Chapter 10

An Inconvenient Constitution? The Troubles with Suspended Declarations of Invalidity

Carissima Mathen

I. Introduction

It is sometimes observed that the mark of a successful society is the willingness of its members to form a queue. The small gesture conceals much: acceptance that all deserve equal treatment; recognition of fellow citizens as entitled to benefits as oneself; and confidence that the desired service or good will not disappear. It reflects a powerful expectation about the conditions under which people engage a shared political community. And it requires a society governed by the rule of law, where actors are subject to legal limits and there is general assurance of the means by which those limits are enforced.

Courts play an essential role in upholding and safeguarding those expectations. In constitutionally bounded systems, they are charged with the responsibility for enforcing a number of limits on other actors. Over the course of Canada's legal development, courts have discharged this duty with admirable resolve. There is, however, one discordant note: the suspended declaration of invalidity.[1] The idea that it is both possible, and appropriate, for a court to delay the effect of its constitutional remedy has become deeply entrenched, so much so that delay is only occasionally the subject of sustained legal argument by parties or by judges themselves.

In this paper, I argue that suspended declarations are problematic, with a focus on the domain of criminal law. Such remedies complicate the separation of powers, produce profound individual unfairness, and increase uncertainty. They detract from the integrity-promoting or detracting decisions of key institutions, and they put at risk citizens' faith in, and loyalty to, the constitution. No matter how much they have become normalized, they remain difficult if not impossible to reconcile with the rule of law.

---

[1] Robert Leckey, "The Harms of Remedial Discretion" (2016) 14:3 International Journal of Constitutional Law 584-607.

II. REMEDIES UNDER THE *CONSTITUTION ACT*

Section 52 of the *Constitution Act 1982* expresses the constitution as Canada's supreme law. All other laws must comply with it; to the extent that laws do not, they have no force or effect.[2] While silent about the role of the courts, section 52 has been seized upon as the primary source of their remedial authority.[3] Indeed, judges have gone much further than the clause's plain meaning, developing a host of remedies beyond simple invalidation.[4]

The most dramatic of those, by far, is the idea that a court may "suspend" the effect of a remedy for a period of time. The technique originated in a seminal constitutional reference: *Re Manitoba Language Rights*.[5] For over a century, Manitoba had flouted one of the conditions of its entry into Confederation: that it publish statutes in both official languages.[6] In consequence, it would appear, its entire regime of positive law was null.

Manitoba Language presented an exceptional circumstance. The Court noted that other jurisdictions, facing civil war, insurgency and constitutional transition, had invoked a "necessity doctrine" to suspend the ordinary application of law.[7] Those examples demonstrated that a decision apparently contrary to the constitution's text could draw on a broader sense of legitimate. Facing a similarly unpalatable result, the Supreme Court stated that the constitution could not sanction the creation of "chaos and disorder".[8] Instead, the Court advised that it would declare the laws invalid but delay the declaration's effect for the minimum period required to re-enact the laws in a constitutional form.[9]

It is hard to fault the Court for resisting an outcome that would have entailed the destruction of a province's legal order. The Court may also have been swayed by the

---

[2] To be clear, this was not new in 1982 but, arguably, an element of the constitutional order dating back to the *Colonial Laws Validity Act 1865* 28 & 29 Vict. c. 63.

[3] To this, one might add s. 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 which empowers courts to grant appropriate remedies for individual rights violations.

[4] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.); *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No.11, 2013 SCC 11 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2 (S.C.C.).

[5] *Reference re: Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.). For a discussion of the incongruity of developing a constitutional remedy while issuing an advisory opinion, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (London: Hart, 2019), c. 10.

[6] *Manitoba Act, 1870*, R.S.C. 1970, App. II.

[7] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[8] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[9] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

fact that the legal deficiency at issue was purely form-based, and for which there was a clear, if time-consuming, remedy.

Unfortunately, the precedent set by *Manitoba Language* proved irresistible in subsequent cases. And those cases diverged from it in two important ways. First, they invariably failed to present anything near the same level of societal peril. And, second, far from being limited to violations of form, they involved serious infringements of individual rights and liberties.

