The Compatibility of Human Rights Remedies with the Rule of Law

An Analysis of Rights Remedies in Canada and the United Kingdom, and Their Compatibility with the Rule of Law

by

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Abstract

This thesis analyses the development of human rights remedies in Canada and the United Kingdom in the context of two controversial rights issues, euthanasia and prisoner voting. It argues that the development of rights remedies in both jurisdictions has been done in a manner which is incompatible with the rule of law, and as such, creates the risk that individuals will be denied effective protection of their rights, either temporarily or permanently. It proposes a new framework for rights remedies, which ensures the immediate and effective correcting of rights violations, whilst providing a mechanism for engagement with the legislature, ensuring that the any judicial development of policy is constrained by legislative oversight, and ultimately subject to legislative amendment.
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INTRODUCTION

The protection of individual rights has become a dominant issue within the sphere of public law, since the modern conception of rights emerged from their chrysalis in the 20th century. Much of the common law world has allocated responsibility to the judiciary to protect rights, trusting that the independence and expertise of the third, least dangerous branch will ensure that such rights are insulated from legislative overreach, or the tyranny of the majority. As well as giving courts the final determination as to whether rights have been violated, this system also gives courts the means by which to remedy violations of rights, such as through potent powers of interpretation or through the power to strike laws down. However, some states, particularly those which retain a strong conception of parliamentary sovereignty, restrain these judicial powers. These states instead permit the courts to identify rights violations, but they curtail their ability to remedy them, relying instead upon the political process to maintain the rights of individuals.

The Supreme Court of the United States is typically seen as the quintessential example of strong form judicial review, with the Supreme Court having repeatedly emphasised its role as the guardian of the Constitution, with the sole capacity to decide whether actions of the political branches cohere with the Constitution, and the capability to strike down those actions it deems to be unconstitutional. Canada comes close to this model, with laws that conflict with the Constitution being ‘of no force or effect’, which has been interpreted as conferring on the courts the competence to nullify laws. In contrast to the United States, however, the Charter provides for a temporary legislative override, with s.33 of the Constitution Act 1982 allowing the federal and provincial parliaments to overrule judicial decisions for up to five years. As such,

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1 Aruna Sathnapally, Beyond Disagreement: Open Remedies in Rights Adjudication, (Oxford University Press, 2012).
4 See decisions including Marbury v Madison 5 U.S. 137 (1803) and Baker v Carr 369 U.S. 186 (1962).
5 Canadian Constitution Act 1982, s52(1).
6 Supra. n.3, 42.
7 S.33 of the Charter states that ‘Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.’
some, such as Mark Tushnet, have argued that the Canadian system falls in between the classic, strong form review, and weak form review.  

Meanwhile, the UK has, relatively recently, formally elevated rights within the UK constitution, with the Human Rights Act 1998 (HRA) bringing into domestic effect the rights contained in the European Convention of Human Rights (ECHR). Under the Act, the courts have been placed under an obligation to interpret legislation as being compatible with human rights ‘so far as it is possible to do so’. Nonetheless, the UK still retains a strong Diceyan notion of parliamentary sovereignty, and consequently, the HRA does not give the courts the power to strike down laws, but grants them the power, where the legislation cannot be interpreted compatibly with rights, to declare that laws are ‘incompatible’ with a Convention right. These provisions, at least theoretically, retain the constitutional fundamental of parliamentary sovereignty, whilst substantially increasing the capacity of the courts to protect the rights of individuals and identify rights-infringing legislation.

In attempting to redress rights violations, similar approaches have emerged in both jurisdictions. First, the courts have used interpretative powers to reconcile legislation with human rights, although the Supreme Court of Canada (SCC) has used its interpretive powers less frequently, most likely as a consequence of having the power to strike down laws that are invalid. In contrast, the UK courts have turned s.3 into a potent remedial power, with some suggesting that this has been an illegitimate expansion of judicial power, with the courts giving themselves strong-form review powers in all but name. To the contrary, Kavanagh argues that whilst the

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9 Miller v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin), [22].

10 The Human Rights Act 1998, s.3.


HRA has expanded the interpretive powers of the courts, this is consonant with their past role, and the need to ensure that the HRA fulfils its purpose of protecting rights domestically.\textsuperscript{16}

Second, although the UK and Canadian courts are empowered to give palpably different remedies to litigants for laws that are irreconcilable with rights, the decisions of the SCC have moved them closer to the UK’s weaker position. Although the SCC originally nullified unconstitutional laws with immediate effect through declarations of invalidity,\textsuperscript{17} its recent decisions suggest a preference towards a temporary suspension of the declaration, providing the legislature with the first opportunity to reform the law.\textsuperscript{18} As a consequence, the suspended DOIs work more like a s.4 declaration, motivating the political branch to act to remedy the violation, albeit a declaration with a stronger sting in the tail, should the legislature fail to act.

The development of these remedies demonstrates the quandary which courts find themselves in when adjudicating upon rights. The courts have an obligation to provide an effective remedy for successful litigants,\textsuperscript{19} which is arguably best achieved through immediate redress of the wrong.\textsuperscript{20} Whilst this redress can be achieved by adjudicating solely for the successful litigant, such as through exempting them from the law, this creates inequality in the law’s application. Thus, this redress is best achieved by striking down or amending the law. Choosing to do this, however, may bring the adjudicating court into conflict with the legislature, potentially in matters where there is legitimate disagreement over the interpretation of the right, and which requires the court to engage in considerations of policy. The court must therefore choose whether to immediately protect the rights, and effect a remedy, or provide an opportunity for the legislature to contribute their understanding of the issue.\textsuperscript{21}

The remedies developed by the courts show how they have attempted to bridge this divide, minimising the extent to which rights violations can persist, whilst providing the legislature with

\begin{itemize}
\item \textsuperscript{16} See Aileen Kavanagh, \textit{Constitutional Review under the Human Rights Act} (Cambridge University Press, 2009).
\item \textsuperscript{17} \textit{Constitution Act 1982}, \textit{supra.} n.5
\item \textsuperscript{19} See, most recently \textit{R(Unison) v Lord Chancellor} [2017] UKSC 51. The right to a remedy is also found in numerous declarations, including Article 13 of the ECHR.
\item \textsuperscript{20} Tom Hickman, ‘Bills of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility’, (2016) \textit{New Zealand Law Review}, 35.
\item \textsuperscript{21} Leckey, \textit{Bills of Rights, supra.} n.3, 116.
\end{itemize}
the opportunity to remedy the violation. However, in taking this moderate stance, there is a real risk that the courts adumbrate their effective protection of rights, leading to inequality before the law, incoherence in the application of remedies, and uncertainty as to the status of law, all foundational principles of the rule of law.22

The paper is divided into four parts. Part I first sets out the review frameworks within which the two national supreme courts operate, before defining what is meant by the ‘rule of law’, an issue which despite its constancy, is one upon which there is yet, nor likely ever will be, any agreement. As it is not my intent to advance a paper defining the rule of law per se, it is hoped that this definition will be without controversy. In Part II, the two issues will be assessed through the decisions of the courts in the ‘right to die’ litigation and in the prisoner voting cases. This part will set out and discuss the courts’ decision making processes, focussing on remedies and the courts’ role in the constitutional definition of rights. On the issue of euthanasia,23 the supreme courts in the UK and Canada have split, with the UKSC refusing to find that the absolute prohibition on euthanasia conflicted with Articles 2 and 8 of the ECHR at this time,24 and the SCC finding that the prohibition violated the Charter, but suspending the declaration for twelve months.25 The second issue will be that of prisoner enfranchisement, which both the UKSC and SCC have found breaches their respective rights legislation, but in which the UKSC has been limited to a s.4 declarations of incompatibility,26 in contrast to the SCC’s immediate nullification of the law in Sauvé II.27 This agreement on the violation, coupled with the disagreement on remedy, will allow comparisons to be drawn between immediate nullification and mere declarations.

In Part III, the compatibility of their approaches with the aforementioned principles of the rule of law will be assessed, focussing upon the need for the courts to take a coherent approach underpinned by an effective remedy. I will suggest that the two systems have evolved in a manner which fails to effectively protect rights, and do so in a manner which does not present

23 There has been some confusion over the appropriate terminology. For the purposes of this paper, and for ease of reference, the term ‘euthanasia’ will be used, encompassing all forms of assisted death.
the law in an adequately coherent and transparent manner, and which creates the risk of horizontal inequality between members of the state.

Part IV will conclude by suggesting that the current approach of the SCC, in moving towards suspended declarations as a default remedy, and the s.4 provisions of the HRA in the UK, through restraining the adequacy of the courts to effect remedies, fail to adequately respect the rule of law. I instead propose an alternative two-track system, where the courts enact general, but temporary remedial measures, alongside an obligation upon the executive to draft corrective legislation, to remedy the systemic violations in the long term.\(^{28}\) Importantly, this ensures that individuals before the court are not granted an enhanced, or superior form of law, but that all are equal before the law.

This system comes close to the Canadian model, but prioritises the immediately remedying of a rights alongside an explicit call for dialogue in certain instances, setting out the expectation that the legislature will contribute to the long-term development of the policy. Whilst some will criticise the approach on the grounds that it violates the sovereignty of parliament, and for moving the judiciary into a policy-orientated role, my approach will allow courts to be more transparent about when they are moving into policy decisions, rather than the opaque approach that can occur under s.3 of the HRA and declarations of invalidity, where policy decisions are presented as judicial determinations. As such, the system will yield greater universality and transparency alongside more immediate and effective rights protections, whilst still accepting the ultimate sovereignty of parliament.

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\(^{28}\) Kent Roach has proposed a similar, two track system, but would instead have the courts redress only the individual violations before them, whilst on the second, the three branches of government would ‘address broader issues’, remedying the systemic violations in the law. See supra n.13.
1 PART I

1.1 Constitutional Remedies and the Strength of Review

Canada and the UK, at first glance, adopt directly contrasting positions on rights review. The remedies available to the UK courts under the HRA appear more deferential, with the courts free to interpret the law under s.3, but unable to invalidate it under s.4, maintaining the sovereignty of Parliament. Meanwhile, Canada emphasises the supremacy of rights in its constitution, with s.52 of the Constitution Act 1982 stating that ‘any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect’. This has been interpreted as giving the Supreme Court of Canada the final say on whether the impugned legislation violates rights, and the power to invalidate such rights immediately, which they tended towards in the immediate period following the enactment of the Constitution Act.

Whilst the text of the two documents may suggest that the UK has a significantly weaker system of rights-protection than Canada, the practice of both courts has departed from the clear meaning of the legislative text. It is of little controversy to say that the UK courts have construed s.3 in a manner that gives them potent powers of interpretation, allowing them to engage in semantic acrobatics in order to read legislation in a manner that is compatible with Convention rights, and therefore provide an effective remedy for the successful litigants. This construction of s.3, and willingness to use it means that the courts frequently remedy the violation through a right-consistent interpretation. Thus, the UK courts have expanded their powers of rights review, whilst still ostensibly adhering to parliamentary sovereignty.

Ironically, where the violation of a right is more egregious, the UK courts must adopt a weaker approach. If the legislation violates rights too grievously for the court to reconcile its language with the provisions of the Convention, the court is restricted to declaring that the legislation is incompatible. Further, whilst the court must interpret the legislation compatibly, so far as possible, there is no corollary for it to declare the legislation incompatible. Instead, the court may

29 Leckey, Bills of Rights, supra. n.3, 2.
30 Roach, Constitutional Remedies in Canada, 2nd ed (Toronto: Canada Law Book, 2013). Although the legislature can overturn the courts temporarily through the use of s.33.
31 Of those who have argued for this approach, see Aileen Kavanagh, Constitutional Review, supra. n. 16 and; Paul Craig, ‘Constitutional Foundations: The Rule of Law and Supremacy’, Public Law (2003).
32 Kavanagh, Constitutional Review, supra. n.16, 108.
issue a declaration of incompatibility where they find the violation of a right, such as in the *Belmarsh Prisoners* litigation, but equally, they may decline to do so, despite suggesting that a violation has occurred, as was seen in *Nicklinson*. This declaration of incompatibility has no effect on the incompatible law, and imposes no formal obligation on the legislature or executive to remedy the violation, although it has nearly always resulted in Parliament drafting corrective litigation. However, this corrective takes time to be enacted, and is generally only prospective in nature, denying the successful litigant recompense for the past harm done to their rights, and a remedy during the intervening period.

In contrast, whilst the Canadian courts have the power to declare unconstitutional laws void, they have been increasingly reluctant to do so. After the emergence of the ‘suspended declaration of invalidity’ in *Schachter v Canada* and the *Manitoba Language Reference*, suspensions have become ‘almost routine,’ with the SCC no longer viewing the suspended remedy as exceptional, and confining suspended declarations to the categories in *Schachter*, but instead moving towards a more dialogic approach. Thus, the Canadian system has moved closer to the UK model, with the burden first resting upon the legislature to remedy the violation. However, the similarities cease if the legislature fails to draft new legislation within the time period, with the court’s remedy coming into effect. This has yet to occur, with the legislature having responded to

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33 *A v Secretary of State for the Home Dept* [2004] UKHL 56.
34 *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38.
40 These criteria permitted suspension where necessary to (i) protect the public; (ii) protect the rule of law, or (iii) prevent harm being done by striking down under-inclusive laws.
41 *Supra.* n.39, 219.
42 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue? (Revised Ed)*, (Toronto: Irwin Law, 2016), 201.
43 Provided the Government does not seek an extension of time, as it did in *Carter v Canada (Attorney General)* [2016] SCC 4.
every suspended declaration, albeit not always in a manner which reflects the remedy that the
court would have ordered.44

During this suspended period, the law is left in a state of purgatory, being neither entirely valid,
although still technically enforceable, yet neither invalid. 45 As will be seen, this is particularly
concerning for criminal law, creating the risk that individuals will be arrested, charged and
potentially incarcerated under an unconstitutional law, to say nothing of those already
imprisoned. Further, this suspension means that the successful litigant(s) are denied an
immediate remedy.46 On occasion, the SCC has recognised the harm that this can do, and has
granted a constitutional exemption for the litigant, ensuring that they are able to receive
immediate redress of the wrong.47 However, as will be discussed, this elevates these individuals
above others similarly situated, requiring others to suffer rights violations, or find the means to
go to court themselves.

