Suspended/Prospected declarations of invalidity: a comparative analysis of the Canadian, South African, and Italian judicial techniques

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Abstract: *Dichiarazioni di incostituzionalità "sospese"/prospettate: un'analisi comparata tra Canada, Sudafrica e Italia* – This paper analyzes the judicial technique known as the *suspended declaration of invalidity* in three different legal systems: those of Canada, South Africa, and Italy. The main goal is to examine whether these three different constitutional Courts use this decision-making method in the same way or with noteworthy differences. By briefly examining the jurisprudence of these Courts, this paper explains how, while these Courts' approach is very similar, each of them has developed its own way of entering into a cooperative and dialogic relationship with the legislature. As suggested in this paper, the Italian Constitutional Court seems more incline to preserve the legislature's margin of discretion by postponing its decision on the constitutionality of the challenged provisions rather than deferring the effects of such decision, therefore adopting a *prospected declaration* of invalidity, instead of suspending their effects.

Keywords: Constitutional court; Separation of Powers; Suspended declaration of invalidity.

1. Introduction

From the perspective of comparative constitutional law, Supreme Court Judges, in constitutional democracies, play a fundamental role in shaping the legal realm. Very broadly, as constitutional courts' declarations of the unconstitutionality of legal provisions remove such provisions, they can be seen as either negative legislators when they annul a law or positive legislators when their interpretation of a given legal rule is used to broaden the scope of application of that rule.[1] Therefore, judicial review could be seen as interfering with the principle of separation of powers, as it might potentially undermine the prerogatives of the legislature (i.e., elected representatives). According to some scholars, the traditionally bilateral and adjudicative character of judicial proceedings can generate some difficulties for courts in formulating or enforcing effective remedies in situations involving highly debated issues on which policymakers are strongly divided

[1] A.R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Study*, Cambridge, 2011, 5 ss.

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(e.g., euthanasia, LGBT rights, and abortion).[2] As Spadaro suggested, the relationship between constitutional courts and parliaments has evolved: from one based on collaboration[3] — essentially cooperative — to one that is dialectical and, occasionally, even conflictual.[4]

Consequently, as many scholars contend worldwide, Supreme Courts (SCs) can be perceived as "invaders" of the legislature's sphere of competence,[5] since their judgments — or their decisions not to decide[6] — can be understood as political choices instead of exercises of judicial power.[7] In fact, if courts are perceived as legislators — though only in the so-called "hard cases" — the idea of "law" can significantly change. Legal experts will then focus on judges' opinions instead of their decisions when trying to foresee possible future outcomes.[8]

On the contrary, other scholars of legal doctrine argue that judicial activism is necessary and desirable, since it can play a crucial role in controlling the chaotic system created by lawmakers in constitutional democracies, thereby preventing fundamental rights violations.[9] In addition, also the legislature's inaction may result in a violation of constitutional

[2] E. Carolan, *The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity*, in 46 *Irish Jur.* 185 (2011).

[3] This paper does not elaborate on the theoretical background behind the so-called judicial dialogue between Courts and legislature, and its developments. It is possible to refer to a vast number of legal scholars. At first, Alexander Bickel, elaborated the theory of judicial review based on the assumption that Courts and legislatures play different but complementary roles in a dialogue between themselves and society as whole. Then, in particular in Canada, this idea has been developed extensively. See P.W. Hogg, R. Amarnath, *Understanding Dialogue Theory*, in P. Oliver, P. Macklem, N. Des Rosiers (Eds.), *The Oxford Handbook of the Canadian Constitution*, Oxford, 2017; S. Gerotto, *Il dialogo tra giudici e legislatori in Canada a 15 anni da Hogg e Bushell*, in E. Ceccherini (cur.), *A trent'anni dalla* Patriation *canadese, riflessioni della dottrina italiana*, Genova, 2013; P.W. Hogg, A. Bushell Thornton, W.K. Wright, *Charter Dialogue Revisited: Or "Much Ado About Metaphors"*, in 45(1) *Osgoode Hall L.J.* 2 (2007); C.A. Fraser, *Constitutional Dialogues Between Courts and Legislatures: Can we Talk?*, in 14(3) *Const. Forum* 7 (2005); A. Bickel, *The Supreme Court and the Idea of Progress*, New York, 1970.

[4] See A. Spadaro, *Involuzione – o Evoluzione? – del Rapporto fra Corte Costituzionale e Legislatore (Notazioni Ricostruttive)*, in *Riv. AIC*, 2, 2023, 104 ss. On this point, see, M. Nicolini, *"Dialogo", "tensione", e supra majoritarian difficulty: per una lettura dei rapporti tra giurisdizione costituzionale e potere democraticamente legittimato*, in D. Butturini, M. Nicolini (cur), *Giurisdizione costituzionale e potere democraticamente legittimato, i soggetti, gli strumenti e i meccanismi del dialogo*, vol. 1, Bologna, 2017, 49 ss.

[5] G. Laneve, *La giustizia costituzionale nel sistema dei poteri – interpretazione e giustizia costituzionale: profili ricostruttivi*, vol. 1, Bari, 2014, 183 ss.

[6] See C. N. Tate, *Why the Expansion of Judicial Power?*, in C. N. Tate, T. Vallinder (Eds.), *The Global Expansion of Judicial Power*, New York, 1995, 33 ss.

