Suspended Declarations of Invalidity: A Comparative Perspective

SUSPENDED DECLARATIONS OF INVALIDITY: A COMPARATIVE PERSPECTIVE

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"We live in a world rich with rights.
Alas, we live in a world poor in remedies".[1]

With these words, a leading constitutional scholar in the field of judicial remedies begins his book on the subject. One cannot help but agree that remedies are a crucial part of the legal system and yet they are an under-studied topic – at least in public law – with respect to their availability and their efficacy.

The present article focuses on a particular public law remedy that has gained much attention in constitutional litigation; namely, suspended (or delayed) declarations of invalidity. The underlying idea is that – under certain circumstances – the judiciary should not simply nullify a law repugnant to the Constitution; courts should instead grant the local legislators an additional period of time during which they could legislate before the law becomes void. In essence, this remedy seeks to maintain the traditional judicial review of the laws but to mitigate the doctrine of nullity[2] by allowing for a period during which the legislative branch may intervene.

In tackling this topic, the article adopts a comparative and analytical approach. The comparative method illuminates the widespread use of suspended declarations in several jurisdictions, with sometimes a transnational dialogue between foreign courts and scholars. In addition, comparative material (mainly from Canada, Italy, and South Africa) is useful in identifying issues and possible solutions in the features that characterize the constitutional remedy in question.

The analytical approach stems from the desire to go beyond a descriptive account of the judgments presented and to foster legal debate on the appropriateness of suspended declarations. Accordingly, the article engages with the limits and contradictions emerging from resorting to suspended declarations and advances normative suggestions on the use of this remedy. It is argued that, if used carefully, suspended declarations can be a promising remedy to employ in constitutional litigation and a flexible instrument that manages to find the difficult balance between the interests and values at stake.

Origin and Spread of Suspended Declarations

Suspended declarations of invalidity are a remedy whose origin may be tracked down to West Germany when the local Constitutional Court started using declarations of incompatibility (*Unvereinbarkeit*) in 1958.[3] A declaration of incompatibility, contrary to a declaration of invalidity (*Nichtig*), implies that a law does not immediately become void. Rather, the court will suspend the effects for a defined period of time, giving the legislature the opportunity to amend the law to make it constitutional.[4] In the following decades, this remedy began to develop in other jurisdictions and evolved in the modern delayed declarations of invalidity.

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[1] K. Roach, *Remedies for Human Rights Violations* (2021), p. 1.

[2] For a brief account on the doctrine of nullity see R. Leckey, "The Harms of Remedial Discretion", *International Journal of Constitutional Law*, XIV, no. 3 (2016), p. 586.

[3] Bundesverfassungsgericht (German Federal Constitutional Court), Beschluß (judgment) of 11 June 1958. Declarations of invalidity, however, became a stable remedy in Germany only after 1970. See N. Fiano, "La modulazione nel tempo delle decisioni della Corte Costituzionale tra dichiarazione di incostituzionalità e discrezionalità del Parlamento: uno sguardo alla giurisprudenza costituzionale tedesca", *Forum di Quaderni Costituzionali* (2016) (available online).

[4] R. L. Nightingale, "How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes", *The Yale Law Journal*, CXXV, no. 6 (2016), p. 1725; R. Pinardi, *L'horror vacui nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore* (2007), p. 37.

The remedy at issue differs from "strong"[5] immediate declarations of invalidity (as practiced – for instance – by United States courts or by constitutional courts) and "weak" declarations of incompatibility as practiced by United Kingdom[6] and New Zealand[7] courts. Suspended declarations of invalidity differ from the latter as they are binding upon the legislature and ensure that – when the time granted has elapsed – the unconstitutional law will cease to exist;[8] at the same time, they differ from the former insofar as they acknowledge the superior ability of the legislature in designing alternatives to polycentric problems.[9]

Critics of suspended declarations argue, *inter alia*, that either the remedy is too deferential towards the idea of parliamentary supremacy or that the same encourages judicial overreach and judicial intervention in the constitutional arena.[10] On the other hand, the supporters contend that this constitutional remedy is a new form of "dialogic"[11] (or "open")[12] remedy, which is supposed to combine the benefits of political and judicial constitutionalism and to foster cooperation between the three branches of public power (judicial, legislative, and executive).

Regardless of scholars' opinions, suspended declarations of invalidity have become stable and widely used judicial instruments, particularly in South Africa and in Canada.[13] The remedy has become popular in other countries.[14] One of these countries is Ireland, where scholars and judges have long discussed the Canadian experience.[15]

In 2017, the Irish Supreme Court delivered a judgment[16] in a case concerning an asylum seeker who sought employment notwithstanding the absolute ban provided in the Refugee Act 1996.[17] The Supreme Court held that a complete ban on asylum seekers working while awaiting determination of asylum status was, in principle, unconstitutional. However, given "that [this] is first and foremost a matter for executive and legislative judgment",[18] the Court adjourned the proceedings for six months, encouraging a legislative response to resolve the issue. Although Irish judges declined to use the expression 'suspended declaration of invalidity' or to cite foreign precedents, many commenters saw

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[5] For the distinction between strong-form remedies and weak-form remedies see M. Tushnet, *Weak Courts, Strong Rights* (2008).

[6] S. 4 Human Rights Act 1998.

[7] See Supreme Court of New Zealand, *Attorney-General v. Taylor*, Judgment No. 65/2017, 9 November 2018.

[8] K. Roach, "Remedies for Laws that Violate Human Rights in Public Law Adjudication", in *Common Law Systems: Process and Substance* (2016), p. 292.

[9] L. L. Fuller, "The Forms and Limits of Adjudication", *Harvard Law Review*, XCII (1978), pp. 353-409.

[10] Leckey, note 2 above, p. 598.

[11] Roach, "Dialogic Remedies", *International Journal of Constitutional Law*, XVII, no. 3 (2019), pp. 860-883.