The divergence began in *Schachter v. Canada*,[10] a case involving parental leave benefits. The plaintiff, a biological father, challenged the limitation of such benefits to adoptive parents.[11] Although the dispute was moot by the time it reached the Supreme Court,[12] Chief Justice of Canada Lamer addressed the trial judge's remedial decision to simply extend the benefits to include natural parents. Chief Justice Lamer held that the correct route would have been to declare the inconsistency but suspend its effective date.

The Chief Justice extolled the benefits of suspension. A delay, he said, would give the legislature "an opportunity to fill the void" created by a declaration of invalidity.[13] That was especially important if striking down posed "a potential danger to the public" or "otherwise threaten[ed] the rule of law".[14] But it might also be in order if the legislation was not problematic *per se*, but merely underinclusive, and immediate invalidation "would deprive deserving persons of benefits without providing them to the applicant".[15]

In the ensuing years, suspended declarations have been used to address: the legal treatment of persons found not criminally responsible;[16] the failure to list of fathers on birth certificates;[17] the removal of criminal prohibitions increasing the danger

---

[10] [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) (hereinafter "*Schachter*").

[11] The *Unemployment Insurance Act, 1971*, S.C. 1970 71 72, c. 48, s. 30.

[12] Parliament changed the parental leave law to include natural parents, but reduced the benefits from 15 to 10 weeks. A subsequent challenge by adoptive parents failed: *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[13] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[14] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[15] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[16] *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

[17] *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835 (S.C.C.).

experienced by sex workers;[18] the eligibility under workers' compensation for chronic pain sufferers;[19] and the criminal prohibition of medical assistance in dying.[20] The cases give rise to numerous concerns, five of which are discussed below.

III. COURT'S APPROACHES

The first concern is that courts have proved quite willing to use suspensions in situations that do not, on a fair interpretation, implicate the rule of law. Indeed, in *Schachter* the Court separated threats to the rule of law from "underinclusiveness".[21] It recognized that pausing a benefits scheme, for example, while the state considers whether and how to repair a constitutional deficiency poses no risk to the rule of law. Even if the benefit is one that the state was obliged to provide, it is difficult to envision a scenario where such a pause would threaten the very legal order.

The second concern is the Court's expansion of the concept of the rule of law itself. In *Schachter*, Chief Justice Lamer suggested that "public danger" alone can implicate the rule of law. This has led to suspensions in numerous successful challenges to criminal laws.[22] To be sure, if it were the case that invalidation would risk the entire criminal justice system, that might indeed pose the kind of public danger requiring a suspension. But, that is never the case. Instead, suspensions are used to shield from immediate consequence discrete offences, or related rules of evidence, proof or procedure.

Striking down a criminal law probably does create a risk that nefarious persons might thereby avoid state sanctions. But that hardly rises to a rule of law problem. Indeed, many criminal law principles, faithfully observed, pose similar risks. Consider that the *Canadian Charter of Rights and Freedoms*[23] itself anticipates the release of a factually guilty person — perhaps because evidence against them was illegally obtained, or they were not tried within a reasonable time, or they were

---

[18] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 110 (S.C.C.).

[19] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.).

[20] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331.

[21] *Schachter v. Canada*, [1992] S.C.J. No. 68 at para. 79, [1992] 2 S.C.R. 679 (S.C.C.): "This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.)). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth."

[22] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 110 (S.C.C.)

[23] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "Charter").

denied the aid of an interpreter. More broadly, society has determined such risks to public safety tolerable in the operation of *constitutional* statutes. It is puzzling how they could become intolerable after a particular law has been found *unconstitutional*.

The third concern is that courts are fond of citing the existence of "legislative voids" that do not bear scrutiny. A good example is *Carter v. Canada*.[24] *Carter* struck down the relatively narrow offence of assisting another person to commit suicide.[25] The Court delayed the declaration for 12 months. Presumably, it did so because it feared some negative impact on public safety, although this was not stated as such; most of the remedial discussion was focussed on whether to permit individuals to seek exemptions (something the Court rejected until the government sought a further extension).[26] I concede that a legislative gap in the state's ability to respond to wrongful killings could trigger a public safety concern. But the *Criminal Code* contains several forms of culpable homicide unaffected by *Carter*, including murder and criminally negligent manslaughter. While it might have been more difficult to convict someone of those offences where the facts involved assisted suicide, it was hardly impossible.

