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**SUSPENSION ORDERS AS A FORM OF
“CONSTITUTIONAL DIALOGUE”**

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Abstract

This essay argues that New Zealand's courts, when considering constitutional matters on which there is no domestic jurisprudence, should draw upon foreign jurisprudence where the principles informing foreign judicial decisions on similar subject-matter are principles of the New Zealand legal system. This essay explores this idea with reference to the principle of "constitutional dialogue", which legitimises judicial orders that suspend declarations of constitutional invalidity thereby giving temporary effect to unconstitutional statutes. It first explains how "constitutional dialogue" can both describe and lend legitimacy to the interactions between the executive, legislature and judiciary in New Zealand. Drawing upon the Canadian, South African and Hong Kong "suspension order" jurisprudence, it then explains how these orders facilitate a "dialogue" between the different branches of government. Finally, the essay criticises the New Zealand High Court's decision in *Spencer v Attorney General* in which the Court held that the Human Rights Tribunal could not grant "suspension orders" that validated unlawful government policies. In particular, the essay focuses on the Judge's failure to recognise "constitutional dialogue" as the principle that underlies the decision to grant these orders in foreign jurisdictions, which would have allowed her Honour to follow Canadian authority when reaching her decision.

Constitutional dialogue – suspension order – temporary declaration of validity – *Spencer v Attorney General* – constitutional law – comparative law

The text of this paper (excluding the cover page, table of contents, keywords, abstract, footnotes and bibliography) consists of exactly 15,006 words.

I Introduction

“Constitutional dialogue” is a constitutional law principle used to explain and lend democratic legitimacy to the interactions between the executive, legislative and judicial branches of government when they act to uphold the Constitution. This essay works towards the conclusion this principle should inform the New Zealand courts’ approach to crafting remedial responses to constitutional issues.

Section II will explain how “constitutional dialogue” developed out of a need to lend democratic legitimacy to judicial review of legislation under the Canadian Charter of Rights and Freedoms. It then details how academics have adapted “constitutional dialogue” from the Canadian constitutional context to describe and legitimise the relationship between the branches of government in traditional Westminster systems, such as New Zealand and the United Kingdom.

Section III will focus on the Canadian innovation of judicial orders that suspend declarations of constitutional invalidity thereby giving temporary effect to unconstitutional statutes. These “suspension orders” have been utilised in Canada, South Africa and Hong Kong. The essay will discuss how these orders have become a tool to facilitate “constitutional dialogue” and how they can be better crafted to achieve that purpose.

Section IV will criticise the recent New Zealand High Court decision in *Spencer v Attorney General* in which the Court held that the Human Rights Tribunal could not use a suspension order to validate an unlawful government policy. In reaching its decision the Court failed to recognise that the principle of “constitutional dialogue” underlies the decision to grant these orders in foreign jurisdictions. The essay explains how both the principle of “constitutional dialogue” and the foreign jurisprudence surrounding “suspension orders” could have assisted the Court in reaching its decision.

II “Constitutional Dialogue”

A *Judicial review of legislation*

The term “constitutional dialogue” originates from Hogg and Bushell’s 1997 article that responds to the argument that judicial review of legislation under the Canadian Charter of Rights and Freedoms (Charter) is illegitimate because it is undemocratic.¹ That argument maintained that judicial review under the Charter permitted unaccountable and unelected judges to strike down the laws created by democratically elected representatives of the Canadian people.² Hogg and Bushell believed that if judicial review were conceived as a “constitutional dialogue” between judges and legislatures, then it could be lent democratic legitimacy.³ Thus, when legislation can reverse, modify or avoid a judicial decision that strikes down a piece of legislation on Charter grounds this can facilitate a “constitutional dialogue”.⁴ In other words, a “constitutional dialogue” occurs when the legislature has the ability to consider the judicial decision that strikes down the legislation and is able to decide how to respond to that decision.⁵

“Constitutional dialogue” strikes a middle ground between judicial supremacy and parliamentary supremacy. The essential idea is that the courts and legislatures participate in a “dialogue” that seeks to achieve the right balance between constitutional principles and public policies. Both the courts and legislatures are equally responsible for making decisions about the Constitution’s meaning. The courts interpret and protect the rights contained in the Constitution as a result of adjudicating disputes relating to past conduct. The legislature is responsible for creating laws that regulate future conduct within the limits set by the Constitution. Because the courts and legislatures bring expertise from these different

¹ Peter W Hogg and Allison A Bushell “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75 at 77.

² At 77.

³ At 79.

⁴ At 79.

⁵ At 82.

backgrounds, they can listen and learn from each other's perspectives of what the Constitution means.⁶ For a charter instrument to facilitate "constitutional dialogue" it needs to recognise both the shared and different roles that legislatures and courts play in constructing and understanding rights, and in balancing rights against social and economic goals. Importantly, the charter needs to be able to leave decisions about social, economic and public policy with the legislature.⁷

Hogg and Bushell argue that the Charter facilitates this "dialogue" in a number of ways. First, s 1 guarantees the rights protected by the Charter subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *R v Oakes* the Supreme Court set out the standards that a law must meet to satisfy the s 1 justification. First, the law must pursue a sufficiently important objective. Second, the law must be rationally connected with the objective. Third, the law must impair the right no more than necessary to accomplish the objective. Fourth, there must be proportionality between the effects caused by the law's limitation of the right and the object that the law achieves.⁸ Generally, a law is struck down because it impairs the right more than necessary to achieve the objective. Upon striking down the law, the Court will explain why the s 1 standard has not been met, which will also involve providing a more rights-friendly alternative measure that could have satisfied the s 1 standard. A "dialogue" occurs when the legislature considers the Court's s 1 analysis and its alternative measure when substituting the invalid law for one that better respects the Charter while achieving the same substantive legislative purpose.⁹

⁶ Anne Meuwese and Marnix Snel "Constitutional Dialogue: An Overview" (2013) 9 *Utrecht Law Review* 123 at 128-129.

⁷ George Williams "A Community-Based Bill of Rights" in Tom Campbell, Jeffrey Goldworthy and Adrienne Stone (eds) *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, New York, 2003) 247 at 249-250.

⁸ *R v Oakes* [1986] 1 SCR 103 at 138-139.

⁹ Hogg and Bushell "The *Charter* Dialogue between Courts and Legislatures", above n 1, at 84-87.

Section 33 of the Charter also facilitates a “dialogue”. It contains an override power that enables the legislature to override the guarantees in the Charter provisions that protect rights of expression and rights relating to legal processes. A Charter-inconsistent law can remain in force if Parliament re-enacts the legislation and expressly declares that the legislation is to continue to operate notwithstanding being invalidated under the Charter. This makes any judicial decision that strikes down legislation on Charter grounds suspensory only.¹⁰ Parliament’s power is subject to a temporal restriction, which means that its declaration will expire at the end of five years, forcing Parliament to reconsider the invalidated legislation.¹¹ Section 33 intentionally allows for a legislative response to a court’s Charter decision. Because the court’s decision does not veto the legislation, but rather suspends its operation pending re-enactment, this allows for the commencement of a dialogue with the legislative branch.¹²

But the “dialogue” can also occur when a Canadian legislature responds to a judicial decision by repealing the unconstitutional law. By actively repealing unconstitutional legislation the legislature is signalling to the Court that it agrees with the Court’s interpretation of the legislation and that the legislature should not have adopted this law in the first place.

Hogg and Bushell’s article surveyed the legislative responses to all the cases in which the Supreme Court of Canada had struck down a law on Charter grounds prior to 1997. The legislature responded to the judicial decision in 52 of those 65 cases. In 44 cases, legislatures substituted a new, Charter-consistent law for the old one.¹³ In seven cases, legislatures actively repealed the offending law but did not substitute the

¹⁰ Peter W Hogg *Constitutional Law of Canada* (5th ed supplemented, vol 2, Carswell) at [36.4(d)].

¹¹ At [39.4].

¹² At [36.5(a)].

¹³ Hogg and Bushell “The *Charter* Dialogue between Courts and Legislatures”, above n 1, at 97.

law with new legislation.¹⁴ Only in two cases did a legislature override the Court's decision.¹⁵ Hogg and Bushell concluded that the Charter should not be thought of as imposing a veto on the legislative policies of the democratically elected representatives of the people, but rather as a "dialogue" between the judicial and legislative branches as to how to best reconcile the rights enshrined in the Charter with the accomplishment of the community's desired social and economic goals.¹⁶

The Supreme Court of Canada has adopted Hogg and Bushell's view of "constitutional dialogue" in several cases.¹⁷ One example is contained in the majority judgment of Iacobucci and Cory JJ in *Vriend v Alberta*. The judges noted that the Courts, due to their independence, are mandated to make reasoned and principled decisions dictated by the Constitution even if such decisions are not supported by the majority. However, in carrying out that task, judges may not make value judgments about policy decisions, as this is the role of legislatures. The judges that respect the role of legislatures ensure that legislatures respect the role of the judges. Mutual respect between the legislature and judiciary is expressed in the features of the Charter that facilitate "dialogue", namely judicial review of legislation. The work of the legislature is reviewed by the Courts and the work of the Court in its decisions can be reacted to by the legislature. Consequently, this "dialogue" has the benefit of making the different branches of government accountable to each other, which enhances the democratic process.¹⁸ Justices Iacobucci and Cory's comments shed light on the fact that "constitutional dialogue" recognises that a relationship of reciprocity and mutual respect exists between the executive, legislative and judicial branches of government.

¹⁴ At 97.

¹⁵ At 97.

¹⁶ At 105.

¹⁷ See, for example, *Vriend v Alberta* [1998] 1 SCR 493 and *Corbiere v Canada* [1999] 2 SCR 203.

¹⁸ *Vriend v Alberta* [1998] 1 SCR 493 at [136] - [139].

What is important to emphasise is that the “dialogue” theory is not a theory of judicial review or about justifying judicial review of legislation. The justification of judicial review rests on moral, political and legal grounds.¹⁹ What the “dialogue” principle does do is it exposes judicial review under the Charter as weaker than previously supposed. It shows that it is not a strong type of judicial review because it allows Parliament to have the last word. Therefore, “constitutional dialogue’ lends Charter review democratic legitimacy.²⁰

B “Constitutional dialogue” in the United Kingdom and New Zealand

It appears from the preceding discussion that “constitutional dialogue” serves two functions in Canada: first, it explains the relationship between the branches of government when engaging in the protection of constitutional rights and second, it lends democratic legitimacy to judicial review of legislation under the Charter. Can “constitutional dialogue” exist in the United Kingdom and New Zealand? These two countries have Westminster systems of Government where the courts do not have the power to invalidate legislation on the basis that it is inconsistent with a supreme law human rights instrument.

1 The explanatory function of “constitutional dialogue”

There is academic support for the notion that “constitutional dialogue” can explain the interaction between the branches of government in the United Kingdom and New Zealand.

The United Kingdom’s Human Rights Act 1998 (UKHRA) was heavily modelled on the Canadian Charter.²¹ The UKHRA requires inter alia the Courts to interpret legislation, as far as possible, in a way which is compatible with the rights contained in the European Convention on Human

¹⁹ Peter Hogg, Allison Bushell Thornton and Wade K Wright “Charter Dialogue Revisited – or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 at 28.