[12] A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (2012).

[13] Leckey, note 2 above, pp. 584-607.

[14] Several jurisdictions have used, more or less frequently, suspended declarations of invalidity or similar remedies: see Article 140(5), Austrian Constitution (English translation available online): "The decision of the Constitutional Court […] enters into force, at the end of the day of the publication, if the Constitutional Court does not specify a time for voidance. This time limit may not exceed 18 months"); United States (although arguably only in one case: Supreme Court of the United States, *Northern Pipeline Construction v Marathon Pipe Line Co.*, Judgment No. 81-150, 28 June 1982); Republic of Colombia (see Corte Constitutional (Colombian Constitutional Court), Judgment No. C-577/11, 26 July 2011), Hong Kong Special Administrative Region (see Hong Kong Court of Final Appeal, *Koo Sze Yiu & Anor v. Chief Executive of HKSAR*, Judgment of 12 July 2006), as well as other Asian countries. See Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (2015). For the sake of conciseness, these jurisdictions will not be examined in the present article.

[15] E. Carolan, "The Relationship Between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity", *Irish Jurist*, XLVI (2011), pp. 180-191; D. Kenny, "The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective", in E. Carolan, *The Constitution of Ireland: Perspectives and Prospects* (2013).

[16] Supreme Court of Ireland, *NHV v. Minister for Justice and Equality*, Judgment No. 31 & 56/2016, 30 March 2017 [hereinafter: *NHV*].

[17] S. 9(4) Refugee Act 1996.

[18] Note 16 above.

in the Court's decision the assimilation of this judicial instrument into the Irish legal system.[19] This is even more so since subsequent case law upheld the remedial approach taken in *NHV*.[20]

The Italian experience seems clearer with respect to this trend. In 2017, an activist named Marco Cappato helped a tetraplegic Italian citizen to die in a Swiss clinic. Following the event, Cappato was charged with the offence of assisted suicide[21] before the Criminal Court of Milan. The judges, however, chose to refer to the Constitutional Court the question of whether the absolute ban on assisted suicide was compatible with the Italian Constitution.[22] In 2018, the Italian Constitutional Court decided to stay the proceedings for 12 months.[23]The Court found that the provisions contained in the Italian Criminal Code were incompatible with human dignity and other rights enshrined in the Constitution, but refused to immediately strike down the said rule and, instead, urged the legislator to approve a new legal framework during the suspension. The interlocutory measure referred to the need of promoting a "collaborative" and "dialogic"[24] dialogue between the Court and the Parliament and, in addition, directly cited *Carter v. Canada* (2015) decided by the Canadian Supreme Court. In the latter judgment,[25] the Canadian judges were faced with the same problem concerning assisted dying and, deciding against the compatibility with the local Charter of Rights and Freedoms, they opted for a suspended declaration of invalidity.

Following its ground-breaking decision, the Italian Constitutional Court adopted the same remedy in two other cases.[26] Thus, suspended declarations of invalidity became part of the judicial armoury of Italian constitutional lawyers.

The Italian and Irish courts did not directly find the law to be invalid suspending the effects of the declaration; rather, they found that these laws were incompatible with some constitutional rights but deferred making an order effectively invalidating them.[27] It is submitted that this difference only concerns the form but not the substance of the remedy, which essentially corresponds to suspended declarations of invalidity as used in Canada or South Africa. Furthermore, this difference might be explained in light of an initial reticence to use a new judicial remedy.

From these experiences, a first conclusion may be drawn. Suspended declarations of invalidity are an increasingly common remedy for supreme and constitutional courts. Their success, even in civil law countries where the doctrine of parliamentary sovereignty was never imported, may be explained by the complex and increasing litigation in the field of public law.[28] Judges have to deal with a request oriented to the affirmation and the development of individual rights. They want to be the "guardians"[29] of constitutional values and freedoms, but they cannot help but acknowledge their limits. In the first place, the perceived democratic deficit, rooted in the well-known "counter-

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[19] See E. Carolan, "Suspended Declarations of Invalidity in Ireland?: The Story So Far", *UK Constitutional Law Blog* (2017) (available online); also E. Carolan, "A 'Dialogue-oriented Departure' in Constitutional Remedies? The Implications of *NVH v Minister for Justice* for Inter-branch Roles and Relationships", *UCD Working Papers in Law, Criminology & Socio-Legal Studies*, Research Paper No. 12/2017.

[20] See, for example, Supreme Court of Ireland, *P.C. v. Minister for Social Protection*, Judgment No. 89, 28 November 2018: in the judgment, the Court discussed in depth the Canadian experience and acknowledged that the decision in *NHV* has "some of the features of the suspended declaration".

[21] Article 580, Italian Criminal Code.

[22] Corte d'Assise di Milano (Criminal Court of Milan), Ordinanza, 14 February 2018.

[23] Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 207 of 2018.

[24] Ibid. All quotations from the present judgment my translations from the original Italian text.

[25] Supreme Court of Canada, *Carter v. Canada*, Judgment No. 35591 of 6 February 2015.

[26] The first one (Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 132 of 2020) concerned the criminal offence of press defamation, whereas the second (Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 97 of 2021) involved the unconstitutionality of a harsher form of life imprisonment (*ergastolo ostativo*).

[27] Kenny, "Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads", *Dublin University Law Journal*, XL, no. 2 (2017), p. 92.

[28] M. Ramsden and K. Gledhill, "Defining Strategic Litigation", *Civil Justice Quarterly*, XXXVIII, no. 4 (2019), pp. 407-426; A. Chayes, "The Role of the Judge in Public Law Litigation", *Harvard Law Review*, LXXXIX (1976), p. 1284.

[29] M. Scheinin, H. Krunke, and M. Aksenova, *Judges as Guardians of Constitutionalism and Human Rights* (2016).

majoritarian dilemma".[30] Moreover, although the judiciary is traditionally focused on the adjudicatory paradigm,[31] the same is inherently not equipped to deal with multifaceted problems that require general decisions in order to allocate limited public and private resources.[32] The latter is the proper task of the legislature.