[7] See G. Silvestri, *Del rendere giustizia costituzionale*, in *Quest. giust.*, 4, 2020, 24 ss.

[8] K. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in 75 *Colum. L. Rev.* 359, 397 ss. (1975).

[9] A. Chacko, P. K. Goyal, *Judicial Legislation and Contemporary Challenges*, in 5(3) *Int'l J.L. Mgmt. & Human.* 1099 (2022).

rights that cannot be tolerated, and SCs cannot refuse to provide a solution by hiding behind the so-called "political question."[10]

However, the adoption of judicial review techniques, such as the so-called "delayed declaration of unconstitutionality," could also undermine citizens' confidence in the fundamental role of judges in ensuring justice, respecting the principle of legal certainty, and upholding the rule of law.[11]

One of the goals of this paper is to understand whether the recent case law of the Italian Constitutional Court regarding the so-called "*prospected declaration of invalidity*" must be considered similar to judicial techniques used in other legal systems or whether it has differences. In addition, this paper is aimed at determining whether it is possible to identify which of the analyzed courts can best guarantee the principle of separation of powers.

To achieve these goals, this article provides a brief comparative overview of the developments of these deciding techniques in three different legal systems: the Canadian, South African, and Italian legal systems. As will be evident in the following paragraphs, what is interesting in these three different systems is that constitutional courts, though achieving the same results — that is, giving the legislature the chance to remedy unconstitutionality— have developed slightly different approaches to it.[12] In this context, the comparison can help explain the reasons behind, and the issues beyond, the courts' decision to delay the immediate effects of their declaration of unconstitutionality. In particular, comparative constitutional case law can help elucidate the functioning of delayed/ prospected

[10] The doctrine of "political question" argues that judges ("the apolitical branch") should not decide on political issues. This judicial approach is also known as the "no justiciability doctrine." The U.S. Supreme Court first applied this doctrine in *Oetjen v. Central Leather Co.* (246 U.S. 297, 1918), in which it found that the conduct of foreign relations was the responsibility of the executive branch and therefore, it held that cases that challenge how the executive branch uses that power are to be considered "political questions." See, E. Andreoli, *Dialogo o judicial interpretation? La* political question doctrine: *tra giuridico ed opportunità politica*, in D. Butturini, M. Nicolini (cur.), *cit.*, 2017, 75 ss.; J.C. Smith, In Re *Hooker: A Political Question Doctrine Game Change*, in 32(3) *Miss. C. L. Rev.* (2014); C. Drigo, *Giustizia costituzionale e* political question doctrine, Bologna, 2012; and L.M. Seidman *The Secret Life of the Political Question Doctrine*, in 37 *J. Marshall L. Rev.* 441 (2004).

[11] As the Venice Commission underlined in its *Rule of Law Checklist* (CDL-AD (2016)007), «everyone has the right to be treated by all decision-makers with dignity, equality, and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures». Thus, legal certainty can be viewed as an essential component of every legal system, since it permits the harmonious coexistence of the interests of many people. It can also foster social collaboration by ensuring mutual expectations in the extremely delicate relationship between citizens and public authorities, particularly, judges. See J. Rawls, *A Theory of Justice*, Cambridge, 1971, 235 ss.; and N. Bobbio, *La certezza del Diritto è un mito?*, in *Riv. int. fil. dir.*, 28, 1951, 150 ss.

[12] R. Serafin, *Suspended Declaration of Invalidity. A Comparative Perspective*, in 17(1) *J. Compar. L.* 115 (2022).

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declarations,[13] and thus, explain the theoretical framework of such declarations.[14]

Supreme Court judges' suspension of the effects of a declaration of invalidity means that they have the power to strike down an unconstitutional provision while freezing the effect of that judgment for a certain length of time to avoid a *lacuna* or clash with Parliament.[15] The legislator should use that time to pass a new piece of legislation that could remedy the invalidity of the previous legislation, i.e., to revise or completely change the legislation. Many scholars have elaborated on this judicial technique[16] and criticized its use.[17] For instance, according to Hole, some courts have become too familiar with the use of suspended declarations, thus endangering constitutional rights.[18]

2. The Canadian approach

[13] On the importance of considering case law at the constitutional or supranational level to better understand the meaning of constitutional principles through "transjudicial dialogues," see B. Makowiecky Salles, P. Márcio Cruz, and N. Basigli, *Attivismo giudiziale e dialoghi transgiudiziali: parametri per l'interazione tra decisioni nazionali e straniere*, in *Riv. AIC*, 3, 2021; K.D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism'*, in 92(5) *Cal. L. Rev.* 1441 (2004); C. Wolf, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, London, 1994.

[14] This judicial technique is not brand new. In fact, the German Constitutional Court adopted the so-called "declaration of incompatibility" in 1958. Unlike the declaration of invalidity, the declaration of incompatibility does not immediately nullify a statutory provision, thus, giving the legislature the opportunity to pass a new law in accordance with the Constitution. See R. Serafin, *op. cit.*, 116; R. L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, in 125(6) *Yale L.J.* 1725 (2016); N. Fiano, *La modulazione nel tempo delle decisioni della Corte Costituzionale tra dichiarazione di incostituzionalità e discrezionalità del Parlamento: uno sguardo alla giurisprudenza costituzionale tedesca*, in *Forum Quad. Cost.*, 2016.