²⁰ At 28-29.

²¹ Richard Clayton QC “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention under the Human Rights Act 1998” [2004] PL 33 at 45.

Rights (Convention).²² If it is impossible to interpret the legislation so as to make it compatible with the Convention, the judges cannot strike the legislation down. The courts can only issue a declaration of incompatibility.²³ A declaration of incompatibility sends a signal from the courts to Parliament that the United Kingdom might be breaching its obligations under the Convention. This does not, however, require Parliament to change the law.

Clayton believes that the Canadian dialogic approach could be used to explain adjudication under the UKHRA.²⁴ Like the Canadian Charter, the UKHRA is designed to prevent the courts from having the final word on human rights issues.²⁵ Clayton argues that the principle of “constitutional dialogue” is implicit in two structural features of the UKHRA. First, the opportunity for “dialogue” arises where a Court is unable to interpret legislation in a way that is compatible with the Convention and consequently makes a declaration of incompatibility.²⁶ Second, the Courts are able to reach a strained interpretation of a piece of legislation that might not give effect to Parliament’s intention. This leaves open the ability for Parliament to enact new legislation that modifies the court’s s 3 interpretation.²⁷ Both features result in judicial decisions under the UKHRA prompting a legislative response.²⁸

In New Zealand, the Bill of Rights Act 1990 (BORA) arguably facilitates the same kind of “dialogue”. The courts must interpret legislation consistently with the rights enshrined in BORA where there is a rights-consistent meaning available.²⁹ Furthermore, although not enshrined in the legislation, there is some suggestion from case law that

²² Human Rights Act 1998, s 3(1) (UK).

²³ Human Rights Act 1998, s 4 (UK).

²⁴ Clayton, above n 21, at 41.

²⁵ At 45.

²⁶ At 46.

²⁷ At 46.

²⁸ At 47.

²⁹ Bill of Rights Act 1990, s 6.

New Zealand courts have the implied power to formally declare that legislation is inconsistent with BORA.³⁰

But is Clayton really correct that the “dialogue” concept can be so easily transposed to a jurisdiction where the Courts cannot engage in judicial review of legislation? It is important to remember that the concept of “constitutional dialogue” was created in Canada, which has an entrenched, supreme law Constitution with which all legislation must accord.³¹ Canada has a very different constitutional context to that in the United Kingdom and New Zealand, whose constitutional model is one of parliamentary sovereignty. Under the doctrine of parliamentary sovereignty, Parliament is omniscient. Parliament may legislate without restriction on any subject matter because it is not impeded by any constitutional laws or an entrenched bill of rights.³² Thus, both the New Zealand and United Kingdom Parliaments do not have formal restrictions on their powers to legislate.³³ So, how can “constitutional dialogue” explain a system where Parliament dominates over all aspects of governance and where the judiciary must always be deferential to Parliament’s intentions?

Joseph believes that the concept of “dialogue” can explain the Westminster constitutional system. For him, parliamentary sovereignty fails to explain the true relationship between the political branch (the executive and legislature) and the judicial branch of government in a Westminster system. Parliament has never been sovereign

³⁰ *Moonen v Film and Literature Board Review* [2000] 2 NZLR 9 (CA); *R v Hansen* [2007] 3 NZLR 1 (NZSC).

³¹ Section 52(1) of Canada’s Constitution Act 1982 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 and effect.

³² Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [1.5.15].

³³ At [1.5.15].

and has never had supreme and undiminished law-making power.³⁴

The reality, according to Joseph, is that the political and judicial branches are constitutionally interdependent to one another. The executive and legislature must look to the Courts for judicial recognition of legislative power. Judges must look to the legislature and executive for recognition of their independence.³⁵ One branch is not supreme over the other. Both branches are ultimately in the business of government, and both are committed to the same ends and ideals. They achieve these ends and ideals in different ways: Parliament through interpretation and the Courts through statutory interpretation and common law principles.³⁶ Consequently, Joseph argues that the true relationship between the judicial and political branches should be viewed as a “collaborative enterprise”.³⁷

The concept of “collaborative enterprise” depicts the joint functioning of the branches of government.³⁸ In a Westminster democracy, the Constitution is not a power play between the political and judicial forces. While the Courts defer to Parliament when it comes to decision-making about policy matters, they are still part of government. The reality is that the Courts accept Parliament’s power to effect legal change through legislation and Parliament accepts the judicial power to adapt its legislation to the fact patterns of litigation.³⁹ This collaborative enterprise is enshrined in the rules and practices that define the relationship between the two branches.⁴⁰

The judicial role in a Westminster system is to declare what the law is at the time a dispute comes before the Court. This

³⁴ Phillip Joseph “Parliament, The Courts and The Collaborative Enterprise”(2004) 15 KCLJ 321 at 321-322.

³⁵ At 322.

³⁶ At 323.

³⁷ At 334.

³⁸ At 334.

³⁹ At 334.

⁴⁰ At 335.

is done within a context of “dialogue” between the branches. The law changes and adapts through this dialogic process. Parliament may legislate on new matters or it might override or modify the law in response to judicial decisions. When Parliament does this, the Courts adapt their rulings to accommodate Parliament’s legislation.⁴¹ Essentially, Joseph’s collaborative model reconceptualises Hogg and Bushell’s “dialogue” for Westminster constitutional theory.⁴²

Joseph argues that parliamentary sovereignty cannot be reconciled with the expanded judicial functions under modern human rights instruments. For example, the UKHRA does not, as many have argued, formally preserve parliamentary sovereignty by only giving judges the power to issue declarations of incompatibility. Rather, the UKHRA marks a development in United Kingdom constitutionalism through which Parliament has given the courts the responsibility to vindicate the rule of law and to protect citizens from unjustified interference. This exercise of power sharing shows that the different branches engage in a “collaborative enterprise”.⁴³

From Clayton and Joseph’s accounts it is possible to understand the interaction between the branches of government in Westminster systems through a dialogic lens. But have academics picked up on the legitimising function of the “dialogue” principle in such systems?

2 *The legitimacy function of “constitutional dialogue”*
Allan has developed “constitutional dialogue” to lend democratic legitimacy to the court’s power to judicially review administrative action in Westminster systems of government. Traditionally, attacks have been made on judicial review of administrative action on the basis that it unacceptably and improperly permits judicial supremacy. Allan conceives of the relationship between the courts and

⁴¹ At 330.

⁴² Petra Butler “It Takes Two to Tango – Have They Learned Their Steps?” (August 15 2011) at 1, available at SSRN: <<http://ssrn.com>>.

⁴³ Joseph “Parliament, The Courts and The Collaborative Enterprise”, above n 34, at 343-344.

legislature when engaging in judicial review of administrative action as one of shared sovereignty. In a common law legal order the courts and legislatures must engage in a “constitutional dialogue” when conducting judicial review of administrative action.⁴⁴

Judicial review of administrative action requires courts to look to a situation where the executive agent has carried out that power and to resolve whether the power was exercised consistent with the agent’s constitutional authority. When legislation confers a power to the executive branch of government, the legislation sets the constraints as to how that power is to be exercised. This legislation draws its meaning from its text, read in the light of common law assumptions and understandings which include presumptions of parliamentary intent. Because Parliament’s legislative powers are constrained by principles of constitutional justice and the rule of law, the courts assume that Parliament intended the ordinary principles of administrative law to apply unless there is a legislative indication to the contrary.⁴⁵ If, for example, Parliament fails to make allowances for fair hearings or remedies for abuse of power in the statute that confers the executive with a power, the courts will presume that Parliament enacted the piece of legislation on the assumption that these principles would apply. So, courts are not “adding” these principles to the legislation, but see these principles as an “intrinsic part” of the legislation.⁴⁶

Judicial review of administrative action is not, therefore, a case of judicial supremacism. Rather it is the legislature that is constraining the power of the executive. When the court concludes that an action is, for example, illegal or irrational, the courts are respecting and applying the legislature’s will, but this is subject to boundaries set by constitutional justice and the rule of law.⁴⁷ This is because the grounds for review of administrative action do not have substantive content.

⁴⁴ TRS Allan “Constitutional Dialogue and the Justification of Judicial Review” (2003) 23 *Oxford Journal of Legal Studies* 563 at 565.

⁴⁵ At 565-566.

⁴⁶ At 566.

⁴⁷ At 566.

Rather, they describe the existence of an injustice based on a reading of the legislation, interpreted in line with Parliament's intention subject to the rule of law.⁴⁸

So, "constitutional dialogue" legitimises judicial review of administrative action in the following way: the judiciary respects Parliament's authority by giving effect to Parliament's intention when reviewing the exercise of administrative power and Parliament respects (or at least is presumed to respect) the authority of the courts to interpret an enactment in line with its intention subject to the limits set by rule of law and common law constitutionality.

3 *"Constitutional dialogue" between the judiciary and executive*

So far, this essay has explained how "constitutional dialogue" occurs between the legislative and judicial branches of government. An interesting feature of the discussion of "dialogue" in relation to Westminster systems is that academics appear to view the executive branch of government as also having a role to play in the "dialogue".

When Joseph uses the idea of "collaborative enterprise" to explain the relationship between the branches of government, he characterises it as a "dialogue" between the judicial and political branches of government. He explains that the reference to the political branch recognises the merged executive and legislative functions under the Westminster system. These functions collapse into one under the principle of parliamentary ministry: Ministers of the Crown must be members of Parliament and must collectively hold Parliament's confidence.⁴⁹ So, the executive governs through Parliament.⁵⁰ Thus, Joseph sees the executive as playing a role in the "dialogue".

⁴⁸ At 566.

⁴⁹ Joseph "Parliament, The Courts and The Collaborative Enterprise", above n 34, at 334.

⁵⁰ At 321.

Palmer shares a similar view.⁵¹ Palmer believes that underlying the concept of the rule of law is the idea that the law has an objective meaning independent of the identity of the people who made it. For law to have this independent meaning, it must be interpreted and applied by someone who did not write it. Consequently, a “dialogue” between the law-maker and the law-interpreter is an inherent part of the rule of law: the law-makers make laws, which are interpreted by law interpreters, this interpretation is then scrutinised by law-makers and, if they so desire, is changed, to then be interpreted again.⁵² In a Westminster system, he describes the “dialogue” playing out in the following way: in the executive, Cabinet Ministers formulate and consider policy proposals and have them translated into proposed Bills. In the legislature, Members of Parliament consider, amend and pass Bills into Legislation. In the judiciary, judges consider legislation in the context of a specific dispute. Ultimately, Palmer views the interactions as a “dialogue” between politicians and judges.⁵³

In addition, Butler notes that the role of the executive in “constitutional dialogue” has not really been explored in the literature. She considers the executive to be a partner in the dialogue in New Zealand, especially in the context of BORA because the safeguarding of human rights is the domain of all three branches of government.⁵⁴

C Summary

This section of the essay has first of all sought to show that the “dialogue” principle can be used to explain the relationship between the branches of government in a Westminster system when it comes to the protection of citizen’s rights. Second, it has shown that the dialogue principle has been adapted to lend democratic legitimacy to

⁵¹ Matthew Palmer “The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People” (Bora Laskin Lecture, 23 January 2007, Osgoode Hall Law School, York University, Toronto, Canada).

