a significant degree of indeterminacy and vagueness to enable it to respond effectively to the different conundrums which come before the courts. Remedial doctrines in constitutional review are no different. In fact, they may require an even greater degree of flexibility given the greater scope for problems which a finding of unconstitutionality may pose to the legal order. My argument here, then, is that is not desirable – and indeed may not be possible – to speak of anything other than general guidelines which courts must bear in mind when deciding on an appropriate remedy. Indeed, the post-*Schachter* jurisprudence suggests that were "tailored" and "calibrated" remedies confined to narrow categories of cases, those categories would, over time, come to be ignored anyway.

[31] Kent Roach, 'Principled Remedial Discretion Under the Charter' (2004) 25 S.C.L.R. (2d) 101 at 107 – 113.

All of that said, the touchstones which I suggest ought to inform courts' remedial practice are as follows. The first of these is that courts and democratically credentialed branches play different institutional roles – courts and lawmakers / policymakers do different things. It may seem a trite observation but it bears repeated emphasis given the inescapable overlap between legal and values based questions in constitutional review of legislation.

The second is that, in keeping with the respect and duty of support which each branch owes to the other under the collaborative separation of powers, courts should – having given appropriate weight to the first touchstone, seek to deploy the tailored remedies of reading down and severance in the first instance. Reading in, given the undoubted proximity of adding words to a statute to straightforward law-making – does not fit quite so neatly into this principle, so its use ought to be reserved for rare cases.

The third touchstone is that the classic instantiation of "calibrated" remedy, the suspended declaration, ought to be used rarely given the very difficult separation of powers issues it raises.

The final touchstone I suggest which ought to guide judges is the need to respect individual rights. It stems chiefly from the fact that "tailored" and "calibrated" remedies will, generally speaking, be remedies which facilitate the State. This touchstone has several consequences. The first of these I suggest is that it calls for the almost wholesale adoption of "as applied" declarations of invalidity as the primary remedy for constitutional invalidity. That is, that a statute is declared unconstitutional insofar "as it applies" only to the circumstances of the case before it. This ensures that judges won't have to disturb the broader statutory architecture to afford a litigant a meaningful remedy. The second consequence is that, if it is to operate meaningfully alongside tailored and calibrated remedies, greater consideration must be given to the use of individualised exemptions from the effects of calibrated and tailored remedies.

6.4.1 – The Courts Play a Different Institutional Role

Turning to the first touchstone, while the other remedial touchstones discussed below contain specific implications for remedial judicial practice, the fact that courts play a

different institutional role must function as an overarching background lodestar which must permeate every remedial decision courts face.

Chief among these is that courts play a subsidiary role in the constitutional scheme[32] - recall Pettit's vision of courts functioning as a site of contestation, as an editorialising mechanism, and as forum capable of contributing to the public reason giving process, but not the prime mover of the direction of the ship of state – and a notably different institutional role to the democratically credentialled branches of government.

Viewed in this way, courts are necessarily "responsive" institutions whose function is not to "step in" unnecessarily where the legislature or executive has failed to take action or take a form of action that would be more desirable. As Kavanagh notes that even Dworkin acknowledged:

> "*Democracy would be extinguished by any general constitutional change that gave an oligarchy of unelected experts power to overrule and replace any legislative decision they thought unwise or unjust.*"[33]

Rather, the role of courts – in constitutional review of legislation – is to offer a site of contestation to parties who think that their rights have been violated and to, in the first instance at least, identify a constitutional flaw (if such exists). This reflects that some of the core purposes of courts are to explain what the law is or means,[34] what the law requires in a particular case, and to hold the legislative and executive branches to account.

This account demands that courts view questions through the prism of their distinctly *legal* lens, notwithstanding the fact that, as repeatedly highlighted in this thesis, constitutional review of legislation inevitably draws courts into the political domain. It further demands that the executive and legislature be given significant areas of leeway on complex questions of policy, with the scope or intensity of courts' review being subject to change depending on the area at issue. As Kavanagh puts it:

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[32] Kavanagh, *The Collaborative Constitution* (n6) at 266.
[33] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (HUP 1996) at 32.
[34] *Marbury v Madison* (1803) 5 US 137.

> "…*in cases concerning national security, the government's decision may be entitled to 'a particularly wide measure of discretion', on the basis that the Executive bears key responsibility for deciding how to combat terrorism and the courts suffer from epistemic deficits in assessing the justification for certain policy choices. But where the expertise of the courts is more directly engaged, e.g. on the requirements of a fair trial in a criminal context, or other matters of procedural fairness, the margin may be narrowed considerably*."[35]

That judges must respect the limits of their own role is a theme common to the existing scholarship and jurisprudence in the area. However, it bears emphasising given the potential concerns – such as those outlined by Hickey at the outset of this chapter – about the possible expansion of judicial power under the collaborative constitution. Indeed, it is one of the principles expressly identified by the Canadian Supreme Court in *Ontario (AG) v G* which the Court said must guide its remedial practice.[36]

There, the Court highlighted that institutional considerations may make the use of, for example, suspended declarations appropriate in particular cases. The Court seemed to have in mind situations where a statue is underinclusive in its scope, and suspension would afford the legislature an opportunity to come up with an appropriate solution. The logic underpinning this approach is that immediate invalidation would benefit no-one, but identifying other potential beneficiaries is not the proper role of courts. As O'Malley J put it in the Irish context in *Donnelly v Minister for Social Protection*,[37] a case where a statute was also challenged on the basis of under inclusivity, if the Court itself identified appropriate beneficiaries, then it would run the risk of "*usurping the task of the legislature*."[38]

While O'Malley J's remarks in *Donnelly* were made in the course of outlining what she saw as the appropriate place of the proportionality framework in constitutional review of legislation, they are equally applicable to courts' remedial practice. Constitutional review inevitably brings courts into the political arena. However, courts must ensure that constitutional review of legislation does not, as O'Malley J

[35] Kavanagh, *The Collaborative Constitution* (n6) at 274.
[36] See *G* (n2) at para 158.
[37] [2022] IESC 31.
[38] ibid at para 163.

cautioned in *Donnelly*, become an "*established part*" of the legislative process. And greater remedial choice for judges does seem to leave significant scope for this to occur.