[15] This technique is often analyzed in comparison with the power to adopt the so-called prospective overruling, that is, the possibility for a court to impose a temporal restriction on its decision, so that it would be applicable only for future cases. As some scholars argue, the main difference between delayed statements of unconstitutionality and the power of prospective annulment is that in one scenario, the judgment takes effect immediately, while in the other case, the sentence takes effect after a certain time has passed. On this point, you see, S. Beswick, *Prospective Overruling Unravelled*, in 41(1) *Civ. Just. Q.* 29 (2022); M. Arden, *Prospective Overruling, Human Rights and European Law: Building New Legal Orders*, Oxford, 2015, 267 ss.

[16] S. Gerotto, *Le delayed e le general declarations of invalidity nell'ordinamento canadese: un caso paradigmatico per il diritto comparato*, in D. Butturini, M. Nicolini (cur.), *Tipologie ed effetti temporali delle decisioni di incostituzionalità, Percorsi di diritto costituzionale interno e comparato*, Napoli, 2014, 253 ss.

[17] See C. Mouland, *Remedying the Remedy: Bedford' s Suspended Declaration of Invalidity*, in 41(4) *Man. L.J.* 286 (2018); A. Niblett, *Delaying Declarations of Constitutional Invalidity*, in F. Fagan, S. Levmore (Eds.), *The Timing of Lawmaking*, Chicago, 2017, 299 ss.

[18] G.R. Hoole, *Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law*, in 49(1) *Alberta L. Rev.* 107, 110 ss. (2011).

The Canadian Constitution allows the Supreme Court of Canada (SCC) to make an "immediate" declaration of invalidity but does not mention the possibility for the SCC to resort to a suspended declaration of unconstitutionality. Thus, the SCC developed the latter based on unwritten constitutional principles. The SCC makes such a declaration when immediately voiding a legislation could worsen the scenario (e.g., cause a legislative gap).[19] Nevertheless, as some authors have pointed out, the Canadian Constitution allows the legislative branch to violate certain constitutional rights — that is, by maintaining or approving particular laws — if necessary by invoking the "notwithstanding" clause.[20] Hence, considering the principle of separation of powers, courts would not need to resort to suspended declarations of invalidity, and whenever they would do so, it would undermine the principle of separation of powers. In other words, lawlessness should be the only case in which it is legitimate to suspend the immediate effects of a declaration of invalidity.[21]

The SCC first used a delayed declaration of invalidity in the very famous (and highly commented on) case *Re Manitoba Language Rights*[22] in 1985. In this case, the SCC found that the Province of Manitoba — where laws were mostly written only in English — had failed to fulfill the constitutional requirement of enacting all of its laws in both French and English. The SCC ruled that all of Manitoba's laws that were not also available in French were unconstitutional, but the effects of the ruling were temporarily frozen to allow for legislative reform.

The SCC explained:

> «The Court must declare the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect. This declaration, however, without more, would create a legal vacuum with consequent legal chaos in the Province of Manitoba. [...] The constitutional principle of the rule of law would be violated by these consequences. [...] The rule of law requires the creation and maintenance of an actual order of positive laws to govern society. Law and order are indispensable elements of civilized life. This Court must recognize both the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the supreme law of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law. [...] It is therefore necessary, in order to preserve the rule of law, to deem temporarily valid and effective the Acts of the Manitoba

[19] E. Macfarlane, *Dialogue, Remedies, and Positive Rights: Carter v Canada as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms*, in 49(1) *Ottawa L. Rev.* 107, 116 ss. (2017).

[20] The Canadian Charter, in Art. 33, c. 1, reads: «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».

[21] B. Bird, *The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity*, in 42 *Man. L.J.* 23, 24 ss. (2019).

[22] SCC, *Re Manitoba Language Rights*, 1 S.C.R., para. 721, decided on 13 June 1985.

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> Legislature, which would be currently in force were it not for their constitutional defect. The period of temporary validity will run from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing».[23]

As a result, to circumvent a scenario in which both legal certainty and the principle of the rule law would have been violated, not only by an enormous legislative lacuna but also by the destruction of all previous obligations (with consequent legal chaos), the SCC decided that — pending the violation — Manitoba authorities had to have the time to remedy the past situation.[24]

In subsequent cases, the SCC developed its own doctrine concerning delayed declaration of invalidity. In *Schachter*,[25] Canadian Supreme Court judges stated that when Canadian courts find a law unconstitutional, they must be given «flexibility in determining what course of action to take,»[26] including suspending the validity of their judgment.[27] In addition, the SCC noted how suspending the validity of a declaration of unconstitutionality should be preferred whenever the scrutinized legislation is considered underinclusive (i.e., when a law confers some benefits only on a group of people and excludes others). In this case, the legislature's discretion should be guaranteed as far as it does not amount to unreasonable discrimination under the Canadian Charter.[28]

In *Schachter*, the SCC seemed to suggest that delayed declarations were to be used only as exceptional remedies. However, this has changed in recent case law, as this judicial method is now being used very frequently.[29]

In *Bedford*,[30] the SCC observed the following in its decision on the constitutionality of legal provisions regulating prostitution:

> «Concluding that each of the challenged provisions violates the Charter does not mean that Parliament is precluded from imposing limits on where and how prostitution may be

[23] *Ivi*., Introductory Part.