The surging of dialogic remedies in general, and suspended declarations of invalidity particularly, is to be viewed as an attempt to implement general and systematic reforms while maintaining a strong role for courts in protecting human and fundamental rights. This trend is currently present in most countries and explains courts' preference for this remedy. This preference is made manifest by the fact that in all the countries under scrutiny, with the notable exception of South Africa,[33] suspended declarations are a judicial creation without any express basis in the written law.[34]

An additional explanation could be found in the judicial history of the last decades. Since World War II, courts in many countries have become more active in fostering constitutional developments.[35] Constitutional courts in continental Europe are an example: created as "negative legislators",[36] only able to invalidate laws repugnant to the constitution, they have developed several kinds of judicial remedies to "manipulate" the law.[37] As a consequence, they are essentially able to create new legal rules without the intervention of the democratically elected bodies.[38] This tendency, together with the alarming inability of the legislatures to act in controversial issues, has arguably shifted more power towards courts. The adoption of more dialogic remedies, at least in some countries, could be interpreted as an attempt to rebalance (maybe fictitiously, as will be discussed below) the balance of power with parliaments and lower the expectations of those who support a (quasi-)law-making power for judges, particularly problematic in continental Europe.[39]

Whatever the reason may be, it is almost unquestionable that in practice this constitutional remedy is gaining a strong appeal, to the extent that a comparative lawyer may talk of a successful legal transplant.[40] However, the successfulness of this remedy in constitutional litigation remains an open question. Several shortcomings and ambiguities have been pointed out, and these limits will be analyzed below.

The Decision to Suspend a Declaration of Invalidity

Assuming that suspended declarations of invalidity are used, a judge should first question whether the use of such instrument is suitable and necessary in the case before him or her. In other words, when should delayed declarations of invalidity be used?

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[30] Made famous by A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).
[31] Chayes, note 28 above, p. 1282.
[32] Fuller, note 9 above.
[33] Article 172(1)(b)(ii), Constitution of the Republic of South Africa: "When deciding a constitutional matter within its power, a court [...] may make any order that is just and equitable, including [...] an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect",
[34] Roach, note 8 above, p. 277. For example, in Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 207 of 2018, the Italian Court vaguely found the power to deliver a (quasi-)suspended declaration of invalidity in its prerogatives to "manage its own constitutional proceedings".
[35] Garlicki, "Constitutional Courts versus Supreme Courts", *International Journal of Constitutional Law*, V, no. 1 (2007), p. 48.
[36] H. Kelsen, *General Theory of Law and State* (1945; reprint ed.; 2009), p. 269.
[37] For an account in English regarding, for example, the evolution of and the doctrines developed by the Italian Constitutional Court see V. Barsotti, P. G. Carozza, M. Cartabia, and A. Simoncini, *Italian Constitutional Justice in Global Context* (2016).
[38] T. Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?", *Journal of Comparative Law*, III, no. 2 (2008), p. 108.
[39] Although somewhat anachronistic, the idea of the judge as a mere "*bouche de la loi*" (expression coined by Montesquieu in his *The Spirit of Law*) remains influential in the civil law tradition.
[40] For the notion of "legal transplant", see A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

In answering this question, Canadian experience is of particular interest. A suspended declaration of invalidity was first used in a case[41] concerning the invalidity of unilingual laws in the Province of Manitoba. The Court found that all laws written in English only, and not in French, were invalid, but it suspended the effects of the judgment during the time needed for the translation of the unilingual provisions. The decision highlighted understandable concerns for the "legal vacuum with consequent legal chaos"[42] that an immediate declaration would have caused. The necessity of avoiding anarchy and preserving the rule of law were, thus, the main reasons to justify the granting of such a remedy.[43]

After the introduction of suspended declarations in the practice of Canadian courts, the Supreme Court tried to justify the conditions for the application of the remedy in *Schachter v. Canada*.[44] The starting premise was that "[suspending a] declaration of nullity should turn not on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public".[45] Accordingly, it laid down three extraordinary situations for awarding a suspended declaration: *a)* a danger to the public, *b)* a threat to the rule of law, or *c)* the invalidity of an under inclusive benefit which would result in the deprivation of benefits from deserving persons. The rationale behind this decision was that delayed declarations are an exceptional remedy which may be used insofar as an immediate declaration would create socially harmful consequences; little or no importance had the dialogic nature of such remedies or the fact that Parliament could be willing to intervene on the issue.[46]

However, the same Court has proved itself unable to follow its own principles.[47] The Canadian Supreme Court has suspended declarations of nullity in several cases which fall outside the three criteria listed in *Schachter*. For example,[48] in *Corbiere v. Canada*,[49] the Court felt compelled to encourage "remedies that allow the democratic process of consultation and dialogue to occur".[50] As a consequence, it suspended the effects of the judgment for eighteen months in order "to give Parliament the time necessary to carry out extensive consultations and respond to the needs of the different groups affected".[51] This decision correctly highlighted a fundamental feature of this remedy, namely the capacity of promoting democratic deliberation, but it was criticized for normalizing suspended declarations to the extent that they have almost become a default remedy in Canadian constitutional litigation.[52]

To resolve this conundrum, one solution would be to abolish judicial discretion on this issue. Indeed, a legal system is conceivable where every declaration of nullity must be followed, if the parliament or the government so wish, by a suspension to allow the repugnant laws to be replaced. Such a model may be criticized for several reasons: apart from the lack of flexibility, it could lead to