In the long term however, these declarations in both the UK and Canada appear to have the
desired effect. A rights violation is identified, and the legislative branch makes the appropriate
amendments. However, whilst this situation may protect rights and promote effective legislative
engagement, it falls short in upholding the demands of the constitution. First, whilst the future
law may be compatible, this offers little relief for those who have brought the case and won, only
to find that no tangible difference will be forthcoming for some time in Canada, and potentially
ever, in the UK.48 Alternatively, if the court uses constitutional exemptions to avoid this
immediate, it creates the risk of widespread inequality under the law, with only those with
adequate resources able to receive justice through an individual exemption.

The engagement of both supreme courts with the legislature in pursuing is arguably rooted in
deference, reflecting concerns about claims of judicial activism, the usurpation of the democratic

44 For instance, the Canadian Parliament’s response to the Bedford decision (post) was to move towards criminalizing
the purchase of sexual services in Bill C-36.
45 As was the case in Manitoba Language Reference [1992] 1 SCR 212, Shachter v Canada [1992] 2 SCR 679, and Canada
48 Geoffrey Marshall calls this victory the ‘booby prize’ in ‘Two Kinds of Incompatibility: More about s.3 of the
process, and an absence of institutional competence.\textsuperscript{49} Given the nature of many rights issues, and the breadth of impact that such decisions can have, going far beyond the litigants party to the case, rights issues can be seen as matters of public morality,\textsuperscript{50} an arena more suited to the institutional capacities of the legislature.\textsuperscript{51} As such, through the creation of staging posts, such as suspending a declaration of invalidity or refusing to issue a s.4 declaration the first time the issue comes before the court,\textsuperscript{52} the court provides the opportunity for the elected branches to contribute to the conception of rights,\textsuperscript{53} and insulate themselves from claims of activism.\textsuperscript{54}

\subsection*{1.2 The Rule of Law}

It is not my intent to rehash the debate on the content of the rule of law. Much academic ink has already been spilt on the issue, and little consensus as to the true nature of the rule of law has emerged. Some suggest that it is purely rhetorical flourish, pulled out to critique the current state of the law,\textsuperscript{55} whilst others argue that it is the bedrock of a modern liberal democracy.\textsuperscript{56} In favour of the latter position is the eminent status which is given to the rule of law within legislation in the UK and Canada. For instance, the UK’s Constitution Act 2005 states that the Act is not intended to ‘adversely affect the existing constitutional principle of the rule of law’,\textsuperscript{57} whilst the Preamble to the Canadian Charter on Rights asserts Canada’s foundation upon ‘principles that recognise the supremacy of the rule of law’.

\begin{thebibliography}{99}
\bibitem{51} Waldron, \textit{ibid}; Stephen Gardbaum, \textit{The New Commonwealth Model of Constitutionalism: Theory and Practice}, (Cambridge University Press, 2013); Alison Young, \textit{Democratic Dialogue and the Constitution}, (Oxford University Press, 2017). On the issue of institutional competence, see the House of Lords’ discussion of this in \textit{Bellinger v Bellinger} [2003] UKHL 61, where the ramifications of a s.3 interpretation would have had a widespread impact on the state.
\bibitem{52} For instance, Kavanagh in \textit{Constitutional Review} (supra. n.16) argues that this is the case where there would be a ‘radical change’ in the law, as was the issue in\textit{Nicklinson}.
\bibitem{54} Roach, \textit{Supreme Court on Trial}, supra. n.42.
\bibitem{57} The Constitution Reform Act 2005, Section 1(a).
\end{thebibliography}
In accepting the need for and value of the rule of law, it is however not clear as to what has been accepted. Some argue in favour of the ‘thin’ conception, a doctrine which goes primarily to procedural principles without affecting the substance of the law. Raz distinguished his thin theory from the ‘rule of good law’, arguing that the proper role of the rule of law is to ensure that the law can act as a guide, providing everyone with the means by which to follow the law of the land.\(^{58}\) Fuller also advanced a thin theory with his ‘inner morality of law’, suggesting that the rule of law is adhered to through eight criteria, namely generality, public accessibility, prospectivity, coherence, clarity, stability, possibility and coherent administration.\(^{59}\) Within these theories there is no attempt to judge the content of the law, although Fuller does argue that through adhering to the principles he sets out, the laws should tend towards fairness and justice.\(^{60}\)

On the other side of the aisle are those who would promote a substantive, or ‘thick’ conception of the rule of law. This has been notably argued for by Trevor Allan and Sir John Laws, who hold that the rule of law imposes substantive limitations and requirements upon the nature of laws within a state, and that it is possible to equate the rule of law with the rule of ‘good’ law.\(^{61}\) Although they do not develop an exhaustive summary of the content of the rule of law, Laws suggests that the rule of law broadly comprises of three principles of freedom, certainty and fairness,\(^{62}\) whilst Allan argues that the rule of law is based upon substantive ideals of moral autonomy and respect for the individual, and that the thin conceptions upon the rule of law necessarily rely upon these same ideals, and must reach the same substantive outcomes.\(^{63}\)

Although the two perspectives take diametrically opposed views to the content of the rule of law, some consistency can be found. Specifically, the thick proponents broadly accept the procedural elements of the rule of law, supplementing these with substantive concepts such as ‘justice’ and ‘fairness’. I therefore do not aim to consider whether the courts must build

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60 Ibid. Ch. 4.
substantive protection of rights into the rule of law, or if they have done so, but rather, whether
the use of DOIs and SDIs brings the remedies for rights violations into conflict with the
accepted principles of the doctrine. Within this is the concern that a remedy must be provided
upon a legal wrong being identified, on the basis that ‘where there is no legal remedy, there is no
legal wrong’.64 As such, any failure to provide a remedy to a right being violated goes against the
very precepts of the constitution, which requires that ‘every right, when withheld, must have a
remedy’.65 However, within this is also the need to ensure that those before the court are not
subject to a different system of laws than all others. Whilst providing individual litigants with
remedies may avoid the difficulties caused by leaving successful litigant without a remedy, the
effect of doing so in the public law context is to create a two-track legal system, whereby those
before the courts are privileged by an exemption from the general laws.66

As such, this paper will broadly reflect the content of a thin conception of the rule of law,
fosuming upon whether the manner in which the law is exercised by the legislature and the
courts, and affects the individuals under it coheres with the need for laws to be universal, clear
and stable.

2 PART II

2.1 The Right to Life

The legality of euthanasia and assisted suicide is one on which there has not been a consistent
approach amongst the legislatures and courts of the Western world. Within Europe, the
Netherlands, Belgium and Luxembourg permit both euthanasia and assisted suicide, whilst
Switzerland and Germany permit assisted suicide.67 Outside of the Europe, Canada is the only
developed western nation to have legalised both euthanasia and assisted suicide, with the
majority of states adopting an absolute prohibition.68

65 Blackstone, supra. n.46, 109.
66 Leckey, Bills of Rights, supra. n.3, 99.
67 Julia Nicol & Marlisa Tiedemann, ‘Euthanasia and Assisted Suicide: The Law in Selected Countries’, Library of
68 Reis de Castro et al, ‘Euthanasia and Assisted Suicide in Western Countries: A Systematic Review’, Revista Biotica,
24 (2016).
Where the state has legalised euthanasia or assisted suicide, it has primarily been done through legislation. Belgium’s Parliament was the first to legalise euthanasia through the Euthanasia Act 2002, Luxembourg’s Parliament legalised it in 2009 (having amended the constitution to remove the requirement for royal assent), and the Netherlands passed the Termination of Life on Request and Assisted Suicide Act in 2002. Within Europe, the legitimacy of an absolute prohibition upon assisted suicide has been challenged multiple times before the European Court of Human Rights, alleging violations of Article 2 (the right to life) and Article 8 (the right to respect for private and family life). However, the lack of consensus within the signatory states has meant that the court has been reluctant to rule conclusively for either side, preferring to give broad margin of appreciation instead.

To date, the only domestic court willing to adjudicate for the necessity of assisted suicide has been the SCC. Other final courts of appeal have either found that the prohibition of assisted suicide and euthanasia is rights-compliant, or that the matter does not fall within the province of the courts, as the rights more properly reflects socio-political concerns the judiciary are not suited to adjudicating.

2.1 Canada

2.1.1 Rodriguez

The matter of assisted death was first dealt with by the SCC in 1993 in Rodriguez v British Columbia, where the claimant challenged s.241 of the Criminal Code, which stated that anyone who ‘aids or abets a person to commit suicide; whether suicide ensures or not, is guilty of an indictable offence and liable to imprisonment…’. There, a bare majority found that prohibition within the Criminal Code did not violate ss.7 (life, liberty and security), 12 (prohibition on cruel and unusual punishment) or 15(1) (equality) of the Canadian Charter.

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70 Luxembourg, Chamber of Deputies, Loi du 16 mars 2009 sur l’euthanasie et l’assistance au suicide.
72 Koch v Germany, BVerwG 3 C 19.15; Straschnam-Ford v Minister of Justice & Correctional Services Case No: 531/2016.
73 [1993] 3 SCR 519.
Writing for the majority, Sopinka J. found that there was an infringement upon the s.7 right, as the claimant was denied absolute freedom of her person.\textsuperscript{74} However, he held this restriction was in accordance with fundamental principles of justice, as there were legitimate concerns about the legality and morality of assisting someone in taking their own life, and these reflected the fundamental values of society.\textsuperscript{75} Further, any violation of the equality provisions would be legitimised by the proportionate objective of preserving life.\textsuperscript{76}

In dissent was Chief Justice Lamer, joined by amongst others, McLachlin J. (as she then was), who found that the distinction drawn by s.241(b) was discriminatory under s.15, and that it could not be justified under s.1 of the Charter.\textsuperscript{77} Lamer C.J. also considered suspended declarations, noting that the over-inclusive nature of the law meant that any remedy was better devised by the legislative branch, given the choice of options available to them; and that the immediate nullification of the law would leave individuals who should be protected, unprotected, therefore meeting the ‘danger’ criteria of \textit{Schachter}.\textsuperscript{78}

However, Lamer also found that the nature of the harm suffered by Ms Rodriguez would have warranted a constitutional exemption being granted for her, accepting that to create ‘a right without a remedy is antithetical to…the purposes of the Charter’.\textsuperscript{79} Relying upon the judgment in \textit{Swain},\textsuperscript{80} he found that the Court could impose conditions that it considered ‘just and necessary’ to ‘vitiating the impact of the violation during the period of suspension’. As such, he devised a set of principles as to when it would be appropriate to suspend the law.\textsuperscript{81} However, Lamer C.J. was also careful to emphasise that that that his criteria were tailored to the

\textsuperscript{74} \textit{Ibid.} at 589.
\textsuperscript{75} \textit{Ibid.} at 590.
\textsuperscript{76} \textit{Ibid.} at 608.
\textsuperscript{77} \textit{Ibid.} at 544.
\textsuperscript{78} \textit{Ibid.} at 570.
\textsuperscript{79} \textit{Ibid.}
\textsuperscript{80} \textit{R v Swain} [1991] 1 SCR 933.
\textsuperscript{81} Lamer CJ suggested that suspension would be appropriate where (i) the individual is, or will become, incapable of committing suicide; (ii) the decision to commit suicide was made freely; (iii) with consent from two doctors; and (iv) the act is approved through a superior court order at \textit{ibid.}, 579.
circumstances of Ms Rodriguez, and that any future application for would have to be considered in its `own individual context`.  

2.1.1.2  **Carter I**  

The issue of remedy became more important when the issue of euthanasia returned to the SCC, where McLachlin, now Chief Justice, had the opportunity to move her dissent in *Rodriguez* into the majority. At first instance, Smith J. had conducted an exhaustive review of the practices of euthanasia and assisted dying, considering ‘medical ethics and current end-of-life practices (both abroad and domestically), the risks…and the feasibility of safeguards’. Smith J. found that the legislation was discriminatory, and imposed in a manner which was overbroad and grossly disproportionate, declaring it to be invalid. However, rather than imposing the declaration of invalidity immediately, she chose to suspend it, providing Parliament with the opportunity to respond with legislation, and granting the plaintiff a constitutional exemption, giving her an immediate and effective remedy.

Smith J. gave considerable consideration to the issue of remedies, emphasising that it was the ‘proper task of Parliament….to determine how to rectify legislation that has been found to be unconstitutional’, but that where legislation affected individuals in ‘certain specific circumstances’, it must be addressed by the Court. In considering a constitutional exemption, Smith J. heard submissions from the plaintiff relying upon *Corbiere v Canada*, where exemptions were found to be legitimate as an ‘interim remedial measure’ when accompanied by a suspended declaration of invalidity, in order to provide the plaintiff with a ‘effective remedy’. For Smith J., there was concern that in granting a s.24(1) remedy alongside the s.52 declaration, the court would be ‘usurping the role of Parliament’, and creating a scheme which would be

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83 *Carter v Canada*, 2012 BCSC 886.  
84 *Carter v Canada* [2015] SCC 5 at [22].  
85 Supra. n.84 at [16].  
86 *Ibid* at [19].  
87 *Ibid.*.  
89 Supra. n.84 at [1401].  
90 *Ibid.* at [1407].
incompatible with the one eventually created by Parliament, and one which would allow others to seek an exemption in the period of suspension.\textsuperscript{91}

Despite these concerns, Smith J found that the circumstances fit the narrow criteria set out in \textit{Corbiere} and \textit{Ferguson}. Given the suspension of the s.52 declaration, a s.24 exemption would allow the successful litigant to receive an effective remedy, and to therefore lawfully proceed with ending her own death, and this was ‘necessary to protect the interests of the successful party’.\textsuperscript{92}

\textit{Before The Supreme Court of Canada}

The SCC upheld the decision of the trial judge, finding that section 241(b) was not saved by s.1 of the Charter.\textsuperscript{93} On the issue of remedy, the majority refused to grant a free-standing constitutional exemption, instead issuing a suspended declaration of invalidity for twelve months,\textsuperscript{94} with the immediate need for an individual exemption having passed due to the death of Ms. Carter and Ms. Taylor in the interim.\textsuperscript{95}

In considering the decision of the Court of Appeal on the remedy, who had ordered a ‘free-standing constitutional exemption’,\textsuperscript{96} rather than a suspended declaration of invalidity, the SCC decided that it was ‘not a proper case for a constitutional exemption’, and that Parliament should be given the ‘opportunity to craft an appropriate remedy’.\textsuperscript{97} They found that any stand-alone exemption would raise concerns about certainty, the rule of law, and the role of Parliament.\textsuperscript{98}

In issuing the suspended declaration, although the court recognised the conflict between a suspended declaration and individual exemption, little consideration was given to the constitutional need for a suspension, and whether the suspension adhered to the criteria established in \textit{Schachter} and discussed in \textit{Rodriguez}. Rather, the SCC approached the issue on the presumption that it was properly a matter for Parliament, and upon finding that the legislation

\textsuperscript{91} Ibid. at [1408].
\textsuperscript{92} Ibid. at [1411].
\textsuperscript{93} Carter v Canada (Attorney-General) [2015] SCC 5.
\textsuperscript{94} Ibid. at [127-8].
\textsuperscript{95} Ibid. at [129].
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid. at [125].
\textsuperscript{98} Ibid.
was unconstitutional, stated that they ‘would suspend the declaration of invalidity for 12 months’. This nature of this approach suggested that the SCC had reversed the presumption in favour of immediate suspension of rights-violating laws, but implicitly, by not addressing the conflict between the decision here and the principles in Schachter, and setting a new precedent clearly.