[24] *Ivi*, para. 81.

[25] SCC, *Schachter v Canada*, 2 SCR, para. 679, decided on 9 July 1992.

[26] *Ivi*, para. 696.

[27] However, according to the SCC, a Judge «may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, supra) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, 1 S.C.R., 721, 1985)». *Ivi*, para. 715.

[28] According to the SCC, «if the government [does not have an obligation] to provide [specific] benefits in the first place, it may be inappropriate [for the government] to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government [to determine what to do]». *Ibidem*, para. 715.

[29] C. Mouland, *op. cit*., 347 ss.; K. Roach, *Remedial Consensus and Challenge under the Charter*, in 35 *U.B.C. L. Rev.* 220 (2002).

[30] SCC, *Canada (Attorney General) v. Bedford*, decided on 20 December 2013.

> conducted, as long as it does so in a way that does not infringe [on] the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year».[31]

Again, in 2015, in the *Carter*[32] case that concerned legislation on medical assistance in dying, the SCC — while recognizing that the criminal laws prohibiting assistance in dying limited the rights to life, liberty, and security under Section 7 of the Canadian Charter — granted the Canadian Parliament a total of 16 months to revise such laws (12 months plus an extension of 4 months).[33] The SCC did not elaborate on the "exceptional" reasons behind its decision to issue a delayed declaration of invalidity, unlike in *Re Manitoba Language Rights* or *Schachter*.[34] Instead, it recognized that for people with a non-curable disease, the issue of assisted suicide was highly complex, and Parliament had to deal with the difficult task of balancing competing public interests.

In other words, in both *Bedford* and *Carter*, there was no risk that a classical declaration of unconstitutionality would undermine the rule of law or create lawlessness. Thus, in Canada, the SCC is frequently using delayed declarations to preserve the separation of powers and permit a dialogic relationship between the SCC and the legislature. Consequently, the legislature is allowed to exercise its mandate within a specified timeframe and within the SCC's established constitutional framework.[35] Considering the timeframe, in *R. v. Albashir*,[36] the SCC explained how, when a legislature enacts new legislation to address the unconstitutional effects of a law during a period of suspension of invalidity, it is crucial to explicitly state the temporal effect of the new law,[37] and consider the possibility to provide for

[31] *Ivi*, para. 165.

[32] SCC, *Carter v. Canada (Attorney General)*, 1 SCR, para. 331, decided on 6 February 2015.

[33] The Supreme Court of Canada has granted the federal government a four-month extension to give it more time to draft a law on physician-assisted suicide. The Attorney General of Canada had requested a six-month extension, but the majority concluded that four months was appropriate because Parliament was dissolved in early August pending the election and was not reconvened until early December.

[34] See E. Macfarlane, *Dialogue, Remedies, and Positive Rights*, cit., 116 ss.; D. Lepofsky, *Carter v. Canada (Attorney General), The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee*, in 76 *Sup. Ct. L. Rev.* 90 (2016); S. Burningham, *A Comment on the Court's Decision to Suspend the Declaration of Invalidity in Carter v. Canada*, in 78 *Sask. L. Rev.* 201 (2015).

[35] B. Bird, *op. cit.*, 47 ss.

[36] SCC, *R. v. Albashir*, SCC 48, decided on 19 november 2021.

[37] *Ivi*, para. 93.

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transitional provisions on the temporal effect of the law so as to avoid confusion.[38]

3. The South African system

In South Africa, the Constitutional Court (ZACC) is familiar with the use of delayed declarations of invalidity, since the country's Constitution (Section 172, c. 1) explicitly provides that courts are allowed to temporarily suspend a declaration of invalidity whenever it would be "just and equitable" to do so, unlike in the Canadian Constitution.[39] As the meaning of "just and equitable" here is vague, the ZACC had to elaborate it.[40]

In *Mistry v Interim National Medical and Dental Council of South Africa*,[41] Justice Sachs (offering a concurring opinion) upheld that for the ZACC to suspend the validity of its judgment, the following had to be demonstrated:

> «[…] the negative consequences for justice and good government of an immediately operational declaration of invalidity […]; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation».[42]

Moreover, the appropriateness of suspending a declaration of invalidity is linked to the necessity of preventing lawlessness. In the aforementioned case, according to the ZACC, judges must consider two main aspects: on the one hand, the interest of the successful litigant in obtaining immediate constitutional relief, and on the other hand, the potential risk of a legislative lacuna.[43] Therefore, no suspension should be granted if no lacuna is determined.

The ZACC has gone further in specifying when a suspended declaration could be deemed necessary. It stated that when a constitutional violation involves a case of discrimination (e.g., the recognition of LGBT

[38] On this point, see, A.M. Turley, Z. Oxaal, *The Significance of R. v. Albashir in the Evolution of Constitutional Remedies*, in 108 *Sup. Ct L. Rev.* 139 (2023); E. Ceccherini, *La certezza del diritto in Canada è una questione di interpretazione?*, in *DPCE*, 2, 2023, 601 ss.

[39] See R. Leckey, *Remedial Practice Beyond Constitutional Tex*, in 64(1) *The American Journal of Comparative Law* 3 (2016); K. Roach, G. Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?*, in 122(2) *African L. J.* 325 (2005).