Take tailored remedies. Each of these allows courts to change the text of a statute or, at the very least, alter a statute's legal effect. Whether a court does so in a way which transgresses of the legislative function will be a matter of degree. The court has to balance the public's interest in constitutionally compliant legislation alongside meaningfully vindicating an individual's rights. How does it achieve this balance? It must maintain as much of the law as is feasibly possible and, if it is not possible to maintain a significant portion of the law such that its core purpose is frustrated, then the judge must make a different remedial choice. This may involve resorting to a calibrated remedial solution or a straightforward declaration of invalidity.

Each of these points serves to re-enforce the fundamental observation that courts and legislatures do different things. And given the possible expansion of the judicial role which alternative remedies may permit (i) of themselves and (ii) taken alongside how the judicial role is understood under the collaborative constitution, I suggest that this principle must rank foremost in judges' minds when exercising their remedial powers.

6.4.2 – The Presumption for Tailored Remedies

The second touchstone I suggest which ought to guide remedial judicial practice is that, where possible and having given appropriate weight to the differing institutional role of courts, where a constitutional flaw is identified in a statute, judges should, in the first instance, seek to read-down that statute's effects and / or sever words from it to preserve its constitutional aspects.

Several arguments support this view. The first is a theoretical argument about respect for the separation of powers in the sense that each of these tailored remedies leave statutes, broadly speaking, in place. As Henchy J observed in *The State (P. Woods) v. Attorney General*, the power to strike down legislation is a powerful and potentially crude mechanism that can cause widespread collateral damage to the legal order.[39] Recall that the image of the judge which the collaborative account presents is one of

[39] [1969] IR 385 at 399.

the judge as a partner in the shared enterprise of governing. It is hard to see how that value of collaboration is served where a court's ruling causes widespread damage to the State's broader legal order.

Relatedly, tailored remedies do not *force* the democratically credentialed branches to act in the same way as a declaration of invalidity might. Again, courts forcing legislatures to deal with issues where there is another course of action available which might cure the constitutional flaw does not fit easily with the concept of collaboration. As Hogg notes: "*[i]t is always open to the competent legislative body to enact a new legislative scheme ... if the legislators are not content with the scheme as amended by the courts*". [40] To be sure, tailored remedies effect a change in the law, but they appear to effect that change in the classic judicial sense – by fleshing out and adapting the precise meaning of a provision when applied to particular contexts.

This, of course, assumes *both* that the court is not performing radical surgery on the law such that what is left is unrecognisable from the statute as originally drafted, *and* that the court has taken as its starting point the need to retain as much of the statute as possible in the form it originally appeared. As the Supreme Court of Canada put it in *Schachter*, tailored remedies should only be granted where it can be fairly assumed that "*the legislature would have passed the constitutionally sound part of the scheme without the unsound part*" and where it is possible to precisely define the unconstitutional aspect of the law.[41] If, following the intervention of the court, the statute is markedly different from the statute as drafted, then it is arguable that the court will have gone too far and impermissibly interfered with the State's policy choice. In particular, and in keeping with ordinary principles on statutory interpretation where the intent of the statute is deduced from a reading of the statute in its complete context,[42] the altered statute must reflect – and therefore tailored remedies must not be granted where they frustrate – the objective of the statute as a whole.[43] The metaphor of collaboration cannot be used as an engine to frustrate the role of other constitutional actors – and where tailored remedies cut directly against the purpose of a statute, it seems that

[40] Peter Hogg, *Constitutional Law of Canada*, (5th edn, Carswell, 2007), para 40–18.
[41] *Schachter* (n1) at 697 and para 114 of *G* (n2).
[42] *Heather Hill Management Company CLG & Anor v An Bord Pleanála & Ors* [2022] IESC 43.
[43] *G* (n2) at 114.

judges will have crossed the line between interpretation and law-making (in the legislative sense).

Alongside these arguments at the level of theory, powerful textual arguments support the use of tailored remedies. They are expressly authorised by the terms of the HRA, but their use also seems better aligned to constitutional text in both Ireland and Canada. Recall that Article 15.2 of the Irish Constitution provides that:

> "*1° The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.*
>
> *2° Every law enacted by the Oireachtas which is in* ***any respect*** *repugnant to this Constitution or to any provision thereof, shall, but* ***to the extent only*** *of such repugnancy, be invalid*."

Thus, alongside Article 34 which gives the courts the power to review legislation for its compatibility with the Constitution, the text of Article 15.2 seems to envisage that remedies which a court may use for invalidity shall be tailored in both form and breadth to the extent of the constitutionality which the court identifies. As O'Donnell CJ said in *Heneghan (No. 2)*:

> "*…the Irish constitutional formula emphasises…that the* ***invalidity must be measured precisely against the inconsistency***."[44]

This built on his previous comments in *P v Judges of the Circuit Court*, where he stated that:

> "*It is in my view to be noted that the Article explicitly recognises that there may* ***be partial invalidity****, and that* ***a section or provision may be repugnant in some respect, but not in others****. Furthermore, I would be inclined to read Article 15.4.2° as pointing strongly towards an approach that* ***salvaged that part of the legislation that was not offensive to the Constitution****. If repugnancy of the Constitution is established, then the provision is and must be invalid, "****but to the extent only of such repugnancy****"… Article 15.4.2° can be seen as a direction to match the remedy*

[44] *Heneghan* (n3) at para 8.

to the wrong… ***In my view, the function of a court is to attempt in as clinical a way as possible to undo the consequences of any invalid act, but not more***."[45]

In similar terms to Article 15.2 of the Irish Constitution, section 52(1) of the Canadian Constitution Act, 1982 provides that unconstitutional laws are: "…***to the extent of the inconsistency***, *of no force or effect*."

Again, the underlined portion indicates that the Canadian Constitution appears to allow for a tailoring of the remedy to the nature of the constitutional violation.[46] Indeed, Lamer CJ in *Schacter* said, drawing on section 52(1), that the use of tailored remedies before considering invalidation was the preferred hierarchy of remedies.[47]

Of course, neither provision expressly authorises the use of tailored remedies such as severance or reading down, but, equally, neither provision expressly equips courts to strike down legislation, though they are generally accepted as the basis for each court's remedial jurisdiction in that regard.