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[41] Supreme Court of Canada, *Re Manitoba Language Rights*, Judgment No. 18606, 13 June 1985.
[42] Ibid.
[43] B. Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity", *Manitoba Law Journal*, XLII, no. 1 (2019), p. 23; G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law", *Alberta Law Review*, IL, no. 1 (2011), p. 111.
[44] Supreme Court of Canada, *Schachter v. Canada*, Judgment No. 21889, 9 July 1992 [hereinafter: *Schachter*].
[45] Ibid.
[46] Hoole, note 43 above, p. 139.
[47] In fact, Supreme Court of Canada, *Ontario* v. *G*, Judgment No. 38585, 20 November 2020 overruled the approach in *Schachter* favoring a proportionality-based analysis: "In determining whether to exercise remedial discretion to suspend a declaration of invalidity, the Court should consider whether and to what extent the government has demonstrated that an immediately effective declaration would have a limiting effect on the legislature's ability to set policy".
[48] See also Supreme Court of Canada, *Dunmore v. Ontario*, Judgment No. 27216, 20 December 2001; Supreme Court of Canada, *Chaoulli c. Québec*, Judgment No. 29272, 9 June 2005; Supreme Court of Canada, *Canada v. Bedford*, Judgment No. 34788, 20 December 2013.
[49] Supreme Court of Canada, *Corbiere v. Canada*, Judgment No. 25708, 20 May 1999. The case concerned the exclusion of off-reserve band members from voting in their Aboriginal Band's election.
[50] Ibid.
[51] Ibid.
[52] S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies", *Supreme Court Law Review*, XXI (2003), p. 228; Hoole, note 43 above, p. 108.

a systematic delay in implementing court decisions and, thus, could perpetuate human rights violations for a longer time than needed. However, within an appropriate institutional environment this solution has several advantages. First, it removes judicial remedial discretion with respect to a difficult and easily contested choice. As a consequence, it removes the disadvantage of the uncertainty related to the court's choice between a delayed or an immediate declaration.[53] Furthermore, it stresses the role (and the duties) of parliament in the law-making process by giving it the chance to intervene, if appropriate, or to be held accountable by the public, if it declines to do so.

On the contrary, if judicial discretion were to be retained, it would be necessary to choose between a rule-based approach, as set out by the Canadian Supreme Court in *Schachter*, or a principle-based approach, as suggested by some authors.[54] The former has the disadvantage of being inevitably under- or over- inclusive. Indeed, a pre-made list is unlikely to encompass all the possible factors and situations justifying the award of a suspended declaration.[55] Accordingly, it seems preferable to govern remedial discretion through a principle-based approach.

Against this backdrop, two principles come into play:[56] the principle of separation of powers, according to which courts have the duty to review the validity of the laws, whereas it is the legislature's task to make new laws balancing all the different interests, and the principle of democratic legitimacy[57] that requires that all political choices are to be taken by the democratically accountable bodies.

Therefore, a distinction should be drawn between the cases where a declaration of invalidity leaves only one option to correct the unconstitutional result and the cases where there are different options potentially in line with the constitution. If the choice is inevitable, courts should be free to exercise judicial review without resorting to a suspended declaration. On the contrary, as the instrument at stake is to be understood primarily as a dialogic remedy, the courts facing the choice between different alternatives must refer the issues to parliaments in order to leave to them the inherently political decision between several legitimate options.[58]

Time of Suspension

A crucial aspect to be considered when analyzing this remedy is the problem of "time". A distinctive feature of a suspended declaration of invalidity is that the effects of the court's decision are delayed for a certain period. Although the time granted can vary, the typical period of suspension is twelve months.[59]

This period of time, however, is not grounded on empirical bases, but on the court's idea of how much time is appropriate for dealing with a particular issue. However, courts usually forget or underestimate the different stages required by parliamentary procedure.[60] Each country has different parliamentary rules, and each class of legislative measures is different. Accordingly, the time needed to approve different bills in different countries varies significantly. Courts usually take these facts into little or no consideration and, instead, prefer an irreflective, default time limit.

This approach raises serious concerns for the outcome of the remedy. In the first place, not giving enough time prevents the opportunity of parliament to legislate, that is, to engage in a real

[53] Leckey, note 2 above, p. 593.
[54] Roach, *Constitutional Remedies in Canada* (2d ed.; 2013), at 3.360.
[55] See Roach, "Principled Remedial Discretion Under the Charter", *The Supreme Court Law Review*, XXV, no. 3 (2004), pp. 101-150.
[56] It is important to mention that other authors who favor a principle-based approach have reached different conclusions. For example, by stressing the use of the proportionality principle, see Hoole, note 43 above, pp. 107-148; see also Roach, note 1 above, pp. 219-221.
[57] This is a "procedural" conception of democratic legitimacy: see Fabienne Peter, *Democratic Legitimacy* (2009).
[58] See Supreme Court of Canada, *Canada v. Hislop*, Judgment No. 30755, 1 March 2007: "[C]hoosing between those options remains the domain of governments".
[59] Roach, note 8 above, p. 278.
[60] Leckey, "Assisted Dying, Suspended Declarations, and Dialogue's Time", *University of Toronto Law Journal*, LXIX, no. 1 (2019), pp. 64-83.

"dialogue".[61] Indeed, either it creates an incentive for bad and rushed legislation, or it determines an "unsuccessful" dialogue by effectively preventing the legislature to intervene. In addition, as discussed below, this could lead to an abuse of the remedy by judges who grant maliciously a short period of time to hide a bold, if not improper, use of their constitutional role.

Finding a solution is a difficult task, and perhaps every proposal has serious shortcomings. A first alternative is to let parliaments decide on the suspension time. Obviously, this solution leaves much room for abuses and malpractices by the legislature.

An alternative is granting by default a significantly bigger amount of time to allow the parliament to legislate unhurriedly. This solution, however, perpetuates the violation of fundamental rights by allowing an unconstitutional law to remain in place for potentially several years.[62] Although this flaw could be maybe overcome by using *interim* orders or constitutional exemptions, another obstacle lies in the legal uncertainty in allowing a temporary measure to remain in place for years.[63] In addition, the parliament and the government could see the issue as less important, thus postponing any actions to tackle the violation.