2.1.1.3 Carter II

The matter returned to the Supreme Court for its final hearing in 2016, where the Government sought a six-month extension of the Court’s suspension in Carter I due to the interruption of the original twelve-month period by a general election. The appellants sought to remedy any harm done by this extension by seeking an exemption for affected individuals, pointing to the ‘severe harm’ done to those affected by the maintenance of an unconstitutional law.

The majority was willing to grant an extension, albeit for a reduced four-month period, and was also willing to exempt Quebec from the extension of the suspension, given that the province had enacted legislation governing end-of-life treatment. However, they found that maintaining the law for those affected in the remaining provinces would have unfairly and unreasonably prejudiced their rights, which ‘outweighed the countervailing considerations’, as well as risking their being treated in a different, discriminatory fashion to those resident in Quebec. As such, the Court granted a constitutional exemption to those who met the criteria set out in para 127 of Carter I, allowing them to go to court and seek an exemption, allowing the judiciary to uphold the rule of law, and function as a ‘safeguard against…risks to vulnerable people’.

The Chief Justice and three other justices dissented in part, refusing to exempt Quebec or provide individual exemptions. They refused to exempt Quebec on the basis that the province had taken the steps envisaged by the court in Carter I, and that an exemption would offer no further clarity, and on the individual exemption point, they echoed the concerns of the

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99 Ibid. at [93].
101 Ibid. at [2].
102 Ibid. at [6].
103 Ibid.
104 Those joining the Chief Justice were Justices Cromwell, Moldaver and Brown.
105 Ibid. at [10].
majority in *Carter I*, pointing to the risks done to legal certainty, the rule of law, and the role of Parliament.\(^{106}\) They reiterated their sympathy for affected individuals, but emphasised the complexity of the moral and ethical dimensions, and the fact that these issues more naturally left the issue as one to be resolved by the legislature.

Within the majority, there was emphasis placed upon the extraordinary nature of a suspended remedy, in contrast to the original judgment. The Court recognised that continuing the suspension would allow an unconstitutional law to persist, and that ‘severe harm’ was alleged to have be done as a result of this suspension.\(^{107}\) However, the Court as a whole still did not engage with the justification for the suspension in *Carter I*, instead finding that as Parliament had been dissolved for four-months, a further four-month extension was warranted.\(^{108}\)

The harm done to the rights of affected individuals in *Carter I* was somewhat remedied by the provision of a constitutional exemption in this decision. Providing this ensured that the constitutional need for an effective remedy was not further abridged, whilst retaining the need for judicial oversight ensured that some certainty and consistency would be maintained in allowing exemptions to occur,\(^{109}\) and would reflect the nature of the remedy to be imposed should the legislature have failed to act within the extended period, with judicial consent still required for an individual to proceed with assistance in ending their life. Given this, the minority’s continued opposition to an exemption was incongruous with their willingness to introduce a judicial remedy at the end of the suspended period. As will be discussed in greater depth, the minority was deeply concerned with a highly complex and multi-faceted issue being resolved by judicial diktat for a confined period of time,\(^{110}\) yet was simultaneously willing for a judicial order to potentially take effect indefinitely after the twelve-month suspension was concluded. In contrast, the majority more effectively balanced the competing demands for an individual remedy and for legislative supremacy, recognising that the continuation of a deferential stance did significant harm to affected individuals, and to the law as a whole.

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\(^{106}\) *Ibid.* at [12].

\(^{107}\) *Ibid* at [2].


\(^{109}\) In this instance, although the exemption was narrow, in that it required litigants to engage in litigation to receive a remedy, it does not necessarily violate horizontal inequality, given that nearly all legislation permitting assisted dying requires judicial oversight.

\(^{110}\) *Ibid.* at [12].
2.1.2 The United Kingdom

2.1.2.1 Pretty

The first challenge to the legality of the blanket ban on assisted suicide was brought by Diane Pretty, who was heard first domestically, and then before the ECtHR. Domestically, the High Court found that the Director of Public Prosecutions (DPP) had not erred in his refusal to grant an undertaking not to prosecute in the event that Mrs Pretty’s husband assisted her suicide.\(^{111}\) This decision was upheld by the House of Lords, who found that there was not a converse right to die contained within Article 2 ECHR,\(^ {112}\) and that Articles 3, 8 and 9 were not breached by the criminal prohibition of assisted suicide.\(^ {113}\) As such, there was no need for the House of Lords to consider a remedy, or the appropriate use of s.3 or a s.4 declaration. However, the Lords did indicate that if public opinion was of such strength that a change in the law to permit assisted suicide was required, this would be a change which would be made by Parliament, rather than the courts, with Lord Hobhouse holding that ‘Parliament has spoken (by criminalising assisted suicide)...any amendment...would be a matter for Parliament’.\(^ {114}\)

Diane Pretty challenged the decision of the House of Lords by taking her case to Strasbourg. However, the ECtHR ruled in a manner consistent with that of the UK domestic courts, dismissing her claim of an unlawful breach of rights.\(^ {115}\) The Fourth Section ruled that although Art. 8 was engaged, the concern of the UK Government, that the decriminalisation of assisted suicide would lead to abuse, and undermine its protection of human life, was a legitimate one, and that consequently, there was no violation of Art. 8, or discrimination under Art. 14.\(^ {116}\)

2.1.2.2 Nicklinson

The next challenge to the blanket ban on assisted suicide was brought by Tony Nicklinson, with an case on assisted suicide that occurred between the challenges of Pretty and Nicklinson, Purdy v DPP, concerned with the legality of the prosecutorial guidelines, rather than assisted suicide per

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\(^ {111}\) R v DPP (ex parte Diane Pretty) & Secretary of State for the Home Dept. [2001] EWHC 788 (Admin).

\(^ {112}\) R v DPP (ex parte Diane Pretty) & Secretary of State for the Home Dept. [2001] UKHL 61.

\(^ {113}\) Ibid. As the House found that the rights were not engaged, the further claim of discrimination under Article 14 also failed.

\(^ {114}\) Ibid at [96].


\(^ {116}\) Ibid. at [74-79].
Nicklinson sought either (i) a declaration that it would be legal for a doctor to kill him, or provide assistance to him so that he could end his own life, or (ii) a declaration that the absolute prohibition on assisted suicide violated his right to a private life under Art. 8 of the ECHR. This was refused at first instance in the High Court, with Toulson J. (as he then was) finding that the law was not incompatible with the ECHR. He held that given the past precedent of the House of Lords and Strasbourg, coupled with the fact that the criminalisation was found in statute, rather than common law, meant that it would be ‘wrong for this court’ to amend the law, and that it would ‘usurp the proper role of Parliament’.

This decision was then appealed to the Court of Appeal, who upheld the decision of the High Court for similar reasons to those given by Toulson J. Lord Judge took a strong view as to the role of Parliament in changing the law, stating that ‘the law relating to assisted suicide cannot be changed by judicial decision…(given) fundamental constitutional principles’.

Before the UK Supreme Court

The Supreme Court upheld the decisions of the lower courts by a 7-2 majority, but within this, the justices reached different conclusions on the sub-issues. With regard to the compatibility of the law with Article 8, five justices found that it was a matter which fell within the jurisdiction of the Court, and that they had the constitutional authority to declare that the general prohibition was contrary to Article 8, and therefore grant a remedy. However, Lords Neuberger, Mance and Wilson refused to make a declaration at this time, finding that although they could adjudicate the matter, that it would be preferable for Parliament to first consider the issue after their judgment. They suggested that the balancing between two moral values, sanctity of life

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117 Purdy v Director of Public Prosecutions [2009] UKHL 56.
118 R(Nicklinson) v MoJ, supra. n.34.
120 Ibid. at [122].
121 [2014] 2 All ER 32.
122 Ibid. at [154].
123 Supra. n.34. per Lord Neuberger at [146].
124 Ibid. per Lords Neuberger, Mance, Wilson and Kerr, and Baroness Hale.
125 Ibid. per Lord Neuberger at [113]; Lord Mance at [190]; and Lord Wilson at [202].
and personal autonomy; and the nature of the Parliamentary process in relation to moral and social issues meant that the issue was properly one for Parliament at this time.126

Both Lady Hale and Lord Kerr dissented, although they concurred with the need for Parliament to remedy the shortcomings in the law, rather than finding that the UKSC could issue a rights-compatible interpretation. They both found that refusing to make a declaration of incompatibility immediately was flawed, with ‘little to be gained, and much to be lost’ from not doing so.127 Lord Kerr emphasised that the purpose of a declaration of incompatibility was to achieve just that, emphasising the failure of the law to adequately protect rights, but to then turn it over to Parliament to decide what to do about it.128 Thus, the reluctance of the majority to issue a declaration rested on absent premises, with there no real distinction in law as to the two remedies, other than the course of the majority potentially creating more uncertainty as to whether the state of the law truly was incompatible with the ECHR.129

Lord Kerr and Lade Hale correctly identify the difficulty contained within Nicklinson. Whilst the UKSC finding an inability to issue a s.3 interpretation was relatively foreseeable, given the language within the legislation, the refusal to issue a s.4 declaration was not, after a majority had found that the blanket prohibition was disproportionate. The majority failed to elucidate the reasoning that underpinned their reluctance to do so in a coherent manner, falling back upon institutional factors and constitutional concerns. As Lord Kerr succinctly pointed out, reliance upon these factors ignored the role of the courts to say when rights conflict.130

This decision therefore demonstrates the potential incoherence between the effects on paper of a s.4 declaration, and the effects in reality. As will be discussed below, the reticence of the majority to declare the law incompatible sits uneasily with the legal impact of s.4, given the absence of any obligatory legal or political burdens flowing from a s.4 declaration. Although a s.4 declaration does allow the executive to redress the incompatibility through the use of s.10 HRA by remedial order, it places them under no requirement to do so. As such, the decision of the majority would suggest that they viewed a s.4 declaration as imposing some form of

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126 Ibid. at [116].
127 Ibid. per Lady Hale at [300].
128 Ibid. per Lord Kerr at [343-345].
129 Ibid.
130 Ibid. per Lord Kerr at [327].
constraint upon Parliament, requiring it to respond, a burden which was felt to be inappropriate in the context of euthanasia. As will be demonstrated, this creates incoherence between the textual meaning of the legislation and the practical meaning, and potentially obscures the relationship between the legislature and the courts.

2.2 Prisoner Disenfranchisement

The issue of prisoner voting is a contentious one internationally, with prisoners the only group whom it is acceptable to disenfranchise within some western liberal polities. The movement in general though, is towards prisoner enfranchisement, but is a movement led primarily by the courts. The issue has come before the ECtHR and the Court of Justice of the European Union multiple times,\(^\text{131}\) and whilst the ECtHR has been careful to grant a margin of appreciation to the states on the issue, it has prohibited a ‘blanket ban’ on prisoner voting, such as that in the UK.\(^\text{132}\) South Africa’s Constitutional Court has taken a similar view on the prohibition,\(^\text{133}\) whilst Israel and Canada have found that any prohibition on prisoner enfranchisement is prima facie unconstitutional.\(^\text{134}\)

The Canadian and UK courts have both recently addressed prisoner disenfranchisement, and in doing so, came to the same conclusion as to the legitimacy of an absolute prohibition on prisoner voting, although differed as to how this prohibition ought to be relaxed.

Similar to euthanasia and assisted suicide, the disagreement over prisoner voting is rooted in conceptions of morality and civic virtue, and how individuals conceive of the right to be a part of the voting polity.\(^\text{135}\) There has been some attempt to base the argument within the purposes of punishment,\(^\text{136}\) but this has broadly been rejected.\(^\text{137}\) Instead, the most effective argument

\(^{131}\) Scoppola v Italy (No. 3) [2012] ECHR 868; Hirst v United Kingdom (No. 2) [2004] ECHR 121; Delvigne v Commune de Lésparre-Médoc [2015] EUE:CJ. C-650/13.

\(^{132}\) See ibid., Hirst (No. 2), as well as Frodl v Austria [2009] ECHR 225; Soyler v Turkey [[2013] ECHR 962; Anchugov and Gladkov v Russia [2013] ECHR 791. In the EU, see cases including Delvigne (Case C-650/13; ECLI:EU:C:2015:648.

\(^{133}\) August v Electoral Commission (CCT8/99) [1999] ZACC 3; Sauvé v. Canada (Chief Electoral Officer) [2002] SCC 68.

\(^{134}\) Alrai v Minister of the Interior [1996]. Isr.SC 50(2) 18.


