

Remedying the Remedy: *Bedford's* Suspended Declaration of Invalidity^{*}

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ABSTRACT

Undoubtedly, *Bedford v Canada's* doctrinal renovations and innovations are reshaping the future of *Charter* enforcement. However, the applause for *Bedford's* progress in assessing *Charter* violations falls flat when it comes to remedying *Charter* violations. With an eye to reform, this article probes the regressive result of *Bedford's* remedy, the suspended declaration of invalidity, which kept the unconstitutional prostitution prohibitions in force for one year. Part I will depict how *Bedford's* remedy frustrated three remedial objectives: 1. promoting the public interest by maintaining the rule of law, public safety, and equality; 2. facilitating institutional dialogue between judges and legislators about rights and freedoms; and 3. fostering consultative dialogue between marginalized groups and the government. On top of the ongoing injustice of enduring another year of “fundamentally flawed laws” held to aggravate the risk of disease, violence, and death, rights-bearers endangered by the s. 7 violation faced procedural harm during Parliament's fast-tracked, fractured reply to *Bedford's* ruling.

To remedy *Bedford's* remedy and suspended declarations writ large, Part II advances “deliberate remedial procedure,” which configures whether and how long to suspend declarations of invalidity. Bookended by classic and contemporary Supreme Court of Canada jurisprudence, including the *Reference re Manitoba Language Rights* and *Carter v Canada*, the mainstays of

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deliberative remedial procedure are a separate remedial hearing, retaining jurisdiction, broader participation, enriched evidence, and interim measures (such as guidelines and constitutional exemptions) to mitigate damage to individual rights. Deliberative remedial procedure calls upon the judiciary's traditional role to protect minorities, enlists the modern movement of access to justice, and is inspired by society's demand for evidence-based justifications.

Keywords: *Bedford v Canada*; right to life, liberty, and security of the person; constitutional remedies; suspended declarations of invalidity; rule of law; *Charter* dialogue; meaningful consultation; litigation procedure; retaining jurisdiction; constitutional exemptions; s. 24(1) of the *Canadian Charter of Rights and Freedoms*, s. 52(1) of the *Constitution Act, 1982*; prostitution; sex work; law reform

I. *BEDFORD* AND BILL C-36

When the Supreme Court of Canada unanimously held in *Bedford v Canada*¹ that prohibitions against keeping bawdy-houses, living on the avails of prostitution, and publicly communicating for prostitution² unjustifiably infringed s. 7 of the *Canadian Charter of Rights and Freedoms*,³ an interested bystander might have tallied the case as a triumph for sex workers.⁴ Despite precedent holding that the impugned laws passed constitutional muster, richer evidence and new legal argument established that the *Criminal Code* prevented prostitutes from taking safeguards to protect themselves while partaking in (what was then) a lawful activity.⁵

¹ *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], rev'g in part 2012 ONCA 186, 109 OR (3d) 1 [*Bedford ONCA*], aff'g in part 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford ONSC*].

² *Criminal Code*, RSC 1985 c C-46, ss 197(1), 210, 212(1)(j), 213(1)(c).

³ *Canadian Charter of Right and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁴ Where capitalized, "Court" refers to the Supreme Court of Canada. "Prostitution" and "sex work" are used interchangeably, according to each term's historical legal context.

⁵ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123, [1990] 4 WWR 481.

It would be reasonable to expect that prostitutes and society would be cured of those unconstitutional laws. After all, the *Charter* is part of Canada's Constitution, and the Constitution empowers judges to strike down unconstitutional laws.⁶ Once laws are found unjustifiable in Canada's free and democratic society, read literally, s. 52(1), the Constitution's supremacy clause, leaves no time to wait:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁷

Plus, invalidating unconstitutional legislation is more than just a reasonable expectation of the citizenry. To the judiciary, the supremacy clause entrusts a power and an obligation. As a duty bestowed upon unelected judges by Parliament, s. 52(1) legitimizes judges' work "to ensure that the constitutional law prevails."⁸ So, when *Bedford's* immediate result allowed the unconstitutional laws to temporarily prevail, it is hardly surprising that people would feel puzzled at this paradox. What would happen to a prostitute on probation who heard the news of *Bedford*? What if that person did not wait before jumping into the car of a violent perpetrator, for fear of a police officer rounding the corner?⁹ Individuals selling sex would have to wait a whole year for Parliament to make new laws. Although the Court found that safeguards (such as drivers, bodyguards, and screening clients) would reduce the daily dangers of prostitution, the Court kept the unconstitutional laws in force, citing public concern, and that Parliament deserved time to "devise a new approach."¹⁰ By enacting the new

⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 52.

⁷ *Ibid*; *R v Ferguson*, 2008 SCC 6 at paras 64–65, [2008] 1 SCR 96 [*Ferguson*]; Kent Roach, "Principled Remedial Discretion Under the *Charter*" (2004), 25 SCLR (2d) 101 at 105 [Roach, "Principled Remedial Discretion"]; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book, 2014) at 3.210, 14.40 [Roach, *Constitutional Remedies*].

⁸ *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, [1985] SCJ No 36 (QL) at 745 [*Manitoba Language Rights*]; *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 at 143 per Dickson CJC. On section 52(1)'s legitimating function, see Hon Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 *Alta L Rev* 540 [McLachlin, "A New Role"] at 554.

⁹ This hypothetical comes from *Bedford*, *supra* note 1 at para 158.

¹⁰ *Bedford*, *supra* note 1 at para 165.

offence of purchasing sexual services, Parliament's swift response made prostitution a de facto crime for the first time in Canadian history.¹¹

For Valerie Scott, one of *Bedford's* three applicants, the Court's delivery of the final judgment marked "the best of day of [her] life."¹² Yet that victory was tempered with trepidation at the government's impending response: "Amy and I were worried,"¹³ she explained. "We didn't expect it to be this bad. We didn't expect it to be simply rewriting the laws in different language."¹⁴ Regardless of any final legislative response, real people like Valerie Scott have real expectations to be freed from unconstitutional laws violating their rights. They expect the Court's remedy to cure the harm they have suffered, not aggravate it. Suspending a declaration of invalidity defeats this expectation, and the text of the Constitution. If the Court has a duty to uphold the *Charter*, then how could, and why should, *Charter*-infringing laws remain on the books?

These social and political problems are also legal problems perturbing lawyers and scholars. Suspended declarations of invalidity have attracted censure from commentators who have rallied against their routine use. This remedy has been accused of contravening the formal dictates of the Constitution, tantamount to abdicating the judicial office,¹⁵ contracting the vindication of individual rights, and lulling legislatures into lethargic constitutional minimalism – all without satisfactory justification.¹⁶ Paying

¹¹ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 ["Bill C-36"]; Department of Justice Canada, "Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act*" (2015), online: <<http://www.justice.gc.ca/eng/rp-pt/other-autre/protect/p1.html>> [Technical Paper].

¹² Erika Tucker, "Why Ex-Sex Worker Calls Prostitution Law Consultation 'Ridiculous,'" *Global News* (30 April 2014), online: <<http://globalnews.ca/news/1301781/why-ex-sex-worker-calls-prostitution-law-consultation-ridiculous/>>.

¹³ Ella Bedard, "The Failures of Canada's New Sex Work Legislation," *Rank and File* (7 April 2015), online: <<http://rankandfile.ca/the-failures-of-canadas-new-sex-work-legislation/>>.

¹⁴ *Ibid.*

¹⁵ Bruce Ryder, "Suspending the *Charter*" (2003), 21 SCLR (2d) 267 at 282.

¹⁶ Sarah Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" (2015) 78 Sask L Rev 201; Grant Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity" (2011) 49 Alta L Rev 107; Ryder, *supra* note 15; Lorraine Weinrib, "Suspended Invalidity Orders Out of Sync with Constitution," *Law Times* (14 August 2006), online: <<http://www.lawtimesnews.com/200608211268/headline-news/>>

particular care to *Bedford*, Robert Leckey has diagnosed harms of remedial discretion, without prescribing any new cures.¹⁷ In excavating *Bedford*'s aftermath, I magnify the extent of those harms, and unearth new ones.

Nevertheless, suspended declarations may possess salvageable worth. Promising doctrinal proposals, including parlaying proportionality into remedial discretion, as Bruce Ryder and Grant Hoole have pitched, can strengthen suspended declarations' weaknesses.¹⁸ Developments offered by Kent Roach, such as "declarations plus"¹⁹ and two-track remedies, can provide individual and systemic relief.²⁰ The reform I advance, which I call "deliberative remedial procedure," complements these valuable contributions, but is distinct by fixing upon procedure. It is grounded in retaining jurisdiction, a separate remedial hearing, and interim measures to minimize damage to individual rights.

Beginning with the suspended declaration's genesis, Part I explores its three primary functions to discuss why it is a useful remedy: to promote the public interest, facilitate institutional dialogue between judges and legislators, and foster inclusive consultative dialogue between marginalized people and the government. Theoretically, I presume these functions are constitutionally legitimate. Turning to *Bedford*, I scrutinize each function against the government's reply to the Court. This post-mortem forms the impetus for Part II's deliberative remedial procedure. With suggestions for alternatives to *Bedford*'s remedy, Part II draws from seminal constitutional cases, including *Reference re Manitoba Language Rights*, *Doucet-Boudreau v Nova Scotia*,²¹ and *Carter v Canada*,²² and compares Canadian and South African approaches. To remedy the remedy, deliberate remedial procedure

suspended-invalidity-orders-out-of-sync-with-constitution>.

¹⁷ Robert Leckey, "The Harms of Remedial Discretion" (2016) 14 *ICON* 584 [Leckey, "Harms"]; Robert Leckey, "Enforcing Laws that Infringe Rights" [2016] *PL* 206 [Leckey, "Enforcing Laws"]; Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015) [Leckey, *Bills of Rights*].

¹⁸ See especially Hoole, *supra* note 16; Ryder, *supra* note 15. See also Burningham, *supra* note 16.

¹⁹ Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66 *UTLJ* 3 [Roach, "Polycentricity"].

²⁰ *Ibid*; Roach, *Constitutional Remedies*, *supra* note 7 at 12.700–12.820.

²¹ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [Doucet-Boudreau].

²² *Carter v Canada* (AG), 2015 SCC 5, [2015] 1 SCR 331 [Carter 2015].

figures whether and how long to suspend declarations of invalidity. Deliberative remedial procedure marries the judiciary's traditional role to protect minorities with the contemporary concern for access to justice, and is inspired by society's demand for evidence-based justifications.

A. The Genesis of the Suspended Declaration

A judicial invention synonymously called the suspended declaration, delayed declaration, delayed nullification, and temporary invalidity generates the power to keep unconstitutional laws in force.²³ This invention operates like a snooze button on an alarm clock: while the Court's declaration lies dormant, the Legislature rises to the task of constitutional compliance. The suspended declaration emerged nearly three decades before *Bedford*, in *Reference re Manitoba Language Rights*.²⁴ The Court postponed invalidating Manitoba's unilingual statutes to allow the Legislature time to correct a mass translation omission. Unlike laws invalidated for breaching substantive *Charter* rights, the constitutional infirmity did not stem from overt governmental action, nor an intentionally enacted legislative provision. Instead, the defect was a procedural failure to meet constitutional criteria for legislation's manner and form. Had the Court immediately invalidated the English-only statutes, a state of lawless disorder would have ensued, with all provincial government institutions rendered inoperative, the Legislature's composition erased, and all legal rights and duties under provincial law impugned.

To avoid a legal vacuum while Manitoba enacted bilingual statutes, the Court kept the unilingual statutes temporarily valid. In doing so, the Court observed that s. 52 merely continued the preexisting jurisprudence under colonial legislation.²⁵ Instead of s. 52 providing the solution, the Court identified s. 52 as precisely part of the problem: “[i]ndeed, it is because of the supremacy of law over the government, as established in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.”²⁶ Rather than reading in a power to suspend under s. 52,

²³ For clarity, I use “suspended declaration” and “suspension” but maintain the synonyms where quoted *verbatim*.

²⁴ *Manitoba Language Rights*, *supra* note 8.

²⁵ *Ibid* at 745–746. The disposition did not cite section 52.

²⁶ *Ibid* at 748–749.

the Court identified a series of common law doctrines to justify temporary validity. The *de facto* doctrine, *res judicata*, mistake of law, and the doctrine of necessity stood in “to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.”²⁷ So, although the suspended declaration did not materialize until after the Constitution’s patriation and the *Charter*’s entrenchment, the power to suspend invalidity was inaugurated by unwritten constitutional principles.

Comparatively, South Africa’s Constitution explicitly confers the power to suspend invalidity. Section 172 empowers judges to make “any order that is just and equitable, including...an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”²⁸ South African jurisprudence lends an alternative angle for examining suspended declarations’ place in Canadian law. Tracing the remedy’s provenance in Canada is important for its legitimacy. True, suspending invalidity is an implied power synthesized by the judiciary, but it was not conjured out of thin air. Its ingredients were gathered from principles that are the “lifeblood” of the Constitution.²⁹ For legitimacy’s sake, however, these exigent, implicit origins enhance the need to explicitly justify suspended declarations when there is no constitutional emergency. Next, we will see why and how that emergency use became augmented.

B. Three Functions of the Suspended Declaration: *Schachter*

From the jurisprudence trailing *Manitoba Language Rights*, scholars charted two functions of suspended declarations: promoting the public interest; and “remanding” matters from the Court to the government.³⁰ Promoting the public interest focuses on the relationship between the

²⁷ *Ibid* at 766–768.

²⁸ *Constitution of the Republic of South Africa, 1996, No 108 of 1996*, s 172.

²⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 51 [*Secession of Quebec*].

³⁰ Kent Roach, “Remedial Consensus and Dialogue Under the *Charter*” (2002) 35 UBCL Rev 211 at 219 [Roach, “Remedial Consensus”]; Ryder, *supra* note 15 at 279 calls these “balancing of interests” and “legislative choice” rationales. Hoole, *supra* note 16 calls this first objective the “public interest” and characterizes the second objective as “institutional considerations.” See also Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ at 17–18.

government and the citizenry. As a key determinant for suspending declarations, *Manitoba Language Rights*' rule of law concern was enveloped and expanded into three categories - all concerned with the public interest - in *Schachter v Canada*,³¹ discussed below. By remanding policy issues from judges to politicians, the second dialogic function concentrates on the relationship among the judicial, legislative, and executive branches. Neither of these two functions served an immediate use for individuals selling sex who were affected by *Bedford*. This raises a third, undervalued function: fostering consultative dialogue between rights-bearers and the government.

1. *First Function: Promoting the Public Interest*

Preventing lawlessness is one among multiple public interests at stake when judges immediately invalidate legislation. The Court issued a suspended declaration following *R v Swain*'s³² successful *Charter* challenge to the *Criminal Code*'s power to automatically detain "insanity acquittees"³³ at the Lieutenant-Governor's pleasure.³⁴ To avoid compelling judges "to release into the community all insanity acquittees, including those who may well be a danger to the public,"³⁵ the majority suspended the declaration of invalidity for six months.³⁶ Despite the ss. 7 and 9 *Charter* violations, the public safety concern outweighed the detainees' rights, but only temporarily. By setting transitional guidelines to release acquitted detainees, the majority abated the continuing violation of the detainees' rights while Parliament worked at bettering the laws.

After *Swain*, the equality rights decision in *Schachter v Canada* carved a wider place for suspended declarations.³⁷ At *Schachter*'s time, the unemployment insurance scheme excluded biological fathers from parenting benefits. That exclusion could not be rectified by severing the defective provision from the Act, nor by reading paternal benefits into the Act. Since all existing beneficiaries would lose their benefits if the laws were immediately invalidated, the Court suspended its declaration. Building

³¹ *Schachter v Canada*, [1992] 2 SCR 679, [1992] SCJ No 68 (QL) [*Schachter*].

³² *R v Swain*, [1991] 1 SCR 933, 5 CR (4th) 253 [*Swain*].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* at 1021 per Lamer CJ.

³⁶ *Ibid* at 1021-1022 per Lamer CJ.

³⁷ *Schachter*, *supra* note 31.

from *Swain and Manitoba Language Rights*, Lamer CJ enumerated three categories necessitating a suspended declaration: where immediate unconstitutionality would pose a danger to the public, threaten the rule of law, or where the unconstitutionality came from an under inclusive benefits provision.³⁸ With an abundance of caution, Lamer CJ impressed the serious impact of these circumstances from two perspectives, the *Charter* applicants and Parliament:

A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. [It] allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation...

To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature.³⁹

These fears spurred Lamer CJ to caveat that suspended declarations “should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations...relating to the effect of an immediate declaration on the public.”⁴⁰ Despite Lamer CJ’s efforts to leash the suspended declaration to exceptional circumstances, in the post-*Schachter* era, it assumed the very habitual role that he warned against: setting priorities and deadlines for the Legislature. *Bedford’s* 12-month suspended declaration is a vivid example.

i. The Justification for *Bedford’s* Suspended Declaration

Bedford’s perfunctory remedial reasons were fraught with equivocation. Immediate invalidity could have purportedly left “prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it.”⁴¹ Noting that “few countries leave it entirely unregulated,”⁴² the judgment stated, “how prostitution is regulated is a matter of great public concern.”⁴³ Picking up the thread from earlier

³⁸ *Ibid* at 719.

³⁹ *Ibid* at 716–717.

⁴⁰ *Ibid* at 717.

⁴¹ *Bedford*, *supra* note 1 at para 167.

⁴² *Ibid*.

⁴³ *Ibid*.

opponents to suspended declarations who called for *Schachter*'s revival,⁴⁴ Robert Leckey has criticized *Bedford* for departing from *Schachter*, lamenting that "the fundamental rights of a class of rights holders"⁴⁵ are outweighed by "deference to the judge's conjecture about many Canadians' 'great concern' and to Parliament's role in tackling a policy issue."⁴⁶ Conceptually, Leckey claims suspended declarations degrade *Charter* rights to soft constitutional directives, placing constitutional supremacy under strain.⁴⁷

Schachter did garner an allusion in *Bedford*. The Court conceded: "[w]hether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v Canada*), may be subject to debate."⁴⁸ However, like Leckey, I am bothered that Canadians' "great concern"⁴⁹ outweighed the proven, ongoing jeopardy to prostitutes' safety. I also take issue with the inconspicuous way that *Bedford*'s suspended declaration was reasoned. Paying lip service to *Schachter*, without analyzing why *Schachter*'s factors are now debatable, does not clarify remedial doctrine for lower courts and prospective litigants. Equally important, *Bedford*'s remedial discussion does little to explain the outcome to the litigants and provide transparency to the public, which are rationales for giving adequate reasons in criminal and administrative dispositions.⁵⁰

⁴⁴ In addition to Hoole, *supra* note 16, over a decade ago, both Weinrib, *supra* note 16, and Ryder, *supra* note 15, called for *Schachter*'s resurrection. Both Hoole and Ryder advanced expansions to *Schachter*'s categories.