Against this backdrop, the best option is for courts to decide the issue with a proportionality-based approach. In particular, courts should initially set a reasonable time limit, which could be raised provided that the State demonstrates and justifies the need for a higher time. In deciding the issue, courts should take into consideration several empirical factors usually neglected, such as the parliamentary calendar and the time usually needed to adopt similar legislative measures.

Assuming that the parliament is willing to intervene but runs out of time, an additional question arises: should courts allow an extension of the initial period? The answer should be affirmative, but only under certain conditions.

First, the parliament must show that a significant effort to approve a new law has been put in place. In the absence of a clear and objective indication, as happened, for example, in Italy,[64] that the legislature is willing to intervene promptly, no dialogue is possible and the suspension only amounts to pointless procrastination. Furthermore, the legislature must demonstrate that extraordinary circumstances justify a prorogation. A good example is the process of dissolving the parliament to hold a new general election, as happened in Canada in 2016 when the State successfully asked for a four-month extension.[65] Nevertheless, as pointed out by the Canadian Supreme Court, "the burden […] is heavy",[66] and an extension should not be granted with ease.

In particular, it should not be granted for reasons which were known at the time of the judgment. These previous facts should be taken into account by the court when it initially decides for how long the declaration has to be suspended. Therefore, it is submitted that only subsequent and severe events could be claimed as an extraordinary circumstance to extend the effects of the suspension.

Legislative Inertia

[61] Ibid.
[62] Leckey, note 60 above; Leckey, note 2 above, p. 591.
[63] Leckey, note 60 above.
[64] During the one-year suspension following Corte Costituzionale (Italian Constitutional Court), Ordinanza (ordinance) No. 207 of 2018, neither the Parliament nor the Government introduced or continued any bill related to the matter referred by the Constitutional Court. The same happened in the second instance where the remedy was used and resulted in Corte Costituzionale (Italian Constitutional Court), Sentenza No. 150 of 2021 nullifying the criminal offences at issue. At the time this article is being written, the Italian Parliament has not approved a new law addressing the latest Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 97 of 2021; however, a bill is under parliamentary scrutiny, and there is a likelihood it will be approved, thus giving the country the first "successful" dialogue with the Constitutional Court using this remedy.
[65] Supreme Court of Canada, *Carter v. Canada*, Judgment of 15 January 2016.
[66] Ibid.

A further question logically arising relates to legislative inertia. Assuming that the parliament is unwilling or unable to pass new legislation or that a request for an extension is rejected, what is the proper course of action for the court?

At first glance, the answer seems simple: nothing. A suspended declaration of invalidity, indeed, is made up of two parts: the order which finds a provision to be contrary to the constitution and, thus, declares it invalid, and a suspension which temporarily paralyzes the effects of the said order. Once the time granted expires, the order of invalidity should come into force nullifying the repugnant provisions. This model, effectively followed by several courts, is consistent with the features of this remedy, as well as with the principle of separation of powers. In fact, the legislature had the chance to intervene and the court, by invalidating the previous law, is performing its constitutional role of judicial review.

The situation can be more problematic when a court has previously adopted an *interim* measure or when the court did not initially opt for a proper declaration of invalidity, as in Italy or Ireland where the local courts retained jurisdiction and deferred the final decision. In these cases, courts could be tempted to adopt a different approach by using manipulative tools in order to achieve the solution the court thinks more appropriate. A court could be concerned that striking down the current laws will result in a socially and politically undesirable situation and, consequently, it could feel "forced" to find an alternative.

An example of this approach is the Italian Constitutional Court decision discussed above. When the Court opted for staying the proceedings for one year, it also set out in the same ordinance[67] some "guidelines" that "should be evaluated"[68] by the Parliament. During the said time, however, the Italian Parliament failed to pass new laws on the matter. As a consequence, in September 2019, the Constitutional Court entered a judgement[69] which declared the unconstitutionality of the relevant provision in the Italian Criminal Code. However, the Court did not simply strike down the incompatible law, but effectively manipulated the existing laws to create an administrative procedure under which a person can legally ask for assisted death.[70] The Court feared that the nullification of the law would have resulted in an impaired protection of other fundamental rights. Consequently, it "t[ook] charge of the need to avoid it […] [by] deriving from the coordinates of the current system the constitutionally necessary filling criteria"[71] to adopt a new alternative system, which is essentially the one "proposed" in its previous ordinance.[72] At the same time, the Court agreed that the choices made are not the only ones compatible with the Constitution, thus allowing future legislation to change the details of the scheme set out by the Court itself.[73]

Although the concerns of the Italian judges were understandable, this decision sets a bad precedent. If a court acknowledges that parliament is best placed to take sensitive decisions and balance concurrent interests, this conclusion remains valid even in case of legislative inertia. A court, even when engaging in dialogic remedies, must remain a court and fulfill its constitutional duties: if the legislature is not willing to adopt a new constitutionally compatible solution, the court should exercise its power of review and invalidate the statute incompatible with the supreme law of the country. On the other hand, a court should never replace the legislature and should always refrain

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[67] Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 207 of 2018.
[68] Ibid.
[69] Corte Costituzionale (Italian Constitutional Court), Sentenza No. 242, 22 November 2019.
[70] With regard to facts that happened before the judgment at issue, since the administrative steps laid down by the Constitutional Court were not possible, the Court held that judges have to assess whether the actions were lawful by looking at "substantially equivalent" requirements (terminal illness, serious physical or psychological suffering, a clear and unambiguous consent, and so on). Following the Constitutional Court judgment, the Criminal Court of Milan found that these conditions were met in the original case and, accordingly, acquitted Cappato from all charges. See Corte d'Assise di Milano (Criminal Court of Milan), Sentenza No. 8/19, 23 December 2019.
[71] Corte Costituzionale (Italian Constitutional Court), Sentenza No. 242, 22 November 2019.
[72] E. Furno, "Il 'caso Cappato' ovvero dell'attivismo giudiziale", *Osservatorio AIC*, no. 1 (2020), p. 305.
[73] Ibid., pp. 312-312.

from making political choices when the constitution allows for different alternatives.[74] A suspended declaration of invalidity gives the parliament the opportunity to "have a say",[75] but it does not create any duty to intervene.