A further reason why this thesis argues for a presumption in favour of reading down and severance is that – in keeping with the internal legal perspective of this thesis – it fits neatly with and builds on basic rules of pleading and doctrines such as standing, mootness, and judicial restraint.[48] Each of these rules and doctrines ensures that a case is properly put before the Court and are reflective of the need to for courts to ensure that constitutional review of legislation is but one part of a functioning legal order that has distinctly *legal* procedures and rules. They are well established principles of avoidance derived from the constitutional separation of powers "*under which the Court will only entertain a claim challenging the validity of public general legislation where it is clearly necessary to do so*."[49]

[45] [2019] IESC 26 at para 52.
[46] See, for example, the analysis in Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book 2003) at ch. 14.
[47] (N1) at 719.
[48] See, for example, O'Donnell CJ's list of these and other related ideas at para 11 of his judgment in *Heneghan (No 2)*.
[49] *Odum v Minister for Justice* [2023] IESC 3 at para 19.

These concerns are well captured by the Supreme Court of Canada's judgment in *Borowksi v Canada*,[50] where the Court made the following three points about the purpose of the mootness doctrine but which I suggest are of broader application:

> "*The first rationale for the policy with respect to mootness is that* ***a court's competence to resolve legal disputes is rooted in the adversarial system****. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for* ***judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile*** *to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is* ***the need for the Courts to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework****…*"[51]

The logic of these comments share much in common with the judgment of O'Donnell J in *Mohan v Ireland*,[52] where he explained the rationale behind the rules on standing and what he termed "other prudential rules" which limit the ability to challenge the validity of legislation:

> "*...****Public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest****.* ***The particular provision challenged may indeed still operate entirely beneficially and helpfully for the great majority of cases****. If such a provision is invalidated, it is, in principle, of no effect in law and the area is left unregulated, with the result that citizens may be deprived of the benefit of the provision.* ***The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision****. .."*

[50] [1989] 1 SCR 342.
[51] ibid at 358 – 359.
[52] [2021] 1 IR 293.

To the extent, then, that they leave the vast majority of the legislative scheme under challenge intact, tailored remedies are an example of the first remedial touchstone in practice in that they see judges operating on familiar terrain while attempting to vindicate constitutional rights – that is, in deploying these remedies, judges are exercising what are, at their core, interpretive powers, albeit sometimes exercising those powers in a notably concerted way. Similarly, tailored remedies also serve the crucial value of respect for other branches – and, in turn, the collaborative constitution – by saving laws where it is possible to do so.

Though in this thesis the remedy of reading in has generally been treated alongside reading down and severance – in the interests of practicality and to reflect its treatment in the literature – that remedy requires separate analysis as to the precise terms of its use. This is because the addition of words into a statute seems to be automatically closer to the legislative function than reading down or severance. I.e., in reading words into a statute, an unelected court will, potentially, be extending the ambit of a statute to cover a situation which the legislature, for whatever reason, did not deem warranted addressing in the statute. As a result, a presumption in favour of its use seems difficult to square with the proper boundaries of the judicial role, even when that role is understood as one of collaboration. In the wrong context, it would seem to envisage the role of judge as moving beyond even the "quality controller" at the end of the legislative production line with which Hickey took issue. Of course, on occasion, the practical effect of the use of severance or reading down a statute's effect could be much the same, but as we saw in Chapters 2 – 4 in the discussion on each of the remedies in practice, those remedies will usually have the effect of removing the "sharp edges" from a statute to cure its unconstitutionality.

None of this to suggest that the remedy of reading in should *never* be available – it is simply that its use should likely be restricted to rare cases. In Chapter 2, we saw how the Supreme Court of Canada is comfortable using the remedy in a range of circumstances and, indeed, in *G*, the Court said it ought to form part of the suite of tailored remedies which courts should turn to in the first instance where they find a constitutional flaw in a statute.[53] Similarly, we saw in Chapter 4 that the Supreme

[53] *G* (n2) at para 116.

Court of the United Kingdom has taken an expansive view of its mandate under s.3 of the HRA to "read and give effect" to all legislation in a way which is compatible with Convention rights "so far as it is possible to do so".

In Ireland, as gestured at in Chapter 3, there is a particular textual concern in that Article 15.2.1° expressly reserves the "sole and exclusive" law making power to the Oireachtas. And, again as noted in Chapter 3, MacMenamin J used this provision to expressly state – in axiomatic terms albeit *obiter* – that the remedy of reading in was not available in Ireland.[54]

This seems difficult to square with the availability of reading down and severance and indeed more traditional remedies such as the strike-down. To be sure, adding words to a statute does raise immediate and obvious separation of powers concerns in a way that reading down and severance do not. But, as Kenny has argued, an automatic preclusion on reading in could only be correct if *all* judicial law-making was prohibited by Article 15.2.[55] Whereas, in reality, all remedies alter the nature of laws to some degree, and the fact that other remedies are permitted by the Irish courts shows that, where the need requires it, Article 15.2 is relaxed to accommodate other priorities.[56]

Returning to the implications of the collaborative constitution for this second remedial touchstone, Kavanagh has identified two standards from the case law on section 3 of the HRA against which the legitimacy of tailored remedies may be measured and, by extension, the permissible limits of the role of the judge under the collaborative constitution exceeded. These principles seem equally applicable to tailored remedies in Canada and Ireland and would further appear to apply with particular force to the remedy of reading in given that, by its nature, it appears to operate at the outer limits of permissible judicial interpretation of statutes.

The first standard Kavanagh identifies is the "fundamental features" limit, where it is said that interpretation will go too far if the court adopts a meaning of the legislation

[54] *PC* (n15) at para 21 of the judgment of MacMenamin J.
[55] Kenny (n12) at 107.
[56] ibid.

which does not fit with its fundamental features.[57] The interpretation of the statute offered by the court must fit with the legislation's "underlying thrust" and be compatible with its "essential principles".[58]

The second standard Kavanagh identifies is the "legislative deliberation" limit.[59] This is where the use of an interpretive technique would result in an amendment to the statute through a decision which courts are not equipped to make. In other words, the issue is one which may require – or at least would be better served by – legislative deliberation. The need or desire for legislative deliberation could stem from the fact that there are several ways that the statute could be fixed, or it could stem from the fact that the fix under consideration from the court may be one which the legislature is better placed to take. The statute at issue could be an area of complex moral, fiscal, or social policy – and the choice therefore more properly belongs to the democratically credentialed branches.