\(^{137}\) R(Chester) v Secretary of State for Justice [2013] UKSC 63.
now maintained is that it reflects the outrage at the citizens at large against criminal activity, and it is this conception of morality which the prohibition reflects, rather than any tangible aim.\textsuperscript{138}

\subsection{2.2.1 \textbf{Canada}}

\subsubsection{2.2.1.1 Sauve I \& II}

Prisoner voting in Canada has been defined by the litigation of Richard Sauvé. He first challenged the blanket prohibition on prisoner voting in 1993 with the Court of Appeal finding that the blanket prohibition was disproportionate, and ordering that s51(e) of the Canada Elections Act be struck down with immediate effect.\textsuperscript{139} This decision was then confirmed on appeal in a brief judgment by the SCC.\textsuperscript{140}

The Canadian Parliament accordingly amended the Canada Elections Act, prohibiting all prisoners serving a sentence of two years or more from voting.\textsuperscript{141} This was again challenged by Richard Sauvé up to the Supreme Court, where the Court upheld the claim, McLachlin C.J. ordering that the legislation be struck down with immediate effect.\textsuperscript{142} In her judgment, it was emphasised that although Parliament could play a legitimate role in the definition of rights, it was not a matter that could travel between the legislature and the courts until the legislature reached the ‘right’ answer.\textsuperscript{143} She discounted the notion that Parliament could have a legitimate contribution to the debate as to how the right could be construed, dismissing the symbolic arguments which had featured heavily in Parliamentary debate,\textsuperscript{144} focussing instead on the lack of effective penological objectives which the disenfranchisement could achieve.\textsuperscript{145}

The strength of McLachlin’s denunciation of Parliament’s legislation resulted in a sharp dissent from Gonthier J.,\textsuperscript{146} who emphasised the need for dialogue with the legislature, and for due

\begin{itemize}
\item \textsuperscript{138} Supra. n.135 at 274.
\item \textsuperscript{139} Sauvé \textit{v} Canada (Attorney-General) (1992) 7 OR (3d) 481.
\item \textsuperscript{140} Sauvé \textit{v} Canada (Attorney-General) (No. 1) [1993] 2 SCR 438.
\item \textsuperscript{141} Canada Elections Act 1985 (amended) s51(e).
\item \textsuperscript{142} Sauvé \textit{v} Canada (Chief Electoral Officer) (No. 2) [2002] SCC 68, at [41].
\item \textsuperscript{143} Ibid. at [17].
\item \textsuperscript{144} Ibid. at [21].
\item \textsuperscript{145} Ibid. at [22].
\item \textsuperscript{146} Ibid. at [65].
\end{itemize}
consideration to be given to the symbolic objectives advanced by Parliament. Gonthier found that deference should be extended to the decisions of the legislature where they are found to be ‘reasonable’, and that this is especially the case on social rights such as the matter of disenfranchisement.

However, although McLachlin may have dismissed the contributions of the legislature and the dissenting justices, the remedy handed down in Sauvé II was in greater adherence to the need for immediate legal certainty and effective remedies. As such, although the manner in which the decision was handed down can be critiqued, substantively, it ensured that the supremacy of rights, and the need for effective remedies for their violation took precedence over dialogue or deference to the role of the legislature, such as through suspending the implementation of the judgment for the legislature to have a further bite at the cherry.

2.2.2 The United Kingdom

2.2.2.1 Hirst

Prisoner voting has been subject to an extended period of litigation, from which no corrective response has emerged from either the courts or the legislature. The case was first brought by John Hirst in the High Court, alleging that the blanket ban on prisoner voting violated his Article 3 rights within the First Protocol of the ECHR. The High Court dismissed this case, finding that the blanket ban approach of the UK fell within the margin of appreciation. Hirst successfully appealed this decision to the ECtHR, where the Grand Chamber found that his rights had been unlawfully interfered with, and that whilst there was a margin of appreciation, it was not all-encompassing, and the blanket approach of the UK fell outside it. Whilst this placed an onus upon the UK to remedy the violation under international law, it placed the government under no domestic obligation to do so.

Reflecting this lack of any domestic onus upon the state, the then Labour Government refused to respect the judgment of the ECtHR, emphasising that prisoners would not receive the vote.

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147 Ibid. at [68].
148 Ibid. at [96].
149 Contained within s.3 of the Representation of the People Act 1983.
151 Hirst v United Kingdom (No. 2) [2005] ECHR 681.
under their Government, and this view was maintained by the Coalition Government, with the then-Prime Minister David Cameron stating that the thought of prisoner voting made him ‘physically ill’.

2.2.2.2 Smith v Scott; & Chester

As a result of the governments’ inactivity on the issue, further litigation was brought in Scotland, where the Registration Appeal Court agreed with the decision of the ECtHR in that there was a violation of the Convention rights. Nonetheless, they found that they were unable to remedy the legislation through interpreting it compatibly, not least because ‘there were many possible levels at which the line (of disenfranchisement) might be drawn…it could be no part of this Court’s function to make an uninformed choice among such alternatives’. The Court, in discussing the legislative history in response to the judgment of the ECtHR, accepted that even though the matter was ongoing in the legislature, it would be not be appropriate for the Court to ‘observe’ that the legislation is incompatible, but ‘make a formal declaration of incompatibility to that effect’.

In addition to the litigation in Scotland, similar claims were filed in the UK, reaching the Supreme Court. There, the greater question was not whether the matter violated the ECHR, but rather, whether the deprivation of the vote it was a constitutional fundamental of the UK which would justify a departure from Strasbourg. The justices dismissed this, accepting that there may be ‘rare occasions where the domestic court has concerns as to whether…(Strasbourg) sufficiently appreciates…particular aspects of our domestic process’, but that the principle at stake here was not so significant as to justify an ‘outright refusal to follow…(the) Grand Chamber’.

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153 Alex Aldridge, ‘Can ‘Physically Ill’ David Cameron Find a Cure for his European Law Allergy?’, The Guardian, 6 May 2011.
155 Ibid. per Lord Abernathy at [26].
156 Ibid. at [56].
159 Ibid. at [27].
However, as a s.4 declaration had already been made in *Smith v Scott*, as well as the finding of a violation by ECtHR, the Court declined to make a further DOI, with Lord Mance emphasising its discretionary nature.\textsuperscript{160} Baroness Hale engaged with the need for a DOI in further depth, challenging the assumption that had a s.4 declaration not already been made, one would have been necessary. She suggested that given the severe nature of the crimes which the appellants had been convicted of, the court would have been willing to find that removing their right to vote was proportionate. As such, giving a declaration, not for the claimants, but for others would have been akin to an *in abstracto* declaration.\textsuperscript{161}

This judgment demonstrates the inadequacy of the HRA in providing an effective remedy. Although the claimants were ostensibly successful, with both the European and domestic courts recognising that there was an unlawful interference with their rights, there has been no recognition of this success through either legislation or executive orders. Moreover, the harm has arguably been exacerbated by the refusal of the Strasbourg court to award affected prisoners damages in *Green v MT*.\textsuperscript{162}

When the question of prisoner voting reached the UKSC in *Chester*, the Court claimed that a further declaration was unnecessary, as a declaration had been made, and a further declaration would not advance the state of the law.\textsuperscript{163} The reluctance of the court to issue a further s.4 declaration from a pragmatic perspective is disconcerting, as there is no greater legal burden placed upon the executive or Parliament to remedy the violation as a result of a s.4 declaration, and the justification that a lower court had already made a declaration was not consonant with precedent in the House of Lords.\textsuperscript{164} As such, this suggests that there may now be a withdrawal from the presumption that the UKSC will reissue declarations of incompatibility, or potentially reflects the concerns of Baroness Hale on the standing of the litigants, and the inappropriateness of the courts making abstract declarations upon rights.\textsuperscript{165} Alternatively, given the controversial

\textsuperscript{160} Ibid. at [39].
\textsuperscript{161} Ibid.
\textsuperscript{162} [2010] ECHR 1826. The ECtHR found that the declaration of a violation of their rights was sufficient remedy for the prisoners, and that they did not require pecuniary compensation. This approach was reiterated in *Firth v UK* [2014] ECHR 874.
\textsuperscript{163} Ibid. per Lord Mance at [39]. They buttressed this with reference to the ECtHR’s refusal to take further cases on the issue.
\textsuperscript{164} *Bellinger v Bellinger*. See further discussion post at page 41.
\textsuperscript{165} Supra. n.157 at [99].
nature of the issue, the lack of a declaration could have been motivated by the view, as argued above in Nicklinson, that the issue was more appropriately one for the political branches, justifying a more deferential stance.

Further, the inaction of Parliament in response to the first instance court’s declaration of incompatibility demonstrates the harm that can be done to constitutionally protected rights as a result of there being no domestically enforceable legally remedy. 166 Through declaring that the law is in violation of legislatively protected rights, but not providing the judiciary with the means to remedy such violations, the rights are devalued. Whilst elevating rights absolutely would interfere with sovereignty, the current state of the constitution devalues rights by permitting them to be violated by implication, rather than through Parliament addressing its intent to violate them explicitly. 167

3 PART III

In considering the compatibility of these decisions, and other decisions where the courts have found that the laws fail to comply with rights, four elements of the rule of law will be focussed upon. Firstly, I will consider the generality of these laws, and the need for remedies to not solely protect the litigants, but also to extend to those similarly affected. In Canada, by attempting to suspend declarations, (which is constitutionally questionable in itself), the courts have tried to provide a remedy for the specific litigants, most frequently through constitutional exemptions. Depending upon how these are executed, they can either provide an effective general framework, giving relief to the litigants and those similarly situated, or can create horizontal inequality, illegitimately elevating those before the court above the general laws.

Secondly, I will consider the coherence of the law, and whether the courts have developed a formulated and consistent framework within which remedies are ordered. In Canada, the SCC has moved away from the principled operation of suspended remedies envisaged in the founding decisions of Schachter and Manitoba Language; whilst in the UK courts have elevated s.3 as a remedy, leading to incoherence as to when a s.4 declaration will be used. This is exacerbated by

167 Such as through the principle of legality in set out in R v SSHD ex parte Simms [2002] AC 115 per Lord Hoffman at [131], where he held that ‘the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost’.
the emergence of the unwillingness seen in Nicklinson to grant a s.4 declaration before Parliament has considered the issue.

Thirdly, I will suggest that where declarations are made, and particularly where declarations are suspended in Canada, significant harm is done to the certainty of the law, with rights-invalid laws having a quasi-legal status pending their nullification. Finally, I will consider whether declarations of incompatibility and suspended declarations of invalidity can ever be a remedy compatible with the rule of law. I will argue that in principle, neither provide an effective remedy, and are therefore invalid. In the Canadian context, the supremacy of rights should require the judiciary to provide immediate relief to the successful litigants. In the UK, the issue is complicated by parliamentary supremacy, which must ultimately permit Parliament to violate rights, if it expressly wishes to.\textsuperscript{168}

I propose that these defects can be remedied through the courts in both jurisdictions moving to prioritise the immediate protection of rights, through either short-term general exemptions, or a more potent rights-interpreting power. These judicial powers would be balanced by the simultaneous request for the legislature to develop and propose a long-term policy that would redress the identified rights violation(s). However, the legislature would retain ultimate sovereignty through having the right to reject the judicial amendments, but only by express recognition of the intent to maintain the violation of rights. This remedy does involve some extension of the judicial role, but as is argued below, this is offset by the dialogic element of the remedy, and is necessary in order to ensure a simultaneously effective and universal remedy.

3.1 Generality

Laws must be of general effect, with the law applying ‘without exception to everyone whose conduct falls within the prescribed conditions of application’.\textsuperscript{169} When concerned with private law, the narrow focus of the issue means that the courts can tailor the remedy to meet the demands of the plaintiff, if successful, with any broader impact occurring through precedent.\textsuperscript{170}

\textsuperscript{168} This issue is also extant, albeit to a lesser extent, in Canada, where the inclusion of s.33 in the Charter was heavily motivated by the need to retain some conception of legislative supremacy. See Rosen & Johansen, ‘The Notwithstanding Clause of the Charter’, Library of Parliament Research Publications, Background Paper (May 2012). Available at http://lop.parl.ca.


In contrast, a public law remedy should extend beyond the plaintiffs, with the change in the law affecting all comparably situated, ensuring horizontal equality. Thus, the development of a specific remedy, discrete from the ordinary effect of the legislation, for parties before the court harms the rule of law, preventing all from being equally subject to the effects of the law.

Maintaining horizontal equality under the law is done most effectively where the court strikes down the infringing law with immediate effect, or through reading impugned provisions down, or reading new provisions in. However, the SCC has become increasingly unwilling to take this course, suspending judgments instead, whilst the UK courts are prohibited from doing so. In order to ameliorate the harm that a suspension would do to the individual litigants, the Canadian courts have considered the use of temporary constitutional exemptions as a remedy, giving immediate relief to the parties before the court, whilst providing Parliament with greater time to consider the issue for the wider populace. The SCC had originally shown reluctance to grant wide-ranging constitutional exemptions, with Lamer C.J. suggesting in Rodriguez that it would be inappropriate for the court to circumnavigate a suspension by allowing judicially granted exemptions to nullify it, and therefore caveating their use by requiring any exemption to be authorised on non-Charter criteria, rather than the Charter violation itself.

It is difficult to reconcile Lamer’s use of non-Charter criteria with the realities of violations under the Charter. Any right to a remedy in the case of a Charter violation does not come from outside factors, but from the fact that they have been subject to a violation of the Charter. Distinguishing who would be able to receive an immediate remedy based upon their membership of a specific group would discriminate in the provision of such a remedy. Kent Roach argues that it would, however, be acceptable for the court to only exempt individuals before them, with the law left in full effect for all those not successful in litigation until parliament legislatures, or

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171 As per Dicey “every man…is subject to the ordinary law of the realm” in An Introduction to the Study of the Constitution, supra. n.64, 202.
172 Leckey, Bills of Rights, supra. n.3, 99.
173 Ibid., 100.
174 Such as in Carter I. However, in this decision, the death of the litigants meant that the matter was not of any real concern before the SCC.
175 Supra. n. 73 at [571].
176 Ibid. at [579].
the suspended period runs out.\textsuperscript{177} Roach argues that this adheres to the separation of powers, with the legislature ‘able to resolve the systemic issues’, whilst the courts retain their ‘core judicial function of providing remedies to individuals’.\textsuperscript{178}

A remedy that adheres to Roach’s criteria can be seen in \textit{Carter II}. By recognising that the extension of the suspension would do significant harm to those affected, the SCC introduced a framework that would allow the provincial courts to adjudicate upon the legality of requests for euthanasia.\textsuperscript{179} However, the nature of the issue in question, assisted dying, meant that the requirement of a court sanction to proceed did not necessarily violate the principle of generality. For instance, when dealing with assisted dying, some legislative remedies, such as those as proposed in the UK, would require both support from doctors and the court before euthanasia could take place. Whilst the Canadian Parliament did devise a remedy which did not require court approval, had such approval been required by the legislation, it would not have elevated a certain group beyond the general law illegitimately, but rather, reflected the exceptional nature of the right to commit euthanasia.

However, if the SCC adopted this approach for all suspended decisions, this would create a two-tier legal system, with those who had access to the courts permitted to enjoy a higher, more right-compliant law. Whereas after \textit{Carter II}, the position was presumptively rights-compliant for all, in other instances, the position will be rights-violating for all, except for those who seek court sanctioned exemption. For instance, in \textit{Seaboyer},\textsuperscript{180} the SCC struck down a rape-shield law which was overbroad, leaving the law in a position where the rights of the accused were presumptively protected, allowing them to raise relevant evidence. This reflects the presumption that evidence should be permitted, with the burden upon the other side to prove its invalidity or irrelevance. If the decision had been suspended, but with individuals able to gain an exemption from it, the burden would have been reversed, leaving the accused having to make an application to protect his rights.