[40] For an overview of the South African constitutional Court judicial developments, see A. Rinella, V. Cardinale, *The Comparative Legal Tool-Kit of the Constitutional Court of South Africa*, in G.F. Ferrari (Ed.), *Judicial Cosmopolitanism, The Use of Foreign Law in Contemporary Constitutional System*, Leiden-Boston, 2019, 217 ss.

[41] ZACC, *Mistry v Interim National Medical and Dental Council and Others*, CCT13/97, decided on 29 May 1998.

[42] *Ivi*, para. 37.

[43] ZACC, *J and Another v Director General, Department of Home Affairs and Others*, CCT46/02, decided on 28 March 2003, para. 21.

rights), there might be a wide range of possible solutions, which should be primarily suitable for the legislature.[44]

In the 2018 case of *Mlungwana and Others v S and Another*,[45] the ZACC clearly fixed the following three criteria for judges' suspension of the validity of a declaration of unconstitutionality:

> «[…] (a) the declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship; (b) there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and (c) the right in question will not be undermined by suspending the declaration of invalidity». [46]

Regarding the third criterion, the ZACC can always provide for *interim* remedies while the legislature is amending the unconstitutional law. Indeed, in *Zondi v. MEC for Traditional and Local Governments Affair*, the ZACC noted how «[t]he infringement of constitutional rights cannot be allowed to continue in the interim»[47] so it granted an exemption for those affected by the unconstitutional provisions.

Hence, the main differences between the Canadian and the South African systems are as follows: first, the Canadian Constitution is silent on suspended declarations of invalidity, while the South African Constitution explicitly allows them; and second, while in the Canadian system, a law that is declared unconstitutional through a delayed declaration remains in force until the solicited legislature intervention is made, in the African system, the constitutional Court can issue an interim order to grant relief to a victim of an unconstitutional provision during the period granted to the legislature to remedy such unconstitutionality.[48]

4. The Italian system

In Italy, the characteristics of the postponed declaration of invalidity, can be distinguished from those of the aforementioned Canadian and South African systems. The use of *prospected declarations of invalidity* is one of the most

[44] ZACC, *Dawood and Another v Minister of Home Affairs and Others*, CCT35/99, decided on 7 June 2000, para. 64. In this case, the ZACC had to decide whether it was constitutional for the Aliens Control Act of 1996 to require the granting of an immigration permit to the spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit.

[45] ZACC, *Mlungwana and Others v S and Another*, CCT32/18, decided on 19 November 2018, para. 105. In this, the ZACC deeply analyzed the provisions of Art. 17 of the South African Constitution vis-à-vis Section 12 (1) a of the Regulation of Gatherings Act (RGA) of 1993 criminalizing protest conveners' failure — willingly or unwillingly — to give notice to public authorities before organizing a public rally involving more than 15 people at the same time and participating in unauthorized gatherings.

[46] *Ivi*, para. 105.

[47] ZACC, *Zondi v MEC for Traditional and Local Government Affairs*, CCT 73/03, decided on 15 October 2004, para. 129.

[48] R. Leckey, *The harms of remedial discretion*, in 14(3) *Int'l J. Const. L.* 591 (2016).

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recent judicial developments[49] aimed at preserving and promoting an open and constructive dialogue between constitutional justices and the legislature. The first attempt to adopt this judicial technique was in the 2018 Order n. 207[50] (the "*Cappato* case").[51] In this ruling on the constitutionality of the legal provision applied in the case of assistance to commit suicide, the Italian Constitutional Court (ICC) — while looking for the right balance between different values — underlined the following:

> «[T]he delicate balancing […] falls to Parliament as a matter of principle, as it is the natural role of this Court to verify the compatibility of choices already made by the legislator, in the exercise of its political discretion, with the limits dictated by the

[49] Elaborating on this innovative development in the Italian system, see D. Manelli, *La diffamazione a mezzo stampa e il persistente dominio dell'inerzia legislativa nella tutela dei diritti. La Consulta perfeziona un nuovo caso di "incostituzionalità differita" con la sentenza n. 150 del 2021*, in *Giur. cost.*, 1, 2022, 94 ss.; R. Romboli, *Il nuovo tipo di decisione in due tempi e il superamento delle "rime obbligate": la Corte costituzionale non terza, ma unica Camera dei diritti fondamentali?*, in *Foro it.*, 1, 2020, 2565 ss.; M. Picchi, *Un nuovo richiamo allo spirito di leale collaborazione istituzionale nel rispetto dei limiti delle reciproche attribuzioni: brevi riflessioni a margine dell'ordinanza. n. 132/2020 della Corte costituzionale*, in *Oss, fonti*, 3, 2020, 1413 ss.; C. Magnani, *Diffamazione e pena detentiva: la libertà di informazione tra ordinamento interno e Cedu nella ordinanza 132 del 2020 della Consulta*, in *Forum di Quad. Cost.*, 2, 2021, 163 ss.; and D. Tega, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale italiana*, Bologna, 2020, 163 ss.

[50] The Court has explicitly affirmed the necessity of preserving a dialogue with the Parliament. In fact, as the Court stated, «[I]t should be noted that whenever, as in the case at issue, the solution to the question of constitutionality involves the intersection between values of primary importance, the balancing of which presupposes, in a direct and immediate way, choices that the legislator is, first of all, authorized to make, this Court considers it appropriate — in a spirit of faithful and dialogical institutional cooperation — to allow Parliament, in this case, every appropriate reflection and initiative, so as to avoid, on the one hand, that a provision continues to produce effects considered to be unconstitutional in the ways described, but, at the same time, to prevent potential gaps in the protection of values, which are no less relevant at the constitutional level». ICC, Order n. 207/2018, para. 11.