The fourth concern involves how the Court invokes deference to the legislature in justifying a decision to suspend. In this context, deference appears to mean that the Court has decided that Parliament must be "permitted an opportunity to respond".[27] But that move conceals a powerful judicial nudge to Parliament that it *should* respond. The stated concern is frequently paired with the above-noted spectre of legislative voids. But, to the extent that they exist, such voids are more a political than legal matter. Unless a legislative non-response would create its own constitutional breach, it is unclear why the Court should consider it.

Striking down laws is a serious judicial intervention in democratic governance. It creates numerous issues, which might include putting some persons at risk of harm. But so do delayed declarations. (Indeed, so do many legislative decisions.) And it should matter whether a "risk" derives directly from a continued deprivation of a proven constitutional right, as opposed to maintaining in place an unconstitutional law. Returning to *Carter*, it was inconsistent for the Court to at one and the same time recognize the "cruelty" inherent in the scheme that it struck down in *Carter* and countenance that such "intolerable suffering" would continue — unless it is more important that the Court not place Parliament in an uncomfortable position. Surely the Constitution indicates that the former concern is more important.

---

[24] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 (S.C.C.) (hereinafter "*Carter*").

[25] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 241(b).

[26] *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, [2016] 1 S.C.R. 13 (S.C.C.).

[27] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 at para. 125, [2015] 1 S.C.R. 331 (S.C.C.).

The fifth concern builds on the just-noted issue of judicial arrogation of what are clearly legislative decisions. That would be the case for suspended declarations in any system where the court is charged with upholding constitutional norms and striking down non-compliant laws. It is exacerbated in the context of the Charter which already provides an avenue of redress: section 33. That provision enables Parliament or a provincial legislature to sustain a law "notwithstanding" that it trenches on certain Charter rights. While section 33 does not cover all Charter rights, the ones that it does (fundamental freedoms, legal rights and equality) are frequently at issue in cases of suspended remedies. Without pronouncing on the wisdom of the notwithstanding clause *per se*, it is surely preferable for the legislature, as opposed to the court, to determine whether a particular situation is serious enough to maintain an unconstitutional law in place. For those rights not subject to the clause, it is arguable that society has already decided that their protection under section 52 is a norm that is not to be cast aside. If so, it matters little whether the institution departing from that norm is cloaked in judicial robes.

IV. CONCLUSION

There is little to commend the current state of suspended remedies. It is a hopeful sign that in some recent cases the Court has invoked remedies with immediate effect — even going so far as to explain why a suspension would not be appropriate.[28]

While it might be challenging to reverse their trajectory, it may be possible to re-introduce the notion that suspended remedies are extraordinary moments to be approached with care. It would be helpful for the court to articulate a more explicit burden on the state (or other supporting party) to justify a suspension. It should no longer be acceptable to devote scant paragraphs to the question in facta, and to gloss over it in hearings.[29] Ideally, there should be time explicitly devoted to the issue at oral arguments. Carving out such space is critical at lower levels, where the trial judge can make factual findings about the matrix of considerations in which a suspension would operate.

The title of this piece invokes the idea of the inconvenient constitution. It is difficult to escape the sense of a certain nonchalance about constitutional compliance, particularly in those moments when constitutional dictates demand hard choices. Seen in those terms, the notion that the constitution poses an inconvenience to political and judicial actors is entirely disreputable. But perhaps that is to peer into the kaleidoscope from the wrong end. Instead, one should understand the constitution's imposition on other actors, at moments and in ways that they find

---

[28] *R. v. Boudreault*, [2018] S.C.J. No. 58, [2018] 3 S.C.R. 599 (S.C.C.).

[29] In *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 33 (S.C.C.), the Attorney General of Canada devoted less than a page of a 53-page factum to remedy; and virtually no time at all was spent on the issue at the hearing. See online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35591/FM030_Respondent_Attorney-General-of-Canada.pdf.

inconvenient, as indispensable to its role: to safeguard against casual or calculated malfeasance against those commitments that are essential to our shared political project.