Kavanagh cites the case of *Bellinger v Bellinger* on transsexual marriage as a good example of each standard in action.[60] There, Mrs Bellinger, who had been born a male, had gender reassignment surgery to become female and then married a male. She claimed that the Matrimonial Clauses Act 1973, which stipulated that a marriage could only between a male and female, with gender for the purposes of the Act being determined at birth, violated her Convention rights. In other words, her marriage was not a valid marriage for the purposes of the 1973 Act.

The House of Lords agreed with Mrs Bellinger's argument that it breached her convention rights, and could have remedied the 1973 Act through the use of reading down, reading in, or perhaps even by severing words from the statute, but said – for several reasons – a declaration of incompatibility was more appropriate. Chief amongst these reasons was that a judicial change to the law of marriage to include transsexuals would be a major change in a sensitive area of law – fraught with ethical and moral dilemmas – which would also pose significant administrative challenges to various state institutions. For those reasons, as well as the fact the government of the

[57] *Ghaidan v Mendoza* (n4) at para 33.
[58] ibid at para 110 – 111.
[59] ibid at para 33.
[60] [2003] UKHL 21.

day had already set up a working group to consider the ramifications of the ECtHR's decision in *Goodwin v United Kingdom* where the Court found that the Applicant had been discriminated against due to her status as a transsexual,[61] the House believed that a section 4 declaration was appropriate, and that the matter was best addressed through wide-ranging legislative deliberation.

Alongside the purposes for which Kavanagh highlights it, *Bellinger* serves as a useful example of the collaborative constitution in action. The court recognised a constitutional flaw in a statute, but rather than change that statute's meaning, it simply pointed out to parliament that there was an area of law which required addressing. Of course, the option to strike the law down was not available to the House of Lords, but, of itself and as I return to more detail below in the context of suspended declarations, that shows the value which alternative remedies such as delayed or deferred findings of invalidity may serve; the House left a socially contentious issue to the democratically accountable branches of government. Collaboration is about supporting and, on occasion, buttressing the choices of those branches. But it cannot be usurpation.

Of course, and much like each of the four broad remedial touchstones discussed in the this chapter, neither factor identified by Kavanagh can serve as a precise algorithm with respect to the proper use of tailored remedies, much less the use of reading in specifically.[62] However, they do provide some guidance on when it is "constitutionally appropriate" for the courts to use tailored remedies to cure unconstitutional legislation and when the matter is better addressed by some form of declaration of invalidity.

In short, then, courts should operate a presumption in favour of tailored remedies like reading down and severance, and may – in exceptional cases – deploy the remedy of reading in – even in Ireland despite the apparent textual bar to its use. Tailored remedies facilitate the other branches of government because they leave intact the

[61] (2002) (Application no. 28957/95).
[62] Kavanagh, *The Collaborative Constitution* (n6) at 239.

legislative scheme, and it is frequently through legislation that the state will attempt to secure the flourishing of its citizens.

6.4.3 – Rare use of Suspended Declarations

The third remedial touchstone which this thesis suggests is that the use of suspended declarations must be confined to rare cases. However, I argue that, given the ways in which suspended declarations can facilitate collaboration between the branches of government, their use need not be restricted to "compelling" circumstances type cases such as *Heneghan* or *Manitoba*. Instead, I argue that, notwithstanding the risks they pose for the separation of powers, they – or similar remedies such as delayed, or deferred findings – may be legitimately be used in cases like *Bellinger* where good constitutional governance seems better served by giving the legislature time to fix a constitutional flaw regarding a difficult social question in circumstances where a declaration of invalidity would have caused damage to the broader constitutional order, and when a tailored remedy would have seemed a relatively clear infringement of the legislative role.

The particular problems of suspension are evident from the Canadian experience outlined in Chapter 2 and explored in more detail in Chapter 5, so will only be outlined in the most salient respects here. For individual litigants, the concerns are relatively obvious. If a court suspends a declaration, then it, initially at least, means that a person who has entered an arena of contestation with the State and succeeded in meeting the high threshold required to demonstrate that their constitutional rights have been breached by legislation will be left without a remedy.[63] It also means that similarly situated litigants will be subject to ongoing violation of their rights by a statute expressly found to be unconstitutional. The solution to this, I suggest, lies in certain devices grounded in the principle that individual rights must be respected, such as individualised exemptions from suspension and the as-applied declaration of invalidity. These points are discussed in more detail below in the context of the fourth principle.

[63] Robert Leckey, 'The Harms of Remedial Discretion' (n10) at 591.

At an institutional level, the core problem is that the suspended declaration potentially gives judges more choices about how to exercise their power and, in turn, may embolden them to make more findings of unconstitutionality than has previously been the case.[64]

The question of the length of suspension highlights this problem. In almost all cases, the burden will fall to the State to justify the length of suspension it requires in a particular instance – though as a matter of basic procedural fairness, the successful litigant will also be invited to make submissions on the length of suspension.

A court making a ruling on the reasons put forward by government lawyers to justify how long the State needs to come up with an appropriate response to a declaration is a deeply troubling prospect. Two cases illustrate this point in different ways.

Prior to the judgment in *Heneghan (No. 2)*, the Irish Supreme Court invited the parties to make submissions on the length of suspension. In doing so, drawing apparently implicitly on examples from the Canadian jurisprudence, it queried whether the Court had the ability to both suspend declarations for more than one period and the ability suspend a declaration for an initial period which could then be extended as appropriate.

The Court accepted it had such a jurisdiction on both counts, but wisely highlighted the dangers of exercising this aspect of the broader suspended declaration jurisdiction. The reason for this is relatively straightforward to grasp. As O'Donnell CJ put it: "*[i]t would inevitably involve the Court supervising the procedures, and scrutinising the internal operations of another branch of the State*."[65]

O'Donnell CJ also drew attention to the fact that, in its submissions, the State had set out what it described as a "forensic" analysis of the steps which would need to be taken before replacement legislation could be enacted.[66] Ultimately, the Court did not engage in any review of those steps, concluding instead that a relatively lengthy but single period of suspension was appropriate.[67]

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[64] ibid at 591 – 597.
[65] *Heneghan* (n3) at para 34.
[66] ibid at para 36.
[67] ibid at para 38.