[51] Marco Cappato was charged, under the Italian criminal code, for helping Fabiano Antoniani — who was paraplegic and blind because of a car accident in 2014 — to reach a Swiss clinic where it was possible for him to access the clinic's procedure for medically assisted suicide. The crime for which Cappato was charged could fetch from 5 to 12 years' imprisonment. When Cappato returned from Switzerland, he surrendered himself to the police, and during the trial, a question of constitutionality was filed before the ICC concerning Art. 580 of the Italian criminal code. See P. Caretti, *La Corte costituzionale chiude il caso Cappato ma sottolinea ancora una volta l'esigenza di un intervento legislativo in materia di "fine vita"*, in *Oss. fonti*, 1, 2020; M. Bonini, *From separation of powers to superiority of rights, The Italian Constitutional Court and end-of-life decisions (the Cappato case)*, in M. Belov (Ed.), *Courts, Politics and Constitutional Law*, New York, 2019; F. Dal Canto, *Il "caso Cappato" e l'ambigua concretezza del processo costituzionale incidentale*, in *Forum Quad. Cost.*, 2019; A. Ruggeri, *Venuto alla luce alla Consulta l'ircocervo costituzionale (a margine della ordinanza n. 207 del 2018 sul caso Cappato)*, in *Consulta online*, 3, 2018; V. C. Tripodina, *Quale morte per gli "immersi in una notte senza fine"? Sulla legittimità costituzionale dell'aiuto al suicidio e sul "diritto a morire per mano di altri"*, in *BioLaw J.* , 3, 2018; A. Ruggeri, *Pilato alla Consulta: decide di non decidere, perlomeno per ora... (a margine di un comunicato sul caso Cappato)*, in *Giur. Cost.*, 3, 2018.

need to respect constitutional principles and the fundamental rights of the persons involved».[52]

Prior to *Cappato*, the ICC adopted different approaches to handling unconstitutional laws to avoid inducing lawlessness or interfering with the prerogatives of the legislature. On numerous occasions, the ICC has applied and still applies what could be called the "warning, waiting, and possibly intervening" method. This judicial approach consists of two cases of the unconstitutionality of a law brought before the ICC at successive times (even many years apart). In the first case, the ICC issues a warning to the legislature (the so-called "*sentenza monito*") but rejects the case or declares it inadmissible, pointing out that the issue must be decided by the legislature.[53] In the second case, in the event of the legislature's inaction, the ICC may eventually decide that the law is unconstitutional. In the ICC's Ruling n. 826/1988 concerning the regulation of telecommunications, it clearly pointed out the following:

> «The future law cannot fail to contain limits and precautions aimed at preventing the formation of dominant positions detrimental to [...] Article 21 of the Constitution. Of course, the effectiveness of such a regulation [...] presupposes the introduction of a high degree of transparency [...], a transparency that still affects the value of pluralism and is therefore of constitutional importance». [54]

In 2022, the ICC intervened in the context of Italian law concerning the automatic attribution of a father's surname to his legitimate child, striking down that legal rule insofar as it did not permit married couples to also attribute the mother's name to the child by mutual agreement at the time of birth.[55] The ICC's perspective has been presented on multiple occasions. In Order n. 586/1988, on the one hand, the ICC recognized the legislature's margin of discretion, and the case was declared inadmissible. Conversely, in another ruling, ICC justices underlined the following:

> «[It] would be possible [...] to replace the current rule on the determination of the distinctive surname of members of a family established by marriage with a different criterion that

[52] ICC, Order n. 207/2018, para. 10.

[53] For instance, the ICC's ruling n. 138/2010, in which it decided on the constitutionality of a civil code provision prohibiting same-sex marriage, declared the case inadmissible. The ICC found that "[...] *for the purposes of Article 2 of the Constitution, it is for Parliament to determine — exercising its full discretion — the forms of guarantee and recognition for* [same-sex unions], *whilst the Constitutional Court has the possibility to intervene in order to protect specific situations.*" Ruling n. 138/2010, decided on 14 April 2010, *Conclusions on Points of Law*, para. 8.

[54] ICC, Ruling n. 826/1988, decided on 13 July 1998, *Conclusions on Points of Law*, para. 26.

[55] ICC, Ruling n. 131/2022, decided on 27 April 2022.