\textsuperscript{178} Ibid., 290.

\textsuperscript{179} Supra. n.100. It also differentiated itself from Lamer’s approach, in that the exemption was granted on the basis that the rights of the individual had been violated.

\textsuperscript{180} \textit{R v Seaboyer [1991]} 2 SCR 577
Roach argues that *Seaboyer* can be seen as an example of dialogue, and Parliament using the decision of the SCC to create superior legislation that ‘advanced the legislative goal’ better than the courts could have achieved.\(^{181}\) However, although this legislative goal would still have been achieved if the SCC had suspended their decision, it would have been achieved alongside the continued violation of a right. The suspension was not a necessary feature for dialogue to take place, or for Parliament to formulate and enact an alternative means of protecting the right to introduce relevant evidence. This can be further seen in the SCC’s remedy in *Swain*,\(^ {182}\) where the Court suspended its strike down of the legislation, but implemented an transitional regime that remedied the constitutional wrong,\(^ {183}\) whilst Parliament was able to respond with a permanent legislative remedy to the violation.\(^ {184}\)

A general, strong form approach also better reflects the distribution of powers under the Canadian constitution. McLachlin C.J. dissented in *Carter II*, suggesting that the interim exemption had served to ‘create uncertainty, undermine the rule of law, and usurp parliament’s role’.\(^ {185}\) To the contrary, the decision of the SCC in *Carter I* served to do this, with *Carter II* providing some remedy for the shortcomings of the first decision. *Carter I* left those whose rights were infringed with no remedy for the immediate future, leaving them in an uncertain position for at least twelve months, uncertainty that would have been present for at least a further four months, had McLachlin’s judgment in *Carter II* been in the majority. In contrast, *Carter II* provided certainty as to whose rights were affected by the law, and provided them with the opportunity to seek redress, whilst also recognising Parliament’s role in determining long term policy.

McLachlin also errs in suggesting that the SCC usurped Parliament’s role in creating an immediate remedy, with the more natural conclusion from the text of the Canadian Constitution that her approach would violate the role granted to the courts by Parliament. The Constitution provides that it is the ‘supreme law of Canada’, and that provisions which are inconsistent are ‘of no force and effect’,\(^ {186}\) and the ‘prevailing view…is that (this) tasks judges with enforcing the

\(^{181}\) *Supra.* n.177, 282.


\(^{183}\) *Ibid.* per Lamer CJ at 1022.

\(^{184}\) Hogg & Bushell, *Charter Dialogue, supra.* n.54.

\(^{185}\) *Supra.* n.100 at [12].

\(^{186}\) *Supra.* n.5.
Constitution’. Within this, it has been argued by Sankoff that s.52(1) provides for the Court to partially strike down or amend the law, as it states that the law be invalid to ‘the extent of the inconsistency’. As such, a textual basis can be found to justify the approach of the majority in *Carter II*. In contrast, there is no such textual basis upon which McLachlin C.J. can rely to validate her preference for the suspension of such decisions, even if the suspension is rooted in the desire to defer to the institutional expertise of the legislative branch.

This view is amplified by the fact that Parliament clearly envisaged there being decisions which a court could decide where the federal or provincial legislatures may disagree, and should have the right to act upon this disagreement. As such, they created an emergency release valve through s.33, allowing the political branches to intervene, overruling the decisions of the court, either in favour of their own new interpretation, or in favour of the status quo. Thus, the development of the suspended declaration, coupled with the reluctance to read in general exemptions, serves to depart from the constitutional role conferred upon them by Parliament, and in so doing, usurps Parliament’s role in the distribution of constitutional powers.

### 3.1.1 Constitutional Exemptions or Reading in?

Whilst an increase in the SCC’s usage of general constitutional exemptions would be an acceptable halfway house, in that all those whose rights were violated would have redress during the suspended period, it would still leave something to be desired. Rather than framing the interim measure as a constitutional exemption, it would be better for the courts to read in clarifying clauses, or read out inconsistent clauses, depending upon the legislation under review. This is especially so given that a constitutional exemption is framed as a temporary remedy, yet is a remedy which would become permanent in the event of Parliament not acting within the timeframe accorded to it. As such, it would be more transparent for the court to read in language, or develop a ‘transitional regime’ as it did in *Swain*, whilst still acknowledging that Parliament should play a role in drafting the legislation in the long term. For instance, in *Carter I*, the Court wrote that the legislation is ‘void insofar as they prohibit physician-assisted death for a

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187 Leckey, *Bills of Rights*, supra. n.3, 43.
189 *Supra*. n.7. This can be contrasted to the text of the South African Constitution, for example. There, the South African courts have the power to suspend declarations conferred upon them, in s.172(1)(b)
190 *Supra*. n.80.
competent adult who...(1) clearly consents...(and) (2) has a grievous and irredeemable medical condition…'.

This declaration of ‘voidness’ could be equally drafted as a qualifying provision in the legislation, and would have precisely the same effect, as was seen in the court granting a constitutional exemption in *Carter II*, where those who fell within the SCC’s exemption were permitted to seek permission from the courts to receive assistance in dying.

Moreover, if the court read in alternative language, not only would the rights-violation be immediately redressed, but there would be no risk of a lacuna in the law emerging at the end of the suspended period. For instance, in *Bedford*, the Court struck down the provisions without providing for alternative language to replace them. Whilst this did ensure that the Court did not draft policy, it also meant that in the event of Parliament not legislating, and the suspended period coming to an end, all those who lived off the ‘avails of prostitution’ would be decriminalised. As such, although the right to security of person would be upheld, it would do so at the cost of leaving prostitution ‘totally unregulated’, and would likely require the court to grant any request for an extension of time requested by the executive.

An explanation for the courts’ preference towards using constitutional exemptions, rather than reading in, is that it maintains the illusion of legislative sovereignty and responsibility. The framing of a remedy as a constitutional exemption makes it appear a temporary remedy, a ‘quick fix’ handed down by the courts until the legislature can deal with the matter fully and effectively. However, as seen in the *Carter* decisions, the language of the exemption itself does not give the impression of being a quick fix, but rather, a construction which would satisfactorily remedy the right-violation indefinitely. This, realistically, is the natural conclusion of any exemption, with the legislature not under any legal obligation to respond. Thus, although Lamer C.J. was at pains to emphasise the temporary nature of a constitutional exemption in *Rodriguez*, they are only temporary in that they form part of the law as a whole upon the suspended period coming to an end, albeit as the law proper, rather than an exemption to it.

191 *Supra.* n.25 at [4].
192 *Bedford*, *supra.* n.45 at [167].
194 *Ibid.* at [168].
195 Holning Lau, ‘Remedial Grace Periods as a Judicial Strategy: From the United States to South Africa and Beyond’
196 *Supra.* n.73
Whilst this may equate to immediate judicial policy making, the nature of exemptions and transitional periods is such that they are near equivalent to short term policy choices. As seen above, the reading down of the impugned provisions of the Criminal Code would have resulted in the SCC’s policy choice coming into effect at the end of the suspended period. As it was, the Canadian Parliament responded with a substantially different approach, as intended by the majority. Nonetheless, this response came after a period of continued harm to the rights of the affected individuals, and it has not been conclusively shown that the advantages of a legislative remedy outweigh this harm.

Moreover, the advantages of a general amendment are apparent where the court considers the use of individual exemptions. An exemption constitutes a policy choice, albeit if restricted to litigants, a policy choice for a narrow portion of the public. Thus, even if Parliament chooses to remedy the constitutional wrong through a different policy choice, those exempted by the court receive an alternative solution not intended by Parliament. As such, presenting the remedy as an ‘exemption’ allows the court to obscure the fact that it is making policy choices, but only for a privileged section of society, whilst also obscuring the fact that in the event of no corrective legislation, such exemptions may persist in the long term. In contrast, a general remedy, caveated with the expectation of Parliamentary action, presents the potential effect of the law more transparently, whilst avoiding continued constitutional violations.

If the Canadian courts were to adopt such an approach, it may also accord more respect to the procedures of Parliament. At present, a decision with suspended effect forces the matter onto the Canadian parliamentary table, and the restricted timetable constrains the capacity of Parliament, preventing the full use of its resources. In contrast, a reading in provides an immediate remedy, whilst Parliament is still able to consider the issue, but without the court dictating their timetable. It also obviates the need for the courts to provide specific guidance to the content of any amendments to the legislation, other than the form of any provisions read

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197 Bill C-36, which became the Protection of Communities and Exploited Persons Act 2014, took a much more restrictive approach to assisted dying than was envisaged by the SCC. Nonetheless, those who came before the courts prior to this act would have had their request approved by a policy not created or supported by Parliament, but by the courts.

198 Leckey, Bills of Rights, supra n.3.

199 Ibid.
Whilst this may run the gambit of parliament taking an alternative approach, as the Canadian Parliament has done in their responses to *Bedford* and *Carter*, and the Court potentially striking the future amendments down, it shows greater respect to the role of the legislature through not explicitly directing them as to the form of any amendments, whilst simultaneously ensuring that there is certainty and a general application of the law.

Although the structure of the UK does not force the issue before Parliament in the same hard manner as in Canada, the effect of a s.4 declaration is that political factors serve to replicate the effects. Not only is a s.4 declaration domestically likely to lead to a binding decision of Strasbourg, imposing obligations upon the UK on the international plane, but the pressure placed upon the government to remedy the rights violation through the political embarrassment of having decisions declared to be incompatible with human rights has served to motivate the government to remedy the defects in nearly every instance. As such, a broader use of reading in may similarly respect the procedures of the UK Parliament, with the lack of a declaration not forcing the matter before Parliament.

Despite these concerns, the fact that in both jurisdictions, the legislature has the final word should also not be forgotten. As such, should the courts read in provisions that create difficulties for the process of government, it is possible for such difficulties to be addressed through legislative reform. If Parliament is concerned with the terms read into the legislation, it has the opportunity to redraft the legislation in the UK, or to suspend the judgment under s.33 in the Charter. As will be discussed in greater detail below, in regards to the creation of a more

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200 For instance, in *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, guidance from the SCC on how to permissibly elevate the use of French was expressly followed, whilst in *Secretary of State for the Home Dept v AF* (No. 3) [2009] UKHL 28, clear guidance was provided by the court on how a fair trial could be maintained in cases that concerned elements of national security.

201 Both parliamentary responses have not been without controversy, and a challenge to 2014 Act has been initiated on the basis that the restrictions are too broad.

202 Sathanapally, *Beyond Disagreement*, supra. n.1, Ch. 5.

203 Kavanagh, *Constitutional Review*, supra. n.16 at 410.

204 Ibid.

205 The nature of the UK system means that constitutional exemptions are rarely, if ever considered. The constraints on strong remedies have generally restricted the court from engaging in such potent exemptions or readings in. For instance, *Vriend* where a group was read in that had been expressly excluded by the legislature would have required the court to conflict with direct, expressed legislative intent. and as such, generality is less of a concern in the UK context, other than the

effective remedy in the UK, the current consequence of most declarations in the UK and in Canada is that the legislature feels an obligation to draft the amendments in a manner envisaged by the courts. Passing this role more fully to the courts would allow them to enact generally effective remedies with immediate effect, whilst also emphasising that Parliament has a legitimate role to play, thereby recognising that the legislature may depart fully and freely in future legislation.

3.2 Coherence & Transparency

In order to fully adhere to the rule of law, courts must take a consistent approach in ordering remedies, ensuring that the remedies ordered in each decision cohere, and reflect a stable and principled approach to the resolution of rights violations. As such, where a remedy is ordered, that remedy should be adopted in analogous situations, whether that be a broad interpretation of legislative language, or through the granting (or refusal to grant) of a declaration or suspended order. As MacCormick argues, such consistency and transparency is necessary to ensure ‘the essential business of rendering as determinate as possible the available grounds of legal argument’,

and to ensure that the ‘same justice is done to everyone’.

However, in both the UK and Canada, there has been an absence of consistent structure in the provision of remedies. In first deciding between when to order a declaration of invalidity to be made immediately, or when to suspend the declaration, the SCC developed a set of criteria in Schachter as where the suspension of a declaration could be legitimately considered. However, despite this precedent, the McLachlin Court has increasingly departed from the Schachter criteria, but without expressly elucidating their departure or formulating new principles, and suspended declarations now ‘verge on the routine’. Similarly, the UKSC has shown inconsistency in whether it chooses to declare legislation incompatible under s.4, emphasising its discretionary nature, and the need to defer to the institutional capacity and constitutional role of Parliament.

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207 MacCormick, ‘The Rule of Law’, supra. n.55, Ch. 8.4.

208 Ibid., Ch. 8.1.

209 Schachter supra. n.37


211 Nicklinson, supra. n.34 per Lord Mance at [52], and Chester supra.
3.2.1 Precedential Incoherence in Canada

Within the Canadian jurisprudence, the SCC has moved from a strong and coherent framework which had a clear presumption in favour of an immediate and general protection of rights, towards a less structured and predictable approach. The language of the court has suggested that this approach is rooted in a notion of institutional competence, with suspended declarations increasingly viewed as a means of incorporating Parliament in rights dialogue.\(^{212}\) Whilst deference to contributions of the legislatures is not inherently incoherent, nor inconsistent with the rule of law generally, the manner in which this deference has been exercised in more recent suspended declarations does raise concerns.

The Canadian Constitution is transparent in its supremacy.\(^{213}\) This supremacy clause has created the presumption that where a law is constitutionally invalid, it will be nullified with immediate effect, and this presumption has been honed by the SCC in *Manitoba Language* and *Schachter*, with the expectation that declarations will only be suspended in exceptional circumstances.\(^{214}\) Despite the fact that this precedent has not been overturned, nor even questioned, the approach of the recent decisions of the SCC has been to ignore this precedent. For instance, in *Bedford*, despite the laws regulating prostitution being found to interfere with fundamental rights, putting sex workers at risk, the Court suggested that the ‘concerns’ of Canadians in leaving prostitution unregulated for a period of time trumped the violations of the litigants’ rights.\(^{215}\) Although they acknowledged that the question of whether to suspend a declaration was a ‘difficult’ one, there was only superficial acknowledgement of such difficulty, with the reasoning and judgment displaying no evidence of the court truly grappling with or engaging with the question.\(^{216}\)

This therefore leaves Canadian jurisprudence with two strands of precedent as to when suspended declarations should be handed down.\(^{217}\) As will be discussed below, this more recent jurisprudence is also concerning in that it fails to provide an immediate and effective remedy, but for the purposes of this section, the concern is with the fact that the law has been left in an

\(^{212}\)Roach, *supra.* n.42.