⁵² At 4.

⁵³ At 9-10.

⁵⁴ Butler “It Takes Two to Tango – Have They Learned Their Steps?”, above n 42, at 2.

the intervention by the courts into the executive's exercise of decision-making powers. Third, it has explained how the executive branch plays a role in the "dialogue". In doing so, this essay has drawn links between the Canadian and Westminster constitutional systems. Although the Canadian courts have the power to invalidate legislation under a charter of rights (a power that the United Kingdom and New Zealand courts do not have), the principle that explains and legitimises this power does exist in Westminster systems. This conclusion that the "dialogue" principle underlies the constitutional systems of Canada, the United Kingdom and New Zealand will be picked up on in section IV of this essay, in which the decision in *Spencer v Attorney General* is discussed.

III Suspension Orders as a Form of "Constitutional Dialogue"

"Constitutional dialogue" can also occur when the courts grant remedies that have implications for the legislature and executive, but allow these branches a range of possibilities when it comes to crafting a response.⁵⁵ This section of the essay will consider one of these types of remedy: suspension orders. It will explain what a suspension order is with reference to the approaches taken to this form of relief in Canada, South Africa and Hong Kong.

A Canada

The Canadian Charter forms the first part of Canada's Constitution Act 1982. Section 52(1) of the Act reads:

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.

Despite this supremacy clause the courts have assumed the power to suspend the operation of a declaration of invalidity, the effect of which is to grant a period of temporary validity

⁵⁵ Kent Roach "Constitutional, Remedial and International Dialogues about Rights" (Public Law and Legal Theory Research paper No 04-03, October 2004) at 12 – 13.

to an unconstitutional statute. Consequently, the statute will remain in force until the suspension period expires.⁵⁶

1 When will suspension orders be granted?

Suspension orders have their Canadian origin in the Supreme Court of Canada's decision in *Re Manitoba Language Rights*.⁵⁷ In this case the Court was asked to determine the validity of all the laws of the province of Manitoba enacted since 1890. Manitoba's Constitution stipulated that Manitoba's statutes were to be enacted in both French and English. In 1890 Manitoba's legislature enacted the Official Language Act. This Act provided that Manitoba's statutes only needed to be enacted in English. Manitoban statutes made after 1890 were enacted in English only. But, because the Constitution stipulated that the laws must be enacted in both English and French, it followed that the laws enacted in English-only were invalid.⁵⁸ The Supreme Court was faced with a situation where it would be forced to invalidate all of Manitoba's laws, which could result in a legal vacuum. Its solution was to invalidate all of Manitoba's English only laws, but these unconstitutional laws were to be given temporary force to allow the legislature time to enact the required corrective legislation. This was premised on the need to uphold the rule of law.⁵⁹

Following Manitoba, the Canadian courts assumed the power to postpone a declaration of constitutional invalidity and began to develop guidelines to govern the remedy's use.⁶⁰ In the Supreme Court of Canada's decision in *Schachter*, Lamer CJ recognised that this remedy was of a radical character because it allows the continued operation of an unconstitutional statute and seriously interferes with the legislative process because the delayed nullification forces the matter back onto the legislative agenda at a time that is not of the legislature's choosing.⁶¹ Chief Justice Lamer

⁵⁶ Hogg, above n 10, at [40(1)(d)].

⁵⁷ *Re Manitoba Language Rights* [1985] SCR 721.

⁵⁸ At [58].

⁵⁹ At [112].

⁶⁰ Hogg, above n 10, at [40(1)(d)].

⁶¹ *Schachter v Canada* [1992] 2 SCR 679 at 716-717.

consequently ruled that the courts should only suspend declarations of inconsistency where the immediate striking down of the law would: (1) pose a danger to the public, (2) threaten the rule of law, or (3) result in the deprivation of benefits from deserving persons.⁶²

Interestingly, these guidelines have largely been ignored in subsequent cases. Suspension orders have been granted in situations where Lamer CJ's exigent circumstances have not existed.⁶³ For example, in *R v Guignard* the Supreme Court invalidated a bylaw restricting advertising signs from being erected outside industrially zoned areas, but allowed the order to be suspended to allow time to reconsider the bylaw.⁶⁴

Academics suggest that this shift in approach can be explained by the fact that the *Schachter* guidelines do not make room for an appropriate division of labour between the branches of government. A new rationale has developed for the suspended declaration of invalidity: the idea of "dialogue".⁶⁵ In many cases where the court has found a law to be unconstitutional, the court would prefer the legislature or executive to design the appropriate remedy to allow it to exercise its policy making functions and provide its own remedy to constitutional defects in legislation, including remedies that the court could not provide. This encourages these branches of government to reflect upon judicial decisions and act in good faith to select an appropriate response.⁶⁶ As a result the suspension of declarations of

⁶² At 719.

⁶³ See, for example, *Re Eurig Estate* [1998] 2 SCR 565 at [44]; *Cobiere v Canada* [1999] 2 SCR 203 at [23] and [118]-[119]; *Dunmore v Ontario* [2001] 3 SCR 1016 at [66]; *Trociuk v British Columbia* [2003] 1 SCR 835 at [43]; *Figueroa v Canada* [2003] 1 SCR 912 at [93]; *Confederation des syndicats nationaux v Canada* [2008] SCR 511 at [94]; *Nguyen v Quebec* [2009] 3 SCR 208 at [46] and [51]; and *UFCW v Kmart* [1999] 2 SCR 1083 at [79].

⁶⁴ *R v Guignard* [2002] 1 SCR 472 at [32].

⁶⁵ Sujit Choudhry and Kent Roach "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 SCLR (2d) 206 at 222.

⁶⁶ Roach "Constitutional, Remedial and International Dialogues about Rights", above n 55, at 14.

invalidity has become an instrument of remedial dialogue between courts and legislatures.⁶⁷ The Court is not avoiding its responsibility to uphold the Constitution, because, if the legislature chooses to take no action during the period of suspension, the Court's declaration of invalidity will take effect. The period of suspension merely gives the legislature the first opportunity to remedy the constitutional wrong.⁶⁸

Yet, this "dialogue" rationale has only been articulated in one Supreme Court decision: *Corbiere v Canada*. In that case members of the Batchewana Indian Band sought a declaration from the Court that s 77(1) of the Indian Act violated s 15(1) of the Charter, which provides for equality before and under law and equal protection and benefit of law. Section 77(1) provided that only band members who ordinarily reside on the reserve were permitted to vote in the band elections even though only one third of the registered members lived on the reserve. The band members were successful, but the Court suspended for 18 months its declaration that the on-reserve residence requirement was unconstitutional.⁶⁹

Justice L'Heureux-Dubé said that there were a number of ways in which the constitutional defect could be repaired, and the best solution would be one designed by Parliament after consultation with the aboriginal people affected. Her view was that the principle of democracy should guide the exercise of the Court's remedial discretion, and that principle "encourages remedies that allow the democratic process of consultation and dialogue to occur."⁷⁰ Thus, she held that the declaration should be suspended to "give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected."⁷¹

⁶⁷ Kent Roach "Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity" 35 UBC Law Review 212 at 220.

⁶⁸ Hogg, above n 10, at [40(1)(d)].

⁶⁹ *Corbiere v Canada* 2 SCR 203 at [24] and [126].

⁷⁰ At [116].

⁷¹ At [118].

So, in the post-*Schachter* cases the courts have been prepared to use suspension orders where there have been a variety of solutions available to the competent legislative body to correct the constitutional defect. The courts clearly see the legislative body as the best judge of the best solution to cure the constitutional defect.⁷²

2 *What is the remedial effect of suspension orders?*

Because the courts have been delegating responses to constitutional issues to the legislature and executive, there has been wide debate on what the nature of the legislative or executive response should be. Should the effect of the response be both prospective and retroactive, or should it be solely prospective? Prior to the advent of the suspension order, legislatures made new legal rules with prospective effect, while the courts recognised and applied pre-existing legal rules with retroactive effect. This distinction has come under strain through the use of suspension orders.⁷³ This is significant because it has the ability to greatly affect those whose constitutional rights have been breached. This is illustrated through a comparison of *Miron v Trudel*⁷⁴ and *M v H*.⁷⁵

Both cases involved constitutional challenges to the definition of “spouse” in provincial legislation governing private financial obligations on the basis that they violated the protection of equal rights section of the Charter. In *Miron* a challenge was made to an insurance policy that provided accident benefits to spouses. In *M v H* the challenge concerned spousal support obligations. The holdings on the merits were the same and the Supreme Court of Canada found that the definition of “spouse” in both cases violated the Charter. However, the remedial outcomes differed radically. The Court in *Miron* amended the under-inclusive legislation by reading un-married common law partners into the definition of “spouse”. This had retroactive effect so the claimant had a right to claim accident benefits, and this

⁷² Hogg, above n 10, at [40(1)(d)].

⁷³ Choudhry and Roach, above n 65, at 209.

⁷⁴ *Miron v Trudel* [1995] 2 SCR 418.

⁷⁵ *M v H* [1999] 2 SCR 3.

remedy extended to persons in similar situations. In *M v H* the Supreme Court suspended its declaration of invalidity to allow the relevant legislative body to address the issue. The legislature's response was to amend the provision but the amendment stated that it was to apply with prospective effect only. Thus, the litigants in *M v H*, while successful on the merits, were denied a remedy.⁷⁶

Following these cases, academics have sought to clarify how a suspension order should operate in order to address potential injustice to successful litigants. Hogg believes that when a suspended declaration of invalidity comes into force, it has the normal retroactive effect of a court order that declares legislation invalid: so it operates to invalidate the unconstitutional statute from the time of its enactment. But, a suspended declaration of invalidity will not come into force at all if the competent legislative body enacts corrective legislation to fix the constitutional defect during the period of suspension. It therefore follows from the retroactive effect of a declaration of invalidity that the corrective legislation must be retroactive in effect. If not, then litigants who successfully assert their constitutional rights and obtain a declaration of invalidity would be left without a remedy.⁷⁷

Similarly, Choudhry and Roach argue that there should be a presumption that remedial legislation has retroactive effect, which would encourage legislatures to consider retroactive relief for the affected parties. This presumption would allow the courts to be loyal to the traditional ideal of retroactive justice, while also leaving open the possibility that, in cases involving complex social, economic and public policy decisions, the legislature can leave the past behind.⁷⁸

In *Canada v Hislop*⁷⁹ the Supreme Court differed from the approach suggested by both Roach and Hogg. In that case, the claimants challenged the legislative response to the Court's decision in *M v H* which did not make the benefits

⁷⁶ Choudhry and Roach, above n 65, at 206

⁷⁷ Hogg, above n 10, at [40(1)(d)].

⁷⁸ Choudhry and Roach, above n 65, at 252-253.