⁴⁵ Leckey, *Bills of Rights*, *supra* note 17 at 141.

⁴⁶ Leckey, *Bills of Rights*, *supra* note 17 at 141. Conjecture may be an overstatement. *Bedford*'s trial record included a 2006 Parliamentary study that discussed public perceptions about prostitution, which had heard directly from some members of the public. See *Bedford* ONSC, *supra* note 1, citing Standing Committee on Justice and Human Rights and Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws: Report of the Standing Committee on Justice and Human Rights* (Ottawa: Communication Canada, 2006).

⁴⁷ Leckey, "Harms," *supra* note 17 at 602–603.

⁴⁸ *Bedford*, *supra* note 1 at para 167.

⁴⁹ *Ibid.*

⁵⁰ On trial judges' duty to give reasons, see *R v REM*, 2008 SCC 51 at paras 11–12, [2008] 3 SCR 3. In administrative law, see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 37–39. Though not endorsing "a general duty to give reasons," see also *Reference re Remuneration of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 156 Nfld & PEIR 1 at paras 181–182 per Lamer CJ.

In one sense, it seems obvious that the public would be concerned about any Charter challenge invoking the right to life, liberty and security that has reached the uppermost echelon of the justice system. If the nature of the Charter right and gravity of the violation captivate the public, then *Bedford* might augur a trend to suspend declarations when s. 7 is violated.⁵¹ If not, then *Bedford* begs the question of what constitutes and measures public concern when judges exercise remedial discretion. Must public concern be proven at trial? Or is judicial notice sufficient? This is problematic, for as Leckey has raised, an offence that has “succumb[ed] to constitutional attack likely no longer represents social consensus.”⁵²

It is also troubling that *ex ante* concern about prostitution in general, devoid of factual context, could rationalize an ongoing danger caused by laws now publicly ventilated as “fundamentally flawed”⁵³ and “inherently bad”⁵⁴ - for defying basic values of justice and rationality, no less.⁵⁵ Knowing the public is generally concerned about how prostitution is regulated is one thing. But taking the existence of public concern to justify jeopardizing anyone’s safety is another. Irrespective of the public’s disagreement on whether and how to control prostitution, many concerned Canadians would not want their personal opinions taken as justifications for endangering anyone, for any amount of time. Moreover, the *ex post* knowledge imparted by the Court’s analysis of how the prohibitions are constitutionally corrosive to vulnerable individuals can inform the public, and consequently may alter public concern. In turn, this would fuel democratic debate to improve Parliament’s legislated response. Besides, even if it is acceptable to situate abstract public concern on the same wavelength as a concrete security risk to vulnerable individuals, sanctioning a temporary departure from the constitutional imperative not only

⁵¹ In addition to *Swain*, *supra* note 32, see *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 [*Demers*]; the 12-month suspension in *Carter* 2015, *supra* note 22, and 4-month extension in *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter* 2016]; *Charkaoui v Canada*, 2007 SCC 9, [2007] 1 SCR 350; and *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 (12-month suspension after partial rehearing (4 August 2005), 29272 (SCC)). But see *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 at paras 31–32.

⁵² Leckey, “Harms,” *supra* note 17 at 595.

⁵³ *Bedford*, *supra* note 1 at para 105.

⁵⁴ *Ibid* at para 123.

⁵⁵ *Ibid* at paras 105, 123; Leckey, “Harms,” *supra* note 17 at 592.

presumes Parliament's competency and capacity to address prostitution - it also presumes Parliament will address prostitution in a democratically legitimate manner. Before observing how Bill C-36's institutional and consultative dialogue destabilized that presumed democratic legitimacy, we will scan how *Bedford*'s suspension fared against factors that the Court did explicitly mention. On this score, by superficially citing *Schachter* with public concern, *Bedford* conflates public interest with an interested public. The public interest, itself a porous concept, is nevertheless a paramount justification for government decisions across all branches of government.⁵⁶ The public interest encapsulates the rule of law, public safety, and equality concerns at *Schachter*'s heart.⁵⁷

ii. *Bedford* and the Public Interest

a. Public Safety

On the public safety plank of the suspension's public interest function, it is perplexing that the Court in *Bedford* concluded that immediate invalidity would leave prostitution totally unregulated.⁵⁸ Granted, the evidence did show that most Western democracies have mechanisms to control prostitution, as even decriminalized jurisdictions transitioned to regulatory regimes.⁵⁹ But what should have been more compelling were the numerous measures remaining within Canadian law to respond to concerns for the safety of prostitutes and the public. Visiting the trial decision adds to this perplexity.

⁵⁶ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 34-42, Abella J (connecting the duty of public actors to act in the public interest to protect values of equality and human rights) at paras 326-340, Côté and Brown JJ (in dissent, asserting that the public interest is served by accommodating difference); see also *R v Morales*, [1992] 3 SCR 711, 17 CR (4th) 74 per Gonthier J (+L'Heureux-Dube J), (dissenting in part on the term as a criterion for bail, but remarking that generally, "[p]ublic interest is at the heart of our legal system and inspires all legislation as well as the administration of justice" at 755-756). As McLachlin CJ wrote regarding defamation in *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640 at para 102, "the public interest is not synonymous with what interests the public."

⁵⁷ Hoole, *supra* note 16 at 133-134, 139, also advocated for the public interest to justify suspended declarations, but joined it with institutional considerations to claim there is a public interest "in the pursuit of an optimal remedy."

⁵⁸ *Bedford*, *supra* note 1 at para 167.

⁵⁹ *Bedford* ONSC, *supra* note 1 at paras 185-213.

Based on the law and the evidentiary record before her, Himel J had reached the opposite conclusion: a legal vacuum would not have ensued from immediate invalidity, and the public would not be threatened.⁶⁰ Notwithstanding the declaration, all concordant child prostitution and exploitation provisions were intact.⁶¹ Procuring offences and prohibitions against impeding traffic were unscathed.⁶² To protect individuals and communities, law enforcement could use existing provisions for combating street disturbances, simple nuisance, indecent exposure, public nudity, and harassment.⁶³ To fight exploitation, prosecutors could have recourse to general criminal offences. Himel J cited successful prosecutions of pimps and clients for uttering threats, intimidation, assault, kidnapping, forcible confinement, sexual assault, and other violent offences, as well as human trafficking prohibitions.⁶⁴ Clients had been punished for theft, robbery, and extortion.⁶⁵ Evidence also showed that police often ignored or were unwilling to use these alternative charges.⁶⁶ This rare and ineffective enforcement of the living on the avails and bawdy house prohibitions, along with the nuisance abatement aim of the communicating prohibition, meant there was no palpable public safety risk outweighing the concrete, continuing security risk of maintaining the trifecta of *Charter*-infringing laws.⁶⁷

Given these considerations, Himel J did not suspend her declaration. Yet when the Court suspended their declaration, they failed to identify any error of law or principle in Himel J's decision. This failure departs from the Court's deferential standard of review for *Charter* remedies.⁶⁸ Since Himel J found adequate regulatory mechanisms existed to address prostitution's safety concerns, the suspended declaration is hardly justifiable. On the

⁶⁰ *Ibid* at paras 535–536.

⁶¹ *Ibid* at para 516 [citations omitted].

⁶² *Ibid* at paras 514–515 [citations omitted].

⁶³ *Ibid* at paras 519–523 [citations omitted].

⁶⁴ *Ibid* at paras 524–534 [citations omitted].

⁶⁵ *Ibid* at paras 530–531 [citations omitted].

⁶⁶ *Ibid* at para 521.

⁶⁷ *Ibid* at paras 536–538.

⁶⁸ *R v Bellusci*, 2012 SCC 44, [2012] 2 SCR 509 at para 30; *Doucet-Boudreau*, *supra* note 21 at para 87: “A reviewing court should only interfere where the trial judge has committed an error of law or principle.”

dimension of the rule of law that requires maintaining a body of laws to ensure public order, no legal void nor societal disarray would have arisen.⁶⁹ As we will now see, additional rule of law dimensions connected to the remaining two *Schachter* categories were also frustrated by *Bedford*'s suspended declaration.

b. Rule of Law and Equality

Immediate or suspended, a declaration of invalidity precipitates legal change. This change's timing is precarious because "the rule of law...requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."⁷⁰ Denoting "horizontal inequality"⁷¹ as a harm of suspended declarations that "will magnify differences amongst members of the litigant's class,"⁷² Robert Leckey has importantly hypothesized that a suspension's time period may harbor arbitrary outcomes for accused under constitutionally infirm provisions.⁷³ Effectively, the likelihood of conviction depends upon how early into the suspension an accused is arrested and enters a plea.⁷⁴ This discord is compounded by socioeconomic status. Those without access to sound legal advice who are prepared to enter guilty pleas (for speedy disposition) may be unaware that they could escape conviction by waiting until the suspension expires.⁷⁵

Moving from Leckey's hypothetical into real prosecutions post-*Bedford* confirms that the rule of law's embrace of certainty and stability was shaken.⁷⁶ One example is *R v Moazami*,⁷⁷ which involved almost a dozen

⁶⁹ *Manitoba Language Rights*, *supra* note 8 at 724.

⁷⁰ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*, [1975] AC 591 at 638 (HL) cited in *R v KRJ*, 2016 SCC 31, [2016] 1 SCR 906 at para 23.

⁷¹ Leckey, "Harms," *supra* note 17 at 590.

⁷² *Ibid* at 592.

⁷³ *Ibid* at 592–593.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Secession of Quebec*, *supra* note 29 at paras 70–71. See also Hon Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171 at 173 [McLachlin, "Maintaining the Rule of Law"].

⁷⁷ *R v Moazami*, 2014 BCSC 261, [2014] BCJ No 297 (QL) (application) [*Moazami*]; 2014 BCSC 1727, [2014] BCJ No 2303 (QL) (trial); 2015 BCSC 2055, [2015] BCJ No 2441

underage victims.⁷⁸ The British Columbia Supreme Court refused to quash five counts of living on the avails of prostitution, rejecting the accused's argument that invalidity had to be determined on a case-by-case basis, and that *Bedford's* suspension was severable from the judgment.⁷⁹ The application was heard less than two months into *Bedford's* suspension, the trial was held three months' before the suspension was set to lapse, and then Moazami was sentenced after Bill C-36 entered into force.

The uncertainty surrounding the *Moazami* case in British Columbia was muddled further by differences between Manitoba and Alberta. In 2017, the Manitoba Court of Appeal upheld a conviction for living on the avails of prostitution. For a unanimous panel in *R v Ackman*,⁸⁰ Cameron JA opined that when Bill C-36 came into force, the new material benefit offence under s. 286.2 pre-empted *Bedford's* declaration of invalidity from taking effect.⁸¹ Yet on the eve of argument before the Alberta Court of Appeal in *R v LRS*,⁸² the Crown conceded that a conviction for living on the avails of prostitution entered one-month after *Bedford* should be overturned due to *Bedford*.⁸³ However, pending Bill C-36's entry into force, Alberta's Prosecution Protocol had directed that it would generally be in the public interest to proceed with prosecuting outstanding cases of exploitation, and

(QL) (sentence).

⁷⁸ *Ibid.* See also Leckey, "Harms," *supra* note 17 at 594 (citing *Moazami's* application at 594, but not the subsequent proceedings); *R v AlQaysi*, 2016 BCSC 937, [2016] BCJ No 1072 (QL) at para 19 (stating that *Moazami* is pending appeal. As of January 3, 2018, there was no record at the Court of Appeal's online registry).

⁷⁹ *Moazami*, *supra* note 77.

⁸⁰ *R v Ackman*, 2017 MBCA 78, 141 WCB (2d) 426.

⁸¹ *Ibid.* at paras 48–51. See also *R v AlQaysi*, *supra* note 78. The conduct precipitating the charge of communicating for the purpose of prostitution had occurred in August 2013, before *Bedford's* final judgment, but the trial did not begin until August 2014, nearly eight months into *Bedford's* suspension. *Bedford* was not cited at trial, which was adjourned until spring 2015. By then, Bill C-36 had entered into force. The accused was convicted and sentenced under the repealed provision. Leave to appeal was denied. Alternatively, based on the *Interpretation Act*, RSC 1985, c 1-21, Bowden J validated the conviction under the former communicating offence, holding that the gravamen of the offence was substantially similar enough to establish the new communicating offence.

⁸² *R v LRS*, 2016 ABCA 307, [2016] AWLD 5025.

⁸³ *Ibid.* The Crown also conceded that a conviction for procuring illicit sexual intercourse should be overturned due to *Bedford*.

to lay new charges.⁸⁴ Meanwhile, Ontario took New Brunswick's cue post-*Bedford* to terminate nearly all prosecutions under the unconstitutional prohibitions, and to advise police against laying new charges.⁸⁵

By bringing to light how difficult it is to predict the legal consequences of suspended declarations, these cases on *Bedford*'s heels make the Court's equivocation about endangering public safety and imperiling the rule of law all the more tenuous. By making law's operation contingent on geography, these inconsistent prosecutorial and police policies perpetuated uncertainty during already ineffective enforcement. Suspending invalidity with dispatch, without evidence of clear necessity or public danger, also means that the original public interest function does not fully explain why judges use suspended declarations. This brings us to the second function: facilitating institutional dialogue about fundamental rights and freedoms.

2. *Second Function: Institutional Dialogue*

i. Collaboration Among the Constitutional Institutions

A peppering of cases that flouted *Schachter*'s warning against forcing Parliament's hand have been well-documented by opponents and proponents of suspended declarations alike.⁸⁶ Chief among this research is a 1997 study conducted by Peter Hogg and Allison Bushell Thornton, who introduced the term "Charter dialogue"⁸⁷ to capture the most common and contentious function of suspended declarations. The authors described *Charter* dialogue by characterizing the judicial decision as a prompt for debate:

⁸⁴ Alberta Justice & Solicitor General, *Prosecution Service Practice Protocol: Prostitution Offences* (4 February 2014), online: <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Documents/RvBedfordpracticeprotocol.pdf>

⁸⁵ Bobbi-Jean MacKinnon, "Ontario Joins N.B. in Move Away from Prostitution Prosecutions," *CBC News* (6 February 2014), online: <<http://www.cbc.ca/news/canada/new-brunswick/ontario-joins-n-b-in-move-away-from-prostitution-prosecutions-1.2521133>>.

⁸⁶ Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 *Osgoode Hall LJ* 75; Hogg, Bushell Thornton & Wright, *supra* note 30; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34 *International Political Science Review* 39; Ryder, *supra* note 15.

⁸⁷ Hogg & Bushell, *supra* note 86.

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision.⁸⁸

This description encompasses acceptance as dialogue, but subscribers of coordinate constitutional construction, such as Christopher Manfredi and James Kelly, exclude tacit legislative approval from *Charter* dialogue.⁸⁹ Their narrower definition requires legislators to revise or reverse judicial rulings, after first conceiving a distinct interpretation of *Charter* rights, independent from the Court's interpretation.⁹⁰ Although normative accounts of what qualifies as *Charter* dialogue remain contested, for now, we need not rehash the debate. To see how suspended declarations are used, the more germane question is why they have principled, pragmatic appeal to the judiciary as a dialogic device.⁹¹

Permitting a less dramatic, more moderate result than immediate invalidity, suspended declarations can strengthen constitutionalism by distributing institutional labour.⁹² A decade after *Schachter*, Sujit Choudhry and Kent Roach illuminated how suspended declarations allow courts and legislatures to share the chore of constitutional compliance, while respecting each institution's traditional role:

The suspended declaration... can be viewed as a form of legislative remand, whereby unconstitutional legislation is sent back for reconsideration in light of the court's judgment. At the same time, however, the court does not abdicate the

⁸⁸ *Ibid* at 79.

⁸⁹ Dennis Baker & Rainer Knopf, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 2 Windsor Yearbook of Access to Justice 347; Christopher Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) Osgoode Hall LJ 37(3): 513. For a discussion of contending positions on using dialogue to justify deference to legislatures, see Kent Roach, "Dialogic Judicial Review and Its Critics" (2004), 23 SCLR (2d) 49 [Roach, "Dialogic Judicial Review"].

⁹⁰ Manfredi & Kelly, *supra* note 89.

⁹¹ Hogg, Bushell Thornton & Wright, *supra* note 30; Roach, "Dialogic Judicial Review," *supra* note 89 at 89-90; Macfarlane, *supra* note 86 at 41.

⁹² Roach, "Remedial Consensus," *supra* note 30 at 220; Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 SCLR (2d) 205 at 233.

responsibilities of judicial review. It formulates a remedy that will come into effect should the legislature not enact constitutional legislation by the court's deadline.⁹³

The Court's deference comes from respect, not subordination, for it is yielded from more than institutional roles. Capacity and competency also make suspended declarations attractive. The legislature is a forum structured for more expansive debate than courtroom, and can provide remedies that the judiciary cannot.⁹⁴ For example, in *Dixon v British Columbia*,⁹⁵ McLachlin CJ (then of the British Columbia Supreme Court) delayed declaring electoral district laws invalid to prevent the crisis that could have transpired if a change in government were to arise.⁹⁶ During the suspension, the legislature created an apportionment scheme that better reflected rural population density, which the judiciary could not have accomplished through a court order.⁹⁷ The government abided her *obiter dictum* on what reasonable limits could be imposed when it enacted legislation expediently. When McLachlin CJ later remarked upon Canada's collaborative constitutional legacy, she regarded *Dixon* as emblematic of how each branch "acting within the bounds of its proper constitutional responsibilities and each accepting its different constitutional responsibility, can efficaciously resolve a difficult issue."⁹⁸ The cooperative utility of the suspended declaration demonstrates that as a remedial tool, it can maximize each institution's strengths, while minimizing their weaknesses. Turning now to what the Court said (and did not say) in *Bedford*, we shall find that *Bedford's* suspended declaration induced a prompt, yet frustrating reply.

ii. Bill C-36's Institutional Dialogue

Mapping *Bedford's* attempt at stimulating dialogue on constitutional values requires visiting paragraph 165 of the judgment, which elicited quotes and quarrels among parliamentarians:

That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house,

⁹³ Choudhry & Roach, *supra* note 92.