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affords greater respect to the autonomy of the married couple [...]».[56]

Eighteen years later, in Ruling n. 61/2006, the ICC expressly decided with even greater resoluteness — as the legislative framework had not changed — that the law under examination was incompatible with the constitutional values of moral and legal equality between man and wife. The system for attributing the surname was, in fact, defined as follows:

> «[... The] legacy of a patriarchal conception of the family rooted in the Roman tradition of family law and of a power within marriage that is now a thing of the past, and is no longer consistent with the principles underlying the legal system and the constitutional value of equality between men and women».[57]

Another judicial technique of the ICC for preventing its institutional clash with the legislature is its temporal modulation of its declarations of unconstitutionality. In its Ruling n. 1/2014, it postponed the effects of the ruling so as not to jeopardize the legislature then, thereby allowing the elected representatives to continue their mandate.[58] The ICC thus decided that

> «[...] since the decision to cancel the contested provisions has altered the legislation governing elections to the Chamber of Deputies and the Senate, it will only take effect during the next general election.»[59]

Returning to the technique that the ICC developed in the *Cappato* case, it first met on 23 October 2018 to analyze the constitutionality of Art. 580 of the Italian Criminal Code (i.e., assisting another person to commit suicide). The day after, explicitly referring to a similar case, *Carter* v. *Canada*,[60] it decided to suspend its examination and reconvene a year later in 2019, stating that:

> «[... as] the solution to the question of constitutionality involves the intersection between values of primary importance, the balancing of which presupposes, in a direct and immediate way, choices that the legislator is, first of all, authorized to make, this Court considers it appropriate — in a spirit of faithful and dialogical institutional cooperation — to allow Parliament, in

[56] ICC, Order n. 176/1988, decided on 11 February 1988.

[57] ICC, Ruling n. 61/2006, decided on 6 February 2006, *Conclusions on Points of Law*, para. 2.2).

[58] See A. Anzon, *Accesso al giudizio di costituzionalità e intervento "creativo" della Corte costituzionale*, in *Riv. AIC*, 2, 2014; B. Caravita, *La riforma elettorale alla luce della sent. 1/2014*, in *Federalismi.it*, 2, 2014; and R. Bin, *"Zone franche" e legittimazione della Corte*, in *Forum Quad. cost.*, 2014.

[59] ICC, Ruling n. 1/2014, decided on 4 December 2013, *Conclusions on Points of Law*, para.7.

[60] See *supra* note 31.

> this case, every appropriate reflection and initiative, [and] relying on its powers to manage constitutional proceedings [...] order the deferment of the proceedings underway, scheduling a new discussion of the questions of constitutionality at the hearing of 24 September 2019».[61]

It should be noted that, unlike the SCC in *Carter*, in the *Cappato* case, the ICC did not adopt a delayed declaration of unconstitutionality. Although the two techniques are similar, this judicial technique of the ICC is distinct because it did not decide on the unconstitutionality of the law and thus, did not strike down the law, but instead, postponed its decision. In fact, instead of a suspended declaration of unconstitutionality, in the *Cappato* case the Court appears to have given the legislature "an order to reform" the law at a fixed deadline.[62]

In the ICC's Order n. 207/2018, the Court stated that it would indeed reconsider the challenged provision of Art. 580 of the criminal code. In its view, a ban on assisted suicide without any permissible exemption amounted to a restriction of the freedom of self-determination of people kept alive by life-support treatments, such as hydration and artificial nutrition, and of people who suffered from an incurable illness that caused them intolerable physical or psychological suffering but who remained wholly capable of making free and informed decisions and thus, whose human dignity was violated.[63] Nevertheless, according to the ICC, it was Parliament that had to deal with the issue.

However, the deadline that the ICC set expired without the legislature passing the necessary reform of the law. Therefore, in the ICC Ruling n. 242/2019, it proceeded to resolve the violation autonomously, declaring that Art. 580 of the Italian Criminal Code violated the Constitution insofar as it did not exempt from punishment those who facilitated the free and informed intent of the people who found themselves in the conditions identified in Order n. 207/2008. In addition, the ICC decided that a public health facility should verify the existence of the medical condition described in the Order after consulting the territorially competent ethics committee.[64]

Although this technique initially seemed an exceptional tool for dealing with very hard cases, such as those that involved the right to life, in 2020, the ICC again decided to give the legislature a fixed time to solve another issue on fundamental rights. The challenged provisions were those that envisaged custodial sentences for the offense of defamation committed through the press. In its Order n. 132/2020, the ICC explained that in these provisions there were two conflicting public interests to balance: on the one hand, the crucial need to protect journalistic freedom, and on the other, the equally crucial need to effectively protect the reputation of potential victims

[61] ICC, Order n. 207/2018, para. 11.

[62] This is the reason why it is better to refer to this judicial technique as a *prospected declaration of invalidity*.

[63] *Ivi*., para. 10.

[64] ICC, Ruling n. 242/2019, decided on 25 September 2019, *Conclusions on Points of Law*, para. 8.

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of any abuse of that freedom by journalists. Once again, the ICC judges stated:

> «Such a delicate balancing act is primarily a matter for the legislator, who is responsible for devising an overall system of sanctions capable, on the one hand, of avoiding any undue intimidation of journalists and, on the other, of ensuring adequate protection of the individual's reputation against unlawful — and sometimes malicious — attacks carried out in the name of journalism.»[65]

In addition, the ICC noted that Parliament was already discussing several bills to amend the existing rules, so it considered it appropriate — in a spirit of loyal collaboration between institutions and within the limits of its power — to reconvene a year later. It is worth noting that the ICC decided to suspend not only the proceeding from which the case originated but all other proceedings wherein the challenged provisions were about to be applied.[66]

Once again, Parliament was unable to enact a law reform capable of overcoming the ICC-raised issues.