Three problems merit consideration. First, had the Court engaged in a review of the steps which the State proposed, then the Court would have been getting involved in a review of the merits of those steps and the justifications the State offered for how long each of those steps would take. Putting a clock on legislative business in this manner seems incompatible with the separation of powers.

Second, the Court did not offer any principled reason for the length of suspension it chose. The Court did highlight that the purpose of suspension was to avoid an unexpected general election occasioned at an inopportune time, and noted examples from other jurisdictions where courts had utilised suspension periods of similar length but it still fundamentally offered no reasons for the length of suspension. Lack of clarity in judicial decision making in this way risks undermining legal certainty.

Third, and very much related to the preceding points, there is a risk that offering principled reasons for the length of suspension at will necessarily see the courts encroaching into the legislative sphere. Obviously, justifying the length of suspension entails giving cogent reasons for its length. And that seems to involve inescapable engagement with whatever the parties have to say on that issue. To decide on any other basis seems procedurally suspect, given that courts are supposed to make decisions on the basis of the arguments put forward by the parties to litigation. Usually, it will be the State parties who will have most to gain from suspension, so it will be the strength of the State's reasons which will attract the most attention. Inevitably, this seems to involve the courts weighing up the strength of those reasons, which effectively seems to put the court in the position of reviewing political processes in a constitutionally illegitimate fashion.

The length of suspension in the case *Carter v Canada* also sheds light on the political nature of the length of suspension.[68] There, on 6 February 2015, the Supreme Court of Canada declared unconstitutional Canada's prohibition on assisted suicide but delayed the effects of that declaration for 12 months. At the time the declaration was made, a general election had already been fixed for 19 October 2015, just over eight months away. As a matter of practicality, parliamentary business would cease some

[68] [2015] 1 SCR 331.

weeks in advance of that meaning that parliament would only be given, at best, between 6 – 7 months to come up with a solution to a notably sensitive ethical conundrum.

In contrast, Ireland's Joint Oireachtas Committee on assisted dying was established in January 2023 and did not make is report to the Oireachtas until March 2024, over a year later,[69] and the issue is still yet to be formally considered in detail by the Oireachtas. An exploration of any topic by a parliamentary committee is likely to be beneficial, but particularly on a topic such as assisted dying. Furthermore, it also seems reasonable, as a matter of just governance and irrespective of the ultimate outcome, that parliament would not be unduly hurried considering an issue like assisted dying. This concern seems particularly acute when a core part of the republican theory of government is that citizens can accept the outcomes of rights and obligation determining processes – a rushed process on foot of a court ruling is exactly the type of thing which could engender scepticism of the institutions of state. Finally, it is not at all obvious that forcing the legislature to deal with any issue within a specified time – let alone an issue like assisted dying which seems to be a matter quintessentially requiring legislative judgment – is constitutionally permissible.

Each of these points show that the use of suspended declarations appear inherently problematic from the perspective of the separation of powers, even allowing for the recasting of the roles of the different branches of government under the collaborative theory of that concept. That is because it seems to involve courts in the law-making process outside its traditional sphere. Court make law but must make it in the judicial space, and not end up intimately embedded in the detail and mechanics of the legislative process. The particular concerns raised here may be rebutted and may, in the right circumstance, seem overstated. But the point is that it is not easy to set out coherent principles on the use of suspended declarations which can avoid these problems.

At paragraph 28 of his judgment in *Heneghan (No. 2)*, O'Donnell CJ appeared to suggest that suspended declarations should only be granted to avert a "*constitutional*

[69] https://www.oireachtas.ie/en/committees/33/assisted-dying/.

crisis", seemingly influenced by the Supreme Court of Canada's judgment in *G*, where the threshold was set at suspension being required by some "*compelling public interest*." Indeed, he further elaborated on this by highlighting that the legislation at issue in that case was part of the "*constitutional architecture of the State itself*." Thus, the case for its use seemed compelling if not nigh on overwhelming in *Heneghan*. Certainly, its use is appropriate where it is necessary to avoid a constitutional crisis. Similarly, where the rule of law is meaningfully threatened, as it was in the *A v Governor of Arbour Hill* case discussed in Chapter 3, then suspension seems to have a useful role to play.

I suggest that the thresholds of constitutional crisis or the constitutional architecture of the state itself needing to be imperilled, while possessing merit and establishing a closed and principled based category, are too high a bar to meet before a court can deploy a suspended declaration. After all, the theory of collaboration calls for support between the branches, and, although it concerned a section 4 declaration of incompatibility, the *Bellinger* case seems an instructive example of that collaboration inaction: parliament's will was respected, the individual received the benefit of a solemn declaration from a court that her rights had been violated and a change in the law followed; and no damage was done to the State's broader legal order. Its use was also arguably appropriate in *Carter* given the complexity of the social issue involved and because the immediate invalidation of the prohibition on assisted suicide may have caused the absence of a regulatory framework and therefore exposed vulnerable people, notwithstanding the significant concerns suspension raised in that case.

As a matter of theory and studied experience, then, it seems as if the use of suspended declarations should be both rare and confined to cases where some compelling countervailing interest warrants it. This language is intended to be suitably broad so as to avoid the post-*Schachter* problems of overly rigid categories being ignored, but also framed in such a way that courts recognise the weighty consideration they must give to the matter before deciding to suspend a declaration.

6.4.4 – The Need to Protect Individual Rights

The final touchstone which I suggest must guide judges in their remedial practice is the need to protect individual rights. After all, a central function of courts in cases of constitutional review of legislation is to provide a remedy for infringement of a

litigant's rights. Indeed, rights without appropriate remedies can render those rights meaningless, and if courts are to function effectively as a meaningful site of republican contestation, then their rulings must carry the required force to protect the interests of the citizen from domination by the state.