⁹⁴ Roach, "Dialogic Judicial Review," *supra* note 89 at 65.

⁹⁵ *Dixon v British Columbia* (AG) (1989), 37 BCLR (2d) 231, 60 DLR (4th) 445 [*Dixon*].

⁹⁶ *Ibid* at 448.

⁹⁷ *Ibid*, discussed in Roach, "Remedial Consensus," *supra* note 30 at 221-222, citing McLachlin, "A New Role," *supra* note 8.

⁹⁸ McLachlin, "A New Role," *supra* note 8 at 558.

living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure – for example, permitting prostitutes to obtain the assistance of security personnel – might impact on the constitutionality of another measure – for example, forbidding the nuisances associated with keeping a bawdy-house. 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.⁹⁹

Paragraph 165 was parsed apart by all political stripes to support and oppose Bill C-36. Quoting *verbatim* at the second reading, the Justice Minister reiterated that the Court had told Parliament “to devise a new approach.”¹⁰⁰ Another parliamentarian claimed the Chief Justice’s words imposed an “obligation to propose a new way of dealing with the issue of prostitution.”¹⁰¹ On the other hand, the Opposition’s Justice Critic emphasized that the Court merely confirmed Parliament could “impose limits on where and how prostitution may be conducted”¹⁰² but that if Parliament did choose to act, its limits must not endanger the health and safety of sex workers.¹⁰³

One such new limit Parliament imposed is the new material benefit offence. By codifying exemptions to the former living on the avails offence, Parliament ostensibly responded to the Court’s overbreadth concerns. True, these exemptions nominally take up the Court’s suggestion to allow “prostitutes to obtain the assistance of security personnel.”¹⁰⁴ However, when it comes to real democratic dialogue, Parliament’s dithering over the Court’s expectations choked genuine debate about the *Charter* values *Bedford* embraced: the autonomy and dignity flowing from psychological and physical integrity.

⁹⁹ *Bedford*, *supra* note 1 at para 165.

¹⁰⁰ *House of Commons Debates*, 41st Parl, 2nd Sess, No 44 [Hansard] (11 June 2014) at 1700 (Hon Peter MacKay).

¹⁰¹ *House of Commons, Standing Committee on Justice and Human Rights, Minutes of Proceedings and Evidence*, Debates, 41st Parl, 2nd Sess, No 44 [Committee Proceedings] (15 July 2014) at 0930 (Hon Bob Dechert).

¹⁰² *Hansard*, (12 June 2014) at 1540–1545 (Hon Françoise Boivin).

¹⁰³ *Ibid.*

¹⁰⁴ *Technical Paper*, *supra* note 11, citing *Bedford*, *supra* 1 at para 165. For an explanation of Bill C-36’s incoherent policy objectives, see Hamish Stewart, “The Constitutionality of the New Sex Work Law” (2016) 54:1 *Alta L R* 69.

The NDP and Liberals wanted to clarify *Bedford* by referring Bill C-36 back to the Court.¹⁰⁵ The Justice Minister, who owes a statutory duty to alert the House to bills inconsistent with the *Charter*,¹⁰⁶ rebuffed the reference requests, as well as entreaties to engage external legal counsel, and to disclose his internal legal opinion.¹⁰⁷ Since the Court's ambiguous words culminated into foiled requests for legal clarity, *Bedford's* institutional dialogue was at best, fractured. At worst, *Bedford's* institutional dialogue uncovers a lack of policy deference on the Court's behalf, and disrespect on the government's behalf. Here, we will see "the devil is [not just] in the details"¹⁰⁸ of the reasons for the suspension, the devil is also in the duration.¹⁰⁹

a. The Devil in the Details

A detailed look at paragraph 165's ambiguity is warranted. Initially, it sounds as though the Court proposed to tweak the unconstitutional prohibitions as "limits on where and how"¹¹⁰ prostitution may occur.¹¹¹ Yet in the same breath, "devis[ing] a new approach"¹¹² infers substantially more work with a fresh start.¹¹³ The Court said "regulation of prostitution,"¹¹⁴ when it could have said "criminalization of prostitution."¹¹⁵ Such diction could have galvanized criminal law as the sword to conquer the unconstitutionality, for regulation does not necessarily entail criminalization. Indeed, Christopher Manfredi deciphered paragraph 165 as the Court hinting that "the criminal law might simply be too blunt a

¹⁰⁵ See, for example, Hansard, (11 June 2014) at 1720 (Hon Francoise Boivin, Hon Sean Casey); Hansard, (12 June 2014) at 1157 (Hon Wayne Easter).

¹⁰⁶ Section 4.1 of *Department of Justice Act*, RSC 1985, c J-2, s 4.1; *Statutory Instruments Act*, RSC 1985, c S-22, ss 3(2), 3(3).

¹⁰⁷ Hansard, (12 June 2014) at 1250-1310 (Hon Sean Casey).

¹⁰⁸ *Doucet-Boudreau*, *supra* note 21 at para 91 per LeBel and Deschamps JJ (dissenting on remedy, but not on remedial principles).

¹⁰⁹ *Ibid.*

¹¹⁰ *Bedford*, *supra* note 1 at para 165.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid* [emphasis added].

¹¹⁵ *Ibid* [emphasis added].

regulatory instrument”¹¹⁶ for such a “complex and delicate matter.”¹¹⁷ However, under Lisa Dufraimont’s interpretation, *Bedford* wedged an opening for an outright criminal prohibition of prostitution.¹¹⁸ Of course, the Court also contemplated that Parliament might not respond at all. Or, as Himel J surmised, the Court may have feared that unlicensed brothels would pop up before Parliament could act.¹¹⁹ Speculation aside, paragraph 165 sends a series of mixed messages that could have sustained a range of constitutional replies, from complete silence to a totally new criminal regime. From this range, we can infer that the Court presupposed that immediate invalidity would have constricted the number of constitutional solutions. But without articulating these presumptions or making their specific concerns transparent, the reasons for the suspension are inscrutable. Alas, there is mischief in the (lack of) details.

b. The Devil in the Duration

Viewed broadly, this mind-reading exercise traces the Court skating around Parliament’s policy sphere, which would signify respect for distinct institutional roles. Thus, on one level, *Bedford*’s remedial ambivalence may bulwark the Court from what Alexander Bickel famously coined as the “counter-majoritarian difficulty”:¹²⁰ a democratically unaccountable judiciary should not have the final word on the citizenry’s rights.¹²¹ Expressing openness to so many responses would shift blame to Parliament for any unanticipated harm caused by new, untested laws. But on a deeper level, the duration is problematic. For if recognizing an array of constitutional policy responses is deferential to Parliament, then for that

¹¹⁶ Christopher Manfredi, “Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006–2015” (2015) 52:3 Osgoode Hall LJ 951 at 967.

¹¹⁷ *Ibid*, citing *Bedford supra* note 1 at para 165.

¹¹⁸ Lisa Dufraimont, “*Canada (Attorney General) v. Bedford* and the Limits on Substantive Criminal Law under Section 7” (2014), 67 SCLR (2d) 483 at 501–502.

¹¹⁹ *Bedford* ONSC, *supra* note 1 at para 539.

¹²⁰ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed (New Haven: Yale, 1986) at 16.

¹²¹ *Ibid* at 16–17. For an argument that numerous legislative choices should not alone justify a suspension in South Africa, see Michael Bishop, “Remedies” in Stu Woolman & Michael Bishop, eds, *Constitutional Law of South Africa*, 2d ed (Cape Town: Juta, 2008) at 9-118–9-120.

deference to be purposeful and productive, the Court would also have to allow Parliament capacity to make an informed choice among those responses - with adequate time to study and prepare. Since the amount of time and preparation is commensurate with the complexity of a particular policy, *Bedford's* 12-month suspension arguably truncated the complexity and creativity of the ultimate policy response.

This truncation had real consequences for institutional relations. The government attributed their extremely difficult position to the Court's deadline. On a time allocation motion to constrict debate, the Justice Minister urged Bill C-36 "needs to proceed because of the timelines and the pressure we are under, placed on us by the Supreme Court."¹²² Wanting "time to do a good job,"¹²³ members suspicious of Bill C-36's constitutionality cited its legal complexity to oppose the motion.¹²⁴ Likewise, in *Bedford*, the Attorney General had sought an 18-month suspension because "new laws in this area are bound to raise complex issues, and the government should receive adequate time to draft laws, and Parliament afforded adequate time to consider them."¹²⁵

So while *Bedford's* suspended declaration did prompt legislating *per se*, to the extent it encouraged what Jeremy Waldron has dubbed "hasty lawmaking,"¹²⁶ the suspended declaration's cooperative, efficacious rationale was defeated.¹²⁷ It is in no one's interest - government or citizen - to ram a regime intended to resolve a "complex and delicate matter"¹²⁸ through a small window.¹²⁹ Since *Bedford's* reasons were silent on whether a 12-month period would be adequate, plausibly, the Court subliminally told the government that it did not expect nor desire significant change. If fixing the time fastens the range of policy choices, then to truly meet the anti-majoritarian challenge, a truly deferential dialogue would allow elasticity on the suspension's duration.

¹²² Hansard, (12 June 2014) at 1145-1150 (Hon Peter MacKay).

¹²³ *Ibid* at 1145 (Hon Hélène Lavergère).

¹²⁴ *Ibid* at 1145; 1155 (Hon Wayne Easter).

¹²⁵ *Bedford*, *supra* note 1 (Factum of the Appellant at para 138).

¹²⁶ Jeremy Waldron, "Principles of Legislation" in *Political Political Theory* (Cambridge: Harvard, 2016) [Waldron, "Principles of Legislation"] at 155.

¹²⁷ *Ibid* at 156-157 (outlining a duty of care owed by legislators).

¹²⁸ *Bedford*, *supra* note 1 at para 165.

¹²⁹ *Ibid*.

Given it is the Court who sets the deadline, it is difficult to argue they are irreproachable for the result of such haste, which may very well be unconstitutional legislation. The Justice Minister accepted a high level of constitutional risk, having admitted that Bill C-36 infringed at least one *Charter* right, as s. 1 was “very much ultimately the determining factor.”¹³⁰ The implications of the government’s response to *Bedford*, slammed in commentary as “fling[ing] the ruling back in the Court’s face,”¹³¹ were astutely forewarned by Brian Slattery during the *Charter*’s infancy. Slattery observed the Court’s institutional limitations for evaluating government policy:

[F]or a government to adopt the attitude of “pass now, justify in court later” would not only be an abdication of its *Charter* responsibilities, but in fact would undermine the foundations of judicial respect for the decisions of coordinate branches of government.¹³²

Thus, if deference to Parliament’s policy expertise is to remain a rationale for suspending declarations of invalidity, and the basis for that deference is respect and cooperation, then the approach to suspending declarations of invalidity needs to change. Otherwise, Canada’s constitutional legacy of collaborative responsibility for constitutional rights is at risk of devolving into defiance.

¹³⁰ Committee Proceedings (7 July 2014) (Hon Peter MacKay) at 1000 (rejecting a reference of Bill C-36, denying a request to disclose the results of an online public consultation in time for the Committee’s study, while also stating “the likelihood that it will be challenged is very real”), 1030–1033 (discussing the level of constitutional risk).

¹³¹ Andrew Coyne, “We Once Had to Wait Weeks for a New Harper Abuse of Power: Now We’re Getting Them Two or Three Times a Day,” *National Post* (6 June 2014), online: <<https://nationalpost.com/opinion/andrew-coyne-we-once-had-to-wait-weeks-for-a-new-harper-abuse-of-power-now-were-getting-them-two-or-three-a-day>>. See also John Ivison, “MacKay’s Weak Defence of His Prostitution Law Implies It Won’t Survive the Courts,” *National Post* (7 July 2014), online: <<http://news.nationalpost.com/full-comment/john-ivison-mackays-weak-defence-of-his-prostitution-law-implies-it-wont-survive-the-courts>>.

¹³² Brian Slattery, “A Theory of the *Charter*” (1987) 25:4 *Osgoode Hall LJ* 701 at 714.

3. *Third Function: Consultative Dialogue with Rights-Bearers and Citizens*

i. Remedial Potential of the Democratic Process: *Corbiere*

In the institutional debate between courts and legislatures, important voices - belonging to the very people who started that debate - have often gone unheard. Beyond the suspended declaration's two predominant uses of promoting the public interest and facilitating institutional dialogue, there is a third, oft-neglected, but equally important function, which tunes into people directly affected by unconstitutional laws. This consultative function is epitomized by *Corbiere v Canada*.¹³³ In *Corbiere*, Aboriginal Band members residing off-reserve launched a successful *Charter* challenge to the *Indian Act* for excluding them from Band elections. The Court found the residency-based exclusion infringed s. 15's equality guarantee. To remedy the violation, the Band requested a "reporting period,"¹³⁴ which would enable negotiations on new voting rules.¹³⁵ Although the Court explicitly predicted legislative inaction could be troublesome, it ordered an 18-month suspended declaration.¹³⁶

Writing for a concurring minority of four (differing on s. 15), L'Heureux-Dube J pronounced that the remedy had to account for the nature of the *Charter* violation.¹³⁷ In appreciating Parliament's role, as *Schachter* exhorted that declarations must do, *Corbiere's* emphasis on the nature of the violation added two dimensions to *Schachter*: first, novel *Charter* infringements may orient the remedial process; and second, considering who bears the immediate brunt of the Court's decision may impact how the remedial process occurs.

First, on novelty, by recognizing an entirely new type of equality violation, *Corbiere* forecasted that a suspended declaration is likely where a case significantly alters *Charter* doctrine, or applies existing doctrine to an entirely novel situation. If laws breach the *Charter* in an unprecedented way, such as in *Bedford*, then it follows that the process of undoing them may

¹³³ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

¹³⁴ *Ibid* at para 109.

¹³⁵ *Ibid*.

¹³⁶ *Ibid* at para 23.

¹³⁷ *Ibid* at para 114.

entail more work, thus necessitating more time to respond. Second, on *Corbiere's* impact, the immediate consequences of invalidity were borne most by the Band, not the government. Attending to the party (i.e., the applicants or government) who feels the remedy's most acutely underscores that deference to Parliament should be rationalized by individual concerns, as well as institutional ones.¹³⁸ Thus, by requiring two layers of justification, *Corbiere* texturizes *Schachter's* caution to respect the separation of powers.

It is Parliament's job to formulate a legislative response not merely because policy is Parliament's domain, but also because Parliament's democratic process can help redress the impact of the suspended declaration on the litigants. This therapeutic potential of the democratic process streams from L'Heureux-Dube's observation that "[b]ecause the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it."¹³⁹ The need to include those most affected by law into the process for curing it is tethered to the principle of democracy, which "requires a continuous process of discussion"¹⁴⁰ to properly function.¹⁴¹ *Corbiere* therefore engrafts a remedy that functions as a conduit between the courtroom and legislature, propelling the applicants forward into the process for creating law.

Extolled as "one of the important factors guiding the exercise of a court's remedial discretion,"¹⁴² *Corbiere* establishes that dialogue between courts and legislatures should "encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation."¹⁴³ When a court "consider[s] the effect of its order on the democratic process,"¹⁴⁴ however, regular Parliamentary debate alone may not accomplish inclusive dialogue.¹⁴⁵ *Corbiere* affirms that democracy that is more than majority rule. A truly democratic process "requires that legislators take into account the

¹³⁸ For a detailed analysis of the legislative response to *Corbiere*, see Roach, "Remedial Consensus," *supra* note 30 at 243–248.

¹³⁹ *Corbiere*, *supra* note 133 at para 116.

¹⁴⁰ *Ibid*, citing *Secession of Quebec*, *supra* note 29 at para 68.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at para 116.

¹⁴³ *Ibid*, citing Hogg & Bushell, *supra* note 86.

¹⁴⁴ *Ibid* at para 116.

¹⁴⁵ *Ibid*.

interests of majorities and minorities alike, all of whom will be affected by the decisions they make.”¹⁴⁶ When suspended declarations are ordered to conduct “extensive consultations and respond to the needs of the different groups affected,”¹⁴⁷ the Court’s remedial power becomes indispensable to the cooperative, whole of government approach embraced by McLachlin CJ: the judiciary, the executive and Parliament all share responsibility to fix the injustice of unconstitutional laws.¹⁴⁸ Probing deeper into Bill C-36’s production will now convey that *Corbiere*’s aspiration for inclusive consultative dialogue was unrealized.

ii. Bill C-36’s Consultative Dialogue

Not all individuals who sell sex were able to voice their reactions to Bill C-36, nor do those individuals necessarily organize together or identify themselves as “sex workers.” It is, of course, a democratic deficit that we do not know their views on whether and how the law should have responded to *Bedford*. Those who do affiliate with the sex work movement, however, (as well as *Bedford*’s litigants), condemned Bill C-36’s legislative input and the resulting output. By marshalling in a paradigm shift from blaming prostitutes as nuisances to protecting them as victims, yet also aiming to treat them with dignity and equality, Bill C-36’s preamble displays an abrupt about-face from the government’s defence in *Bedford*.¹⁴⁹ While preambles are instruments of institutional dialogue for prescribing limits on *Charter* rights,¹⁵⁰ Bill C-36’s preamble does not reflect the individualized perspectives of many diverse people whose rights it now limits. Many sex workers find the preamble’s rhetoric of victimization and protection offensive and oppressive. To them, manufacturing “the language of feminist intervention and humanitarianism”¹⁵¹ into a brand of empowerment belies

¹⁴⁶ *Ibid*, citing *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 at para 176.

¹⁴⁷ *Ibid* at para 118.