Therefore, in the ICC's Ruling n. 150/2021, it issued a declaration of invalidity of those legal provisions that disproportionally limited the freedom of the press.[67] Nevertheless, it reminded the legislature of the importance of a comprehensive reform of the law to include overall sanctioning strategies for avoiding any undue intimidation of journalistic activity, on the one hand, and for ensuring adequate protection of individuals' reputation, on the other hand.[68]

5. Concluding Observations

This brief examination of the Canadian, South African, and Italian constitutional courts' case laws concerning what is commonly referred to as the "suspended declaration of invalidity" highlights how, in all the analyzed legal systems, the reasons behind these decisions were mainly the same. Indeed, all the courts referred to the necessity of avoiding legal chaos[69] (possible lacuna) and the need to respect the principle of separation of powers

[65] ICC, Order n. 132/2020, decided on 9 June 2020, para. 8.

[66] *Ibid.*

[67] The ICC extensively referred to the European Court of Human Rights' case law on freedom of the press.

[68] ICC, Ruling n. 150/2021, decided on 14 July 2021, para. 10.

[69] Interestingly, in the Cappato case, the ICC was concerned about the possibility of creating an uncertain legal scenario. In Order n. 207/2018, the Court held that it could not remedy the constitutional violation «[…] by merely removing scenarios in which help is provided to individuals in the circumstances […] described from the scope of application of the criminal provision. Indeed, such a solution would leave the area of materially assisting patients in such conditions to commit suicide entirely unregulated […].This Court may not assume responsibility for the possible consequences of its decision, even where its duty is, as in the present case, to evaluate the incompatibility of just one criminal provision with the Constitution.»

by giving the legislature the chance to act within its sphere of competence, especially when the legislature could remedy the unconstitutionality of a law in multiple ways.

Among the analyzed systems, that of South Africa is the only one wherein the Constitution provides for the possibility of postponing the effects of a declaration of invalidity. In Canada and Italy, this technique is the result of the courts' interpretation of their constitutional prerogatives.

In addition, in the three countries, courts have chosen to implement similar rather than identical judicial strategies. Although the Canadian and South African Supreme Courts adopt delayed declarations of invalidity in the same way — by postponing the effects of the judgment to give the legislature the chance to remedy the constitutional violation, in South Africa, the ZACC can also take interim measures to protect individuals while waiting for the intervention of the legislature. In addition, The ZACC has identified three specific grounds according to which the Court could possibly suspend – for a limited amount of time – the declaration of invalidity in order to give the Parliament the possibility to amend the unconstitutional piece of legislation.[70]

In this specific context, it could be argued that, by setting (*only*) these three specific reasons according to which the Court could be likely to suspend a declaration of invalidity, the Court has somehow limited itself for future possible developments. This, in turn, seems quite unusual for a constitutional Court, at least if compared to other legal systems where Courts have also used the suspension of the declaration of unconstitutionality but without limiting themselves.[71]

On the other side, in Italy, the constitutional Court does not issue delayed declarations of invalidity. Instead, the ICC determines why a specific legal provision violates the Constitution. Then, it decides not to go further and reconvenes — usually a year later — to give the legislature the chance to intervene. To do so, the ICC first issues what could be called «an order to reform» to the legislature, accompanied by a fixed deadline. Only if Parliament fails to intervene by the deadline does the ICC strike down the challenged provision.

The main differences among these approaches are as follows. While in Canada and South Africa, the constitutional courts directly decide on the unconstitutionality of the law and require the legislature to fill the potential gap caused by such decision, in Italy, the ICC provides the coordinates for the legislature to enact constitutionally compliant legislative reforms. This is arguably more cooperative and constructive, since the ICC does not decide *a priori* but intervenes only in the absence of legislative action.[72]

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[70] As it has been broadly elaborated by the legal doctrine, the first aim of suspending a declaration of invalidity is to preserve the spirt of the Constitution in terms of division of powers. As Carolan underlines, «It is well known that the traditionally bilateral and adjudicative character of judicial proceedings makes it difficult for the courts to formulate or enforce effective remedies in certain types of situation», see E. Carolan, *op. cit.*, 185; See also, C. Mouland, *op. cit.*, 281 ss.

[71] See, M. Di Bari, *Freedom of Peaceful Assembly and (Un)Constitutional Limitations in South Africa*, in *Federalismi.it, Focus Africa*, 1, 2020, 12.

[72] This article has not addressed toward two important issues that must necessarily continue to be studied: (a) the time intercurrent between the declaration of invalidity

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Thus, the Italian Constitutional Court seems more inclined to preserve the legislature's margin of discretion by postponing its decision on the constitutionality of a challenged provision rather than making the decision but deferring its effects. This might seem only a formal distinction, especially considering that when the ICC postpones its decision, it already provides its opinion on the challenged provisions. Nevertheless, if suspended declarations of invalidity are meant to preserve the principle of separation of powers, the Italian approach seems best suited to achieve this purpose.

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and the entry into force of the new rules, i.e., what might be called the "time factor"; and (b) the adherence of the new legislation with the reasoning adopted by the courts. In fact, as underlined by Carolan «the legislator can address the problems identified by courts in ways that from the remedies suggested by the judiciary in their rulings. The other branches are "informed but not controlled" by the Court's reasoning». On this point, see, E. Carolan, *A 'Dialogue-Oriented Departure' in Constitutional Remedies: The Implications of NHV v Minister for Justice for Inter-Branch Roles and Relationships*, in 40(1) *Dublin U. L. J.* 191 (2017); K. Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, in 4 *Int'l J. Const. L.* 347 (2006).