This solution seems preferable also because it allows courts to replace the questionable techniques developed in the last decades to find alternatives to simple declarations of invalidity.[76] If dialogic remedies are fostered, courts may return to what they do best: adjudicate disputes and, if necessary, exercise judicial review by invalidating unconstitutional laws. Issues concerning the replacing or the extending of unconstitutional laws, on the other hand, can be left to the best equipped legislative branch.

Interim Remedies

A major disadvantages of delayed declarations of invalidity is that they leave successful applicants without any effective remedy.[77] While the effects of the declared invalidity are suspended, those who litigate and successfully demonstrate their case are left in a state of uncertainty and without redress.[78] This raises worse problems in criminal proceedings because the delay affects the lives of people who are deprived of their rights and freedoms by the State.[79] Furthermore, it should be considered that usually the laws adopted to face a delayed declaration of invalidity are prospective so that they only affect future situations.[80] This may lead to paradoxical scenarios where the people who have litigated and are affected by a past violation, although nominally winners in courts, find no remedy because the laws that should repair their wrongs only regulate future violations.

Despite the problems, courts usually assign little importance to the measures for successful plaintiffs in case of a suspension, to the extent that, in not a few cases, they do not even address the issue. In the Irish case *NHV*, for example, the Supreme Court was completely silent on the temporary measures for those who were unlawfully deprived of their constitutional right to seek employment.[81] One way to tackle this problem is to combine an individual remedy tailored for the applicants in the specific case with a more general remedy directed to the legislature. This "two-track approach"[82] tries to combine the benefit of traditional remedies, which apply only to the parties to the proceedings, with more general and systematic remedies that acknowledge the role of institutional cooperation in public law issues.

In case of unconstitutional legislation, plaintiffs usually seek a constitutional exemption, that is, an order from a court that exempts them – and only them – from the application of the general law[83]. When such instrument is used to relieve the successful claimants in the context of a suspended declaration of invalidity, this remedy amounts to "an exemption from the effect of the suspension".[84] The said option, however, fails to cover those in a position similar to the original applicants.

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[74] A. Ruggeri, "Rimosso senza indugio il limite della discrezionalità del legislatore, la Consulta dà alla luce la preannunziata regolazione del suicidio assistito (a prima lettura di Corte cost. n. 242)", *Giustizia insieme* (2019) (available online).

[75] A. Kavanagh, "The Lure and the Limits of Dialogue", *University of Toronto Law Journal*, LXVI, no. 1 (2016), p. 85.

[76] Such techniques include, in common law countries, "severance", "reading in", and "reading down". B. Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity", *Manitoba Law Journal*, XLII, no. 1 (2019), p. 28. Other judicial techniques developed in civil law countries include "interpretative" decisions and "additive" judgments. See Groppi, note 38 above, p. 100).

[77] Leckey, note 8 above, p. 279.

[78] Kenny, note 27 above, p. 97.

[79] Leckey, note 2 above, p. 592.

[80] Choudhry and Roach, note 52 above, p. 209; Roach, note 8 above, p. 288.

[81] Admittedly, this was influenced by the fact that the applicant did not "need" a remedy at the time of the judgment. In fact, he was granted refugee status before the final hearings, so that there was no longer any statutory impediment to him taking employment.

[82] Roach, note 11 above, p. 867.

[83] Roach, note 8 above, p. 280.

[84] M. Rosenberg and S. Perrault, "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada", *Supreme Court Law Review*, XVI (2002), p. 375.

An alternative is the issuing of general *interim* orders which replace the unconstitutional provisions with a provisional scheme designed by the court to be applicable to everyone in the applicant's situation. The Constitutional Court of South Africa is particularly known for the use of this instrument.[85] For example, in the case *Zondi v. MEC for Traditional and Local Government Affairs*,[86] the Constitutional Court suspended a declaration of invalidity on the grounds that the legislator "ha[d] to make certain policy decisions".[87] The Court implemented temporary measures to protect the interests of the affected individuals (in that case, landowners) while preventing the violations of the Constitution to continue.

The problem of this approach lies in the fact that, in deciding the content of the temporary order, a court must make some choices between several options, all of them in principle compatible with the constitution. This goes against the assumption that, when there are several alternatives, the decision should be made by the democratically elected bodies. This flaw was stressed in the minority opinion delivered in the Canadian case *Carter v. Canada* (2016).[88] Following the extension of the suspension period, the majority of the local Supreme Court endorsed the implementation of a temporary scheme to legally ask for active euthanasia. However, the minority rebutted that, if a court acknowledges that "these are matters most appropriately addressed by the legislative process",[89] then it follows that Parliament alone, not courts, should address the issue of crafting a general remedy, regardless of the time taken or other circumstances.[90] In other words, it would be inappropriate for courts to decide on issues they referred to parliaments before the latter have taken any decision.

Another option should be mentioned: the court could temporarily stay the proceedings before it, awaiting the parliament's decision to enter into force. This is the only *interim* remedy granted in favor of the affected party by the Italian Constitutional Court.[91]

This choice, although probably easier for courts than constitutional exemptions or the implementation of temporary schemes, has several shortcomings. First, the stay of proceedings can benefit only those applicants who have an interest in blocking or delaying the proceedings; in particular, this remedy may appeal to those involved in criminal proceedings who aim at not being convicted but seems of little or no interest for other plaintiffs. Second, the court order of stay is not *erga omnes*, so that similar people involved in similar proceedings will find no protection.[92] Furthermore, the mere stay of proceedings can hardly be seen as an effective individual remedy for the applicants. Although the negative consequences may be postponed, it is not known whether the

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[85] Leckey, note 2 above, p. 591; Roach, note 11 above, p. 868.