¹⁴⁸ *Dixon*, *supra* note 95; McLachlin, “A New Role,” *supra* note 8 at 557–558.

¹⁴⁹ Bill C-36, Preamble, *supra* note 11; *Technical Paper*, *supra* note 11; *Bedford*, *supra* note 1 at paras 79–83 (part of the government’s defence was that prostitutes’ “choice – and not the law – is the real cause of their injury”); Angela Campbell, “Sex Work’s Governance: Stuff and Nuisance” (2015) 23 *Fem Legal Stud* 27 (arguing that Bill C-36 reinforces a nuisance abatement policy).

¹⁵⁰ Roach, “Dialogic Judicial Review,” *supra* note 89 at 57–58.

¹⁵¹ *Bedard*, *supra* note 13.

a narrative of patriarchal subjugation.¹⁵² Many sex workers are doubly or triply marginalized as impoverished racial and gender minorities. For them, pre-existing stigma led the government to misconstrue their needs, undermine their dignity and autonomy, and aggravate their vulnerability to violence.¹⁵³

The scorn at Bill C-36's content only partly depicts the democratic deficits after *Bedford*. At Parliament, the Justice Minister cited input from consultations for the *Canadian Victims Bill of Rights*¹⁵⁴ to support Bill C-36.¹⁵⁵ Yet those consultations were conducted before *Bedford*'s final judgment was even rendered.¹⁵⁶ And prostitution, though "intertwined"¹⁵⁷ with victims' rights, was not the focus of those face-to-face discussions before *Bedford*.¹⁵⁸ As for consultations after *Bedford*, three months before Bill C-36's introduction, the government held private consultations decried as "false" and "token" because eleven of the sixteen groups did not represent sex workers.¹⁵⁹ Later, when Bill C-36 was already before Parliament, the Justice Minister held invite-only, *in camera* roundtables with criminal justice

¹⁵² *Ibid*; Committee Proceedings (9 July 2014) at 1624 (testimony of Sheri Kiselbach); Ainsley Doty, "After *Bedford*: What's Next for Canada's Sex Industry," *GUTS* (6 May 2014), online: <<http://gutsmagazine.ca/Bedford-whats-next-canadas-sex-industry/>>; Naomi Sayers & Sarah Hunt, "Abolition of Sex Work Won't End Violence Against Native Women" *Globe and Mail* (22 January 2015), online: <<http://www.theglobeandmail.com/opinion/abolition-of-sex-work-wont-end-violence-against-native-women/article22572753/>>.

¹⁵³ *Ibid*.

¹⁵⁴ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

¹⁵⁵ Hansard, (12 June 2014) at 1154, 1205 (Hon Peter MacKay).

¹⁵⁶ Canada, Department of Justice, "Minister of Justice Concludes Cross-Country Consultations on Victims Bill of Rights," News Release (Ottawa: DOJ, 25 September 2013), online: <<http://news.gc.ca/web/article-en.do?nid=775479>>.

¹⁵⁷ Hansard, (12 June 2014) at 1205 (Hon Peter MacKay).

¹⁵⁸ *Ibid*.

¹⁵⁹ Committee Proceedings (7 July 2014) at 1310 (testimony of Émilie Laliberté, Spokesperson, Canadian Alliance for Sex Work Law Reform: "Only three sex workers were at the table when Minister MacKay held private consultations on March 3. The minister made it very clear that he did not intend to consult with Canada's sex workers."); Selena Ross, "Sex Worker Bill Built on 'False Consultation'" *Chronicle Herald* (14 June 2014), online: <<http://thechronicleherald.ca/metro/1215019-sex-worker-bill-built-on-false-consultation>>.

stakeholders.¹⁶⁰ While a pro-abolitionist happily tweeted a selfie with the Justice Minister, people currently working in the sex industry were not invited, and disclosure requests for the invite list were refused.¹⁶¹

One might object that this perceived prejudice during informal consultations was mollified by the fact that activists later testified formally before Parliament. After all, consultations have limitations that make them inadequate substitutes for Parliamentary deliberation. Debates outside of the very institution officially devoted to democratic deliberation are not forcefully held to account by a rigorous opposition mandated to test proposed policies.¹⁶² Unlike Parliamentary and adjudicative procedures, and apart from a soft policy commitment to broadly and transparently consult, there are no normative standards for conducting consultations.¹⁶³ However, whether the government actually muted sex workers is not the point. What matters is that the post-*Bedford* consultations incubated an impression of bias against individuals who, for a range of different reasons, sell sex – individuals who are ostracized and unpopular, and whose entrenched right to security hinged upon the government’s (in)action. Through *Corbiere*’s lens, the dialogic purpose of those consultations was to rectify the chronic harm which *Bedford* held the state had caused. It is no wonder then that sex workers would interpret the mere appearance of unequal participation as illegitimate. As we know from natural justice principles, appearance is integral to maintaining trust in our legal and political institutions.¹⁶⁴ To be clear, I do not claim that comprehensive consultation and increased democratic deliberation should or would have

¹⁶⁰ Kady O’Malley, “Peter MacKay’s Justice Roundtables Didn’t Set a Place for Sex Workers,” *CBC News* (27 August 2014), online: <<http://www.cbc.ca/news/politics/peter-mackay-s-justice-roundtables-didn-t-set-a-place-for-sex-workers-1.2747403>>.

¹⁶¹ *Ibid*; Megan Walker, “Selfies at Community Meeting with @MinPeterMacKay @EdHolder_MP @Sextrade101 Discussing #c36 and #justice Issues” (13 August 2014 at 10:25am), online: Twitter <<https://twitter.com/meggiewalk/status/499622732091625472>>.

¹⁶² Waldron, “Principles of Legislation,” *supra* note 126.

¹⁶³ Canada, Department of Justice, *Policy Statement and Guidelines for Public Participation* (Ottawa: DOJ, 2016), online: <<http://www.justice.gc.ca/eng/cons/pol.html>>. According to the Department of Justice, the policy in place between *Bedford*’s decision and Bill C-36’s Royal Assent is exactly the same as the current policy, apart from one minor grammatical correction.

¹⁶⁴ *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624.

grounded the right to a particular substantive outcome (i.e., decriminalization). Rather, the ability to have a meaningful exchange about sex work was illusory. Besides, even if sex workers had to rely on parliamentarians as proxies in that exchange, plenty of the precious 12-months allocated by the Court, which was supposed to serve the *Charter* rights of the successful applicants, was instead winnowed away on emotional pandering that digressed to extraneous issues.

Subjective perceptions aside, the issues debated inside and outside Parliament ran on an entirely different track than *Bedford*. Tangential topics of human trafficking and underage prostitution comprised much of the content.¹⁶⁵ Although these are immensely important issues, human trafficking and child exploitation were not the thrust of the offences struck down in *Bedford*, nor did they form the crux of the litigants' dispute.¹⁶⁶ Surely, widening the debate to consider incidental problems is democratically desirable when crafting policy and law. The government should not have to wait for the judiciary's alarm to rouse them to action. But there is an essential difference between enriching debate and entirely changing the debate. Largely, Bill C-36's debate ignored the contextual injustice to adults who consensually sell sex, yet were not trafficked or exploited as children.

When legislating to redress *Charter* infirmities, the government should not lose sight of the very people whose needs fomented the legislation in the first place – people whose *Charter* rights were unjustifiably violated. When the invite list for informal consultations is cloaked in Cabinet confidence, and the official witness list at Parliament is piloted by Parliamentary privilege, there is no guarantee for diverse representation of Canadians, let alone those most affected by the agenda. Take the proven fact in *Bedford* that prostitution disproportionately affects Indigenous peoples.¹⁶⁷ Yet Monica Forrester, the sole Indigenous transgendered sex worker scheduled to testify before the House of Commons Standing

¹⁶⁵ See especially interventions by Hon Joy Smith: Hansard, (12 June 2014) at 1321, 1346, 1548; Ross, *supra* note 159.

¹⁶⁶ *Bedford* ONSC, *supra* note 1 at para 183: “incidental” issues included “human trafficking, sex tourism and child prostitution. While important, none of these issues are directly relevant to assessing potential violations of the *Charter* rights of the applicants.”

¹⁶⁷ *Bedford* ONSC, *supra* note 1 at paras 90, 165, 174.

Committee could not attend.¹⁶⁸ The abiding irony is the reason for Monica's absence. Monica was serving as a surety for a colleague - who had just been arrested under the communicating offence that *Bedford* struck down, then suspended.

On this front, it is noteworthy that *Bedford's* applicants did testify before Parliament.¹⁶⁹ Terri-Jean *Bedford* was escorted out of Senate after exceeding her allotted time, and insinuating she knew politicians partaking in prostitution.¹⁷⁰ However, glimpsing at a Committee Member's questioning of a former sex worker—who supported Bill C-36—shows how non-judicial government procedures can disrespect individuals and undermine remedial potential. After recounting a traumatic rape by three men, Timea Nagy expressed the need to create safe, supportive environments and viable exit options, which she believed Bill C-36 could achieve.¹⁷¹ A Committee Member, Robert Goguen, then posed the following hypothetical:

You were describing a scenario where you were being raped, I believe, by three Russians. Let's suppose that the police authorities had broken in and rescued you. Would your freedom of expression have been in any way breached? You couldn't possibly have been doing it freely.¹⁷²

The audacity to ask such a question is offensive in itself - but the Committee Chair's failure to intervene is also disquieting. The irrelevant, inflammatory examination permitted by parliamentary privilege, which governs legislative procedure,¹⁷³ would not be countenanced in court. We might therefore be tempted to chalk up this exchange to distinct

¹⁶⁸ Committee Proceedings (7 July 2014) at 1627 (Testimony of Chanelle Gallant).

¹⁶⁹ Committee Proceedings (9 July 2014) at 0950–1005 (Testimony of Valerie Scott, Amy Lebovitch).

¹⁷⁰ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 2nd Sess, No 16 (10 September 2014) at 15:189 (Terri-Jean *Bedford*), online: <<https://sencanada.ca/Content/SEN/Committee/412/LCJC/pdf/15issue.pdf>>.

¹⁷¹ Committee Proceedings (7 July 2014) at 1437–1441 (Hon Robert Goguen, testimony of Timea E Nagy).

¹⁷² *Ibid.* Nagy, explaining that “English is my second language still,” apologized for misunderstanding the question. Goguen reframed his assertion, telling Nagy, “You don’t get it. Okay.” Nagy then acknowledged Goguen’s claim that “If you were rescued, you wouldn’t feel that your rights were violated.”

¹⁷³ Audrey O’Brien & Marc Bosc, “Committees” in *House of Commons Procedure and Practice*, 2nd ed (Toronto: Carswell, 2009), online: <<http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=DC42FA65-ADAA-426C-8763-C9B4F52A1277&sbpid=1&Language=E&Mode=1>>. See especially witness testimony.

institutional roles. It is not the Court's job to enforce Parliamentary decorum. But the disrespectful question Robert Gougen asked of Timea Nagy is just one example of how the Court's remedy fell short of *Corbiere's* remedial aims. If *Corbiere's* goal to include rights-bearers within the democratic process is to be fulfilled, then the Court must also consider the barricades of misunderstanding and inequity hindering meaningful participation.

Viewed alone and abstractly, these political problems may appear peripheral to suspended declarations. Cardinaly, it is Parliament's domain, not the judiciary's, to make laws "through a procedure dedicated publicly and transparently to [lawmaking]."¹⁷⁴ The acumen of South African law, however, lends an intriguing angle. In *Doctors for Life International v Speaker of the National Assembly & Others*, the applicant's "repeated and persistent" efforts to be heard during the legislative process for two significant healthcare statutes "were in vain."¹⁷⁵ The Constitutional Court held the National Council of Provinces in breach of its express constitutional obligation to facilitate public involvement in the legislative process, thereby rendering both Acts invalid.¹⁷⁶ As in *Manitoba Language Rights*, the constitutional infirmity was framed as a procedural omission of the prerequisites for legislation's manner and form.¹⁷⁷ Insisting that the separation of powers "cannot be used to avoid the obligation of a court to prevent the violation of the Constitution,"¹⁷⁸ the Court suspended invalidity for 18-months, expounding the relationship between participation and legitimacy with the following:

Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective...is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it

¹⁷⁴ Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1 *Legisprudence* 91 at 99.

¹⁷⁵ *Doctors for Life International v Speaker of the National Assembly & Others*, 2006 (6) SA 416 (CC) at 216 [*Doctors for Life*], invoking s 72(1) of the *Constitution of the Republic of South Africa*, *supra* note 28. See also s 59.

¹⁷⁶ *Doctors for Life*, *supra* note 175 at para 216.

¹⁷⁷ *Ibid* at paras 208–209.

¹⁷⁸ *Ibid* at para 200.

also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.¹⁷⁹

Of course, Canada has no concordant statutory requirement for public participation in lawmaking. Outside of Aboriginal law's duty to consult, the Court has refused to enforce any legal duty for participation in the lawmaking process.¹⁸⁰ Notably, though, none of those precedents invoked individual *Charter* rights, nor did they involve declarations of constitutional invalidity, nor any delayed remedy whatsoever.¹⁸¹ What is more, the shared values of a free and democratic society embroider the constitutional fabric of both Canada and South Africa. Measured against those values, which include, "faith in social and political institutions which enhance the participation of individuals and groups in society,"¹⁸² the treatment of sellers of sex during Bill C-36's creation casts doubt upon its legitimacy.

Thus, viewed cumulatively and contextually, Bill C-36's constellation of procedural defects distorts the values underlying Canada's constitutional order – values that the judiciary is charged to defend. When Bill C-36 was devised, historically ostracized individuals tried to engage with the very authority legally declared to have contributed to that ostracization by violating their security. Although rights-bearers stepped into the legislative process victorious on the merits, their steps began from a deeply entrenched position of subordination with limited bargaining power. Such deep-seated oppression cannot be undone in a single day by a single court decision, no matter how monumental. It would also be naïve to think that decriminalization would have followed from better consultation. Meaningful engagement with sex workers might nevertheless have produced similar legislation. Yet if the process for creating law is democratic and inclusive, the ultimate result may be more palatable. In a lecture about the

¹⁷⁹ *Ibid* at paras 205.

¹⁸⁰ *Authorson v Canada*, 2003 SCC 39, [2003] SCR 40 [Authorson]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473; *Reference re Canada Assistance Plan*, [1991] 2 SCR 525, 83 DLR (4th) 297 at 559–560; *Wells v Newfoundland*, [1999] 3 SCR 199, 180 Nfld & PEIR 269 at para 59 [Wells].

¹⁸¹ For an argument distinguishing *Authorson* and *Wells* from constitutional rights, see Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the *Charter*" (2013), 63 SCLR (2d) 377 at 399–400.

¹⁸² *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 per Dickson CJ at para 64.

administrative law process, McLachlin CJ poignantly professed this procedural dimension of the rule of law:

Without knowing the basis for a decision or without feeling that she has been heard by all persons participating in the decision-making process, how can a citizen honestly be told that the resolution of her problem is binding and legitimate? In the absence of a meaningful opportunity to be heard or to understand the justification for this exercise of public power, in whatever form that it may take in the circumstances, that person will feel that the Rule of Law failed in her case.¹⁸³

As for the legislative and adjudicative processes, advocates and analysts have also pressed the legal ramifications of defective political processes. Alan Young, who represented Terri-Jean *Bedford*, warned that any fouls against basic democratic norms will bear on the government's attempted justification in a future *Charter* challenge.¹⁸⁴ On remedies more generally, Bruce Ryder and Grant Hoole forged a link between s. 1's proportionality principles and suspended declarations. They connected the values of a free and democratic society to *Schachter's* three categories of promoting the rule of law, the public interest, and equality.¹⁸⁵ Ensuring that *Charter* applicants are genuinely heard in the democratic process is further compelling, for as Lorraine Weinrib observed, more nuanced and dramatic law reform can actually come from immediate declarations.¹⁸⁶ Relatedly, the Court's remedy should also address its impact on the democratic process, because as Jeremy Waldron raised, the general citizenry, as opposed to judicial elites, may actually have greater empathy for "discrete and insular minorities."¹⁸⁷ This insight, however, presumes the Legislature is fully functioning - and as we saw earlier, by Waldron's own standards, Parliament's consideration of Bill C-36 was democratically dysfunctional. So what, if anything, should judges should do about that democratic dysfunction?

¹⁸³ McLachlin, "Maintaining the Rule of Law," *supra* note 76 at 188. Outside of administrative decision-making, for a similar expression regarding legislation, see Waldron, "Principles of Legislation," *supra* note 126 at 158.

¹⁸⁴ O'Malley, *supra* note 160 (see Alan Young's comments regarding arbitrariness).

¹⁸⁵ Hoole, *supra* note 16 at 139; Ryder, *supra* note 15 at 283.

¹⁸⁶ Weinrib, *supra* note 16 (discussing abortion and marriage).

¹⁸⁷ Waldron, "The Core of the Case Against Judicial Review" in *Political Political Theory*, *supra* note 126 at 243 [Waldron, "Against Judicial Review"].

Before *Bedford*'s final appeal, Alana Klein proposed a way for judges to account for institutional capacity and democratic legitimacy.¹⁸⁸ Outlining a principled differentiation between proportionality under ss. 7 and 1, Klein explained, "section 1 is explicitly concerned with tempering judicial overreach in light of the legislature's presumed democratic legitimacy,"¹⁸⁹ whereas s. 7 "is a substantive, individual right."¹⁹⁰ From this distinction, she proposed that s. 7 should ground a right to proportionate lawmaking, for "[t]he proportionality norms ... vindicate the dignity of human beings and arguably rule of law by protecting against overweening majoritarianism - majoritarianism that takes insufficient account of the needs of those whose interests may be excluded from or harmed by law and policy."¹⁹¹ However, Klein conceded that affixing political marginalization into s. 1 may not be doctrinally viable.¹⁹² Given that *Bedford* then transformed the relationship between ss. 7 and 1, in my view, it instead may be more feasible to empirically account for political marginalization through the Court's remedial power.¹⁹³ To be frank, reform to judicial remedies is not a panacea for democratic illegitimacy. But procedural reform is not a placebo either - because it can bypass normative barriers to revamping rights doctrine, remedial procedure could have a salient effect. As Part II will now show, some constitutional cases in South Africa and Canada telegraph that some judges are already steering towards this direction.