\(^{213}\)*Supra.* n.5.


\(^{215}\)*Supra.* n.45.


\(^{217}\)Leckey, *Bills of Rights*, 139-141.
incoherent state. The rule of law requires that the decisions of the courts be coherent, with departures from past precedent acknowledged and overturned. However, the SCC has failed to do so, paying scant attention to the demands of Schachter in its recent decisions.

Not only does this approach do harm in principle, but in practice. As the final court of appeal, the decisions of the SCC act as a guide for the lower courts. Where the decisions of the supreme courts fail to cohere collectively, there is the risk that the decisions of the lower courts will not cohere, leading to a patchwork of decisions emerging across the country.218 This is particularly pertinent in Canada, where the structure of the provincial court system would allow for different provincial appellate courts to develop different responses to national issues. For instance, in R v Smith, the British Columbia Court of Appeal was adjudicating the legality of a ban on baked marijuana.219 In finding that the prohibition on possession violated the s.7 Charter right to liberty, the BCCA suspended its declaration, giving the legislature the opportunity to redress the issue, despite the fact that none of the Schachter criteria were met.220 Although the SCC corrected the error, ordering the declaration take immediate effect,221 the decision displays the flaws within the system. In elevating dialogue above rights, but without a coherent framework as to when the need for a legislative contribution should be prioritised, the absence of clear guidance will necessarily lead to a patchwork of decisions.

3.2.2 Incoherence in the Remedial Choices Under the HRA

In contrast, the incoherence in the UK context is reflected in first, where the divide falls between s.3 interpretation and s.4 declaration, and second, the contrast between s.4 declarations of incompatible, and non-s.4 declarations of incompatibility. The UKSC (and before that, House of Lords) have used s.3 to enhance their interpretive powers, but without allowing them to ‘act
as legislators'. However, the difficulty that emerges from this is distinguishing when the court is interpreting, and when it is impermissibly legislating.

_Ghaidan v Gobin-Mendoza_ is traditionally seen as the archetypal example of the extent of the courts’ interpretative power under s.3, with the House of Lords substantially altering the natural meaning of the language in order to remedy unlawful discrimination by finding that homosexual couples could also fall within the category of ‘spouse’ in the legislation. In this, the House of Lords created a two stage test by which a court could assess if it had the capacity to interpret the legislation in a rights-compatible way. First, the court must assess the legislation on its face, and decide whether according to the rules of ordinary statutory interpretation, it violates Convention rights. If it does so, only then do the courts go on to try and construe it ‘in accordance with s.3’.

Through this s.3 construction, the courts are not necessarily limited by the language’s ordinary meaning, but must instead depart from the draftsman’s language, which would risk the outcome being a ‘semantic lottery’. In doing so, the courts must find an interpretation which ‘brings it into conformity with the constitution’, able to stretch the language ‘almost (but not quite) to breaking point’.

Interpretation is an inherently subjective act, and as such, will necessarily result in some uncertainty and inconsistency in how the justices reach their decision. From a pragmatic perspective, this potent construction of s.3 is beneficial to the right-holder, as otherwise the constitutional framework of the UK would restrict the courts’ ability to effectively uphold rights by providing effective remedies. However, in acknowledging that the courts can ‘quasi-legislate’, uncertainty will necessarily emerge as to where the courts will find that they are merely interpreting, and when they may be legislating proper.

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222 R v A (No. 2) [2001] UKHL 25 per Lord Hope at [108].
224 Supra. n.12.
225 Ibid. per Lord Millett at [60].
226 Ibid. at [77].
227 Ibid. at [64].
228 Ibid. at [67].
230 See, amongst others, Kavanagh in both ‘What’s so Weak’, _supra_. n.14 and _Constitutional Review_, _supra_. n.16.
Whilst such an approach may be acceptable pragmatically, from a theoretical perspective, it is unsatisfactory. The limit the courts have imposed upon themselves, of not giving legislation an ‘impossible meaning’\textsuperscript{231} is a limit that is impossible to identify. As such, whilst much of the interpretation done by the courts under s.3 will be consonant with their past interpretive practices, and some will be a reasonable extension of interpretive power consistent with the language of s.3, some of the interpretations will be more akin to legislating than interpreting. Further, given the contrasting opinions on the nature of the power even amongst the senior judiciary, from the very introduction of the HRA, it is likely that the extent of the power is likely to rest upon the perspective of the presiding judge.\textsuperscript{232} Thus, the framework of s.3 does not present a coherent and transparent approach to the nature of judicial decision-making, not acknowledging what judges are truly doing, and little guidance as to when they may do it.

Ekins argues that s.3 was not intended as the remedial power that it has become under judicial interpretation, but rather, was intended to change ‘how all persons should read statutes’.\textsuperscript{233} He argues that since the enactment of the HRA, the courts have become more activist, with a correlative ‘expansion of judicial power’.\textsuperscript{234} In particular, the courts’ use of s.3 has been not just judicial interpretation, but an ‘unusual Henry VIII power to amend statutes’.\textsuperscript{235} As a result of this, there is a ‘much higher degree of uncertainty for citizens in knowing what the law is’,\textsuperscript{236} given the uncertainty over both Convention rights and the possibility of a rights-compatible interpretation.

Whilst Ekins’ approach would see a dramatic reduction in the capacity of the courts to hold the executive and legislature to account for rights-violations and effectively remedy violations of rights, his approach does recognise the uncertainty and incoherence that is inherent in the remedies developed under the HRA. This incoherence is not limited to the breadth of s.3 interpretations, but also includes s.4 declarations. Whilst the majority of judicial decisions show

\textsuperscript{231}Supra. n.12 per Lord Millett at [67].
\textsuperscript{232}See the comparison between senior members of the judiciary in Bonner et al, ‘Judicial Approaches’, supra. n.223, 555. On temperament, see post n.221.
\textsuperscript{234}Ibid., 3.
\textsuperscript{235}Ibid., 10.
the extension of judicial power to amend rights violations and find legislation incompatible with human rights, decisions such as Nicklinson and Chester show a sudden curtailment of judicial power, through the refusal to formally declare a law incompatible with the ECHR.

The difficulties with the ‘optionality’ of s.4 can be seen most clearly in Nicklinson. In theory, a s.4 declaration should be an uncontroversial remedy, and a much less controversial one than s.3, given that it involves no substantive intrusion into the legislative domain. This approach can be seen in the dissent of Lord Kerr, who would have issued an immediate declaration of incompatibility. He held that a s.4 declaration does not ‘usurp the role of Parliament’ or ‘offend the separation of powers’, but merely conveys to Parliament the fact that the legislation is incompatible. Thus, given the absence of any formal obligation placed upon Parliament after a s.4 declaration, Lord Kerr found that the need for the court to defer declaring the legislation incompatible confusing, with the fact that the Court had made a declaration not evidence of the courts making a ‘moral choice’ as to the state of the law. Either the legislation is compatible, or it is not.

However, in Nicklinson, the UKSC was loathe to issue a declaration ‘at this time’, instead preferring to give Parliament the first opportunity to remedy the violation of rights, despite finding that they ‘could properly hold that section 2 infringed Article 8’. Thus, it would seem that the majority of the UKSC concluded that their institutional capacity should restrict their granting of a declaration of incompatibility at this stage. The incoherence in this approach with the text is arguably rooted in in the concern that the court had in that its decision would hinder the ability of the legislature to develop a remedy free from judicial opinion or suggestion, given its past compliance with the guidance of the court.

The view that a s.4 declaration would place some burden upon Parliament is not illogical if the practice of the legislature is assessed, with the legislature generally adhering to s.4 declarations,

237 A drift condemned by Sales & Elkins as ‘ever more searching review into previously non-justiciable powers’ (see ibid., 223).
238 Supra. n.34 at [343]. Stephen Sedley, writing extra-judicially, takes a similar view, where he suggests that ‘only if that (a s.3 interpretation) is not possible should they make a declaration of incompatibility under s.4’ in Sir Stephen Sedley, ‘The Rocks or the Open Sea: Where is the Human Rights Act Heading?’, (2005) Journal of Law and Society, 3.
239 Supra. n.34 per Lord Kerr at [344].
240 Ibid. per Lord Neuberger at [113].
241 Ibid.
correcting the law in a manner envisaged by the courts.\textsuperscript{242} This has led some commentators to suggest that a constitutional convention of compliance has emerged, with Parliament and the Executive seeing themselves as under an obligation to respond to s.4 declarations, but not through engaging in dialogue through alternative suggestions, but through mere compliance.\textsuperscript{243} However, if such a convention has emerged, there is a clear disconnect and incoherence between the language of the legislation and the effects of the legislation. For the implementation of the legislation to comply with the rule of law, such practices should be presented more transparently, with the relationship between text and practice more consistent.

One could point to the decision of the legislature to ignore the declaration of incompatibility in \textit{Chester} as evidence that this convention does not exist, and that Parliament is willing to assert its supremacy by refusing to respond to s.4 declarations. However, in that decision, it is worth noting that the UKSC did not reissue the declaration of incompatibility, and that the issue was framed more around the relationship of the UK to Europe and the ECHR, than the rights of prisoners to have the vote.\textsuperscript{244}

The lack of coherence in both the extent of s.3 remedies, and the relationship between parliament and the courts in relation to s.4 is arguably inherent in the drafting of the HRA. The HRA simultaneously gave the courts the explicit power to assess the compatibility of legislation with rights, yet without a clear judicial remedy. As such, from the outset of its enactment, the courts were in a quandary, whereby they had an obligation to both ensure that successful litigants received an effective remedy, but without intruding upon the sovereignty of parliament.\textsuperscript{245} The drafting of the legislation left s.3 as the most textually-consistent method of resolving the dilemma, whilst deferring to Parliament meant that there was the prospect that no remedy would be forthcoming for some time, if ever. As such, coherence and transparency would be aided by a more express recognition of the breadth of judicial powers, such as through dual interpretative powers, with one reflecting the ordinary process of common law interpretation, and the other recognising the more extensive, quasi-legislative, interpretive power.

\textsuperscript{242} Kavanagh, ‘What’s so Weak about Weak-Form Review’, \textit{supra.} n.14, 24.

\textsuperscript{243} See Kavanagh, ‘What so Weak About Weak-Form Review’, \textit{supra.} n.14, 24-25; Sathanapally, \textit{Beyond Disagreement, supra.} n.1, 192.

\textsuperscript{244} \textit{Hansard}, HC Debate Vol 540 Col 493. (10\textsuperscript{th} February 2011).

\textsuperscript{245} Roach, ‘Remedies for Laws’, \textit{supra.} n.13, 287.
Oddly, however, the response of Parliament to the s.4 declarations in implementing a remedy has created a difficulty for the courts where the law is incompliant, but where they do not want to restrict the response of the legislature. However, this arguably then presents the courts as holding that the law is compatible, if the reader does not closely read the judgment, and results in no parliamentary activity, and no understanding that the law is unconstitutional.

3.2.3 Towards Legislative Engagement?

The approach of both supreme courts in these decisions has been to move from what Leckey calls ‘constitutional enforcement’ towards ‘legislative engagement’.246 This is not, as I have explained above, prima facie illegitimate, or inconsistent with the rule of law. Rights are amorphic concepts, upon which the courts do not necessarily have the final or only interpretation. However, there should be clarity in the manner by which the courts approach this engagement, yet both the weak-form devices used by the SCC and the UKSC are not exercised in this way. The SCC has developed suspended declarations in a manner which appears to rest solely upon the discretion of the Court, with no firm precedential basis guiding their usage. Meanwhile, there is some confusion over the use of s.4, and whether its use imposes an obligation upon Parliament to comply with the s.4 declarations of the court with minimal resistance; and whether its absence allowed Parliament to justify a refusal to comply. As such, incoherence and uncertainty may emerge as to whether the law is constitutional, or not.

The current jurisprudence in both courts is therefore unable to adequately address these shortcomings. In Canada, the SCC either has to recognise its use of institutional factors as a further extension of the *Schachter* criteria, or has to retreat from its growing use of suspended declarations towards its original practice, a practice now viewed as ‘radical’. In the UK, the challenges are less reconcilable within the current constitutional structure. Whilst the Canadian judges have the power to develop potent effective remedies, and clearly accept that they are doing so, the UK judges do not. As such, any greater clarity is likely to need to come from further legislative reform, such as within a new ‘British Bill of Rights’, or from the courts taking a more deferential approach to s.3, using it as a less potent power, and instead using the declaration of incompatibility more frequently. However, as this would necessarily result in less effective substantive remedies, the gains that may be seen in coherence and certainty would be significantly offset by the harm done to the provision of an effective remedy.

246 Leckey, *Bills of Rights*, supra. n.3, 158.
3.2.4 Political Uncertainty

In addition to the uncertainty caused in the law through the development of an incoherent and unprincipled framework of remedial action, is the uncertainty done to the status of the law in any intervening period where a declaration is made stating that the law violates rights.

This issue is particularly relevant in Canada, where during the suspension of the law, which ‘breathes life into the constitutionally invalid provision’, but still raises questions over the legitimacy of its enforcement. This is particularly the case in the criminal law, where there would be understandable concern and confusion amongst law enforcement officials as to the relevance and consequences of enforcing a law which will be necessarily obsolete within a specified period of time. Leckey has drawn attention to the consequence of the Bedford decision, where there was uncertainty as to the need and purpose of pursuing such violations to the same extent that they had done pre-Bedford.

In a similar way, the understanding of individuals is likely to be limited. Actions under the law are either legal, or they are not. Where a law is unconstitutional, the natural conclusion to draw is that actions prohibited under it are no longer verboten. It is not difficult to imagine circumstances in which individuals run a defence based upon this mistaken understanding of the law, alleging that they understood the law to have been ruled in violation of the Charter by the Supreme Court, and therefore of no effect. This is particularly the case where people’s understanding may rest upon brief news articles or snippets of a television broadcast, where the nuance of the judgment is not conveyed. Whilst lawyers and legal scholars may view the suspended declaration as straightforward, the law should not be assessed as to its adequacy and certainty for those who are versed in it, but for the ‘man on the Clapham omnibus’.