⁷⁹ *Canada v Hislop* [2007] 1 SCR 429.

available to same-sex partners retroactively. The majority of the Court stated that the remedial effect of a suspended declaration of invalidity was to “facilitate the legislature’s function in crafting a *prospective remedy*” and that “to allow the claimants to recover concurrent retroactive relief would be at *cross-purposes* with the Court’s decision to grant a suspended declaration of invalidity”.⁸⁰

Bastarache J in his concurring opinion in *Hislop* differed from the majority on this point. He noted that the question of whether to deny a retroactive remedy is different from deciding whether to grant a suspended declaration of invalidity. He reasoned that a suspended declaration of invalidity is ultimately only a temporary limit on retroactivity and does not determine whether governments are entitled to deny retroactive relief to the claimants when they act to remedy the constitutional defect. In order to determine the remedy to which a claimant is entitled, the courts should have regard to “reasonable reliance, good faith, fairness to litigants and Parliament’s role”. Thus, if a legislative response to a declaration of invalidity is challenged it is possible for the courts to “read in” that the remedy applies retroactively or “read down” or “sever” a provision which limits retroactive relief.⁸¹ However, he agreed with the Majority that this was an appropriate case in which the legislature should be given the flexibility to make its remedial response prospective only.⁸²

Despite Bastarache J’s obiter statements, the position in Canada is that the legislative response to a declaration of invalidity does not have to apply retroactively. It is up to the legislature to decide whether or not to provide a remedy to those who have suffered a right’s breach.

⁸⁰ At [92] (emphasis added).

⁸¹ At [161].

⁸² At [164].

B South Africa

The Canadian innovation of suspended declarations of invalidity forms part of the South African Constitution.⁸³ The Constitution⁸⁴ contains explicit authorisation of suspended declarations of invalidity in s 172(1).⁸⁵ It reads:

When deciding a constitutional matter within its power, a court

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including
- ...
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

1 When will suspension orders be granted?

In *Executive Council of the Western Cape Legislature*⁸⁶ the South African Constitutional Court explained that when the Constitution came into force there were many old laws on the statute book that were inconsistent with the new Constitution. If all those statutes were invalidated it would cause a legal vacuum. Section 172(1)(b)(ii) was necessary to avoid the consequences of a declaration of invalidity where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity.⁸⁷

So, when the Constitutional Court had the opportunity to consider whether the option of suspension should be available for the first time in *Coetzee v Government of the Republic of South Africa*⁸⁸ Sachs J commented that the court should make an assessment on a case-by-case basis as to

⁸³ Kent Roach *Constitutional Remedies in Canada* (2nd ed supplemented, Thompson Reuters, Canada, 2013) at [14.1530].

⁸⁴ Final Constitution Act 108 of 1996.

⁸⁵ Roach "Constitutional, Remedial and International Dialogues about Rights", above n 55, at 14.

⁸⁶ *Executive Council, Western Cape Legislature v President, Republic of South Africa* [1995] (4) SA 877 (CC).

⁸⁷ At [107].

⁸⁸ *Coetzee v Government of the Republic of South Africa* [1997] (3) SA 527 (CC).

whether “more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification”.⁸⁹

But like in Canada, the South African courts seem to have moved away from solely granting suspension orders to avoid creating a legal vacuum. Bishop identifies a number of factors that tend to weigh in favour of or against the suspension of a declaration of invalidity. The factors in favour of suspension are: (1) when the immediate order of invalidity would create uncertainty, administrative confusion or potential hardship; (2) where multiple legislative cures to the constitutional defect exist and it is more appropriate for the legislature not the judiciary to make the policy decision as to which cure should be realised; and (3) if the deficiency is of a purely procedural nature.⁹⁰ The factors against suspension are: (1) the importance of the right at issue or the extent of the violation of that right; and (2) if the Court has previously granted a suspension on the same or similar issue.⁹¹

The second rationale that suspension is appropriate where there is a constitutional defect for which multiple legislative cures exist is essentially “constitutional dialogue”. Where the Constitution does not require a particular outcome, then it is for the legislature and not the judiciary to make the policy decisions as to which outcome is the best.⁹² Thus, the “dialogue” rationale appears to be central to the court’s decision as to when it is appropriate to suspend a declaration of invalidity. This idea will be illustrated by reference to three decisions of the South African Constitutional Court.

In *Dawood v Minister of Home Affairs*⁹³ a provision that limited the right of foreign spouses of South African citizens

⁸⁹ At [76].

⁹⁰ Michael Bishop “Remedies” in Stu Woolman and Michael Bishop (eds) *Constitutional law of South Africa* (2nd ed, looseleaf, Juta, 2008) 9-111 at [9.4(e)(i)(bb)(x)].

⁹¹ At [9.4(e)(i)(bb)(y)].

⁹² At [9.4(e)(i)(bb)].

⁹³ *Dawood v Minister of Home Affairs* [2000] (3) SA 936 (CC).

to reside in South Africa while seeking permanent residence status was invalidated by the Court on the basis that it was a violation of the constitutional right to dignity.⁹⁴ O'Regan J, when determining the appropriate remedy, said that in this situation the legislature was the appropriate body to determine the circumstances in which a residence permit should be granted because there were a number of possibilities that the legislature could have adopted to cure the unconstitutional legislation. She emphasised that in situations like this the Court should be slow to make choices which are more suitable for the legislature to make.⁹⁵ She suspended the declaration for two years to give enough time to the legislature to allow it to rectify the constitutional defect.⁹⁶

In *Minister of Home Affairs v Fourie*⁹⁷ the Constitutional Court held that legislation that prevented same-sex couples from marrying was unconstitutional. A majority of the Court said that the declaration of unconstitutionality should be suspended for an appropriate period so as to give Parliament the opportunity to correct the defect for a number of reasons.⁹⁸ First, legislation would ostensibly provide a more solid foundation for the change in the law and would lessen the likelihood of an alteration of the law in the future. Certainty was also necessary because a temporary remedial measure, such as reading in “husband” to mean “spouse” so that the statute gave the ability for same sex couples to get married, would not be able to achieve the equality promised under by the Constitution: the right for homosexual couples to marry represents a major symbolic milestone in homosexual rights equality.⁹⁹ Second, on such a contentious social issue, a change in the law would be viewed as more legitimate if it were initiated by the legislature rather than the courts.¹⁰⁰ Third, there were a number of different ways in which the legislature could legitimately deal with the gap that

⁹⁴ At [58].

⁹⁵ At [63]-[64].

⁹⁶ At [65].

⁹⁷ *Minister of Home Affairs v Fourie* [2006] (1) SA 524 (CC).

⁹⁸ At [135].

⁹⁹ At [136]-[137].

¹⁰⁰ At [139].

existed in the law. On this basis, the Court held that Parliament should be given the opportunity to decide how the equality rights at issue could be best achieved.¹⁰¹

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*¹⁰² the Constitutional Court of South Africa considered the statutory rape laws to consensual sexual acts when both parties are younger than the age of consent. The issue was whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith.¹⁰³ The Constitutional Court struck down legislative provisions that made it a crime for children between the ages of 12 and 16 to engage in consensual sexual activity with other children of the same age range on the basis that the provisions infringed the rights to dignity¹⁰⁴ and privacy¹⁰⁵ and the best interests of the child principle.¹⁰⁶ Khampepe J was of the opinion that while the provisions should be declared invalid, justice and equity warranted that their invalidity should be suspended for a period of 18 months in order to allow Parliament to remedy the defects in the statute.¹⁰⁷ Applying *Dawood*, Khampepe J said that the regulation of sexual conduct falls squarely in the legislature's domain.¹⁰⁸ Because the subject matter of the impugned provisions, in addition to being policy laden, was sensitive and had attracted a high degree of public scrutiny, she felt that Parliament was institutionally best-suited to ensure that the ultimate statutory regime be decided upon in an open manner, with interested parties being given the opportunity to shape the solution.¹⁰⁹

¹⁰¹ At [139].

¹⁰² *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2014] (2) SA 168 (CC).

¹⁰³ At [4].

¹⁰⁴ At [58].

¹⁰⁵ At [64].

¹⁰⁶ At [79].

¹⁰⁷ At [110].

¹⁰⁸ At [109].

¹⁰⁹ At [109].

These three examples illustrate that the “dialogue” principle greatly influences the court’s decision-making when it comes to the relief it grants following a declaration of constitutional invalidity.

2 What is the remedial effect of suspension orders?

If s 172(1)(b)(ii) is invoked by the court it has the effect of making a declaration of invalidity subject to a resolute condition in the sense that if the defect is fixed, the declaration falls away and the legislature or executive’s response is valid. If not, the declaration of invalidity comes into effect at the expiry of the prescribed period, and the usual consequences that follow from a declaration of invalidity attach to that declaration.¹¹⁰

It is an important principle of South African constitutional adjudication that successful litigants should be awarded relief.¹¹¹ In situations where a declaration of invalidity is suspended and the legislature fixes the constitutional defect prior to the expiration of the suspension period, the declaration ceases to take effect and the litigants do not receive any relief. To ensure that this principle of adjudication is upheld, the Constitutional Court has the ability to grant an interim remedy during the period of suspension to diminish the continuing violation of rights. This is a power that the Court has exercised fairly regularly.¹¹² There are two ways in which the court will do this. The first method is for the Court to make an order requiring the relevant officials to consider the constitutional rights of the effective parties when exercising the temporarily validated power.¹¹³ The second way is that the court can temporarily alter the meaning of the words of the legislation to be read in a way that is consistent with the Constitution

¹¹⁰ Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* (4th ed, Juta & Co Ltd, Landsowne, 2001) at 184; *Executive Council, Western Cape Legislature v President, Republic of South Africa* [1995] (4) SA 877 (CC) at [106].

¹¹¹ *S v Bhulwana, S v Gwadiiso* [1996] (1) SA 388 (CC) at [32].

¹¹² Bishop, above n 90, at [9.4(e)(i)(cc)].

¹¹³ See, for example, *Dawood v Minister of Home Affairs* [2000] (3) SA 936 (CC) and *Janse van Rensburg v Minister of Trade and Industry* [2001] (1) SA 29.

until the legislature gets around to deciding which option it prefers to remedy the constitutional defect.¹¹⁴

What happens when the legislature fails to cure the defect and the suspended order comes into effect? In *Western Cape* the Constitutional Court said that in such circumstances the declaration of invalidity comes into effect at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue.¹¹⁵ However, Bishop notes that this is not how the Court has understood suspension orders to work in practice following *Western Cape*. The position appears to be that suspended orders will not operate retrospectively unless the Court has expressly stated otherwise.¹¹⁶ In *Mashavha* the Constitutional Court felt that because the suspension order is based on a need to retain the legal position in place in order to avoid disruption of a legal system, it will not operate retroactively, primarily because it would cause the precise ill that the court intended to avoid.¹¹⁷ However, it is less clear what should happen where this is not the rationale for the suspension order and the Court remains silent on retroactivity. In practice it seems that where there is uncertainty a person seeking retroactive application of a declaration should apply to the Court for clarification on the suspended order's effect.¹¹⁸

C *Hong Kong*

In Hong Kong a distinction is drawn between “suspension orders” and “declarations of temporary validity”. These are two different types of remedial order that permit unconstitutional legislation or policies to continue to operate.

¹¹⁴ See, for example, *Monseke v The Master of the High Court* [2001] (2) SA 18 (CC) and *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board* [2006] (8) BCLR 901 (CC).