II. DELIBERATIVE REMEDIAL PROCEDURE

Surveying *Bedford*'s aftermath has demonstrated that three functions for suspending declarations were frustrated: promoting the public interest, facilitating institutional dialogue about constitutional values, and fostering consultative dialogue. It would be shortsighted, however, to conclude that *Bedford*'s suspended declaration alone caused this frustration, and should

¹⁸⁸ Klein, *supra* note 181.

¹⁸⁹ *Ibid* at 396.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* at 398.

¹⁹² *Ibid* at 400-401.

¹⁹³ For an analysis of *Bedford*'s changes to proportionality under ss 7 and 1 that engages with Klein's proposal, see Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill L J 575.

therefore be discarded. Nor does it follow that the Court ought to have immediately struck down the prostitution offences. The consequences of immediate invalidity could have been even worse than those stemming from the suspension. Perhaps pressure to instantly reply would have incited Parliament to explicitly override *Charter* rights via the notwithstanding clause.¹⁹⁴ As for reverberations for the judiciary, Leckey reckoned that suspended declarations may have “emboldened Canadian judges to find rights violations from which they would otherwise shrink.”¹⁹⁵ Under Leckey’s claim, since rights and remedies are intertwined, eschewing suspended declarations could counteract recognizing future *Charter* violations.¹⁹⁶ Still, warts and all, suspended declarations’ have a positive prognosis. Their mounting frequency,¹⁹⁷ export into other jurisdictions,¹⁹⁸ and the government’s propensity to voluntarily abide by declarations,¹⁹⁹ are realistic signs that this remedial tool is unlikely to become obsolete. If we accept the reality that suspended declarations are likely here to stay, then it is pragmatic and prudent to address their associated harms. With *Bedford* in the background, I will now sketch how deliberative remedial procedure can contribute to this broader remedial project.

Two constitutional authorities set the parameters for deliberative remedial procedure. First, recall there is no explicit textual power to suspend declarations of invalidity. Section 52(1) of the *Constitution Act* mandates:

¹⁹⁴ *Charter*, *supra* note 3. Section 33 allows Parliament and Legislatures to declare that an “Act or provision shall operate notwithstanding a provision included in section 2 or sections 7 to 15” for a renewable period of five years. For a discussion of section 33 as a dialogic device, see Roach, “Dialogic Judicial Review,” *supra* note 89.

¹⁹⁵ Leckey, “Enforcing Laws,” *supra* note 17 at 9.

¹⁹⁶ Leckey, “Harms,” *supra* note 17 at 605.

¹⁹⁷ Ryder, *supra* note 15 at 292–293 (the Court suspended 57% of its declarations); Hoole, *supra* note 16 at 114 (from Ryder’s 2002 article until May 2010, the Court suspended 73% of its declarations).

¹⁹⁸ Hong Kong also utilizes suspended declarations. See for example, *Hong Kong Koo Sze Yiu v Chief Executive of the HKSAR*, [2006] 3 HKLRD 455. Contrast with the United Kingdom’s “declarations of incompatibility,” which lack binding force under section 4 of the *Human Rights Act 1998* (UK), 1998 c 42.

¹⁹⁹ *Doucet-Boudreau*, *supra* note 21 at para 32; Roach, “Remedial Consensus” *supra* note 30; McLachlin, “A New Role,” *supra* note 8.

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.²⁰⁰

As a general remedy for enactments unconstitutional in purpose or effect, s. 52(1) is distinct from the *Charter's* unique grant of remedial discretion, which is the second authority for deliberative remedial procedure.²⁰¹ Section 24(1) explicitly provides a personal remedy for unconstitutional government actions:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.²⁰²

Both ss. 52(1) and 24(1) are instrumental to the deliberative remedial procedure proposed below, which addresses the relationship between these provisions to suggest alternatives to *Bedford's* remedy. The procedural apparatus I propose is constructed from a separate oral hearing dedicated to remedies. It bears resemblance to American decree hearings, and Canadian criminal sentencing procedure.²⁰³ Deliberate remedial procedure has the following components:

- I. Fully-articulated reasons;
- II. Evidence adduced on remedial issues;
- III. Participation by stakeholders who can inform the Court and the litigants;
- IV. Focused remedial argument and potential joint submissions;
- V. Setting a suspension's duration by retaining jurisdiction and motions for extensions; and
- VI. Mitigation measures to ameliorate the risk of irreparable harm to *Charter* rights.

²⁰⁰ *Constitution Act, 1982*, *supra* note 6 at s 52(1).

²⁰¹ *Ferguson*, *supra* note 7 at paras 58–65; *Doucet-Boudreau*, *supra* note 21 at para 87; *Charter*, *supra* note 3.

²⁰² *Charter*, *supra* note 3 at s 24(2).

²⁰³ *Criminal Code*, *supra* note 2, Part XIII; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281; Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1.

A. Reasons

As the former Chief Justice McLachlin has remarked, lawyers and judges are often so fixated with rights doctrine that remedies manifest almost as an afterthought, receiving “whatever space and energy is left over.”²⁰⁴ *Bedford*’s scrimpy remedial reasons (3 of the 169 paragraphs) join a string of suspended declarations suffering from what Grant Hoole calls “inadequate reasoning.”²⁰⁵ As Part I highlighted, the Court acknowledged in *Bedford* that keeping the prohibitions in force left “prostitutes at increased risk for the time of the suspension - risks which violate their constitutional right to security of the person.”²⁰⁶ Yet, other than undefined public concern, the reasons did not identify any negative impacts of immediate invalidity on competing third party *Charter* rights, nor upon the justice system, either or both of which could have rationalized the suspension.²⁰⁷

As for the suspension’s duration, *Bedford*’s judgment did not explain why 12-months is an appropriate period to cure three invalid laws - despite the government seeking 18-months,²⁰⁸ and despite the Court of Appeal’s estimation that 12-months was necessary to redress only one invalid law (the bawdy-house provision).²⁰⁹ Interestingly, *Bedford*’s 12-month suspension also stands in stark contrast to a lengthy suspension in *S v Jordan*.²¹⁰ To correct South Africa’s prostitution offences, a formidable dissent of the Constitutional Court, citing Canadian research, would have suspended invalidity for 30 months.²¹¹

²⁰⁴ Hon Beverley McLachlin, “Rights and Remedies - Remarks” in RJ Sharpe & Kent Roach, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) at 22.

²⁰⁵ Hoole, *supra* note 16 at 118.

²⁰⁶ *Bedford*, *supra* note 1 at para 168.

²⁰⁷ Hoole, *supra* note 16 at 134-135, accepts third-party interests may make “perfect vindication of an impinged right” impossible; Roach, “Polycentricity,” *supra* note 19 at 46 (“judges should hesitate to order immediate remedies with wide systemic and perhaps unanticipated effects”); Roach, *Constitutional Remedies*, *supra* note 7 at 3.840-3.900.

²⁰⁸ *Bedford*, *supra* note 1 (Factum of the Appellant at para 138).

²⁰⁹ *Bedford* ONCA, *supra* note 1 at para 326.

²¹⁰ *S v Jordan and Others*, 2002 (6) SA 642.

²¹¹ *Ibid.* Like *Bedford*, Jordan’s dissent accepted that suspending invalidity would prolong prostitutes’ exposure to adverse conditions, but the nature of the violation urged a

The Court's lack of deference to Himel J's remedy and factual findings is also bewildering. In Part I, I suggested that *Bedford's* suspension contradicted the Court's own precedent on appellate standards of review. The stated reasons seem premised upon exaggerated assumptions that enforcement during the suspension would be effective - assumptions which were unsupported by the trial record.²¹² The Court did not make any discernible effort to justify those assumptions on the case's facts. This is concerning not just for the parties and the public - it is concerning for the Court's legitimacy. A robust remedial framework begins from the footing that clear, full explanations are imperative for remedial decisions.

Meagre reasoning is not just an issue of rhetorical fatigue. It is also a procedural problem. If judges do not receive persuasive evidence and argument on remedial issues, then it is unreasonable to demand clearer justification for remedial decisions. A distinct procedural framework for remedial discretion would anchor remedies at the forefront of lawyers' and judges' consciousness to give remedies the space and energy they deserve. In this aim, to achieve meaningful, effective outcomes for their clients, litigators should pitch more specific and innovative relief. This requires lawyers to shift their minds towards long-term implications of the relief they request.²¹³ Even if courts deny pleas for imaginative remedies, thorough remedial pleadings could cue judges to thoroughly explicate their chosen result.

B. Evidence

To articulate rational justifications for suspended declarations, it is axiomatic that the Court's logic be bounded by concrete facts. Applicants must prove they are entitled to constitutional remedies by establishing a sufficient factual basis.²¹⁴ That said, relevant evidence often lies outside of the applicants' hands for at least three reasons: first, deferring the ultimate

carefully measured response by the legislature.

²¹² See Part I, Section B.1.ii., "*Bedford* and the Public Interest," *above*.

²¹³ Roach, "Remedial Consensus," *supra* note 30 at 262 (suggesting *Charter* applicants should seek more than declaratory relief, and judges can adjourn requests for mandatory remedies pending government compliance with declarations).

²¹⁴ *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385; *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3; Roach, *Constitutional Remedies*, *supra* note 7 at 5.480-5.490.

remedy to the other branches of powers calls for speculation about future political events; second, litigation tactics on the merits might have presented a partial picture of the scope of the violation; and third, *Charter* rights of third parties may be at stake. Additional evidence directed to these remedial issues can therefore assist the Court.

When it comes to the future, suspended declarations contemplate, but do not compel government action because of the purpose underlying declaratory relief. By its nature, declaratory relief is designed to attain future compliance; by extension, declarations are influenced by the government's history of voluntarily following court orders.²¹⁵ Naturally, anticipating future government action requires forward-looking appraisals. To build a precise calculus for these estimations, evidence from the rights violation is still important. However, the existing record is insufficient because it is concerned with past actions.²¹⁶ For future contingencies, additional facts should be adduced about the government's willingness and ability to promptly respond to a declaration of invalidity, the need for additional research and study,²¹⁷ the complexity and variety of possible responses,²¹⁸ and the breadth of consultation (if any) to occur. Fetching this information will not be instantaneous. Criminal procedure suggests that a brief adjournment of no more than 30 days would suffice on a standard of "as soon as practicable."²¹⁹ By then, a suspension might become moot - on second thought, a government may opt not to legislate at all.

On the merits, evidence from s. 1 justifications is pertinent to remedial issues. There is an intuitive allure to importing proportionality analysis to suspended declarations, especially because legislative facts pertain to causes

²¹⁵ Roach, "Remedial Consensus," *supra* note 30 at 237, 242; "Dialogic Judicial Review," *supra* note 89 at 65.

²¹⁶ Roach, *Constitutional Remedies*, *supra* note 7 at 5.510.

²¹⁷ *Jordan*, *supra* note 212 at paras 127-128 (the dissent's 30-month suspension was based on the need to further study prostitution and the complex options available); *Dawood & Another v Minister of Home Affairs and Others*, 2000 (3) SA 936 (CC) [*Dawood*] at para 65 (the government's publication of a White Paper on Immigration was calibrated into the two-year suspension for it "suggest[ed] that a fundamental review of the legislation...is in train").

²¹⁸ *R v Smith*, *supra* note 51 at para 32; *Minister of Home Affairs and Another v Fourie and Another*, 2006 (1) SA 524 (CC) at paras 139-148 per Sachs J (noting multiple legislative options) [*Fourie*]; Hoole, *supra* note 16 at 145-146.

²¹⁹ *Criminal Code*, *supra* note 2 at s 720.

and effects of legislated issues. So, a sizeable portion of the s. 1 record remains relevant to deciding whether to suspend a declaration, particularly legislative aims, and any minimally impairing alternatives. For overbroad criminal prohibitions, such as living on the avails of prostitution, enforcement difficulties could be material proof for balancing public concern with individual rights.²²⁰ But relying on proportionality evidence risks overlooking important issues. Litigation tactics demonstrate that evidence fielded from the s. 1 record is inadequate. An informed remedial decision depends upon full analysis of the violation and a comprehensive attempt to justify that violation under s. 1. As Lamer CJ admonished in *Schachter*, when the record is scant on these issues, the Court is “...in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate...”²²¹ In situations like *Schachter*, where the government concedes the violation, or later concedes the violation is unjustifiable under s. 1, the Court “respond[s] to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.”²²² It is therefore possible that *Bedford*’s skeletal s. 1 analysis (neither Attorney General “seriously argued”²²³ the laws were justified) may partly explain *Bedford*’s cursory remedial reasons, and may also have hampered the Court from considering a different suspension period.²²⁴ However, since *Bedford*’s analysis collapses the issues of whether and how long to suspend a declaration into a single determination, we can only guess.

Evidence should also have a principal place in remedial discretion to address competing rights and interests. There should be a wide berth for rebuttal evidence when considering suspended declarations, regardless of whether the parties or the judiciary propose the suspension. In advancing a balancing of interests approach to suspended declarations, Bruce Ryder

²²⁰ *Bedford*, *supra* note 1 at paras 113, 144.

²²¹ *Schachter*, *supra* note 31 per Lamer CJ at 695.

²²² *Ibid* per LaForest (+ L’Heureux-Dube J, concurring in result) at 727. The minority adopted a narrower approach to reading in due to the “unsatisfactory” presentation of the case to the Court.

²²³ *Bedford*, *supra* note 1 at para 161.

²²⁴ *Ibid* at paras 161, 163.

underlined how information that the suspension would irreparably damage the applicants' (or other similarly-situated individuals') rights, or conversely, facilitate the positive exercise of competing *Charter* rights, could be vital to attaining an effective remedy.²²⁵ Admittedly, it may seem cumbersome to track how many similarly-situated individuals are at risk during a suspension. With the advent of case management software, however, it would be relatively easy to ascertain caseload statistics for active criminal charges under infirm provisions. That evidence could prevent abstracting about horizontal inequity among accused during the suspension, plus pacify concerns for administrative resources, which could then persuade judges to also hear interim s. 24(1) applications. In this way, deliberative remedial procedure can also harness Kent Roach's "declarations plus" and two-track remedies. These doctrinal developments, which can secure general and personal relief in parallel, map pathways to systemic justice that can reconcile deference to Parliament with vindicating individual rights.²²⁶ Furthermore, deliberative remedial procedure can soften the charge of judicial activism - that setting the suspension's duration is an "essentially political"²²⁷ decision²²⁸ because it inputs facts regarding the benefits and costs of suspended declarations to individuals and groups. Such facts are material if, as *Corbiere* propounded, the Court is to heed the remedy's impact on the democratic process. Making room for remedial evidence can therefore guard against insolent majoritarianism and populism to advance *Charter* values and democracy.

Finally, since remedial decisions are discretionary, rigid burdens of proof may also be unworkable.²²⁹ Given that a suspended declaration deviates from the constitutional default of immediate invalidity, it may seem logical to allocate the burden of proving that a suspension is necessary to

²²⁵ Ryder, *supra* note 15 at 284.

²²⁶ Roach, "Polycentricity," *supra* note 19; Roach, *Constitutional Remedies*, *supra* note 7 at 12.700-12.835.

²²⁷ Leckey, "Harms" *supra* note 17 at 597 (citing monetary costs of retrospective invalidity and Parliament's schedule as political factors).

²²⁸ *Ibid* at 596-597.

²²⁹ Roach, *Constitutional Remedies*, *supra* note 7 at 12.700-12.835, fn 134, discussing *M v H* (1994), 17 OR (3d) 118, [1994] OJ No 146 (QL) (SC) per Epstein J at 131: "the court itself determines the appropriate remedy; the party challenging the constitutional validity of legislation does not carry the onus of establishing which remedy the court should order."

the government, who apparently stands to benefit most directly from the temporary deprivation of rights.²³⁰ Yet because the Court might also suspend invalidity on its own motion,²³¹ imposing a justificatory burden for suspended declarations may not succinctly fit within a government defendant's evidentiary burden under s. 1. It is also myopic to assume that the government is the sole party who could benefit from a suspended declaration.²³² Along with *Corbiere*, at first instance, the plaintiffs in *Carter v Canada*'s assisted suicide suit requested a suspended declaration to enable Parliament's response.²³³ Intervenors might also support a suspended declaration, and as we will now see, their positions can help inform the Court for a variety of reasons.

C. Participation

Participation is the means to furnish the Court with evidence and argument on whether and how long to suspend a declaration. Information germane to the remedy may be within the direct knowledge and means of stakeholders who did not litigate the merits, but who may later be encumbered with or benefitted by the case's result.²³⁴ If the decision to

²³⁰ According to Bishop, *supra* note 121 at 9-126, this is South Africa's evidentiary burden for suspending declarations. Though not distinguishing between evidentiary and justificatory burdens, Hoole, *supra* note 16 at 144-145 argues judges should bear the onus of justification. Ryder, *supra* note 15 at 284 proposes that both the evidentiary and justificatory burdens should fall to the government.

²³¹ Hoole, *supra* note 16 at 145, fn 144.

²³² Roach, "Remedial Consensus," *supra* note 30 at 223 (observing the courts' assumption that governments benefit from the opportunity "to devise for themselves the details of their response").

²³³ *Corbiere*, *supra* note 133 (the applicants requested a "reporting period" to enable negotiations); *Carter v Canada* (AG), 2012 BCSC 886, 287 CCC (3d) 1 [*Carter* 2012] at paras 27-28, 1394-1397. Both the plaintiffs and the federal Attorney General requested a suspended declaration, disagreeing only on its duration. However, the declaration was coupled with an exemption under section 24(1) to allow one of the plaintiffs to seek physician-assisted death in the interim. British Columbia's Attorney General also gave submissions on the necessity and capacity to legislate.