[86] Constitutional Court of South Africa, *Zondi v. MEC for Traditional and Local Government Affairs*, Judgment No. CCT 73/03, 15 October 2004.

[87] Ibid.

[88] Supreme Court of Canada, *Carter v. Canada*, Judgment of 15 January 2016.

[89] Ibid.

[90] Arguably, the majority opinion was heavily influenced by the fact that a denial to implement temporary measures would have deprived individuals who died during the suspension of the right that had been recognized, causing otherwise avoidable pain. See J. Ettel, "Remedial Postscripts — Reflections on Carter II, Suspensions, Extensions and Exemptions", *The Supreme Court Law Review*, LXXXI (2017), p. 267).

[91] Strictly speaking, the Italian Constitutional Court ordinance did not directly stay the criminal proceedings against Cappato. However, according to Article 23, Law No. 87, 11 March 1953 (*Norme sulla costituzione e sul funzionamento della Corte costituzionale*), the judge who refers a question to the Constitutional Court has to suspend the relevant proceedings before him or her until the Court has delivered a final judgment. Therefore, the decision of the Constitutional Court to postpone for one year the declaration of invalidity implied a stay of the underlying criminal proceedings for at least the same amount of time. Arguably, the Constitutional Court took a step forward in the following Corte Costituzionale (Italian Constitutional Court), Ordinanza No. 97 of 2021, where it encouraged trial judges to stay similar proceedings before them until the matter was settled. However, the change is only apparent: the indication of the Constitutional Court merely amounts to a persuasive suggestion that it does not create any legal duty for the judges or other public bodies. D. Manelli, "La diffamazione a mezzo stampa e il persistente dominio dell'inerzia legislativa nella tutela dei diritti. La Consulta perfeziona un nuovo caso di "incostituzionalità differita" con la sentenza n. 150 del 2021", *Consulta OnLine*, XII, no. 1 (2022), p. 112.

[92] This is the same problem behind constitutional exemptions and could arguably be solved with a general order staying all similar proceedings.

legislative measures will only be prospective or whether the new measures will address the applicant's specific situation and in what way. On the other hand, it is certain that the suspension will prolong the proceedings leaving the winning party in a "limbo", with possible uncertainty and distress.[93] For these reasons, staying the proceedings is the least effective remedy.

Accordingly, if the fundamental rights of the affected individuals are to be protected during the suspension, the alternative is between a specific *inter partes* remedy or a general *erga omnes* measure. The choice is not easy and both solutions have inherent limits.

An individual constitutional exemption, since it discriminates against similarly placed individuals, goes against the principle of horizontal equality.[94] A general order, on the other hand, overlaps the role of the legislative and risks to unduly interfere with the choices to be made by the legislative itself.[95] Within this framework, any attempt to find the "best" solution abstractly is doomed to fail as the final decision lies in the peculiarities and the values protected by each legal system.

In particular, the present writer suggests distinguishing the jurisdictions where constitutional issues are addressed by ordinary courts from those jurisdictions where a separate constitutional court is in place. Ordinary courts – even if "supreme" or "superior" and even when involved in public law cases and vested with judicial review powers – are primarily concerned with adjudicating disputes between individuals. Constitutional courts, on the other hand – even when the proceedings stem from ordinary private disputes – are only concerned with public law matters, and their judgments have general effects: they never directly adjudicate the private dispute underlying a constitutional case.[96] They may occasionally decide an issue with no connection to an actual controversy.[97]

Therefore, for ordinary courts the granting of a constitutional exemption would usually be the best option. Indeed, this is in line with the idea – particularly rooted in common law legal culture[98] – that a court should primarily adjudicate a dispute by giving an effective remedy to the winning party.[99] This is sufficient to justify *inter partes* remedies and a departure from the principle of horizontal equality.

On the contrary, constitutional courts are not "courts" in the traditional sense[100] or, at least, they do not deal with the same disputes. Constitutional courts deviate from ordinary courts' paradigm focused on the adjudication of a specific case between a claimant and a respondent: their main task is to assess the validity or invalidity of a legal norm, usually a law, and the effects of their judgments everyone, as they are *erga omnes*. Therefore, the adoption of general temporary measures adheres more to the peculiar features of constitutional courts proceedings.

Possible Criticisms

This section addresses some criticisms related to the remedy at issue: specifically, possible abuses of suspended declarations of invalidity by the judiciary as well as by the legislature.

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[93] The negative consequences of a long-lasting case are made clear by the fact that, in many jurisdictions and also at the international level, the right to a speedy trial is regarded as a fundamental right for the citizens. See Article 6, European Convention on Human Rights.

[94] Roach, note 11 above, p. 872.

[95] Leckey, note 2 above, p. 591; Ettel, note 90 above, p. 268.

[96] Groppi, note 38 above, p. 104.

[97] This kind of judicial review is called "abstract". See G. Vanberg, "Abstract Judicial Review, Legislative Bargaining, and Policy Compromise", *Journal of Theoretical Politics*, X, no. 3 (1996), p. 300.

[98] William Blackstone, *Commentaries on the Laws of England* (1765-1769), III §7: "it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress".

[99] Roach, note 1 above, p. 429. See also Justice Gorsuch's concurring opinion in Supreme Court of the United States, *Department of Homeland Security v. New York*, Judgment No. 19A785, 27 January 2020: "[R]emedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit".

[100] In Italy, for example, the Constitutional Court is not part of the judiciary: see Corte Costituzionale (Italian Constitutional Court), Judgment No. 13, 16 March 1960.