¹¹⁵ *Executive Council, Western Cape Legislature v President, Republic of South Africa* [1995] (4) SA 877 (CC) at [106].

¹¹⁶ Bishop, above n 90, at [9.4(e)(i)(aa)(y)]. For an example where the Court expressly required a suspension order to take retrospective effect see *Matatiele v President of the Republic of South Africa* [2007] (1) CLR 47 (CC).

¹¹⁷ *Mashavha v President of the Republic of South Africa* [2006] (4) SA 309 (CC).

¹¹⁸ Bishop, above n 90, at [9.4(e)(i)(aa)(y)].

The Basic Law is supreme law in Hong Kong. Any law that is inconsistent with the Basic Law has no force. The Basic Law does not provide for its supremacy in any single provision.¹¹⁹ Article 160(1) provides if any law previously in force prior to the establishment of the Hong Kong Special Administrative Region is later discovered to be in contravention of the Basic Law, it shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law.¹²⁰ Article 11 provides that laws enacted by the Region's new legislature cannot contravene the Basic Law.¹²¹ These provisions do not state the legal consequences of inconsistency with the Basic Law,¹²² but the Court of Final Appeal has recognised that the courts have jurisdiction to invalidate legislation or executive actions to the extent of any inconsistency.¹²³

In *Koo Sze Yiu v Chief Executive of the HKSAR*¹²⁴ (*Koo*) the Court of Final Appeal considered the availability of suspension orders in Hong Kong. In *Koo* a constitutional challenge was brought against s 33 of the Telecommunications Ordinance and an associated executive order. Section 33 of the Telecommunications Ordinance authorised the Chief Executive of Hong Kong to order the interception or disclosure of telecommunications when required by the public interest.¹²⁵ In addition the Chief Executive published the Law Enforcement (Covert Surveillance Procedure) Order requiring covert surveillance to be conducted only where authorised at a fairly senior level and kept under regular review at an even more senior level.¹²⁶ The challenge was based on Article 30 of the Basic Law, which guarantees the freedom of privacy and communication

¹¹⁹ Kevin Zervos "Constitutional Remedies under the Basic Law" (2010) 40 HKLJ 687 at 690.

¹²⁰ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 160(1).

¹²¹ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 11.

¹²² Zervos, above n 119, at 691.

¹²³ *Nga Ka Ling and Others v Director of Immigration* [1999] 2 HKCFAR 4 at 25.

¹²⁴ *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 9 HKCFAR 441.

¹²⁵ At 450.

¹²⁶ At 450.

except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation.¹²⁷

At first instance, the trial judge found both s 33 and the Executive Order to be unconstitutional.¹²⁸ He issued a “temporary validity order” pending corrective legislation that made s 33 and the Executive Order valid and of legal effect for a 6 month period. If s 33 and the Order were immediately invalidated, law enforcement agencies could not conduct surveillance. This would disrupt the protection of law and order. The Court of Appeal upheld the “temporary validity order”.¹²⁹ The plaintiffs appealed to the Court of Final Appeal to challenge the validity order. The Court asked whether a court can make an order according temporary validity to a law or executive action which it has declared unconstitutional, or alternatively, whether a court can suspend a declaration of invalidity so as to postpone its coming into operation?¹³⁰ Interestingly, it treated “temporary validity” given to a law or executive action and “suspension” of a declaration of invalidity as different concepts. The majority of the Court believed that the Canadian courts distinguished between these two types of order. This was because counsel in argument had made submissions on the basis that the Canadian authorities made such a distinction.¹³¹ This is not what the Canadian authorities actually say, which will be discussed in section IV of this essay. Despite this the Court held that the Basic Law did not preclude the availability of either type of order.¹³²

So, what is a “declaration of temporary validity”? The Court said that it had two results. First, during the period of temporary validity the executive is permitted to function pursuant to unconstitutional law. Second, the executive is shielded from liability for so functioning. This order is

¹²⁷ At 449.

¹²⁸ At 451.

¹²⁹ At 451-452.

¹³⁰ At 449.

¹³¹ At 459.

¹³² At 452.

appropriate in circumstances where there would be a legal vacuum following an immediate declaration of invalidity resulting in chaos.¹³³ The majority of the Court did not think that the situation in *Koo* could justify temporary validity, but did leave open the question of temporary validity being available in an extreme case.¹³⁴

In contrast, suspension of a declaration of invalidity does not provide the executive with a shield from liability. It merely allows the executive to act pursuant to the unconstitutional law for a specified period of time. The practical effect is that in continuing to act pursuant to the unconstitutional law, the relevant Government official will not be acting in contravention of a declaration of invalidity and so will not be in contempt of court for so acting, which would have otherwise been the sanction if there were no suspension order. But the official will still be acting contrary to the law and will incur legal liability for so acting during the suspension period.¹³⁵ The majority identified that the judicial power to suspend the operation of a declaration was a “concomitant of the power to make the declaration in the first place” and was within the inherent jurisdiction of the Court.¹³⁶ It identified the guidelines in the Canadian case of *Schachter* as appropriate instances to grant temporary suspension. But ultimately, whether or not to suspend in any given case was a question to decide bearing in mind whether the danger to be averted by suspension would be of such magnitude that suspension of a declaration of unconstitutionality would not offend against the rule of law.¹³⁷

In *Koo* the danger to be averted was of sufficient magnitude to justify suspension. The majority replaced the temporary validity order with a suspension of the declarations of unconstitutionality so as to postpone their coming into

¹³³ At 456.

¹³⁴ At 456.

¹³⁵ *Chan Kin Sum Simon v Secretary for Justice* [2009] HKEC 393 at [64].

¹³⁶ *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 9 HKCFAR 441 at 456.

¹³⁷ At 457.

operation for six months. This would afford an opportunity for the enactment of corrective legislation. The Government could during the period function pursuant to what had been declared unconstitutional, doing so without acting contrary to any declaration in operation. But it was not shielded from legal liability for so functioning.¹³⁸

The Hong Kong approach has found favour in the United Kingdom. It was adopted by the United Kingdom Supreme Court in *Ahmed v HM Treasury*.¹³⁹ In that case the United Kingdom Treasury submitted that the Supreme Court should suspend the operation of the orders it proposed to make declaring certain counter-terrorism measures contained in Orders in Council ultra vires, which have the immediate effect of quashing the Orders. Although the Court believed it was inappropriate to grant suspension in that case, drawing on *Koo*, Lord Hope said that it would be wrong to regard the suspension as giving any kind of temporary validity to the provisions that are to be quashed and there is no shield from legal liability for functioning pursuant to what has been declared to be ultra vires during the period of the suspension.¹⁴⁰

D Comparison of the three approaches

The essay will now consider how well these three countries' different approaches to suspension orders facilitate "constitutional dialogue". First, it will compare the extent to which the courts in each country incorporate the "dialogue" principle into their decisions when deciding whether to suspend a declaration of invalidity. Second, it will discuss how effective each model is at providing a remedy for past constitutional breaches that have affected the rights of citizens. Third, it will analyse the extent to which the three models ensure that, when the provision of a remedy is entrusted to the legislature or executive, the remedial response of those branches is adequate to protect those rights in the future.

¹³⁸ At 458.

¹³⁹ *Ahmed v HM Treasury (No 2)* [2010] UKSC 5; [2010] 4 All ER 829.

¹⁴⁰ At 835.

1 Incorporation of the “dialogue” principle in judicial reasoning

In Canada, the courts in most cases have failed to articulate that the “dialogue” principle underlies their decision to suspend a declaration of invalidity. Of the post-*Schachter* cases none, except for *Corbiere*, state “constitutional dialogue” as the principle that justifies the postponement of invalidity.¹⁴¹ Because these cases deal with important constitutional rights, it is necessary for the courts to give clear reasons that justify a departure from an immediate declaration of validity. If the reason for issuing such suspension orders is, as academics have noted, to facilitate “constitutional dialogue” then the courts need to make it very clear to the legislature and executive that this is indeed the rationale behind the suspension. There is a risk that the courts would otherwise be indicating to the other branches of government that they are being soft on rights breaches. The courts need to send a clear message to the other two branches that it is not abdicating from its role to uphold the rights and obligations contained in the constitution, but rather that, in the circumstances, the courts see it as appropriate to allow another branch to have the first say in crafting a remedy.

Unlike the Canadian courts, the South African courts have made it very clear in several cases that one of the reasons why they suspend declarations of invalidity is because the remedy required to fix the constitutional defect involves the balancing of policy factors, which the legislature and executive are better equipped to deal with. “Constitutional dialogue” is a key factor that guides the courts’ remedial response.

It is also worth acknowledging that the factors identified by Bishop that are used to determine whether suspension is appropriate are consistent with the “constitutional dialogue” principle. When the party responsible for the unconstitutional law argues that an immediate order of invalidity will create a lacuna in the law that would create uncertainty, administrative confusion or potential hardship, the courts are

¹⁴¹ Hogg, above n 10, at [40(1)(d)].

generally suspicious of such an allegation. In the majority of cases the court has rejected such claims.¹⁴² The courts are not quick to shirk from their responsibility to uphold the rights and obligations contained in the Constitution. This is clear from the fact that, when the extent of the violation of the right is so gross that it will not be able to outweigh any disruption caused to administration, suspension can never be justified. Moreover, when the courts have previously granted a suspension order on the same issue they will not postpone a declaration. In such situations the court has tried to engage in “dialogue” with the legislature or executive and has given either branch a fair chance to respond, but they have failed to do so. The courts will therefore take the lead to ensure that rights are upheld. In addition, the courts are more likely to suspend declarations when the defect in the law is purely procedural to give the legislature a chance to pass new legislation according to the proper procedures. This is a pragmatic approach that gives Parliament a fair opportunity to remedy the defect in order to continue the enforcement of an otherwise rights-consistent law.¹⁴³

One of the most significant things that distinguishes the Hong Kong approach from the Canadian and South African approaches is that “constitutional dialogue” does not seem to expressly or impliedly enter into the courts decision as to whether it should grant either (1) a “suspension order” or (2) a “declaration of temporary validity”. Instead, the focus of the two types of order is on averting danger.

The decision in *Koo* has been criticised because the Court of Final Appeal did not engage in a discussion of when these remedies will be used, except for saying that they will be

¹⁴² Bishop, above n 90, at [9.4(e)(i)(bb)(x)]; see examples of the Constitutional Court refusing to grant suspension where the remaining powers are sufficient to prevent a lacuna from arising in *Coetzee v Government of the Republic of South Africa* [1995] (4) SA 631 (CC) at [18]; *Case v Minister of Safety and Security* [1996] (3) SA 617 at [84]-[86]; and *Ex Parte Minister of Safety and Security and Others: in Re S v Walters and Another* [2002] (4) SA 617 (CC) at [76].