²³⁴ For an example of an extended suspended declaration that arose because the federal government, as the party ultimately responsible for addressing unconstitutional aquaculture legislation, was absent from the decision on the merits, see *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 92 BCLR (4th) 314, *aff'd* on other grounds 2009 BCCA 481, 97 BCLR (4th) 103. With the benefit of concerns raised by an intervenor, Hinkson J narrowed the scope of the one-year suspension when he

suspend is briefly adjourned, it allows time to consider whether other skilled, interested players should participate in the remedy.²³⁵ Without this breathing room, a government striving to fill a legal void is less likely to consider local alternatives that could creatively respond to intricate issues. Indirectly, suspended declarations presuppose that the level of government who defends the defective law should be the same level of government that redresses it. Hence, suspended declarations may discourage cooperative federalism and the subsidiarity principle that “power is best exercised by the government closest to the matter”²³⁶ - which the Court has endeavored to foster when criminal law and health converge.²³⁷

Depending on which right(s) and constitutional powers are engaged, it may be constitutionally efficacious (and administratively and financially efficient) for the Federal government to defer to (or collaborate with) the provinces. For instance, if the Federal government had opted for a labour and health policy response to *Bedford*, in lieu of (or alongside) its criminal response, each province’s constitutional authority would be directly implicated beyond administering justice. Provinces and communities are diverse in their local experience of prostitution as a socioeconomic and cultural issue. Across municipal and provincial jurisdictions, law enforcement’s means and resources vary widely, as well as governmental capacity to develop policy and law. Beyond untying the legal knots, coordinating multiple positions and different legislative capacities takes longer than a single government’s response.

From Quebec’s intervention in the *Carter* litigation, we can distil some advantages and disadvantages of using a separate remedial hearing to engage multiple governments on polycentric issues.²³⁸ In 2015, the Court

extended it for another year at Canada’s request: 2010 BCSC 100, 2 BCLR (5th) 306.

²³⁵ Roach, “Polycentricity,” *supra* note 19 at 11.

²³⁶ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 at para 69.

²³⁷ *Ibid* at paras 69–72 (per McLachlin CJ (+3)), at para 273 (per LeBel and Deschamps JJ (+2), disagreeing on subsidiarity’s application to the Reference); *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 63 [PHS]; *Carter* 2015, *supra* note 22 at paras 49–53.

²³⁸ Polycentricity, a classic structural problem of adjudication, involves distributing limited resources among multiple contending stakeholders who may lack standing to litigate. See Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353, as explained in Roach, “Polycentricity,” *supra* note 19 at 5, 9.

suspended its declaration that the *Criminal Code*'s blanket ban on physician-assisted death violated s. 7 of the *Charter*.²³⁹ Since Quebec had begun studying assisted death well before the *Carter* suit, Quebec's intervention enriched the deliberation about respecting the rights of individuals seeking end-of-life assistance. In 2016, the Court struck a separate oral hearing to determine whether the suspension's duration should be extended. At that time, Quebec's intervention enabled the province to enact its own assisted death legislation, as the Court exempted Quebec from the four-month extension. Unfortunately, the courtroom debate did not translate to the brief judgment for the extension, but submissions on the impact and role of other stakeholders such as medical professionals and the provinces featured prominently at the hearing.²⁴⁰ To be sure, looking short term, a separate remedial hearing could be undesirable because additional participants might slow down the time for closing cases. In the long term, however, a separate remedial hearing could remit some intervention from the merits to the remedy - if intervenors have a proximate interest in the ultimate legislative response. There is no guarantee that a separate hearing would save time, but if a more informed remedial decision can prevent relitigation by fostering collaboration and consultation, then benefits abound.

Taking stock of deliberative remedial procedure also requires acknowledging that governments, accountable to Parliament and voters, are always free and capable of acting on their own without the judiciary prodding them to confront complex problems.²⁴¹ This is theoretically and historically true, yet it also overestimates legislators' capacity, and underestimates complex government affairs. It may seem obvious, but many parliamentarians are sheltered from the first-hand impacts of the policies they champion, and many lawmakers are not lawyers. For example, amidst much bewilderment during the Standing Committee's study of Bill C-36,

²³⁹ *Carter* 2015, *supra* note 22; Leckey, "The Harms," *supra* note 17 at 597, fn 73 (noting that the length seemed short, citing Quebec's study).

²⁴⁰ *Carter* 2016, *supra* note 51 (Oral Hearing). Interestingly, Wagner J (as he then was) asked the appellant's counsel whether the suspension ought to have been issued in the first place.

²⁴¹ For example, the failed attempt to pass new abortion laws following the immediate declaration in *R v Morgentaler*, [1988] 1 SCR 30, [1988] SCJ No 1 (QL); Roach, "Remedial Consensus," *supra* note 30 at 249; Hoole, *supra* note 16 at 120-121, 134; Ryder, *supra* note 15 at 281; Weinrib, *supra* note 16.

the Parliamentary Secretary to the Minister of Justice actually requested a memo from the Justice Department on whether summary conviction offences would be registered on a criminal record.²⁴² Since even legally-trained parliamentarians may be unacquainted with the consequences of criminal liability, let alone *Charter* jurisprudence, deliberative remedial procedure could foster due attention to the legal ramifications of new policy approaches. It would do so by creating a space to consider how forthcoming legislative remedy directly affects individual rights.

Waiting for the government to initiate action on unpopular issues also presumes that lawmaking is parliamentarians' primary task. As Jeremy Waldron has observed, politicians may regard lawmaking as the least prestigious among their many occupations, which include "the mobilization of support for the executive, the venting of grievances, the discussion of national policy, the processes of budgetary negotiation, the ratification of appointments, and so on."²⁴³ Outside of Parliament, unlike judges, politicians are distracted with reelection and pleasing their constituents. Geographic and sociocultural idiosyncrasies mean those constituents may not represent (let alone understand) vulnerable, disenfranchised people relying on *Charter* litigation to protect their rights and advance their interests. Furthermore, because unpopular reform would rattle discord into an otherwise complacent electorate, as Roach has noted, politicians facing reelection are loath to spearhead systemic change to an unprincipled status quo.²⁴⁴ Such danger may have been reified in *Bedford's* context because the government responsible for Bill C-36 was elected through a tough-on-crime platform,²⁴⁵ and marketed Bill C-36 in a package with its *Victims Bill of Rights*.²⁴⁶ It would therefore be fatuous to expect the Federal government of the day to voluntarily introduce decriminalization. While *Charter* remedies should not endow successful litigants with a policy veto, as Roach has emphasized, provoking and providing time and space to debate policy

²⁴² Committee Proceedings (8 July 2014) at 1300 (Hon Bob Dechert).

²⁴³ Waldron, "Principles of Legislation," *supra* note 126 at 156.

²⁴⁴ Roach, "Dialogic Judicial Review," *supra* note 89 at 75.

²⁴⁵ Roach, "Dialogic Judicial Review," *supra* note 89 at 96 (noting the influence of crime agendas on voting patterns and "neglect[ing] the rights of minorities and the unpopular).

²⁴⁶ See Part I, Section 3.ii., "Bill C-36's Consultative Dialogue," *above*.

options can be within the judiciary's bailiwick.²⁴⁷ For suspended declarations to be prosperous for democracy, however, jurists must pay closer attention to the risk of democratic deficits during debate, including the ability of affected individuals to participate.

The changing dynamic of institutional actors also makes inclusive remedial participation important. Globally, scholars have flagged accelerating public/private governance partnerships for blurring legal, political, and social boundaries. Through decentralized hybrid governance, burdens traditionally borne by the state are reallocated to non-state actors, often without stringent oversight.²⁴⁸ Domestically, after exiting the courthouse, successful claimants treading through political quicksand may also face unanticipated obstacles of bargaining with non-state actors to access beneficial services that can redress rights violations. Although *Bedford's* remedy remitted prostitution's harms to Parliament to "devise a new approach"²⁴⁹ that new approach enlisted social organizations to the frontlines of sex work. As part of the new policy aim to eradicate prostitution, administrators allotted funding for support services to social organizations subscribing to abolitionist ideology.²⁵⁰ This deferral of state responsibility may disadvantage sex workers who seek support and safety-enhancing benefits, but resist victimization.

Consequently, over and above civil society's contributions to jurisprudence and legislation, civil society's intervention in *Charter* litigation can bring normative implications for individuals that actualize long after

²⁴⁷ Roach, "Dialogic Judicial Review," *supra* note 89.

²⁴⁸ Kerry Rittich, "Out in the World: Multi-Level Governance for Gender Equality" in Ashleigh Barnes, ed, *Feminisms of Discontent: Global Contestations* (Oxford: Oxford University Press, 2015) at 57-59.

²⁴⁹ *Bedford*, *supra* note 1 at para 165.

²⁵⁰ Canada, Department of Justice, "Measures to Address Prostitution Initiative: Call for Proposals - NGOs & Governmental Organizations" (Ottawa: DOJ, deadline January 30, 2015), online: <<http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/ngo.html>>. Selection criteria to receive funding included having "existing networks with various support services for individuals wishing to exit prostitution." See also Public Safety Canada, Crime Prevention Action Fund, "Measures to Support Exiting Prostitution," Call for Letters of Intent (Ottawa: PSC, deadline January 30, 2015), online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/fndng-prgrms/crm-prvntn-ctn-fnd-eng.aspx>>. Funding was available to "support a range of tailored and comprehensive approaches to assist individuals who want to exit prostitution."

courts and legislatures finish their work.²⁵¹ That those implications can transpire in unchecked ways redoubles the need for remedies to recognize the manifold ways in which social justice is purveyed. Theoretically, this flexible approach to participation would harmonize remedial responsibility with the flexible causation test which (thanks to *Bedford*'s doctrinal feats) now applies to assessing responsibility for *Charter* violations. Since "government action or law"²⁵² need not "be the only or the dominant cause of the prejudice suffered by the claimant,"²⁵³ appreciating the confluence of state and non-state conduct in curing that prejudice would unite remedial practice with doctrinal progressions on accountability for *Charter* breaches.²⁵⁴ Within this holistic frame, inclusive participation in *Charter* remedies marks a modern, realistic recognition of the influence (both good and bad) that civil society exerts in justice.

D. Argument and Agreement

Along with facilitating an informed, inclusive constitutional solution, bifurcating the rights adjudication from the remedial decision can facilitate joint positions. Recall that in *Bedford*'s final appeal, the Court acknowledged the need for temporary validity was debatable - yet the Court did not invite any debate.²⁵⁵ By then, the parties had agreed that the Court of Appeal's remedy was inappropriate: the applicants "join[ed] forces with ...Canada, who vigorously argue[d] that [the] reading-in of 'circumstances of exploitation' [was] an unworkable and inappropriate remedy for the living on the avails offence."²⁵⁶ However, on their face, the applicants' written

²⁵¹ Rittich, *supra* note 248 at 58-60 (discussing complications arising from norm authorship via private/public partnerships). A similar argument is raised to critique feminist approaches to law in Carolyn Moulant, "Are Feminists Their Own Worst Enemy?" (2017) Faculty of Law, University of Toronto (Paper, Alternative Approaches to Legal Scholarship) [unpublished].

²⁵² *Bedford*, *supra* note 1 at para 76.

²⁵³ *Ibid.*

²⁵⁴ *Ibid* at para 80.

²⁵⁵ *Ibid* at para 167; see Part I, Section B.1.i., "The Justification for *Bedford*'s Suspended Declaration," *above*.

²⁵⁶ *Ibid* (Factum of the Respondent at paras 117-118). In *Carter* 2012, *supra* note 233 at paras 1394-1397, the plaintiffs and Canada had both requested the suspension, disagreeing only on its duration.

submissions did not look beyond invalidation to clearly oppose Canada's proposed suspension, nor to anticipate what consequences a suspension could catalyze.

Although it is incumbent upon applicants to seek the remedy they feel is just and appropriate, the nature of the power to suspend invalidity - as an implied exception to the dictate of s. 52(1) - implies that reciprocal latitude to the parties is warranted. To avoid unfairly blindsiding the parties, the Court's capacity to suspend declarations on its own initiative also militates towards a separate hearing, especially because procedural prejudice and a sufficient record are prerequisites for an appellate court to raise a new issue.²⁵⁷ Additionally, if parties have not addressed material remedial issues in their submissions, then fairness - a recognized remedial principle - supports granting them that opportunity.²⁵⁸ On this point, Himel J's approach in *Bedford* is instructive. She stayed her judgment for 30 days "to enable the parties to make fuller submissions"²⁵⁹ on potential public harm from brothel operations.²⁶⁰

At any rate, if the parties cannot reach remedial consensus, then a short pause could still be beneficial by encouraging them to narrow areas of contention. In promoting a better understanding of the scope of the infringement, breaking to review the Court's adjudication of the violation may encourage a change of heart in the government defendant. Think about how *Bedford's* endorsement of safe houses (dismantled by the bawdy-house offence) could have facilitated negotiations for a creative remedy consistent with remedial principles.²⁶¹ If the Court's assessment of the merits had been a springboard for remedial negotiations, it could have propelled the parties to negotiate a restitution-oriented remedy for Grandma's House, which was raided and charged during Robert Pickton's perpetrations.²⁶² Such a remedy could have vindicated past harm and prevented that harm's future

²⁵⁷ *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689.

²⁵⁸ *Doucet-Boudreau*, *supra* note 21.

²⁵⁹ *Bedford* ONSC, *supra* note 1 at para 539.

²⁶⁰ *Ibid.*

²⁶¹ *Bedford*, *supra* note 1 at para 64.

²⁶² *Ibid.* Charges were not stayed until four years after its closure. Standing issues aside, an exemption from the bawdy-house provision would also have been required if safehouses were re-established during the suspension. The Court's previous remedy in PHS, *supra* note 237, which involved a safe drug injection site, could have been a useful precedent.

replication. And if counsel first propose creative remedies in joint submissions, it could overcome judicial reticence to dynamic remedies. Those remedies would have a consensual element from joint submissions, rather than being invented and unilaterally imposed by a judge.

Even failed attempts at negotiating a joint submission have advantages that promote *Charter* values. A process that provides space for the wrongdoer to offer routes of redress, and for the sufferer to accept, reject, or counteroffer can empower individuals and educate the government. Three parliamentarians from three parties heralded this message when recently advancing democratic reform, stating that: "...presence matters not just for what is said, but for the added power that comes when words come from the lips of those who have been affected or will be affected by government policies."²⁶³ This political sentiment suggests that time to negotiate may create a more restorative remedy by giving rights-bearers a fair opportunity to explain why a proposed legislative solution is inappropriate.

Capacity for fuller negotiations also allows the defendant's tone to change from forceful denial to repentant responsibility. Deliberative remedial procedure can therefore lend credibility to policy pendulums. Prior to stepping out into the policymaking and lawmaking stages, the tempo and topics ripe for upcoming deliberations could already be set. Deeper debate about changes that respect *Charter* rights could already have begun. Even if the Court does not retain jurisdiction, or later denies structured relief, a separate remedial hearing can gear the parties towards meaningful consultation because it inscribes a structured process to unpack the rights' violation into remedial deliberations. Indeed, the timing of rights-bearers' dialogue with the Executive may be crucial. Lori Sterling asserted that the "real," "robust" *Charter* dialogue actually occurs before a bill is ever tabled into the House, through a confidential risk assessment during the drafting phase.²⁶⁴ Considering that the Justice Minister admitted

²⁶³ Michael Chong, Scott Simms & Kennedy Stewart, *Turning Parliament Inside Out: Practical Ideas for Reforming Canada's Democracy* (Madeira Park: Douglas & McIntyre, 2017) at 6.

²⁶⁴ Lori Sterling, "The *Charter's* Impact on the Legislative Process: Where the Real 'Dialogue' Takes Place" (2007) 23 NJCL 139 at 148. The constitutionality of that risk assessment procedure is now under challenge: *Schmidt v Canada (AG)*, 2016 FC 269, [2016] 3 FCR 477 (appeal pending) (1 April 2016), Ottawa, FCA-105-16 (Notice of Appeal), heard on February 8, 2017.

that s. 1 was the ultimate determinant for Bill C-36's constitutionality,²⁶⁵ constitutional risk-taking underscores that a deliberative mechanism during legislative drafting could prove critical to meeting the needs of those whose rights have been violated. Most of all, then, if an inclusive, informed remedial process can begin at the Court, the overall gains for justice are invaluable.

E. Duration by Retaining Jurisdiction

1. *The Duration Dilemma*

When setting a deadline for Parliament, judges walk a tightrope between two pitfalls: condone legislators' dawdling, or trigger a reckless, shotgun sprint to the Queen's Printer. Before delving into how the Court should compute a suspension's duration, it is useful to compare precedents.

In *Swain*, only three extra months from the initial six-month suspension sufficed to compose the *Criminal Code*'s new Part XX.1, with significant procedural and substantive changes for mentally disordered accused.²⁶⁶ Yet against the years Quebec spent studying assisted death, *Carter*'s total 16-month suspension likely cut too short.²⁶⁷ Contrast also the paradigm shift plowed through Bill C-36's 12-month deadline with the 30-months allocated to encourage "comprehensive and integrated"²⁶⁸ prostitution laws in *S v Jordan*.²⁶⁹ Although fixing an impractically short timeline can increase the hazard of a poor response, if *Bedford*'s suspension had been 30-months, there is no guarantee the government would have used that time efficiently

²⁶⁵ See Part I, Section B.3.ii., "Bill C-36's Institutional Dialogue," *above*; Committee Proceedings, *supra* note 131.

²⁶⁶ *Swain*, *supra* note 32 (28 October 1991), 19758 (SCC) (motion for directions granted until February 5, "with the proviso that for whatever reason the parties may reapply"), online: <<http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=19758>>; *An Act to Amend the Criminal Code (mental disorder)*, SC 1991, c 43. The regime, most of which was proclaimed into force on February 4, 1992, was upheld in *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 175 DLR (4th) 193.

²⁶⁷ Leckey, "Harms," *supra* note 17 at 597, fn 73. Compare also Quebec's response to *Chaoulli v Quebec*, *supra* note 51, discussed in Roach, "Polycentricity," *supra* note 19 at 39-40.

²⁶⁸ *S v Jordan*, *supra* note 212 at para 128.