This uncertainty is potentially of greatest concern to those charged with criminal offences, and law enforcement officials. For instance, in the case of R v Smith, had the SCC maintained the suspension of the declaration, how should law enforcement officials have approached those in possession of baked marijuana? To charge an individual with an offence that had been found to be unconstitutional would seem nonsensical to some, whilst other

248 Ibid., 18; also see R v Moazami 2014 BCSC 261.
249 Supra. n.219.
officials may have seen it as simply upholding the law. Thus, whilst the suspension may have been issued to maintain continuity, this continuity may simply cause greater uncertainty.\textsuperscript{250}

In the UK, the risk of such uncertainty has arguably resulted in the courts being reluctant to use s.4 declarations in the criminal context. This can be seen in their use of ‘robust remedial interpretative remedies’,\textsuperscript{251} such as in \textit{R v A (No. 2)},\textsuperscript{252} where the House of Lords concluded that as Parliament could not have intended for the accused to be denied the opportunity of ‘advancing truly probative material’, and that as such, the Court’s reinterpretation of the statute allowed its objective to be achieved, but with its ‘excessive reach…attenuated’.\textsuperscript{253}

\section*{3.3 Adequacy of the Remedy}

Finally, the most significant flaw in the rights remedies in both the UK and Canadian system is their adequacy in providing litigants with effective redress. Litigation is intended to reward the successful litigant, such as through the payment of compensation and the cessation of the unlawful act. However, in both jurisdictions, impediments have either been legislatively enacted, or judicially created which serve to deny litigants an effective and meaningful remedy to the harms they have suffered. In both instances, this inadequacy takes a multifaceted form. Not only do the decisions often fail to provide a substantively effective remedy, but they also fail to provide an expeditious remedy or a retrospective one.

\subsection*{3.3.1 Effective Remedy}

The need for an effective remedy has long been a cornerstone of the British common law, and is contestably as much a part of the constitution as parliamentary sovereignty. Bentham, in his general critique of rights as being ‘nonsense upon stilts’, endorsed the Blackstonian view that ‘no right is without its remedy’, and that ‘where it gives in effect no remedy, it gives in effect no right’.\textsuperscript{254} Similarly, Dicey wrote that there is an ‘inseparable connection between the means of enforcing a right and the right to be enforced’.\textsuperscript{255} As such, the notion that a right and a remedy

\begin{footnotesize}
\begin{enumerate}
\item Leckey, \textit{Bills of Rights}, \textit{supra.} n.3, 176.
\item Roach, ‘Remedies for Laws that Violate Human Rights’, \textit{supra.} n.13, 286.
\item \textit{[2001] UKHL 25}.
\item \textit{Ibid, at [45]}.
\item Dicey, \textit{supra.} n.64, 199.
\end{enumerate}
\end{footnotesize}
are, or should be, insuperable, has been founding principle of the British constitution, and is arguably a principle that should have as much weight as that of the supremacy of parliament.

It is difficult to envisage how s.4 could be conceived of as a legitimate remedy. Whilst defenders of the HRA may point to the fact that it has, in the overwhelming majority of cases, resulted in a favourable outcome for the litigant, this argument mistakes practice for obligation, and confuses a political remedy with a legal one. An effective remedy can only be effective where it imposes a binding obligation on the losing side to act in some way so as to redress the wrong done. Even if it could be proven that s.4 had resulted in a constitutional political convention emerging of compliance, as the justices in *Nicklinson* seem to envisage, the absence of any power within the courts themselves to remedy the breach of the right would prevent it from being legally effective.

The inadequacy of s.4 has also been addressed by Strasbourg, with the ECtHR finding that the HRA failed to provide even an effective political remedy, given the absence of any binding obligation upon the government to redress rights violations. Indeed, this has been demonstrated most ardently by the above discussed prisoner voting saga, which has yet to result in a satisfactory response, with Parliament and the executive seemingly kicking the issue into the long grass, to no real political or legal consequence.

From a pragmatic perspective, the question of whether a remedy is effective can be answered by whether a litigant, having been told that they had received such a remedy, would view it as successful. In the case of a s.4 declaration, it is doubtful that even a litigant who had the strongest faith in Parliament to redress the law would find it to be effective recompense for the harm done to their rights. As Hickman writes, 'no well-advised claimant would bring a claim in the hope of getting such a helpful comment from a judge in the course of losing the case'. Indeed, these latter words are important, as the court views a s.4 declaration as the claimant having lost the case, and as a consequence, the claimant also runs the risk of bearing the cost burden for discovering that their rights have been violated.

In the UK, this ineffectiveness is magnified by the need to go to Strasbourg for effective financial redress, such as that filed seeking financial redress for the deprivation of prisoners’

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256 *Greens v MT* [2010] ECHR 1826; *Hobbs v The United Kingdom* (App No. 63684/00, June 18, 2002).

257 This ineffectiveness is magnified by the domestic courts lacking in the power to award damages, alongside the parsimonious response of the ECtHR in ordering damages in *Green v MT* [2010] ECHR 1826.

voting rights. The UK courts are unable to order that compensation be given to those whose rights have been violated, outside of where they would have been able to do so in ordinary civil proceedings. For instance, In the prisoner voting saga, the prisoners were obliged to return to Strasbourg in order to have even the opportunity to receive an order validating their rights, and requiring the government to pay financial recompense as a remedy, although they were ultimately unsuccessful in doing so. However, this also fails to provide a truly effective domestic remedy, as the dualist structure of the UK constitution means that there is no domestic obligation upon the legislature or executive to pay compensation as a result of an order from Strasbourg.

The effect of the Canadian jurisprudence has been, peculiarly, to move away from the provision of an effective remedy, despite the recognition of McLachlin C.J. it is a ‘fundamental right…that affirms the rule of law.’ Whilst the UK courts have arguably stretched the meaning of ‘interpretation’ beyond its traditional conception in an attempt to ensure they are able to provide a remedy where possible, the Canadian courts have retreated from the authority conferred upon them by the Constitution to enact effective remedies, through their increasing use of suspended declarations.

Whilst suspended declarations are not as permanently legally devoid of effectiveness as s.4 declarations, they are the equivalent for the period of the suspension in most cases. Ironically, the manner in which they were first used was in order to maintain the rule of law, with the consequence of immediate nullity in that instance being the absence of any law whatsoever. However, the manner in which the SCC has used its remedial powers means that the court has moved away from the presumption of unconstitutional laws being an immediate nullity. It has shown an awareness of the ineffectiveness of this through considering exemptions, yet as was

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259 Greens v MT, supra. n.257.
260 Ibid.
261 Ciccocioppo, ‘There is no justice without access to justice: Chief Justice Beverley McLachlin’, (2011) University of Toronto Faculty of Law Newsroom
262 Kavanagh, ‘What’s so Weak’, supra. n.14
264 Manitoba Language, supra. n.38.
265 Carter II, supra. n.100
shown above, this then brings the law into conflict with the need for it to apply ‘without exception’.266

As will be seen below, these two situations present an irreconcilable quandary where the rights-violating legislation cannot be remedied through interpretation. Either the court must remedy the legislation generally, and in doing so, potentially engage in policy; or the court must remedy the legislation for the specific litigant, and elevate them above other members of the polity. I will argue that the rule of law elevates the need for generality over potential interference with policy issues, and that therefore the most acceptable remedy is legislative strike-down or amendment.

3.3.2 Retrospectivity

The expectation with most remedies concerning the invalidity of laws is that they are to take retrospective effect, either through reversing the effects of the unlawful law from the time that they were imposed, or through providing compensation for that period of harm. In contrast to the prospectivity of such decisions, which should extend forward without the need for judicial authorisation, retrospective remedies may however require judicial approval or administrative approval. The Canadian Charter system originally took this approach, with rights-violating legislation found to be a nullity, whilst the UK common law states, as adumbrated by Lord Goff in *Kleinwort Benson*, that the law would be of retrospective effect for any similar cases that may come before the courts.267

However, through the SCC moving towards suspended declarations, and the UKSC relying upon s.4, this retrospectivity is circumnavigated. If the decision of the SCC comes into effect, through the legislature not acting, the presumption would be that the decision would have retrospective effect, in line with the common law framework. However, where legislation is drafted, it operates on a presumption that the legislation is only prospective, unless otherwise specified.268

As such, the violations that occurred between the date of legislative enactment and the date of legislative amendment are recognised as violations, but are not remedied as such. In the UK, given the absence of any strong-form powers, there is no prospect of a judicial rights remedy

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266 Tamanaha, ‘On the Rule of Law’, *supra. n.169.*
267 *Kleinwort Benson Ltd v. Lincoln City Council* [1998] UKHL 38.
268 Hickman, ‘Bills of Rights’, *supra. n.20, 54.*
other than interpretation having retrospective effect,\textsuperscript{269} with the successful party solely reliant upon Parliament to make the legislation retrospective; although this is a near futile hope, given that in the 20 remedied pieces of legislation, retroactivity has only been legislated for in a single instance.\textsuperscript{270}

The harm that this can potentially do can be seen through the consequences of the s.4 declaration in Bellinger.\textsuperscript{271} Whilst Mrs Bellinger was integral to the change of the law through the enactment of the Gender Recognition Act 2004, which permitted those who had undergone gender reassignment surgery to lawfully marry, the 2004 Act had no effect upon her 1981 marriage, which remained unlawful. As such, despite the recognition that her rights had been violated from 1981 to 2004, she received no recompense for the twenty-three years of harm that she suffered. Thus, whilst s.4 may give the appearance of a change in the law, this view often fails to consider those who have been so necessary to the enactment of any change.\textsuperscript{272} Whilst declarations may be effective in ensuring that our conception of rights remains current, the success of a legislative amendment allows the harm done affected individuals, with whom the law should be concerned, to be glossed over.\textsuperscript{273} Should the SCC continue down the path of broadening the criteria for suspended declarations of invalidity, it runs the risk of creating a similar set of circumstances, forgetting its role in ensuring the retrospective protection of rights of harmed litigants in favour of more democratic law-making.

It is important to note that this is not a claim that all judicial decisions should be retrospective. During the period in which the act in question is viewed as lawful, those under it would have 'regulated their lives on the presumption that the act is valid'.\textsuperscript{274} Thus, a whole host of actions could have taken place under the act, some of which could not reasonably be expected to result in recompense for the harm done. However, the relevant point is that through the courts declaring an act invalid, there is the potential for an individual to receive recompense or remedy,

\textsuperscript{269} King, ‘Parliament’s Role’, supra. n.35.

\textsuperscript{270} Ibid.

\textsuperscript{271} Supra. n.51.

\textsuperscript{272} The harm caused by non-retrospectivity can be seen more tangibly in International Transport Roth GmbH v SSHD [2002] EWCA Civ 58. There, the fixed nature of penalties under the Immigration and Asylum Act 1996 was in violation of Art.6 ECHR, and declared so under s.4 HRA. Although this was redressed in legislation, the penalties paid by the company were not recoverable.

\textsuperscript{273} Hickman, supra. n.20, 45.

if they can show that it would be warranted.\textsuperscript{275} Through legislation achieving the same reform, this potential is eradicated.

\textbf{3.3.3 Delay}

Finally, these remedies run the risk of justice being delayed significantly, and potentially indefinitely, for both successful litigants and similarly situated individuals. There is a constitutional presumption that legal remedies will take immediate, or near immediate effect, for instance, Magna Carta expressly states that ‘to no one will we refuse or delay, right or justice…’\textsuperscript{276} whilst Art. 6 of the ECHR guarantees that rights must be enforced ‘within a reasonable time’\textsuperscript{277}.

This raises the question of what constitutes a ‘reasonable time’, with the practicalities of any decision, judicial or otherwise requiring time to be spent putting the remedies in place. Nonetheless, whilst the HRA does contain means by which rights can be remedied by the legislature with minimal delay, with the government using a remedial order under s.10 of the HRA. However, this method has only been used on three occasions, with Jeff King showing that the overwhelming majority of responses coming as a result of subsequent primary legislation,\textsuperscript{278} and that there is a ‘fairly substantial’ delay between the judgment and remedial provision (lag time) of twenty-five months. This approach compares unfavourably to Canada, where the average ‘lag time’ is four months.\textsuperscript{279}

However, the issue of delay is not one confined purely to the UK system. Whilst the majority of Canadian decisions result in a low lag time, the decisions of the SCC which are suspended see an average delay of eleven months before a legislative response occurs.\textsuperscript{280} This period potentially

\begin{footnotesize}
\textsuperscript{275} For instance, in \textit{Percy v Hall} [1996] 4 All ER 523, the legality of arrests which had occurred under a by-law which was found to be invalid were challenged. The Court of Appeal found that whilst setting aside a conviction retrospectively on the basis of the invalidity was reasonable, a finding of tortious conduct for false arrest had ‘no sound policy reason’ underpinning it (per Simon Brown LJ at 541).

\textsuperscript{276} Magna Carta,

\textsuperscript{277} The European Convention on Human Rights, Article 6.

\textsuperscript{278} King, \textit{supra.} n.35.

\textsuperscript{279} \textit{Ibid.}

\textsuperscript{280} \textit{Ibid.}
\end{footnotesize}
reflects the suspension of the order for a twelve month period, and the burden put upon Parliament to respond to the declaration within that time frame.

Any system which provides for the legislature to contribute to the remedying of rights will necessarily require some delay between the handing down of the judgment and the devising of a remedy by the legislature. To some degree, given the nature of the legislative process, a greater delay is more likely to allow all the constituent parts of the legislature to work effectively, and create the most effective long term situation. The nature of suspended declarations in Canada prevents this from occurring, and whilst the structure of the HRA could permit this, the general response of the legislature to s.4 declarations has meant that it has not emerged, with the legislature viewing the role of the courts as ‘interpreting rights at first instance’, and that they are therefore not intended to ‘offer a contrary interpretation of the right’. Similarly, decisions such as Sauve II demonstrate how the Court can take a legislative response as insufficient, and impose the conception of the right it envisaged on the original appeal. The response of the SCC to the legislative responses in Bedford and Carter will provide some guidance as to how far the SCC is willing to permit the legislature to depart judicial intention. Should the Court take a dim view of the approach of the legislature, and strikes down the law, the harm caused to individuals in the interim will have been to little gain.

As will be argued, the benefits that are achieved by engaging in dialogue, and through the legislative determination of policy, can be provided in a system that provides with a more immediately effective remedy. By allowing the courts to introduce an effective remedy, alongside the express recognition of the need for legislative contributions, rights violations are minimised, whilst still ultimately subject Parliament, both in its legislative response, and through its capacity to expressly contravene rights protections, through s.33 in Canada and the principle of legality in the UK.  

4  PART IV

4.1  An Alternative Remedy

The difficulties that have emerged from adjudication of human rights issues are arguably rooted in the fact that rights cross the legal-political divide. They are increasingly protected legally

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281 ex p. Simms, supra. n.167.
through the courts, yet are simultaneously defined by both the courts and the legislature. This need to accommodate legislative understandings and concerns about rights must therefore be balanced with the need for the court to provide effective remedies, but in a way which does not privilege those immediately before the court, and which presents a coherent relationship between the three powers.