¹⁴³ See, for example, the approach of the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly & others* [2006] (6) SA 416 (CC) at [214].

granted when “necessary”.¹⁴⁴ Academics doubt the appropriateness of distinguishing between “suspension orders” and “temporary validity orders”. In particular, they do not like “suspension orders” because under such orders the government incurs liability for engaging in activity that the court is willing to tolerate during the suspension period.¹⁴⁵ If the Court of Final Appeal had based its approach on the “dialogue” principle, this argument falls away. If the court is issuing a suspension order to facilitate dialogue it is not saying that it tolerates the other branches engaging in unconstitutional activity. Rather, the court is saying that because there are a number of solutions to the problem and the choice of the solution involves making complex policy decisions, it is not actually competent to come up with the solution and so it is deferring this decision to either the executive or legislature. The court will give the other branches time to come up with a solution. But, under Hong Kong’s “suspension orders” the court also recognises that the government has wronged people through its unconstitutional actions and so the court is going to require the legislature or executive to provide a remedy to those who have been wronged.

Ultimately, “constitutional dialogue” will be furthered the best under all three countries’ approaches when there is a clear articulation of the principle as the rationale for suspending a declaration of inconsistency because it makes it clear to legislatures and governments that the courts are not legitimising rights breaches. Instead, all three branches play an important role in upholding the constitution.

2 *Remedying past breaches of constitutional rights*

As discussed earlier in this essay, a majority of the Supreme Court of Canada in *Hislop* ruled that corrective legislation that responds to the suspension of a declaration of invalidity does not have retroactive effect. Instead, the legislature’s

¹⁴⁴ See, for example, Johannes Chan SC “Some Reflections on Remedies in Administrative Law” (2009) 39 HKLJ 321 and P Y Lo “Levitating Unconstitutional law” (2006) 36 HKLJ 433.

¹⁴⁵ Chan, above n 144, at 332. A similar criticism is made by Zervos, above n 119, at 715.

response is prospective. This is because a claimant's recovery of retroactive relief would be at "cross-purposes" with the suspension of the declaration of invalidity. There are two major problems with this approach.

First, it is clear from the majority's opinion in *Hislop* that the Canadian approach to suspension orders is not particularly effective at providing a remedy to those who have suffered a rights breach prior to the passage of corrective legislation. Claimants who bring cases before the court will often succeed on the merits, but fail to receive any redress for themselves. In a study of all the suspension orders issued that had resulted in a corrective legislative response prior to 2003, only 7 of 27 responses provided any form of remedy to those who had suffered previous rights breaches.¹⁴⁶

Second, the *Hislop* majority's statement that granting to claimants retroactive relief "would be at cross-purposes with the Court's decision to grant a suspended declaration of invalidity" is incorrect when the rationale for granting a suspension order is to facilitate "constitutional dialogue". In such circumstances the court is not saying that suspension should be ordered because an immediate declaration would otherwise result in legal chaos, but rather, that the legislature or executive should have the first shot at crafting a remedy because it is better equipped to legitimately exercise discretion when it comes to policy making. Providing a remedy to those affected by the constitutional defect is not inconsistent with deferring the remedial response to elected representatives. It would only be at "cross-purposes" if the declaration were suspended because it fell within the *Schachter* categories,¹⁴⁷ at which point the presumption in favour of retroactivity would be displaced. The *Hislop* Court's approach is probably to be understood by the fact that the Court inexplicably reaffirmed the guidelines set out in

¹⁴⁶ Choudhry and Roach, above n 65.

¹⁴⁷ To repeat, in *Schachter*, Chief Justice Lamer held that the courts should only suspend declarations of inconsistency where the immediate striking down of the law would: (1) pose a danger to the public, (2) threaten the rule of law, or (3) result in the deprivation of benefits from deserving persons.

Schachter without explanation or reference to the previous Supreme Court cases, such as *Corbiere*, that had completely departed from those guidelines.¹⁴⁸

In South Africa, if a declaration is suspended, the declaration falls out of existence when the legislature responds. Similar to Canada, this means that there is no obligation on the legislature or the executive to make its response retroactive. In addition, even when the legislature fails to cure the defect and the declaration of invalidity comes into force; there is a presumption that the declaration will not act retrospectively unless the court says otherwise. This is premised on the rationale that it would make no sense to have a suspension order act retrospectively when it would cause the precise ill that the court intended to avoid. But this is inconsistent with “constitutional dialogue”. The idea of “dialogue” is that sometimes Parliament is in a better position to remedy the constitutional defect than the courts. If the legislature, after having had the chance to consider the court’s judgment, has chosen to do nothing to fix the impugned law, then the court should step in and ensure that not only are the rights and obligations of the Constitution upheld, but also that those who were affected by the constitutional breach receive a remedy.

The measures that restrict the availability of retroactive relief to wronged claimants in South Africa are mitigated by the availability of interim remedies. Interim remedies ensure that successful litigants get some form of relief even if ultimately the declaration of invalidity falls away due to an acceptable legislative cure to the defect. This addresses the problems associated with the Canadian model that suspension orders often leave those deserving claimants who have brought the rights breach to the attention of the courts without a remedy. Furthermore, interim remedies, such as directions to officials and temporary alterations of the meaning of words, provide useful indications to the legislature as to what appropriate cures to the defect might be, which the legislature is free to

¹⁴⁸ Hogg, above n 10, at [40(1)(d)],

adopt when it formulates its solution. This helps to facilitate “dialogue”.

Based on the Canadian and South African experience, this essay suggests that if the rationale for suspending the order is based upon the “dialogue” principle, then the courts should make it clear that there is a presumption that Parliament or the Government’s response is to be retroactive. However, this presumption should be able to be displaced at the discretion of the court where there is a risk of legal chaos ensuing because of a lacuna in the law. In those cases there should be a presumption that the declaration operates retroactively. Such an approach would encourage Parliament to actually engage with the Court in a dialogue and to take pragmatic steps to remedy the constitutional defect.

Interestingly, one of the key criticisms of the Hong Kong approach is that there is a doubtful distinction between a “temporary validity order” and a “suspension order”. Johannes Chan SC writes:¹⁴⁹

Be it a temporary validity order or suspension, the practical result is the same that an otherwise unconstitutional legislative provision is allowed to continue to operate, albeit for a definite period of time. In both cases this can only be justified on very compelling grounds. Thus, it would be difficult to find, conceptually and practically, what difference there would be between a temporary validity order and suspension.

However, the distinction between the two types of order is quite significant because it has the potential to impact upon the relief available to the claimants who bring a constitutional challenge before the Court. A “suspension order” in Hong Kong does not shield the Government from legal liability and ensures therefore that at the expiry of the suspension period, the Government is liable to compensate any person who was harmed as a result of the unconstitutional law. The “temporary validity order” seems to operate similarly to the Canadian and South African approaches where, if the

¹⁴⁹ Chan, above n 144, at 332.

legislature or executive remedies the constitutional defect, then that remedy will only take prospective effect as the law is valid up until the expiry of the validity period.

When thought about in terms of “constitutional dialogue”, the Hong Kong approach solves many of the problems associated with the Canadian and South African models. It is a clever solution to have two types of order available because it provides the court with a degree of flexibility. “Suspension orders”, which would be used more frequently, ensure that the declaration of invalidity acts retroactively and provides successful litigants with a remedy because claimants can still bring claims against the government. However, the court still has the power to issue “temporary validity orders” in the rare circumstances in which the situation before the court calls for a remedy that should only take effect prospectively.

One criticism of this essay’s argument might be that having these two types of order does not actually facilitate “dialogue” as well as the orders available in South Africa and Canada. The Hong Kong model permits the courts to dictate to the other branches of government what the nature of the remedy should be. But it is necessary to remind these critics that the “dialogue” principle acknowledges that the courts have a constitutional role to apply existing constitutional rules with retroactive relief to the disputes before them. The courts perform their constitutional role under the Hong Kong approach, while still reserving the power to deny retroactive relief through temporary validity orders where they believe that the situation is such that legislatures and governments should have full discretion to decide how to tailor the remedy. Governments under the Hong Kong model will know that when a “suspension order” is granted, they should incorporate into their response remedial measures for parties affected in the past. But when a “temporary validity order” is granted, they have full discretion and the legislative response is unlikely to be further challenged. Compare this position with that of Canada. In *Hislop* the plaintiffs challenged the legislative response on the basis that it lacked retroactive effect. Bastarache J reserved the power of the court to read

into the legislative response the retroactive effect of provisions where the court believes it is appropriate. The Hong Kong model facilitates “constitutional dialogue” better because it allows the courts to very clearly articulate how they have understood the nature of the constitutional right at stake and how they believe the other branches of government should think about that right in the future. This results in a more considered legislative or executive response.

3 *Remedying the constitutional defect for the future*

A significant problem arising from the use of suspension orders is that often the remedy crafted by the elected branches of government does not effectively address the constitutional defect and leaves citizens in a worse off position from a rights stand-point than if the court were to immediately declare the law invalid. One Canadian case that illustrates this potential problem is *Dunmore v Ontario*.¹⁵⁰ In *Dunmore* the Court invalidated a provision excluding agricultural workers from Ontario’s labour relations statute, but suspended the declaration of invalidity for 18 months to allow time for amending legislation to be drafted and enacted.¹⁵¹ The Court took care to specify minimum requirements for the remedy so that agricultural workers had the statutory freedom to form and maintain associations as well as the associated protections for the exercising of these rights, such as freedom to assemble.¹⁵² The Court abstained from requiring more controversial rights in the agricultural context such as the inclusion of a full collective bargaining regime and the right to strike.¹⁵³ However, the fact that the Court deferred the crafting of a remedy to the legislature left the workers vulnerable to the Ontario government’s legislative response. The response in the form of the Agricultural Employees Protection Act 2002 ignored most of what the Court said in *Dunmore*, which constrained the ability of agricultural workers to unionise.¹⁵⁴

¹⁵⁰ *Dunmore v Ontario* [2001] 3 SCR 1016.

¹⁵¹ At [66].

¹⁵² At [67].

¹⁵³ At [68].

¹⁵⁴ Mary Liston “Delayed Declarations of Invalidity: Deferential Dialogue or Justice Deferred?” (paper prepared for the 2005 Canadian Political

Carson and Smith identify *Dunmore* as an example of the extent to which dialogue through the use of suspension orders can hamper progressive causes that protect and enhance constitutional rights. The setting of a minimum remedy by the Court, and leaving the response to the legislature to do more, gave the legislature discretion in determining how to craft legislation in response to the Court's holding so as to facilitate "dialogue". However, this "dialogue" hindered the protection of agricultural workers' constitutional rights. If the Court had gone further so as to require that agricultural workers have the same rights as other workers prior to issuing the suspension order, the legislative response would have been a very different piece of legislation.¹⁵⁵

A similar problem arises in South Africa. Bishop explains that there is a lack of clarity as to what happens if the legislature's response is not sufficient to address the problem. If the response is not acceptable, does the declaration of invalidity come into effect? This is not a matter which has come before the South African Courts, but theoretically there could be subsequent litigation, like there has been in Canada, which challenges the remedial response of the legislature. Such a challenge could have been made to the legislative response to *Fourie*. The Civil Union Act¹⁵⁶ passed by the legislature in response to the Court's suspended invalidation of provisions in the Marriage Act¹⁵⁷ did not rectify the unconstitutional failure to permit same sex couples to marry identified by the Court. This is because it created a separate regime different to that of marriage. The Court had specifically stated when issuing the suspension order that a "separate-but-equal" approach was not sufficient to remedy the constitutional defect.¹⁵⁸ If the Court had not suspended

Science Association Conference, 4 June 2005, University of Western Ontario, London, Ontario) at 37.