²⁶⁹ *Ibid*; Bill C-36, Preamble, *supra* note 11; *Technical Paper*, *supra* note 11.

and effectively.²⁷⁰ But remembering *Bedford's* s. 7 infringements came from “fundamentally flawed”²⁷¹ laws indicates that the nature of the constitutional infirmity should weigh towards greater time to respond.²⁷² As posited when discussing *Corbiere*, if laws breach the *Charter* in unprecedented ways, then it may take longer to remedy that breach with new policy and legislation. This logic is strengthened by mechanics of legislative drafting, which involves an internal risk assessment by government counsel on Cabinet’s behalf.²⁷³ If governments draft bills because landmark cases dramatically change the law, it follows that governments face a greater constitutional risk in legislating. Prudence counsels careful, comprehensive consideration to manage that higher risk to individual rights.

At the same time, if courts habitually issue long suspensions at a ruling’s outset, without proof of how much time is necessary and feasible, governments are less incentivized to act forthwith. The suspension works as a sedative, not a stimulant; an unconstitutional status quo persists longer than necessary, to only then produce the bare constitutional minimum.²⁷⁴ This reductive risk came to fruition in *Corbiere's* 18-month suspension. Nearly seven months elapsed before the government even announced a plan, never mind commencing consultations.²⁷⁵ Aside from prompting follow-up litigation, *Corbiere's* legislative sequel lacked the complexity and breadth that the Court imagined.²⁷⁶ When it comes to lengthy suspensions, Hoole has alerted that constitutional minimalism is an unfortunate risk and consequence often borne by marginalized individuals.²⁷⁷

Without any interim remedy to mitigate the potential irreparable harm to prostitutes’ safety during *Bedford's* suspended declaration, 12-months was far too long. On the other hand, the democratic deficits extracted from Bill C-36’s legislative process make it plain that 12-months was also sorely too short. In my view, the dilemmatic risks of unduly short and unnecessarily

²⁷⁰ Roach, “Remedial Consensus,” *supra* note 30 at 242, 246.

²⁷¹ *Bedford*, *supra* note 1 at para 105

²⁷² *Ibid* at para 123; Leckey, “Harms,” *supra* note 17 at 592.

²⁷³ Sterling, *supra* note 264 at 150.

²⁷⁴ Roach, “Remedial Consensus,” *supra* note 30 at 242.

²⁷⁵ *Ibid* at 244.

²⁷⁶ *Ibid* at 244–245.

²⁷⁷ Hoole, *supra* note 16 at 127.

long suspensions can be averted by harkening back to first principles and practices, and acclimating to modern complexities. A detour to case law before and after *Bedford* will now help explain how retaining jurisdiction can resolve the duration dilemma.

2. *Reviving Doucet-Boudreau*

In *Manitoba Language Rights*, the suspended declaration was ushered through separate hearings facilitated by retaining jurisdiction. To “fix some arbitrary period”²⁷⁸ when the reference was decided was unsatisfactory to the Court, because there was “no factual basis”²⁷⁹ to determine how long it would take to enact curative legislation.²⁸⁰ Instead, the Court adjourned for 120 days before reconvening for a special hearing to determine the minimum time for constitutional compliance, with submissions from intervenors as well.²⁸¹ The Court was ultimately seized with the matter for nearly 7 years while Manitoba translated its statutes.²⁸² Thus, from the suspended declaration’s very beginning in *Manitoba Language Rights*, it symbolized a tradition of judicial and legislative cooperation in pursuit of a common goal: reaching a just, constitutional solution. Since *Manitoba Language Rights* did not invoke the *Charter*, and as a reference, it was an unbinding, advisory opinion,²⁸³ it should therefore be all the more

²⁷⁸ *Manitoba Language Rights*, *supra* note 8 at 769.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid* at 768–769.

²⁸¹ *Ibid.*

²⁸² *Manitoba Language Rights*, *supra* note 8; *Ref Re Manitoba Language Rights*, [1985] 2 SCR 347, 26 DLR (4th) 767; *Manitoba Language Rights Order (Re)*, [1990] 3 SCR 1417, 1990 CarswellNat 749F; *Reference re Manitoba Language Rights*, [1992] 1 SCR 212, 2 WWR 385. The parties’ agreement on duration was adopted by the Court. The suspension was again extended in 1990, pending a second reference, which resulted in the parties’ second agreement in April 1992.

²⁸³ *Secession of Quebec*, *supra* note 29 at paras 8–9, 15. Unlike a *Charter* application, as an exercise of original, rather than appellate jurisdiction, references are not adversarial in nature, nor are they legally binding – the opinion is purely advisory. That said, this procedural distinction is more of a technical than controlling difference; like complying with declarations, following reference advice also happens to be customary of Canadian governments: *Bedford*, *supra* note 1 at para 40. See also *Ref re Remuneration of Judges of Prov Court of PEI*, [1998] 1 SCR 3, 161 Nfld & PEIR 125. To inoculate Provincial Court decisions from a flood of *Charter* challenges, three Attorneys General sought additional remedies at a rehearing after a reference on the remuneration of provincial judges held

legitimate to retain jurisdiction in *Charter* challenges because of s. 24(1)'s express, expansive remedial provision, and the principles that fortify the *Charter*'s remedial power.

Rooted in the same background of protecting minorities, *Doucet-Boudreau v Nova Scotia* grounded the foundational principles guiding remedial discretion under the *Charter*.²⁸⁴ After ruling the Nova Scotia government had violated s. 23 of the *Charter*, LeBlanc J retained jurisdiction over the parties. His order mandated Nova Scotia to use its "best efforts" to construct previously-promised Francophone schools by stipulated deadlines, and to reappear for progress reports. The final appeal edified that remedial discretion under the *Charter* can only be restrained by constitutional principles, which require:

1. A meaningful and effective remedy that vindicates the claimant;
2. Respects the separation of powers and institutional relationships;
3. Invokes the functions and powers of a court; and
4. Is fair to the party against whom the order is made.²⁸⁵

The bench fissured on how these principles applied, with five judges upholding LeBlanc J's remedy. The minority scolded the order as vague and procedurally unfair, and criticized the managerial style of the reporting hearings for tangling the branches of power.²⁸⁶ These concerns are important reminders to broach the retention of jurisdiction delicately. Yet through a static stance on judicial functions, the minority strictly cordoned off the branches of powers in a way that undercuts collaboration in stable good governance. This rigidity depreciated the urgent context posed by the language right, which was atrophying; the circumstances of the infringement, which was historical and ongoing; and the reality that only one solution could effectively redress the infringement: building the schools straightaway. While the minority's objections are formidable, they are somewhat paradoxical. If, out of purported fairness to the government, judges must always impose terms sufficiently detailed for contempt, it can

that the three provinces unconstitutionally interfered with judicial independence. Amid uncertainty about its original disposition, the Court imposed a suspension and retained jurisdiction to allow the parties and intervenors to seek further directions.

²⁸⁴ *Doucet-Boudreau*, *supra* note 21.

²⁸⁵ *Ibid* at paras 55–58.

²⁸⁶ *Ibid* at paras 103, 120–121. For a recent critique of the minority's approach, see Roach, "Polycentricity," *supra* note 19 at 30–31.

antagonize institutional relationships by anticipating that the government will defy the court. If clarity begets fairness to the government, yet there is only one solution capable of meaningfully remedying the breach, then the only conceivable way to respect the branches of power is to identify that one solution, then defer on the precise details of its implementation.

Importantly, *Doucet-Boudreau*'s minority did not object to retaining jurisdiction in all circumstances. Here, it is noteworthy that the injunctive, jurisdictional remedy did not invalidate any legislation. To the minority, retaining jurisdiction in *Manitoba Language Rights* - which did invalidate legislation - was legitimate because the purpose of the procedure was "to ask for the government's assistance in fashioning [the remedy]."²⁸⁷ Thus, if courts retain jurisdiction to scaffold their suspended declaration to the government's impending response, then retaining jurisdiction remains a judicial remedy fitted to the adjudicative role. And if a suspended declaration is ordered in tandem with other features of deliberative remedial procedure, then judges will not become *functus*: adjudicative issues are left outstanding (e.g. the suspension's total time, individual remedies), to be decided following evidence and adversarial argument. In this vein, retaining jurisdiction provides a soft *ex ante* incentive for compliance (having to justify inaction with evidence), rather than a hard *ex poste* penalty for defiance.

Retaining jurisdiction can also achieve clarity because it is impossible to predict uncertain legal consequences (eg. enforcement) and events beyond all parties' control (eg. elections, crises). Kent Roach had such considerations in mind on the brink of *Doucet-Boudreau*'s final appeal, when he supported retaining jurisdiction (with extension motions) to address timing and interpretive disputes during suspended declarations.²⁸⁸ His recent insights draw an affinity between LeBlanc J's remedy and a "declarations plus" approach, which "maintains the virtue of general declarations that leave governments room to decide the precise means to comply,"²⁸⁹ while simultaneously "counteract[ing] the vice of... costly new litigation if there are ongoing problems of compliance."²⁹⁰ Moreover, the Court's departure from *Schachter*'s categories to defer to Parliament's

²⁸⁷ *Ibid* at para 144.

²⁸⁸ Roach, "Remedial Consensus," *supra* note 30 at 256-259.

²⁸⁹ Roach, "Polycentricity," *supra* note 19 at 33.

²⁹⁰ *Ibid*.

capacity and competency, plus recent combinations of individual and declaratory relief,²⁹¹ transmit *Doucet-Boudreau*'s principles to constitutional remedies at large, including suspended declarations. Roach elucidated that "principles of effective remedies and proper institutional role"²⁹² figured centrally in *Schachter* when the Court "articulated helpful and workable principles to guide judges."²⁹³ In other words, the explicit principles espoused in *Doucet-Boudreau* were already implicit in *Schachter*. Principled remedial practice can therefore embed *Doucet-Boudreau*'s principles within suspended declarations.

3. *Supervising Suspended Declarations*

A recent addition to the rare line of cases on retaining jurisdiction came with *Thibodeau v Air Canada*,²⁹⁴ which restrained retaining jurisdiction to "compelling circumstances"²⁹⁵ - at least when language rights are violated.²⁹⁶ In overturning a structural order for fixing a systemic breach of Air Canada's bilingualism obligations, *Thibodeau* reaffirmed that retaining jurisdiction remains within s. 24(1)'s remedial arsenal. However, *Thibodeau* cautioned that structural remedies must be handled "with special care"²⁹⁷ because potentially vague wording can pique disputes about compliance.²⁹⁸ Certainly, judges should draft clear orders so that parties can move forward. Yet in confining judicial supervision to compelling circumstances - circumstances which the Court did not specify - *Thibodeau* underappreciates the dexterity of trial judges, and the responsiveness of both modern and equitable practice. In civil procedure, judges are continuously involved in implementing resolutions.²⁹⁹ Judges commonly order mandatory

²⁹¹ See Part II, Section F., "Mitigation by Interim Remedies," *below*.

²⁹² Roach, "Principled Remedial Discretion," *supra* note 7 at 137-138.

²⁹³ *Ibid* at 141.

²⁹⁴ *Thibodeau v Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

²⁹⁵ *Ibid* at para 128.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid* at para 126.

²⁹⁸ *Ibid*.

²⁹⁹ *Doucet-Boudreau*, *supra* note 21 at para 71; Roach, *Constitutional Remedies*, *supra* note 7 at 13.50-13.80, 13.1300-13.1350; "Remedial Consensus," *supra* note 30 at 264; "Polycentricity," *supra* note 20 at 32-33; Nova Scotia, *Nova Scotia Rules of Civil Procedure* at rr 4.13, 10. Rule 1.01 states, "These Rules are for the just, speedy, and inexpensive

mediation, convene date assignment conferences, and supervise settlements for speedy and just resolutions. Judges also have statutory powers to supervise criminal case management for fairness and efficiency.³⁰⁰ Thus, a procedurally vigorous approach to remedial discretion unites constitutional remedies with the movement of modern legal practice. But even accepting that retaining jurisdiction should be a last resort, if redressing harm to politically and socially marginalized people would not count as compelling circumstances distinguishable from *Thibodeau*, then it is hard to imagine what would. That one of judicial review's most staunch opponents, Jeremy Waldron, admits the value of judicial intervention in situations of prejudiced minorities and dysfunctional lawmaking suggests that *Bedford* could have fit the mold.³⁰¹

When governments are capable of addressing the legal and operational fallout from the declaration, evidence of readiness to respond, plus good faith steps towards a constitutional solution should justify granting or extending a suspension - as long as harm to individual rights can be allayed in the interim.³⁰² Retaining jurisdiction during a suspension can benefit successful claimants and other affected stakeholders, who can rebut proposed extensions with evidence of heel-dragging, and raise concerns for

determination of every proceeding.”

³⁰⁰ *Criminal Code*, *supra* note 2 at ss 551.1–551.7.

³⁰¹ Waldron, “Against Judicial Review,” *supra* note 187 at 243. For an example of how retaining jurisdiction on clearly stipulated terms can prevent future disputes during a suspended declaration, see *Catholic Children’s Aid Society of Hamilton v GH*, 2016 ONSC 6287, 83 RFL (7th) 299 at para 110 [GH]. Chappel J promoted meaningful consultation by insisting that an extension of the suspension would only be granted with detailed evidence of steps taken and estimations of extra time needed.

³⁰² Roach, “Remedial Consensus,” *supra* note 30 at 243. But see *Procureure générale du Canada c Descheneaux*, 2017 QCCA 1238 at paras 39–83, [2017] QJ No 10959 (QL), outlining a four-factor framework for extending suspended declarations. When the Federal Government failed to promptly respond to a section 15 violation caused by gender discrimination in the *Indian Act*, RSC 1985 c I-5, the Court of Appeal drew four factors from prior suspended declarations, including *Carter* 2016, *supra* note 51: changed circumstances, reasons for ordering the initial suspended declaration, the likelihood of remedial legislation being passed during the suspension, and impacts on public confidence in the administration of justice. However, the Court of Appeal did not cite *Morton*, *supra* note 234 at para 17, nor *GH*, *ibid*, which both establish that the government’s ability to anticipate and plan measures to mitigate the impact of the suspension, and willingness to engage in good faith consultations, can support extending the suspension without discounting the rights of affected parties.

irreparable harm without shouldering the costs of fresh litigation. By employing the Court's role to protect minorities, retaining jurisdiction has flexibility for governments to independently devise policy, and can foster democratic dialogue.³⁰³ As a dispute resolution mechanism, retaining jurisdiction is also important because barriers of inequity and misunderstanding must be leveled before meaningful deliberation about the range and merits of policy options can even take place.³⁰⁴ To be sure, if the Court facilitates the means and opportunity to engage with the government, that interruption to the elected branches may entice objections of judicial activism. But there is an essential difference between interposing to balance an inequity of bargaining power in a particular process (tied to a systemic violation of a historically oppressed group) and intruding to impose a single policy result. The Court's capacity to see that the parties engage fairly within the policymaking sphere does not direct a particular policy outcome,³⁰⁵ but instead preserves the government's independence in reaching whatever result it chooses, and ensures that result is informed by a process that listens to the voices of those affected by it.

If this distinction between process and result animates judicial discretion, then judges should not balk at retaining jurisdiction to secure an appropriate and just remedy. Including applicants' viewpoints within the policymaking sphere matters because governmental responses to unconstitutional laws may not always result in new legislation. As Roach has pressed, since "there is no guarantee that the successful *Charter* applicant will even be consulted or kept informed about the policy process",³⁰⁶ incremental supervision over a suspended declaration can achieve transparency and accountability through an adversarial process that behooves the judiciary. It can keep the Court, participants, and public abreast of developments towards curing the violation, what has yet to be

³⁰³ *Ibid* at 242–243, 266–267.

³⁰⁴ *Ibid* at 240. See also Sandra Liebenberg, *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta, 2010) at 434–437. In South Africa, judicial interventions to redress poverty, homelessness, and infection are also grounded in these concerns.

³⁰⁵ Liebenberg, *supra* note 304 at 412 (courts' institutional characteristics render them "well placed to detect the impact of general legislative and executive acts and omissions on particular individuals and groups").

³⁰⁶ Roach, "Remedial Consensus," *supra* note 30 at 224–225; *Constitutional Remedies*, *supra* note 7.

implemented, and why those items are outstanding. The mere prospect of airing unfulfilled undertakings on the record can spark governments to action, and can kindle democratic debate about the rights and values at stake.³⁰⁷

In summary, if evidence and argument warrant a suspended declaration, the Court should retain jurisdiction for the entire suspension. Depending on the invalid law(s)' complexity and multiplicity, and the government(s)' readiness to respond, the suspension should first be fixed for an initial 3-to-6-months, which would encourage a productive start. To avoid the perils of slipshod decision-making, if the government returns to court with proof of good faith steps towards a solution and meaningful consultation with the applicants, subject to rebuttal, the suspension could continue. At the same time, a short initial suspension could avoid subjecting rights-bearers to prolonged unconstitutional harm. The Court would be available to clarify any interpretive disputes regarding its ruling on the breach,³⁰⁸ remain open for rights-bearers and participants to seek interim relief and to apprise the Court of new issues that surface after the ruling.

F. Mitigation by Interim Remedies

When used to brace suspended declarations with interim remedies, retaining jurisdiction can also mitigate irreparable damage to *Charter* rights during suspensions, reduce horizontal inequity occasioned by disparate enforcement, and ward off legal uncertainty plaguing the rule of law. Precedent in this area is averse, but not adverse. Depending on each case's facts, policy reasons against concurrent remedies may chafe against access to justice, and run counter to longstanding constitutional rules.

1. *Reconceptualizing Concurrent Remedies*

Although *Doucet-Boudreau* treated retaining jurisdiction as a s. 24(1) remedy, given the *Charter* was not invoked in *Manitoba Language Rights*, it should be logically and doctrinally sound to treat retaining jurisdiction over a suspended declaration as an inherent judicial power, rather than pinning

³⁰⁷ Roach, "Polycentricity," *supra* note 19 at 30, on *Doucet-Boudreau*, *supra* note 21: "fidelity to adjudication facilitated adversarial and public debate about the significance of the information contained in progress reports."

³⁰⁸ *Ref re Remuneration of Judges of Prov Court of PEI*, *supra* note 283.

it to either ss. 24(1) or 52(1).³⁰⁹ Mitigation via interim relief, limited to the suspension only, does not necessarily have to be ordered under s. 24(1).³¹⁰ Regardless of which peg we hang these remedies on, some judges have resisted pairing declaratory relief under s. 52 with individual relief under s. 24(1).