The particular concern in this regard is that that tailored remedies, suspended declarations, and prospective only declarations, are, on one view, relatively "state friendly" remedies. That is, in the interests of securing good constitutional governance, they afford the legislature "time" or an "opportunity" to "fix" constitutional flaws in a statute, or the courts may give a statute an aggressively constitutionally conforming interpretation and / or carry out some form of an amendment to the statute to avoid making a broader finding of unconstitutionality.

Obviously, as we have seen, it may very well be highly desirable for the State to have time to fix an unconstitutional statute. It may also be desirable that a statute is saved through a constitutionally conforming interpretation.

The particular problem – for the purposes of this section of the thesis – with each of these remedial approaches, however, is that they may leave some litigants without a meaningful remedy for a violation of their constitutional rights. I suggest here two possible solutions to this problem, one – I hope – relatively uncontroversial solution and one which has the potential to be somewhat controversial, albeit it is already the norm in Canada.

The non-controversial solution is the adoption of the "as-applied" declaration of invalidity as the paradigmatic remedy for situations where a declaration of unconstitutionality is considered appropriate. As we saw in Chapters 2 and 3, a law is only declared unconstitutional "as it applies" to a particular party or state of affairs; the statue remains in force in all of its constitutionally compliant aspects.[70]

Thus, by using as applied declarations of invalidity, courts ensure that an individual litigant – who might otherwise not obtain any meaningful benefit should the court opt for a different remedial option – receives meaningful constitutional redress. And

[70] Kenny (n12) at 106.

courts do this while ensuring that the law is saved in its constitutionally compliant respects.

As we saw in Chapter 3, in *O'Meara v Minister for Social Protection* – essentially an under-inclusive statutory benefits case – the Irish Supreme Court issued something at least very close to an "as applied" declaration of invalidity for the first time, though it did not expressly advert to the fact that it was issuing such a declaration.[71]

To recap *O'Meara*, the Applicant, an unmarried father of three, applied for a social welfare payment known as the Widower's Contributory Pension following the death of his life partner, who was also the mother of his children. His application was initially rejected because the legislation provided that the payment could only to be made to the surviving spouse where the couple had been married, or to the surviving partner in a "civil partnership" as provided for in the Civil Partnership Act 2010.

However, the Supreme Court held that the legislation was "*inconsistent*" with the Constitution because it constituted an impermissible level of differential unequal treatment between the Applicant and otherwise similarly situated – but married – couples. There were several reasons for this, with one of the most important being the fact that the payment was designed to benefit children, as distinct from the entitlement to the benefit deriving from the marital status of the parents.

O'Donnell CJ's comments on the appropriate remedy in the case usefully draw out – explicitly and implicitly – several of the issues calibrated remedies pose regarding the protection of individual rights, and also highlight the potential benefits of the as applied declaration from the perspective of the courts collaborating with the democratically credentialed branches:

> "*This case raises the familiar problem of a successful equality challenge to a provision which is found to be under-inclusive. The payment of benefit to widows, widowers or surviving civil partners is not challenged or said to be unconstitutional. Instead, the unconstitutionality found in this case, is that the benefit does not extend to Mr O'Meara. However, should the Court make a declaration that s. 124 of the 2005 Act is invalid having regard to the Constitution, that would deprive those who are*

[71] [2024] IESC 1.

acknowledged to be entitled to WCP, a beneficial statutory right, to which it is not suggested they are not entitled. ***Accordingly, I would make a declaration that s. 124 of the 2005 Act is inconsistent with the Constitution insofar as it does not extend to Mr O'Meara as a parent of the second, third and fourth appellants***."[72]

As O'Donnell CJ's comments demonstrate, the statute was unconstitutional because it should have included persons in the Applicant's situation but did not. However, a full and immediate declaration of invalidity would both have availed the applicant of nothing but also deprived persons who were otherwise entitled to the benefit of the statute of its positive effects.

Suspension may have afforded the legislature the opportunity to change the law to remedy the statute's under-inclusivity but the Supreme Court had, less than a year previously in *Heneghan*, said that the use of that remedy should be confined to exceptional cases. And there is nothing particularly exceptional – in the sense the Court outlined in *Heneghan* – about an underinclusive benefits case. That rule of precedent aside, had a suspended declaration been granted, once the period of suspension ended, and unless the legislature had enacted remedial legislation in the interim, the provision would have been be removed from the statute books, thereby depriving all persons of its benefit.

Tailored remedies were, arguably, potentially available to the Court. The Court could have read in to the statute people such as the Applicant or replaced the words "widow(er)" and "civil partner" with some form of neutral phrasing that could have captured every person who met the remainder of the statute's criteria, regardless of marital status.

However, had the Court decided to deploy a version of either of these tailored remedies, this would appear to be a case where the "elusive" divide between interpretation and legislating would have been crossed. The Court would, in effect, have been substituting its own judgment of what the common good would have required in that instance, notwithstanding that the legislature had pronounced on the issue in a particular way.

[72] ibid at para 159.

For all of those reasons, the solution adopted by the Court – the declaration of constitutional inconsistency insofar as persons in the Applicant's situation did not get the benefit of the statute – seems a solution which: (i) afforded the Applicant a meaningful remedy; (ii) met the requirements of the collaborative constitutional separation of powers but (iii) which also guarded against concerns about constitutional review becoming an established part of the legislative process. The Applicant still received a remedy – a solemn declaration by the Irish Supreme Court that his constitutional rights had been infringed – and the normative force of that declaration may very well lead to some form of legislative amendment in the future.[73] On the other hand – and in keeping with the idea that courts and the democratically elected branches of government play different institutional roles – the remedy chosen still left it to the other branches of government to come up with a policy based solution to the constitutional problem. Similarly, the Court – whether consciously or not – recognised there would be little value in striking down the provision in an *erga omnes* fashion, such that it has provided the legislative and executive branches with an appropriate degree of "support" in carrying out their functions.

As noted earlier, David Kenny has written about the benefits of "as applied" declarations of invalidity and it is difficult to disagree with his analysis.[74] The essence of his argument is that these declarations ensure that litigants obtain meaningful relief while the separation of powers is better respected in that the law remains intact insofar as it is not unconstitutional.

Additionally, and as with tailored remedies, such declarations seem to fit better with constitutional text in both Ireland and Canada, where laws are invalid only to the extent of their repugnancy and inconsistency, respectively, with each jurisdiction's constitution.