¹⁵⁵ Jonathan Carson and Charles Smith "Waiting for the Revolution: Democracy, Dialogue and *Dunmore*" (draft paper prepared for the 2003 CPSA Meeting, Halifax, Nova Scotia, 2003).

¹⁵⁶ Act 17 of 2006.

¹⁵⁷ Act 25 of 1961.

¹⁵⁸ *Minister of Home Affairs v Fourie* [2006] (1) SA 524 (CC) at [149].

the declaration of invalidity, the immediate effect of the declaration in *Fourie* would have changed the meaning of “spouse” in the Marriage Act to permit homosexual marriage. So, did the declaration come into effect at the expiry of the suspension period because the legislature went against the Court’s remedial instructions?¹⁵⁹

Fourie illustrates a problematic aspect of suspension orders. Sometimes the courts and the legislature do not engage in a “dialogue” when the legislature is left to craft the remedial response. The legislature may choose to ignore the court’s decision and formulate its response based on its own perspective of what falls within the boundaries of the Constitution. This is worrying when important constitutional rights are at stake.

The risk of this issue occurring in Hong Kong is lower due to the existence of the two types of orders. The Court is more likely to issue a “suspension order” over a “temporary validity order” because a “temporary validity order” will only be granted where there is a “virtual legal vacuum”.¹⁶⁰ Given that a government will incur liability during the suspension period and be obliged to compensate any citizens wronged at the end of the suspension period, it is likely that the remedial response would have to generate an adequate response for the future from a rights standpoint. This is because the remedial response could also be challenged and the legislature or government could incur in further liability even after the end of the initial suspension period if the court deems the solution not to be satisfactory and invalidates it.

E Summary

Four conclusions can be drawn from this section of the essay. First, the “dialogue” rationale plays an important role in guiding the court’s decision to suspend a declaration of invalidity in both Canada and South Africa. Although the dialogue principle does not guide the decision to suspend in Hong Kong, if the rationale behind the types of order were

¹⁵⁹ Bishop, above n 90, at [9.4(e)(i)(aa)(x)].

¹⁶⁰ *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 9 HKCFAR 441 at 456.

“constitutional dialogue”, then this would address concerns levied by academics against having two distinct types of remedial order.

Second, the “dialogue” rationale is furthered when the courts clearly articulate that they are suspending declarations of invalidity because it reminds legislatures and governments that they also have an important role to play in the protection of constitutional rights, especially when the protection of those rights includes the balancing of complex policy factors.

Third, if the “dialogue” principle informs the use of suspended declarations of invalidity, it would not be inconsistent with suspension to provide retroactive relief to those who have suffered rights breaches as a result of the unconstitutional legislation or executive action.

Fourth, the “dialogue” principle can be undermined where the suspension model permits legislative responses to suspended declarations of invalidity that do not actually remedy the constitutional defect and that do not engage with the court’s ruling. A mechanism within the suspension order should address this problem.

IV The New Zealand High Court’s decision in Spencer v Attorney General

The essay will now consider the New Zealand High Court’s decision in *Spencer v Attorney General (Spencer)*,¹⁶¹ where the Court was required to explore the availability of suspension orders in New Zealand for the first time. It will analyse Winkelmann J’s discussion of suspension orders in the light of the conclusions reached in the previous two sections of this essay.

The facts of *Spencer* are as follows. Mrs Spencer was the caregiver of her adult son Paul who suffered from Down’s Syndrome. Paul was seriously disabled and unable to care for himself. He lived with Mrs Spencer. Mrs Spencer had tried to

¹⁶¹ *Spencer v Attorney General* [2013] NZHC 2580, [2014] 2 NZLR 780.

obtain payment from the Ministry of Health for the care that she had provided to Paul. The Ministry operated a policy that excluded family members from receiving publicly funded payment for those caregiving services on the basis that they were “natural supports” bound by a social contract between families and the state whereby families are not paid for looking after their own.¹⁶²

The policy had been challenged before the Human Rights Review Tribunal in *Atkinson v Ministry of Health*.¹⁶³ The Tribunal is an independent judicial body created by statute. Its principal function is to consider and adjudicate on civil proceedings brought under the Human Rights Act 1993 (NZHRA).¹⁶⁴ The Tribunal can declare that the Government has acted in breach of the anti-discrimination standard contained in s 19 of BORA and s 21 of NZHRA. This has the effect of making a Government policy unlawful on the basis that it is unlawfully discriminatory.¹⁶⁵ In *Atkinson* the Tribunal declared that the policy was inconsistent with s 19 of BORA because it unjustifiably limited the right to freedom from discrimination, family status being a prohibited ground for discrimination.¹⁶⁶ This finding was upheld on appeal.¹⁶⁷

Following the Tribunal’s declaration, the Ministry immediately applied under s 92O(2)(d) of the NZHRA for an order suspending the declaration. Section 92O(2)(d) provides that the Tribunal can make any remedy it grants take effect only prospectively. If the Ministry were simply to remove the prohibition on funding the employment of family members, it would render the existing system chaotic. The Ministry needed time to develop a new policy and redesign its

¹⁶² At 784.

¹⁶³ For the Court of Appeal decision see *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; for the High Court decision see *Ministry of Health v Atkinson* (2010) 9 HRNZ 47; for the Tribunal decision see *Atkinson v Ministry of Health* (2010) 8 HRNZ 902.

¹⁶⁴ *Spencer v Attorney General* [2013] NZHC 2580, [2014] 2 NZLR 780 at 790.

¹⁶⁵ At 790.

¹⁶⁶ *Atkinson v Ministry of Health* (2010) 8 HRNZ 902.

¹⁶⁷ For the Court of Appeal decision see *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; for the High Court decision see *Ministry of Health v Atkinson* (2010) 9 HRNZ 47.

disability support services framework in the light of the Tribunal's decision. The Ministry wanted to lawfully apply the existing policy while it worked out its new policy. The *Atkinson* plaintiffs consented to a suspension order being made.¹⁶⁸ Judge RE Ryan of the Tribunal signed the suspension order that suspended the declaration until further order of the Tribunal under s 92O of the Human Rights Act. The Tribunal did not revisit the order for 3 years.¹⁶⁹

Mrs Spencer renewed her earlier efforts to obtain payment from the Ministry. The Ministry declined her application on the basis that the Tribunal's declaration had been suspended, so the policy continued to operate.¹⁷⁰ She applied for judicial review of the Ministry's decision, challenging inter alia the validity of the suspension order on the basis that the Tribunal did not have jurisdiction to suspend the declaration it had made in *Atkinson*.¹⁷¹

The Ministry argued that the Tribunal had jurisdiction to make the order under s 92O(2)(d). The effect of the order was to render the policy lawful while the order remained in place. The policy would be declared unlawful at some time in the future. Interestingly, it argued that the ability to suspend a declaration reflected the "constitutional dialogue" between the courts, the executive and legislature.¹⁷²

Justice Winkelmann held that the Tribunal did not have jurisdiction under s 92O(2)(d) to make an order suspending the declaration it had already issued, and to backdate that order. Section 92O(2)(d) is not on its face a provision that authorises a grant of suspension.¹⁷³ The order made did not fit within the terms of s 92O(2)(d). Furthermore, the *Atkinson* plaintiffs could not have consented to the making of an order that "suspended" the Tribunal's finding that the policy was unlawful so it would only operate prospectively. This would

¹⁶⁸ *Spencer v Attorney General* [2013] NZHC 2580, [2014] 2 NZLR 780 at 785.

¹⁶⁹ At 789.

¹⁷⁰ At 785.

¹⁷¹ At 792.

¹⁷² At 792.

¹⁷³ At 794.

completely go against the *Atkinson* plaintiff's intention to pursue damages for the past application of the policy. The plaintiffs cannot have agreed to wipe away their rights to remedies for past breaches.¹⁷⁴ This reasoning is undoubtedly correct. As discussed in section III, there is a clear distinction between "suspending" a declaration of incompatibility and the issuing of a prospective remedy. Suspension declarations of invalidity can have retroactive effect. It was not possible for the provision that the Ministry relied on to be read in that way.

Before considering her treatment of suspension orders, it should be pointed out that Justice Winkelman ultimately concluded that even if the Tribunal did have jurisdiction to make a suspension order, the order was so full of procedural defects that it was a nullity.¹⁷⁵

Of interest in the case are the additional comments Winkelman J makes about suspension orders. She adopted the Hong Kong model of "suspension order" on the strength that it had been given support by the United Kingdom Supreme Court in the context of judicial review of administrative action in *Ahmed*.¹⁷⁶ She therefore reasoned that even if the Tribunal had the power to suspend a declaration, this would not render the policy lawful for that suspension period and that the Tribunal had no power to deem a policy it has found unlawful, lawful.¹⁷⁷ This essay will unpack her reasoning on this point.

Justice Winkelman offers four reasons in support of her conclusion. First, she says that "deeming an invalid Act or policy valid or lawful is an exceptional remedy, utilised by constitutional courts in cases of necessity".¹⁷⁸ This is not necessarily correct. As has been illustrated in section III, the Canadian jurisprudence suggests that the courts no longer suspend declarations of invalidity solely to prevent a legal

¹⁷⁴ At 794-795.

¹⁷⁵ At 812.

¹⁷⁶ At 800-801.

¹⁷⁷ At 801.

¹⁷⁸ At 801.

vacuum. Rather, the rationale for suspension is aimed at facilitating “constitutional dialogue”. A similar approach is taken in South Africa. Necessity is not the only accepted rationale for granting such a remedy.

Second, Winkelmann J states that, although the Canadian cases like *Corbiere* indicate a more liberal use of “deemed invalidity” than the decision in *Manitoba*, care needs to be taken with the Canadian cases because of the different context in which they are decided. The remedy, she adds, was developed in conjunction with the exercise of a power that the courts do not have in New Zealand: the power to invalidate an Act of Parliament.¹⁷⁹ So, Justice Winkelmann acknowledges that the courts in Canada have used suspended declarations of invalidity in situations where there was no risk of a legal vacuum. She does not, however, outright state that there has been a shift in the Canadian approach from using the remedy in situations of necessity to using it to facilitate “dialogue”. She concludes that this “more liberal use” is irrelevant because the constitutional context in New Zealand is different.

But is the constitutional context really that different? Section III of this essay has shown that “constitutional dialogue” underlies the increased use of suspension orders in Canada. Section II has shown that the “dialogue” principle explains the relationship between the branches of government and lends democratic legitimacy to the review of government actions by the courts in Westminster systems. The principle of “constitutional dialogue” in New Zealand links its constitutional system to that of Canada: both systems share the “dialogue” principle that can guide the exercise of judicial review powers.

If the underlying rationale for suspension is present in New Zealand, can it be said that there is a material difference from a dialogic perspective between the power to invalidate a piece of legislation and the power to make a policy unlawful such that a suspension order can be granted for the former but

¹⁷⁹ At 798.

cannot be granted for the latter? It should not matter that in *Spencer* the impugned act was carried out by the executive branch of government as it also plays a role in the “dialogue” in Westminster systems.