As for the former, the possible delaying effects of a declaration of nullity can increase judicial activism. A court may be less reluctant to intervene in delicate matters if the legislature is called to take care of the judgment's effects.[101] For example, if the nullification of a certain provision implies consistent public spending, a judge will likely be more prone to invalidate the provision if he or she knows that the legislator will step in and take care of the financial aspects. Even if the legislator should not intervene, the judge will feel less pressure on him or her, given that the legislative branch will likely be blamed for the possible harmful consequences caused by the judgment. It should be noted that this "shifting of responsibility" from judges to the parliament is not necessarily negative and, on the contrary, it is part of the dialogic process. However, it is also important to highlight how – paradoxically – a remedy founded on the assumption that the judiciary has inherent limits can increase judicial overreach in sensitive areas of the law.

Elaborating this argument, a judge might easily manipulate the use of this remedy to "impose" his or her ideas on the legislature. As pointed out above, a judge could grant such a short period of suspension that any action taken by the legislature would be irrelevant.[102] Alternatively, a judge might issue in his or her judgment such strict "guidelines" for the legislator that any attempt of dialogue would be frustrated. It is undisputed that, in giving a delayed declaration of invalidity, judges must motivate the decision by explaining why a law is repugnant to the constitution and the principles applied in the judgment. Consequently, in every judgment referring a certain matter to the parliament judges must provide for some sort of "guidelines"[103] to "guide" the legislator towards a constitutionally-acceptable solution. In doing so, however, the judiciary risks overlapping its preferences with the choices to be made by the legislator. The more detailed the guidelines are, the less room there is for the discretion of the parliament and for political mediation between different positions. In truth, judicial guidance can be so invasive that it effectively annihilates political discretion, to the extent that the legislative action becomes nothing more than a "ratification" of the judicial decision.[104] Such behavior circumvents the purpose of this remedy and could eventually degenerate into institutional confrontations.

Other than judicial abuses, the dialogic nature of the remedy can be eluded by an unsympathetic legislator. As happened in Italy, the local parliament may be deaf to the call of the courts, and the outcome of the dialogue can be "unsuccessful". The complex matters that lead to delayed declarations of invalidity are usually politically sensitive topics. Politicians are prone to avoid these divisive issues, fearing electoral losses and criticisms from other political parties. Against this backdrop, legislators are likely to attempt to postpone any decision or even not taking any decision at all.

It may well be that some of excesses laid down are at this stage hypothetical or, in any event, uncommon and difficult to demonstrate. However, these abuses are easily imaginable and might occur in potentially every jurisdiction. An analysis of suspended declarations must take into account the possible misuses of dialogic remedies, find the root of the problem, and offer viable solutions.

The aforesaid problems are endemic to this remedy as they essentially depend on the institutional actors' willingness to engage in a positive and fruitful dialogue. Dialogic remedies implicitly assume that the relevant institutions do not compete between themselves; rather, they are willing to cooperate as they acknowledge the different responsibilities and areas of expertise.[105] Thus, the solution must be found from within the institutional system by ensuring that the affected actors remain aware of their constitutional roles.

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[101] Leckey, note 2 above, p. 596.
[102] Leckey, note 60 above.
[103] A. Stone Sweet and J. Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (2019), p. 132.
[104] These concerns are similar to those expressed by Leckey, note 2 above, p. 591, about *interim* general orders.
[105] Ettel, note 90 above, p. 262: "The notion of constitutional dialogue is built on a foundation of mutual respect between courts and legislatures and of mutual trust that each branch will act responsibly within its constitutional sphere".

Courts, within their constitutional responsibilities, should exercise self-control, be sensible in their decisions, and give as much space as possible to legislative discretion. At the same time, lawmakers should review in good faith the matters raised by courts and take the necessary steps to comply with the judicial decisions.

Within this framework, another actor – namely, the civil society – plays a crucial role in ensuring the success of the remedy at issue. If the civil society is attentive to ensure proper separation of powers and is effective in raising awareness among the public, urging the legislator to address violations of human rights, even when politically sensitive topics are at stake, then the problems discussed in the present article will likely fade.

Conclusions

It may be useful to recap the theses argued above. First, suspended declarations of invalidity are a spreading constitutional remedy with a great potential since they satisfy the need for a more dialogic approach to public law remedies. Second, this instrument lives in a delicate balance between the need to preserve the role of the legislature and the prerogatives of the courts. Courts should defend their right to adjudicate disputes and to ensure the protection of fundamental rights by invalidating unconstitutional laws. However, courts should embrace the rationale behind this remedy and refer to parliament every issue that requires political choices. A careful balance between the different interests at stake should be made when assessing for how long the declaration is to be suspended in order to ensure an effective dialogue.

Third, the issue of *interim* remedies is of the utmost importance and probably the most difficult to solve. Immediate remedies to redress past violations are convenient and necessary; however, the problem related to the form they may take – general temporary measures or individual constitutional exemptions – is not open to a general solution. On the contrary, the solution relies on the individualities of each system and, more specifically, on the distinction between ordinary courts, more focused on the individual dispute, and constitutional courts, more attentive to general measures.

All these aspects play an important part in designing this remedy and ensuring its popularity and effectiveness, but the key aspect to be considered is the institutional environment in which this remedy is going to be used. Arguably, the most important factor in deciding the outcome of a remedy – let alone a remedy grounded on the idea of institutional dialogue – is the behavior and the attitude of the actors involved. When dealing with suspended declarations of invalidity, abuses by the legislature or by the judiciary are always possible when the actors are perceived as untrustworthy and the institutional environment is hostile to dialogue and cooperation.

It follows that the remedy of delayed declarations is not suited for every jurisdiction. It should not be seen as a novel “panacea” in the field of constitutional remedies. However, for many jurisdictions, this remedy may be crucial in protecting fundamental rights while, at the same time, preserving other essential values at stake, such as the rule of law, the central role of democratically elected parliaments, and majority rule.