More importantly for present purposes, however, is the fact that the availability of this remedy could see judges being more willing to vindicate the rights of a meritorious litigant, absent the practical concerns which have traditionally accompanied

[73] At the time of writing, the general scheme of a bill has been published which has brought people in the applicant's situation within its ambit.
[74] David Kenny, 'Grounding Constitutional Remedies in Reality: The Case for As-Applied Constitutional Challenges in Ireland' (2014) 37(1) Dublin University Law Journal 53.

invalidation. As Gerard Hogan – writing extra-judicially – has argued, the practical effects of the far-reaching implications of invalidity could make judges more reticent to issue declarations of invalidity.[75] The as applied declaration is a useful solution to this problem. Of course, the fact that an as applied declaration could become the paradigmatic declaration does not change the fact that, in the right case, a declaration of *erga omnes* effect will still be available to the courts. Experience in Canada is reflective of this.

The potentially controversial solution to the meaningful individual remedy problem is what Kent Roach has termed the "twin track" approach to constitutional remedies.[76] Roach argues that this approach is appropriate where a statute which violates an individual's constitutional rights also raises significant "polycentric" concerns which a court may not be best placed to deal with.[77] In such circumstances, Roach argues, a remedy which affords the legislature an opportunity to remedy the systemic harm coupled with an individualised exemption for a litigant who has brought the case is an appropriate remedial response. A core aspect of Roach's argument is that if courts only focus on individual rights, then the systemic violations are likely to continue to occur but, if remedying systemic violations comes at the expense of neglecting individual redress, then courts move away from their traditional role and their legitimacy is called into question.[78]

The controversial aspect of this idea is that it could lead to similarly situated classes of persons being treated differently from one another. The Court in *G* seemed to endorse something approaching a presumption for the granting of the individualised exemptions from the effects of suspension or prospective only effects of a declaration of invalidity.

A presumption for an individualised exemption seems to put the matter too far, given the very basic equality before the law and connected rule of law concerns which this

[75] Gerard Hogan, 'Declarations of Incompatibility, Inapplicability, and Invalidity: Rights Remedies and the Aftermath' in Keirnan Bradley et al (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014).
[76] Roach (n16) *A Two-Track Approach to Remedies*.
[77] Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two Track Response' (2016) 66(1) University of Toronto Law Journal 3.
[78] Roach (n16) *A Two-Track Approach to Remedies* at 76.

raises. But the option for individualised exemptions must be available given that one of the purposes of constitutional review of legislation is to safeguard constitutional rights.

A factor which will weigh heavily on whether to grant an individual exemption will be the nature of the interest which the State has identified to obtain a suspension or make the effects of a declaration prospective only. For example, an individual exemption in *Heneghan* would have been difficult to contemplate give that it concerned eligibility for an electorate in an election which was unlikely to take place for several years. Similarly, where the compelling public interest identified as necessitating suspension is some form of "protection of the public" type concern, then an individualised exemption may not be appropriate. But where, as in *G*, the individual exemption was justified by powerful considerations and did not poses any obvious cost to another party or constitutional value, then its use is difficult to argue against.

There is one final point to make on individual exemptions. To be sure, they raise some uncomfortable issues. In light of that, and in keeping with the general approach of modest suggestions which this thesis has adopted, this chapter recommends that their use should be confined to rare cases. But in the name of protecting individual rights, it seems as if their use must be available. Fashioning individualised solutions is something which courts do on a daily basis. Of course, exemptions from rules of general application where legislation is concerned is something of a different character. But so long as courts approach the decision of whether to grant an exemption in a transparent way, then it removes the concern about the arbitrary application of different standards. After all, a decision is only truly arbitrary where there are no reasons for it, and a degree of indeterminacy and flexibility in the law and legal decisions is necessary in any properly functioning legal order.[79]

[79] Timothy Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (OUP 2000).

Chapter 7 | Conclusion

CHAPTER OVERVIEW

7.1 – Thesis Summary

The most straightforward conceptual approach to answering the question of what the proper boundaries of judicial power in remedies for unconstitutional legislation ought to be is, arguably, to simply enable judges to identify constitutional flaws and do no more. But the elegant simplicity of that solution is not, I suggest, an appropriate approach to constitutional review of legislation in an age of ever increasing statutory regulation and societal complexity, nor does it adequately reflect the role of the courts under the collaborative constitution. Additionally, it fails to recognise the ends to which the collaborative concept of the separation of powers is put under a plausible account of the modern state, such as that articulated by the republican scholar Philip Pettit.

In response to those difficulties, this thesis has approached the question of what the proper scope of remedial judicial discretion in constitutional review of legislation ought to be in the following way.

Chapter 1 began by introducing the key subject matter of the thesis, its central research questions, and the way in which I proposed to provide answers to those questions. In particular, it highlighted that this thesis is primarily a doctrinal piece of comparative constitutional theory research which is informed by a background political theory of the State. Importantly, it also recognised the inescapable limitations and trade-offs in a piece of work of this nature – the most pertinent of which are the limitations of comparative scholarship and the fact that theory, whether constitutional or political, can only shed so much light on the inherently practical problem of what remedies judges should deploy when they find legislation unconstitutional.

Chapter 2 analysed the remedial approach of the Supreme Court of Canada. It highlighted that the Canadian remedial experience had come to be characterised by a relatively unrestrained and unprincipled approach to remedial discretion, with suspended declarations becoming the default remedy deployed. The Supreme Court has recently attempted to restate its approach, opining that suspended declarations should be rarely used, as applied declarations of invalidity should be used regularly, and that there should be a presumption for tailored remedies such as reading in, reading down, and severance.

Chapter 3 then examined the Supreme Court of Ireland's remedial practice. It set out that the Irish courts are much less travelled down the remedial road than their Canadian counterparts, with the Supreme Court only formally suspending a declaration of invalidity for the first time in 2023, in what was a truly compelling set of circumstances. Additionally, the use of tailored remedies in Ireland is heavily circumscribed, with the Supreme Court even expressing the view that the remedy of reading in is unavailable. The Irish courts have much to learn from the Canadian experience, in particular how laying down overly rigid categories on when certain remedies ought to be used can lead to conceptual and doctrinal confusion. Instead, the Irish courts appear to intend to approach remedial questions cautiously, grounding their approach in broader ideas of constitutional principle such as the separation of powers and the rule of law.