Justice Winkelmann’s belief that the constitutional context is different leads her to consider the Hong Kong approach to “suspension orders”, which were considered to be available in the Westminster constitutional context by the United Kingdom Supreme Court in *Ahmed*. She accepts the Hong Kong approach as the correct position in law. Ironically, this remedy had also been developed in conjunction with the Hong Kong courts’ power to invalidate legislation inconsistent with the Basic Law.

She then makes her third point. *Koo* and *Ahmed* stand for the proposition that a declaration of invalidity is merely a remedy. Even if the declaration is suspended, this does not alter what the law is, which is the law pronounced in the judgment. But, while it is correct that this is what these cases stand for, this proposition of law is based on a misreading of Canadian authority.

In the course of argument before the Court of Final Appeal in *Koo*, counsel had said that there was a distinction in Canadian law between the concepts of “temporary validity” and “suspension” of a declaration.¹⁸⁰ Justice Bokhary for the majority accepted counsel’s argument. But, in his concurring judgment, Mason NPJ did not believe that the Canadian authorities distinguished between an order according temporary validity to a statute held to be unconstitutional and an order temporarily suspending a declaration of invalidity of an unconstitutional statute. He referred to Hogg, who makes it clear that when the Supreme Court speaks of suspending the effect of the declaration the effect is to grant a period of temporary validity to an unconstitutional statute, because the statute will remain in force until the expiry of the period of postponement. Justice Mason did not, however, think that this was of significance to the ultimate decision reached

¹⁸⁰ At 459.

because he did not believe that the circumstances justified giving the statute temporary validity.¹⁸¹ A correct reading of the Canadian authorities would have revealed that the existence of the remedy does affect the law for a temporary period.

Furthermore, in *Ahmed* the United Kingdom Treasury, who was seeking the suspension order, did not seek to challenge the position in *Koo* on this basis. Treasury accepted that suspension would do no more than delay the taking effect of the Court's orders, which would then operate retrospectively as from the specified date. It would have no effect whatsoever on remedies for what had happened in the past or during the period of the suspension.¹⁸² Therefore, the Court took no opportunity to consider whether or not the foundation of the approach in *Koo* was correct and merely applied its ratio as law.

This is not to say that the solution reached in *Koo* is not good from a dialogic perspective. In fact, it addresses a lot of problems associated with the Canadian and South African approaches. What this essay is saying is that Winkelmann J should not have been so quick to dismiss the Canadian authority and pronounce that the position in *Koo* was the correct position *in law*. The distinction that Bokhary PJ makes between the types of orders is founded upon a misunderstanding of Canadian authority.

Fourth, Winkelmann J states that there is nothing in s 92O that empowers the tribunal to confer legality on a policy. Section 92O allows the Tribunal to shape the temporal application of its orders. It can delay the making of formal orders,¹⁸³ it can refuse to grant a remedy that has retrospective effect,¹⁸⁴ or in respect of things that happened before the proceedings were commenced or determined,¹⁸⁵ it

¹⁸¹ At 459-460.

¹⁸² *Ahmed v HM Treasury (No 2)* [2010] UKSC 5; [2010] 4 All ER 829 at [16].

¹⁸³ Human Rights Act 1993, s 92O(2)(a).

¹⁸⁴ Human Rights Act 1993, s 92O(2)(b).

¹⁸⁵ Human Rights Act 1993, s 92O(2)(c).

can provide that any remedy granted has effect only from a date specified by the Tribunal,¹⁸⁶ or that any retrospective effect of any remedy is limited as the Tribunal specifies.¹⁸⁷ As mentioned earlier, the Tribunal is empowered to grant a declaration that the defendant has committed a breach of BORA or NZHRA.¹⁸⁸ The power to modify the temporal application of its orders extends to the issue of declarations.¹⁸⁹ Justice Winkelmann concluded that the provision allows for the modification of remedies, but not for the modification of the substantive law itself. The provision does not contemplate that the Tribunal will say: “until this date conduct will not be unlawful discrimination but after this date it will”. Rather, it contemplates that it will determine for what periods of the unlawful discrimination remedies will be available.¹⁹⁰

The reality is that these powers conferred to the Tribunal under the statute allow it to achieve the same practical result as if it had the power to make an unlawful policy lawful through a Canadian-style suspension order. Even if one accepts that the position in *Koo* and *Ahmed* is correct and that the effect of making a declaration does not render a previously lawful policy unlawful, if that declaration is suspended, the court will not be acting in contempt of court if it continues to operate the policy. This is because the Tribunal has not yet declared the position in law. It can delay the making of the declaration until a later date at which it can limit the retrospective effect of the declaration and provide that the declaration takes prospective effect only. The Tribunal’s decision at that later date could take into account whether the Government had changed the policy before formal orders were made and whether that change in policy had remedial effect. The Tribunal could even choose not to make a declaration at that later stage. While Winkelmann J is probably right that there is nothing here that can *technically*

¹⁸⁶ Human Rights Act 1993, s 92O(2)(d).

¹⁸⁷ Human Rights Act 1993, s 92O(2)(e).

¹⁸⁸ Human Rights Act 1993, s 92I(3)(a).

¹⁸⁹ *Spencer v Attorney General* [2013] NZHC 2580, [2014] 2 NZLR 780 at 793.

¹⁹⁰ At 801.

make an unlawful policy lawful following the issuing of a declaration, the Tribunal's powers when issuing remedies can be used in a way that would have the exact same practical effect of issuing a suspension order that grants temporary validity to the impugned policy.

While these criticisms made of Winkelmann J's judgment in *Spencer* do not alter the result of her decision (the order was defective because of its process) they seek to illustrate that her comments that deny the ability of the Tribunal to issue a suspension order that would temporarily validate the policy are not very compelling.

The Tribunal would be justified using the "dialogue" principle when deciding what relief it should grant. Although it cannot "suspend" the entering into force of a declaration already made or "temporarily validate" discriminatory policies, the Tribunal can justifiably be guided by the jurisprudence relating to suspension orders of not just Hong Kong, but also of Canada and South Africa. This essay advocates that when the Tribunal is confronted with a situation where an executive policy is inconsistent with the anti-discrimination provisions in the NZHRA and BORA, but that there are a number of options open to the government to fix the discrimination issue, the Tribunal should, on the basis of "constitutional dialogue", suspend the coming into effect of a declaration by delaying the making of formal orders. This should temporarily allow the body to act pursuant to a discriminatory policy while it formulates an alternative one. The Tribunal should then wait a specified period of time for the government to address the breach at the expiry of which it can choose whether to make a declaration. A declaration should be issued where the government fails to offer a retroactive remedy when such a remedy is justified. As section III has shown, the availability of retroactive relief is not inconsistent with the dialogue principle. It should also issue the declaration where the government's solution does not adequately fix the problem for the future to strongly indicate to the Government the Tribunal's opinion of the Government's response.

V Conclusion

In *Spencer v Attorney General* Winkelmann J did not follow the Canadian jurisprudence when considering the availability and effect of suspension orders in New Zealand. This was because the Canadian constitutional context was too distinct from that of New Zealand. The Canadian courts had developed the remedial order in conjunction with the power to strike down legislation incompatible with the Canadian Constitution. New Zealand courts do not have this power. Instead, Winkelmann J drew guidance from Hong Kong authority that had been applied to a Westminster constitutional system by the United Kingdom Supreme Court in *Ahmed*.

This essay ultimately seeks to argue that there is no reason why Winkelmann J should have given limited weight to the Canadian jurisprudence when reaching her decision because the principle that informs a Canadian court's decision to grant a suspension order, "constitutional dialogue" is equally applicable in New Zealand.

Section II of this essay discussed the theory of "constitutional dialogue". It identified that "constitutional dialogue" was originally used to lend democratic legitimacy to judicial review of legislation in Canada. It then discussed the works of various academics who believe that "constitutional dialogue" exists in Westminster democracies. In Westminster systems, "constitutional dialogue" is able to explain the relationship between the executive, legislative and judicial branches of government and lend democratic legitimacy to the court's review functions. The essay drew on Allan's argument that "constitutional dialogue" gives democratic legitimacy to the judicial review of administrative action. With reference to Clayton and Joseph, it showed that the principle also explains the relationship between the courts, Parliament and government when issuing declarations of incompatibility under instruments such as the BORA or the UKHRA to signal to governments when the courts believe that legislation is rights-inconsistent.

Then, section III of this essay explored how “constitutional dialogue” both explains the use of and lends legitimacy to the Canadian innovation of suspended declarations of invalidity. In particular, it identified the “dialogue” rationale as playing an important role in guiding the courts’ decision to suspend declarations of invalidity in both Canada and South Africa. When considering the approach to such orders in Hong Kong, the essay acknowledged that Hong Kong’s courts do not view “suspension orders” and “declarations of temporary validity” through a “constitutional dialogue” lens. But if the approach of the Hong Kong courts to such orders were considered in the light of the “dialogue” principle, then this would address a number of concerns that academics have levied against the availability of two distinct types of remedial order.

Pulling this together, if the principle underlying the decision to grant a suspension order in Canada and other countries is “constitutional dialogue” and this “dialogue” principle explains and legitimises the actions of the different branches of government in New Zealand in relation to the constitution, then the Canadian jurisprudence concerning suspension orders should be highly relevant to a New Zealand court’s decision as to the nature and availability of such orders domestically. So too should the South African jurisprudence.

Because New Zealand is a jurisdiction of approximately 4 million people, it does not produce the volume of authority needed for the courts to be able to rely solely on domestic jurisprudence when determining the outcome of cases.¹⁹¹ In addition, New Zealand and the United Kingdom are two of only three developed societies that do not have a supreme law written Constitution.¹⁹² Unlike other developed countries, the courts of New Zealand and the United Kingdom do not have the power to strike down legislation inconsistent with the supreme law. Because of the small pool of domestic jurisprudence and the fact that only two other countries have a similar constitutional system, New Zealand judges would

¹⁹¹ Petra Butler “The Use of Foreign Jurisprudence in New Zealand Courts” in *Festschrift fuer Ingeborg Schwenzer zum 60. Geburtstag* (Staempfli Verlag, Bern, 2011) 305 at 322.

¹⁹² The third country is Israel.

be severely limited when ruling on constitutional matters if they ignored foreign jurisprudence on the basis that the foreign jurisprudence is associated with constitutional powers and structures that do not exist in New Zealand. But New Zealand courts should still be cautious when seeking guidance from such foreign jurisprudence. Therefore, what this essay ultimately suggests is that the New Zealand courts, when deciding on matters of constitutional law on which there is no domestic jurisprudence, should engage in a process that looks to the principles informing the judicial decision-making on similar subject-matter in the foreign jurisdiction. The courts should then ask if that principle forms part of the New Zealand legal system. If so, the courts should be comfortable in seeking guidance from this foreign jurisprudence when ruling on constitutional issues. This is the precise exercise that has been carried out by this essay. It is also something that Winkelmann J could have done, but did not do in *Spencer*.

At the time of writing this essay, an appeal of *Spencer* is set down to be heard by the Court of Appeal in October 2014. What will be interesting to see is whether the principle of “constitutional dialogue” and the Canadian or South African suspension order jurisprudence will be given a warm reception from the Court of Appeal judges.

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