The methods which the UK and Canadian courts have attempted to balance the need for legislative contributions alongside an effective protection of rights have often failed to successfully achieve either. The discussion of Nicklinson and Chester above has demonstrated the potential ineffectiveness of declarations, both in and of themselves as a remedy, and as a means of inculcating dialogue. Indeed, the question of a declaration being an effective remedy was faced directly by the Australian High Court, who found that the power to give a declaration was not a judicial power, given that it required the presiding court to acknowledge the ‘denial of…Charter rights’, whilst ‘upholding the validity of the conviction’. Similarly, Hickman suggests that where the s.4 declaration is not accepted as the determination of the law, it devalues the courts, reducing them to a ‘privileged pressure group’ proposing arguments.

As such, restricting the judiciary from nullifying or amending rights–violating legislation restricts them from fulfilling their constitutional duty. However, as has been discussed, giving the courts the power to determine any rights issue will necessarily engage the courts in policy making, requiring them to make decisions which are properly the jurisdiction of the political branches. This therefore places anyone developing a remedy in a quandary. It is impossible to reconcile the need for the courts to have effective oversight of rights, whilst prohibiting them from having some involvement in the development of policy.

All the solutions therefore require some form of compromise. Either the courts’ ability to remedy the violations must be inhibited, or the courts’ ability to make policy choices must be extended. Roach has argued that the most effective system would be an adaptation of the Canadian system, similar to that which emerged as a result of Carter II. By permitting the court to hand down remedies to those before it, alongside a suspended declaration requiring Parliament to develop a remedial response, or expressly accept the system devised by the court,

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\text{(282)} \quad \text{Momcilovic v Australia, at [604].}
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\text{(283)} \quad \text{Hickman, ‘Courts and Politics After the HRA’ supra n.166, 100.}
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\text{(284)} \quad \text{Ibid.}
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the courts are able to exercise their remedial powers in the manner they are best suited to, whilst the long term, universal policy decisions are made by the legislature.

However, this, as has been discussed, runs the risk of horizontal inequality. Rights are intended to be universal, and their effect should be equally universal. Relying upon the courts to hand down individual remedies reduces rights to objects of chance, dependent upon the litigants’ ability to engage in the judicial system, and on the chance of a court listing occurring before the suspended period runs out. Not only is this likely to privilege the most advantaged groups in society, but it will require the courts to make policy choices. Admittedly, on a small scale, but nonetheless, in a manner which will result in a patchwork of individuals able to access a remedy dependent upon a choice that is beyond the ambit of the courts’ power on a broader stage.

Moreover, in the event that Parliament fails to legislate, and the courts refuse an extension, a policy choice must come into effect (in Canada). This places the argument that courts are ill-equipped to make policy choices, which is at the root of such an approach, in direct conflict with the courts’ eventual ability to make such choices.

Instead, I outline below a system which could function in both jurisdictions, that would return the Canadian courts to a function similar to that which originally existed under the Charter, and would confer upon the UK courts more power in declaring laws invalid and amending laws, whilst recognising more explicitly the nature of their interpretative powers. However, this system would also contain a more explicitly dialogic remedy, encouraging contributions of the political branches. this system,

This system would operate on three levels, with the first two levels distinguishing the interpretative approaches of the UK courts towards s.3, and the third, short-term strike down power recognising the need for legislative contributions.

As has been discussed, the broad use of s.3 by the UK judiciary has served to obscure whether the court is truly interpreting or quasi-legislating. Recognising the breadth of this power would create greater transparency and coherence as to the nature of the judicial remedy. As such, within the first two levels of interpretation, there would be a distinction drawn between strong interpretation, permitted by virtue of s.3, and ordinary interpretation, which is consistent with

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285 A chance that is not particularly high, given the delays that are endemic within most modern legal systems. For instance, see Owen Bowcott, ‘Delays Taking 19 Months to get to Appeal Courts Owing to Backlogs’, *The Guardian*, 7 March 2016. Available at www.guardian.co.uk.
the ordinary norms of judicial interpretation.\textsuperscript{286} For instance, in \textit{R v A}, where Lord Steyn engaged in \textquote{substantial re-writing of the legislative provision},\textsuperscript{287} the remedy would fall under the strong form interpretation. This would more transparently recognise the remedial task performed by the courts, and would recognise that a policy choice was being made, albeit a circumscribed choice arguably within the expertise of the courts. However, given that the government has been willing to accept s.3 interpretations, the exercising of such a power is unlikely to result in legislative or executive opposition, thereby creating the risk of further legislation which may threaten rights.\textsuperscript{288}

The third level would operate in a manner akin to the original functioning of the Canadian declaration of invalidity, alongside a s.33 provision. However, rather than being presented as form of legislative override, where the legislature is denying the application of the correct rights-interpretation, the new provision would function as a more dialogic tool, with the Court expressly welcoming a long-term legislative solution, reflecting the superior ability of the legislature to draft and implement multi-faceted, wide ranging solutions. Alternatively, if the legislature was determined to maintain the rights-violating provisions, they would retain the option to do this, albeit in a manner which expressly recognised the intent of the legislation to abridge rights.

I suggest that this system more effectively respects rights, and upholds the rule of law, whilst still ensuring that parliament is able to contribute to rights-dialogue, and if necessary, have the last word.

\textbf{4.1.1 Constitutional Enforcement}

First, this system would recognise the need for constitutional enforcement through an effective protection of rights. At present, the UK system ostensibly permits the most egregious violations of rights, allowing Parliament to sit idly by. This system favours legislative inertia, ahead of rights protections, and in doing so, elevates the notion of parliamentary supremacy ahead of all

\textsuperscript{286} Kavanagh, \textquote{What’s so Weak?}, \textit{supra.} n.14, 19.

\textsuperscript{287} \textit{Ibid.}

\textsuperscript{288} Lord Phillips, \textquote{The Art of the Possible: Statutory Interpretation and Human Rights}, \textit{The First Lord Alexander of Weedon Lecture}, (April 2010).
other constitutional fundamentals, fundamentals which are arguably equally a part of the constitutional tradition of the common law.289

Through placing the burden upon Parliament to redress rights in the long-term, but by ensuring that rights are adequately upheld in the short-term ensures that there is a more proper balance between the constitutional principles in play. This system will ensure the immediate, effective protection of rights, whilst not introducing judicial supremacy, with Parliament still permitted, and in some cases invited, to have the last word. Further, this is not an approach which is inconsistent with general practice, or in some way radical, but instead a practice which would bring the UK into line with the majority of other western countries.290

The concern that courts will begin to develop policy under this system is a legitimate one. Yet, as I have outlined above, the nature of any suspended remedy is that there is a risk that the courts’ policy will come into effect at the end of the period, should the legislature remain inert. As such, the harm has been done to rights for the entirety of the suspended period, justified on the basis that it would be institutionally unacceptable for the courts to remedy it, is now to be remedied by the courts. There is no clear explanation as to why this institutional justification for restraint falls away after a confined period.

Moreover, in the alternative, where the courts are unable to change the law, but can exempt individuals, a long term refusal from the legislature to amend the law, coupled with significant engagement with the courts by affected individuals could lead to a chaotic legal system. This theory, if stretched to its logical conclusion, could lead to everyone affected by a rights-violating law being exempt from the law. For instance, in the case of prisoner voting, each prisoner could theoretically apply for the right to vote. Depending upon the approach of the adjudicating court, this could lead to a law prohibiting the vote to prisoners universally, yet with all prisoners individually exempted by the courts.

Finally, this shift towards constitutional enforcement does not necessarily erode the role of the legislature, and in some ways, may enhance it.291 It has been shown that the UK Parliament is remarkably compliant (in most instances) to declarations of incompatibility, and nearly wholly

289 Hickman, ‘Bills of Rights’. supra. n. 20, 42.
291 Ibid., 53.
accepting of s.3 interpretations.\textsuperscript{292} Similarly, the Canadian system has shown the SCC to be dismissive towards the contributions of the legislature towards conceptions of rights in \textit{Sauve II}, whilst s.33 does not acknowledge Parliament’s role in defining rights, but its power to abridge them temporarily.

As such, in both systems, the courts are perceived as the ultimate arbiters of rights, and as such, any criticism of their reasoning or construction of their rights as denying the right, rather than offering an alternative perspective. In contrast, this system would allow the courts to operate an effective remedy, whilst expressly welcoming legislative contribution, where appropriate, in the definition of rights. To some degree, this would reflect s.33 of the Canadian Charter, but whereas s.33 retains the rights-violating status of the law, this system would provide for Parliament to contribute to the definition of the right, moving away from the view that rights are solely the preserve of the courts.

Such an approach may also lead to a greater dialogue emerging between the powers. Whilst some have praised the HRA for the development of dialogue, reality would suggest that true dialogue has been minimal. The current HRA framework provides no real mechanism by which the legislature is encouraged to offer a competing scheme for the protection of the right, and in reality, has led to either acceptance of s.3, or implementation of a s.4 declaration.\textsuperscript{293} In Canada, the use of suspended declarations has led to some dialogue, with the legislature adopting alternative approaches, but the suspension of the remedy is unnecessary for dialogue to emerge, especially given the fact that it does harm to a constitutionally protected right in the interim. Instead, an immediate, effective remedy, alongside a call for legislative engagement would promote a more frequent, and more fulfilling dialogue.

\textbf{4.1.2 General Effect}

The shift towards upholding rights in the short term also moves away from accepting a ‘temporary period of injustice for some’, and recognises the unique nature of constitutional litigation. Further, through making remedies of general effect, the court will be able to acknowledge its role in deciding policy, albeit in the short term. In contrast, where courts

\textsuperscript{292} \textit{Supra.} n.14

\textsuperscript{293} Hickman, ‘Bills of Rights’, \textit{supra.} n.20, 51.
provide remedies on an individual basis, there is the risk that the role of the courts, in making policy choices, is obscured.

Moreover, this system would be likely to introduce retroactivity into rights remedies, addressing the harm that has been done to individuals for the period of violation, such as in Roth, where the unconstitutional penalties paid by the successful litigants were never returned; and reflecting the intent of provisions such as s.10 HRA, the content of which has been broadly ignored by the UK Parliament. However, as the judiciary have been generally, more willing to recognise the harm that can be done by retroactive remedies in some instances, this retroactivity would still remain dependent on discretion.

4.1.3 Certainty and Transparency

As has been discussed, the current approach of the courts has verged towards incoherence and opacity at times. The UK courts’ reliance upon s.3 to implement an effective remedy has meant that the courts are frequently engaged in quasi-legislation, rather than interpretation, and in doing so, obscure their role. Similarly, the SCC’s desire to accommodate legislative contributions, possibly in response to the paucity of use of s.33 of the Charter by the legislature has led to an incoherent use of s.33, which rests increasingly upon institutional considerations.

Within the three tiers of remedy, the courts would be able to more transparently acknowledge their role as the arbiters of rights, whilst having less concern over inhibiting parliamentary responses over issues where there could be legitimate disagreement. The division of interpretation into weak-form and strong-form interpretation allows the courts to acknowledge when they have gone beyond their traditional powers of interpretation, and have engaged in more radical amendments, such as through reading in rights-correcting provisions. Whilst this may result in decisions comparable to those currently under s.3, it would do so in a more coherent and transparent way. This coherency may also lead to a more consistent approach from the judiciary. After the enactment of the HRA, there was significant difference of opinion as to the potency of s.3, with Lord Steyn at the vanguard of the ‘radical’ cohort, and with Lord Hope taking a more conservative view. Whilst there will always be varied perspectives of the power

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294 Supra. n.14, 26
295 In contrast to legislature’s general unwillingness to consider making legislation retroactive. See Roach, supra. n.13 295.
of any remedy, particularly an interpretive one, more clarity as to the potency (or lack thereof) of a judicial tool would aid cohesion.

Further, the use of a general, immediate short term remedy for more controversial rights issues would recognise the need for legislative contributions to rights. However, the manner in which suspended declarations have been used by the SCC has minimised the ability of the legislature to take full use of their institutional advantages, by confining them to a narrow timeframe. In contrast, this system would uphold rights in the short to medium term, whilst allowing Parliament to craft a more effective remedy according to its own timeframe, not the courts would not need to be concerned with the ongoing violations of rights, and the attendant harm, in the interim.

5 CONCLUSION

The suggestion that parliamentary sovereignty conflicts with the rule of law is not an uncommon one. However, this conflict is often presented in terms of substance, rather than upon the ‘thin’ principles which also make up the rule of law. I have set out how the development of remedies in a human rights context arguably brings the judiciary into conflict with the rule of law, a conflict often motivated by institutional limitations of the courts, and the institutional advantages of Parliament.

The nature of rights means that their enforcement, whether by the courts or the legislature, will always lead to controversy, either over the definition of the right itself, or the mechanism by which it is remedied. At the root of this controversy, however, is the need for a right that is recognised as having been violated, to be remedied. Whilst the two jurisdictions analysed take alternative approaches to how this remedy will be enacted, both are either willing or required to see harm done to the right whilst the legislature considers (or not) how to redress it.

The conflict as to how best to resolve the violation has also led to incoherence emerging within the approaches of the courts to the appropriate remedy, and concerns about the equality of the law, with some remedies elevating others, those privy to the litigation, above the general populace. This conflicts with the nature of rights and of constitutional law, which operate on the presumption that they are universal, and should be applied to all in analogous situations.

The quandary is not an easy one to resolve, with some abridgement of principle necessary. Some, such as Danny Nicol, would leave the matter more fully to the political process, seeing strong
judicial interpretation as ‘vandalism’, and the legislature as the most appropriate venue for the redress of rights. Others, such as Kent Roach, have persuasively argued that individual exemptions are the best midpoint.

However, these still entail harm being done to the rights of individuals, potentially for some time. As such, I have aimed to develop a system which still retains the supremacy of Parliament, but which requires this supremacy to be exercised in the clearest possible way if rights are to be violated. The compromise inherent in this system is that it does require the judiciary to engage in some policy work, but, as I have argued, this is only a small step removed from the role the courts already can play in Canada, where they implement a remedy. Whilst it is a significant step for the UK courts, it is not a step inconsistent with the judicial role elsewhere, and is less radical.

Finally, through more clearly acknowledging the respective roles of the institution, and the need for interaction between them, this system more accurately and transparently reflects the nature of the judicial role in constitutional concerns, upholding these elements of the rule of law.

297 Supra. n.223.
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