In the final chapter of the doctrinal section of this thesis, Chapter 4 explored the Supreme Court of the United Kingdom's approach to constitutional remedies under section 3 and section 4 of the Human Rights Act 1998. The key points which emerged from Chapter 4 were that while the system of judicial review which obtains in that jurisdiction is traditionally understood as the classic instantiation of weak form review, the practical effects of the way in which the Supreme Court has exercised its powers under sections 3 and 4 suggests that the label weak form is apt to mislead. Section 3 has been used to often radically rewrite laws, while parliament has a near perfect rate of compliance with section 4 declarations of incompatibility.

Moving from legal doctrine to theoretical analysis, Chapter 5 was in two parts. The first part addressed in detail the problems of constitutional theory which the remedial powers outlined in Chapters 2 – 4 posed. These were primarily separation of powers based concerns, but rule of law issues were also considered. In essence, these concerns were that, on the separation of powers, increased remedial discretion could lead to judges straying into the legislative domain, while on the rule of law the chief concern was that remedial discretion had the potential to undermine certainty and predictability in the law.

The second part of Chapter 5 explored to what extent these concerns rested on unrealistic accounts of the separation of powers. In doing that, it highlighted several

deficiencies in "orthodox" or "pure" accounts of the separation of powers, accounts which, in turn, rested on a notably narrow view of the state. Chapter 5 argued that questions of constitutional remedies ought to be approached through the prism of the collaborative account of the separation of powers, which I argued provided a more realistic and morally appealing account of the separation of powers. Chapter 5 also argued that the content of the separation of powers itself could only be worked out with reference to a background theory of the state, a plausible vision of which I argued could be found in the neo-republican theory of freedom and government generally associated with Philip Pettit. Ultimately, Chapter 5 concluded that to achieve the rich set of institutional and policy demands mandated by the republican vision of the state, institutions had to work together to ensure that citizens were free from domination and enjoyed an equal share of joint control in the direction of the State. Applying that analysis to the specific question of judicial remedies, the Chapter concluded that these aims were better served by a more fluid conception of the role of the judge in constitutional review of legislation.

7.2 – A Final Word

Finally, Chapter 6 provided a detailed account of four touchstones to both ground and constrain judges when they find that legislation is incompatible with the constitution.

The language of touchstones used in Chapter 6 rather than, say, rules is deliberate. Rather than creating a hostage to fortune in attempting to set down a rigid formula – a formula which, over time, may well come to be ignored anyway – in a misguided attempt to lead judges to the right remedial answer in individual cases, this thesis has sought to suggest a series of broader guidelines which, as Roach has noted in adapting Dworkin's discussion of principles from the latter's theory of adjudication: "…*officials must take into account, if it is relevant, as a consideration inclining in one direction or another*." On this account, a judge is "*required to assess all of the competing and conflicting principles*" that bear on a case and "*make a resolution of these principles rather than identifying one among others as 'valid'*".[1]

[1] Kent Roach, 'Principled Remedial Discretion Under the Charter' (2004) 25 S.C.L.R. (2d) 101 at 111, citing Ronald Dworkin, *Taking Rights Seriously* (HUP 1976) at 26 and 72.

The touchstones identified chart a balance between, on the one hand, ensuring the necessary degree of collaboration between the courts and the other branches of government to achieve the republican aims of the state outlined in Chapter 5 while also, on the other, respecting individual rights to a sufficient degree such to assist in the aim of ensuring that citizens are free from domination.

In summary, Chapter 6 sought to outline four key touchstones which may serve as a guide for judges in the exercise of their remedial practice. It does this in the hope of assisting judges in understanding the proper limits of their remedial role as that role is understood under the collaborative constitution. Owing to the potentially problematic images of the Dworkinian judge that the collaborative account of the separation of powers may be read as encompassing, it counsels modesty and restraint at a general level on the part of the judiciary, but also in the weighting of the specific remedial touchstones recommended.

The first – and most important – of these is that courts and the democratically elected branches of government play different institutional roles. Courts do different things to the other branches and serve a different purpose. This must be the guiding light for judges in any remedial choice they have to make, notwithstanding the need for collaboration on the part of institutions in ensuring the republican goals of the state are attained.

The second touchstone is that, where possible and subject to certain constraints, courts should, in the first instance, attempt to remedy an unconstitutional statute through the remedies of reading down and severance. These remedies, while undoubtedly leading to similar results in certain cases, seem of a less potent nature generally than the remedy of reading in. Consequently, the use of that final remedy should be restricted to rare cases.

The third touchstone which this thesis argues for is the rare use of suspended declarations and only where some public interest warranting its use has been expressly identified.

Finally, this thesis argues that the need to protect individual rights must inform remedial judicial practice to a significant extent. This seems to call for much greater

use of the as applied declaration of invalidity as well as individualised exemptions from the effects of remedies which would otherwise not afford an individual immediate redress. For the courts to function as meaningful site of contestation where citizens can seek to check the actions of the State, collaboration between the branches of government cannot come at the expense of individual rights.

These touchstones are subject to the important caveat that we cannot hope to have a proscriptive series of rules which will lead judges to the right remedial answer in a given case. Common law adjudication is a notoriously context specific exercise. All we can do, then, is outline standards which are broad and flexible enough to meet the varied challenges of constitutional review, but which are sufficiently grounded in principle to prevent judges straying beyond the proper boundaries of their role, as that role is understood under the republican informed account of the collaborative separation of powers.

As I see it, what logically follows from this work is the development of fully-fleshed out republican account of the separation of powers. In this thesis, I have sketched the broad consequences of the implications of Pettit's work for the separation of powers, and highlighted what I see as the inescapable links between his theory and the collaborative vision of that concept, which I think presents a compelling vision of that doctrine. Realistically, however, given the depth of both Pettit's work and the detail of picture of the separation of powers painted by the collaborative theorists, a full examination of the implications of both theories for one another has to be the focus of a standalone project over several years – and which leaves aside, for a time at least, its application to specific questions like remedial judicial discretion.

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