To see why interim relief should be considered when courts invalidate criminal offences, we first need to investigate judges' aversion to concurrent remedies. *Schachter* refused concurrent remedies to avoid exorbitant budgetary repercussions and expenditures on monetary damages in civil cases.³¹¹ Yet in the context of criminal offences, Lamer CJ dialled back *Schachter* to dissent in *Rodriguez*³¹² he would have ordered a constitutional exemption for assisted suicide simultaneously with a suspended declaration. He qualified that suspended legislation "will not necessarily be left operative in all of its violative aspects... the Court has jurisdiction under s. 52 to make the declaration subject to such conditions as it considers just and necessary to vitiate the impact of the violation during the period of the suspension."³¹³ Despite Lamer CJ's significant qualification of *Schachter*, *R v Ferguson* cemented *Schachter*'s objections to concurrent personal and general remedies. *Ferguson* denied constitutional exemptions to remedy cruel and unusual punishment inflicted by mandatory minimum penalties. Because exemptions contradicted Parliament's expressed intent to oust sentencing discretion, the Court regarded exemptions as more intrusive to Parliament than invalidation.³¹⁴ Additionally, because citizens and the government relied upon laws "on the books" to govern their conduct, the Court forebode that case-by-case exemptions disrupt the rule of law.³¹⁵

There are both principled and factual bases to surmount *Ferguson* if we distinguish *Bedford*'s unconstitutional prohibitions from *Ferguson*'s

³⁰⁹ *Manitoba Language Rights*, *supra* note 8.

³¹⁰ For example, individual exemptions for assisted death following *Carter* 2016, *supra* note 51 would fall under section 24(1), but Quebec's exemption was not a personal remedy.

³¹¹ *Schachter* *supra* note 31; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 SCR 405.

³¹² *Rodriguez v British Columbia (AG)*, [1993] 2 SCR 519, 107 DLR (4th) 342.

³¹³ *Ibid* at 571–572 (dissenting, citing *Swain* as precedent under section 52 for vitiating a suspension. Three other dissenters agreed with Lamer CJ's remedy).

³¹⁴ *Ferguson*, *supra* note 7 at paras 52–56.

³¹⁵ *Ibid* at para 69.

penalties. When respecting institutional roles, there are elemental distinctions between exempting overbroad mandatory sentences post-conviction versus relieving overbroad prohibitions during a suspended declaration. Although Parliament has mandated that convictions for certain offences receive the same minimum sentence, Parliament has not mandated that every alleged commission of every offence be prosecuted. Since Parliament has not ousted discretion to charge and prosecute offences, Parliament has therefore accepted inevitable incidental uncertainty when those offences are enforced. The prostitution prohibitions' very existence, and the general prospect of arrest and charge thereunder (rather than a specific application of a sentence) spawned the *Charter* violations in *Bedford*.³¹⁶

The limited temporal effect of interim remedies is another distinction. Unlike exemptions for mandatory sentences, exemptions for unconstitutional prohibitions can be made on an interim basis. Roach delineated this difference to critique *Carter 2016*'s minority, who, echoing *Ferguson*, opposed exemptions during the unanimous extension of the suspended declaration.³¹⁷ *Carter 2016*'s minority missed the fine distinction that *Ferguson* barred permanent, not temporary exemptions. Technically, a permanent exemption is final; but a temporary exemption (and any uncertainty it produces) lasts only as long as the suspension. In this way, temporary exemptions quarantine individuals susceptible to harm. When the suspension and exemptions expire, the final cure, administered by either the Court's declaration or Parliament's new legislation, applies universally.

Although *Ferguson* held that ss. 24(1) and 52(1) serve separate remedial purposes, the case unanimously affirmed that s. 24(1) remedies can be unusually ordered in conjunction with s. 52(1) when an applicant would otherwise be deprived of effective relief.³¹⁸ While s. 24 provides discretionary personal remedies for unconstitutional actions, and s. 52 mandates general relief for unconstitutional laws, these two remedial

³¹⁶ *Carter 2016*, *supra* note 51 at para 10. Interestingly, the minority's objection to exemptions in *Carter 2016* was informed by the fact that Quebec's Justice Minister had issued a directive against prosecuting physicians during the suspension. Principled executive discretion by the Justice Minister might have obviated the need for judicial discretion to maintain the rule of law.

³¹⁷ Roach, *Constitutional Remedies*, *supra* note 7 at 14.1811–14.1813.

³¹⁸ *Ferguson*, *supra* note 7 at para 63, citing *Demers*, *supra* note 51.

purposes need not be mutually exclusive.³¹⁹ As LeBel J exalted through his dissent against a prospective stay of proceedings in *R v Demers*, individual and public interests can coalesce with concurrent remedies, for “the constitutional rights and freedoms of all citizens are enhanced”³²⁰ when violations of individuals’ rights are vindicated by immediate relief.³²¹

Constitutional rules also fortify the principled use of concurrent remedies. Using s. 52(1) as a machete to undercut s. 24(1)’s more precise scalpel is a disproportionate result – one that is antithetical to the rule that “no part of the Constitution can abrogate or diminish another part of the Constitution.”³²² By foreclosing personal remedies from people unable to bring a challenge, narrowly and disharmoniously construing ss. 52(1) and 24(1) diminishes the *Charter*’s dual purposes to fully benefit and protect rights-holders.³²³ Denying individual remedies also departs from the Court’s general rule to immediately apply the ruling to successful claimants.³²⁴ The scope of this ongoing injustice might not have appeared obvious in *Bedford* because the applicants, who sought only to invalidate unconstitutional laws under s. 52(1), were not charged under the unconstitutional prohibitions during the challenge.

That said, the Court’s “slavish adherence”³²⁵ to one remedial track can create a pyrrhic victory for similarly situated individuals that public interest standing should help, not hinder.³²⁶ The absence of other individuals’ names from *Bedford*’s application did not remove the urgency to uphold their rights. Access to justice therefore calls for harmony between ss. 52(1) and 24(1). Although *Bedford*’s applicants had no outstanding charges, at the time, there were people selling sex who were accused under the infirm prohibitions, yet were unable to launch their own challenge.³²⁷ In fact, the

³¹⁹ *Ferguson*, *supra* note 7 at paras 59–61, 64–65.

³²⁰ *Demers*, *supra* note 51 at para 99 per LeBel J (dissenting).

³²¹ *Ibid.*

³²² *Doucet-Boudreau*, *supra* note 21 at para 42.

³²³ *Ibid* at para 23.

³²⁴ *Demers*, *supra* note 51 at paras 102–103 per LeBel J (dissenting).

³²⁵ *Ibid* at para 96.

³²⁶ *Ibid*; *GH*, *supra* note 301 at para 107; Roach, *Constitutional Remedies*, *supra* note 7 at 14.1812–14.1813.

³²⁷ *Bedford*, *supra* note 1 at para 123 affirmed that a hypothetical violation of anyone’s section 7 interest can breach the *Charter*. Since Amy Lebovitch was actively engaged in sex work

Court had just recognized the difficulty of hoisting direct challenges to the prostitution prohibitions the year before *Bedford* when it granted public interest standing to the Downtown Eastside Sex Workers United Against Violence Society.³²⁸ In determining that the Society's suit was a reasonable and effective means of bringing the issues forward under s. 52, Cromwell J highlighted social, practical, and personal barriers to justice. Those multifaceted barriers included inevitable public exposure from controversial litigation, which stirred fears for lost safety, privacy, clients, families, and educational opportunities.³²⁹ It therefore falls to public interest litigants and intervenors to remind the Court of third parties at risk of irreparable harm during a suspension. Unless and until unconstitutionality is proven, those most directly impacted by the result may be unable to step forward to seek relief under s. 24(1). Those individuals should not endure a lost personal remedy because civil society accessed justice instead. The Court's pragmatic attention to reasonable, effective standing at its entrance should be matched with meaningful, effective remedies at its exit. Retaining jurisdiction over a suspended declaration can therefore reinforce access to justice by keeping the Court open to mitigate ongoing injustice to individuals.

2. *Precedent for Interim Remedies*

Taking care to avoid commandeering the domain of the executive and Parliament, judges in Canada and abroad have already maneuvered over hurdles erected by resistant precedent and rigid branches of powers.³³⁰

when the application was initiated, she had direct, private interest standing. Terri-Jean Bedford and Valerie Scott were not working in the sex industry then, but because they planned to return, Himel J concluded there was no meaningful difference for assessing standing under section 52(1): all three had standing as of right (*Bedford* ONSC, *supra* note 1 at para 55). Alternatively, she found that Bedford and Scott would not have public interest standing (*Bedford* ONSC, *supra* note 1 at paras 60–62). The Court of Appeal declined to address the issue. Lebovitch's private standing made Bedford and Scott's standing irrelevant (*Bedford* ONCA, *supra* note 1 at paras 48–50). Standing was not revisited in Bedford's final appeal.

³²⁸ *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 64.

³²⁹ *Ibid* at para 71.

³³⁰ For a recent Canadian example of concurrent remedies, see *GH*, *supra* note 301. Numerous possibilities for resolving the unconstitutional definition of "Native" in child welfare legislation necessitated consultation, but Chappel J adverted that her 10-month suspended declaration did nothing to assist the Métis child in the proceedings before her, who was excluded from the definition. To ensure he would receive the same

South Africa's remedial approach is a helpful model. During the two-year suspended declaration in *Dawood and Another v Minister of Home Affairs*, O'Regan J buffered the uncertainty from potentially arbitrary applications of broad immigration criteria.³³¹ By fashioning a "good cause"³³² test for refusing temporary permits, the applicants and similarly situated individuals would not be denied immediate relief whilst the legislature worked on "a range of possibilities."³³³ Despite the remedy touching upon the executive sphere, limiting interim guidelines to the suspension's duration was the "best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other."³³⁴ O'Regan J's words evoke how a suspended declaration, coupled with temporary guidelines for administrative discretion, can consummate the principles of vindicating rights and respecting institutional roles.³³⁵

Swain's suspended declaration exhibits the efficacy of setting a short suspension at the outset, braced with interim guidelines, and amenability to adjusting for changing needs. Lamer CJ prepared directions for lower courts to provide clarity and quell fears for public safety from the impending release of automatically-detained mentally disordered accused. During the 6-month suspension, interim detention orders would last 60 days maximum, failing which *habeas corpus* would provide a default saving

protections as non-Métis Aboriginal children, she undergirded the declaration with a section 24(1) remedy, directing that the child be treated as a Native child in both present and future proceedings. In retaining jurisdiction, her principled order was fair to the government, as the terms outlined when and how to extend the suspension, yet she also fulfilled the judiciary's duty to enforce the constitution and protect the rights of the child without delay.

³³¹ *Dawood*, *supra* note 217.

³³² *Ibid* at para 67.

³³³ *Ibid* at para 64.

³³⁴ *Ibid* at para 68. See also Bishop, *supra* note 121 at 9-123-9-126.

³³⁵ Leckey, "Harms," *supra* note 17 at 591. Though not citing *Dawood*, *supra* note 217, Leckey also sees South Africa's interim orders as "an important middle ground." See also Leckey, *Bills of Rights*, *supra* note 17 at 105-106. Leckey's view accords with O'Regan J's dissent in *Fourie*, *supra* note 218 at para 170 (the separation of powers cannot "be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint"). See also Bishop, *supra* note 121 at 9-73-9-74.

grace.³³⁶ The Court remained open to recalibrating those transitional guidelines, as well as the suspension's duration (subsequently extended by 3-months), with affidavit evidence showing cause for the adjustment.³³⁷ Swain's remedial compromise was dynamic and anticipatory, establishing that fairness does not always equate with finality at the earliest stage.

Carter also portrays the Court's competency and capacity to draft guidelines for alleviating damage to *Charter* rights during a suspended declaration, without overrunning Parliament's turf.³³⁸ Evincing how litigators can fine-tune suspended declarations with their pleadings, the Plaintiffs originally requested guidelines to ensure legal certainty and to inform the legislative process.³³⁹ Smith J acknowledged it was Parliament's "proper task ...to determine how to rectify"³⁴⁰ unconstitutional legislation, yet she reconciled the separation of powers with the principles of vindication and fairness.³⁴¹ Since "the unconstitutionality ar[ose] from the legislation's application in certain specific circumstances,"³⁴² it was "incumbent on the Court to specify...those circumstances."³⁴³ Thus, rather than muddling the clarity required by the rule of law, interim guidelines can heed *Ferguson's* instruction that "[l]egislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to

³³⁶ *Swain*, *supra* note 32 at 1021. See also *R v Bain*, [1992] 1 SCR 91, 87 DLR (4th) 449 at 104. A six-month suspended declaration was issued when prosecutorial stand-by provisions breached section 11(d)'s trial fairness guarantee. *Bain* predated *Schachter*, but there was no public safety issue, nor long queue of cases that would jeopardize the rule of law or equality. Interim remedies were available by challenging the stand-by provisions in ongoing proceedings.

³³⁷ *Swain*, *supra* note 32 at 1022, *supra* note 266 (discussing motion for directions).

³³⁸ For a recent 12-month suspended declaration which offered detailed guidelines to legislators for redressing a violation of section 2(b) of the *Charter* under freedom of information legislation, see *Toronto Star v Ontario (AG)*, 2018 ONSC 2586 at paras 130–142. Although not a declaration of invalidity, to brook an onslaught of systemic repercussions for violations of the right to be tried within a reasonable time, a 5:4 majority formulated exceptional transitional criteria for stays: *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 at paras 93, 95–104.

³³⁹ *Carter* 2012, *supra* note 233 at para 28.

³⁴⁰ *Ibid* at para 1386.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

remedy legislation that is found to be constitutionally infirm.”³⁴⁴ Although the final criteria set for exemptions during *Carter 2016*’s extended suspension were less detailed than Smith J’s,³⁴⁵ the majority did recognize that interim relief “ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.”³⁴⁶ Certainly, there is a risk that judicial guidelines or exemptions may stymie innovative reform by giving Parliament a ready-made constitutional template. But Parliament’s reply to *Carter* actually restricted access to assisted death to narrower circumstances than the Court’s guidelines.³⁴⁷ Regardless of that reply’s wisdom, at bottom, Parliament’s deviation from the Court’s criteria signals that Parliament’s autonomy was preserved, and that interim relief can respect the separation of powers.

The separation of powers can also be respected through other features of remedial procedure. With cogent reasons and fuller submissions from participants, judges can avoid becoming draftspersons. If the Court’s reasons stress the temporary, minimal character of interim guidelines, and indicate that a menu of responses (including more intricate ones) exist, then it could avoid unbridled trespassing onto Parliamentary and Executive territory. If the Court is considering interim relief, then participants could draft and submit proposed options. Transitional guidelines that the parties have a hand in drafting are less intrusive than the interpretive remedy of reading in, where the Court unilaterally takes responsibility to rewrite unconstitutional laws, eliminating any need for government action.³⁴⁸ Accounting for the separation of powers also raises an important distinction between endorsing untested, permanent solutions (especially when unbidden) and outlining transitional guidelines to protect the rule of law

³⁴⁴ *Ferguson*, *supra* note 7 at para 73.

³⁴⁵ Cf *Carter 2015*, *supra* note 22 at para 127 with *Carter 2012*, *supra* note 233 at paras 1387–1392.

³⁴⁶ *Carter 2016*, *supra* note 51 at para 6. Like the new sex work laws, the new regime for end-of-life assistance is mired in controversy. A constitutional challenge to new legislation for medically-assisted death is underway in *Lamb v Canada (AG)*, 2017 BCSC 1802, 5 BCLR (6th) 175.

³⁴⁷ *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3.

³⁴⁸ *Schachter*, *supra* note 31. For a bold example of reading in, see *Canadian Foundation for Children, Youth, and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 at paras 36–40.

and grant effective but temporary relief to individuals. Advising that a range of possible constitutional approaches exist should be less invasive than prescribing each approach within that range, and dictating that legislators should implement one to permanently redress *Charter* violations.³⁴⁹ The foregoing cases all counsel that the Court can remain seized of the matter to adjust the remedial framework for unanticipated contingencies. Such agility can curb the hazards of harm to individual rights and the public interest, without barging into the legislative and executive spheres.

Extrapolating this final element of deliberative remedial procedure to *Bedford* indicates workable alternatives that could have mitigated the continued jeopardy to individuals in the sex trade. Faced with brandishing an already clumsy and now unconstitutional criminal law, *Bedford's* all-or-nothing approach to suspending declarations placed police and prosecutors in a precarious position to do their jobs to protect the public. In addition to the earlier recommendation to rebuild safe houses with restitution, guidelines for staying proceedings could have been a minor mitigation. Prosecutions could have proceeded against pimps and johns, while those who sold sex could qualify for stays. Sorting out prosecutions during *Bedford's* suspension according to exploitative circumstances could have been justified because that distinction among the class of accused is attached to the specific injustice litigated in *Bedford*. Temporarily defusing one element of the dangerous environment would not extinguish the danger, but denying a remedy to persons accused of igniting that danger would uphold *Bedford's* spirit. Furthermore, a nuanced dialogue about the public interest could have occurred if the Court invited provincial Attorneys General to submit their protocol for maintaining uniformity in the administration of justice during the proposed suspended declaration. That conversation might have even obviated judicial stays with prosecutorial stays. Far from curing the unconstitutionality, guidelines would have been a compromise that left the ultimate response to Parliament, respected the Crown's role, and tried to vindicate injustice. At the very least, Monica Forrester would not have had to sacrifice appearing before the Standing Committee's study of Bill C-36 to serve as a surety.

³⁴⁹ For a strong prescription, see the dissent in *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69, [2000] 2 SCR 1120 per Iacobucci, Arbour, and LeBel JJ.

G. Summary

Regardless of whether a declaration is suspended, subjecting remedial decisions to informed, adversarial argument ensures concerns about remedial repercussions are objectively heard, addressed, and recorded. Intended or not, if the government's ultimate solution wrongly dismisses those concerns, or spurns the judgment's spirit without recourse to the exceptional *Charter* override, then publicly chronicling that controversy could be potent for a future *Charter* challenge. By cuing judges to acknowledge and answer arguments and weigh evidence, a hearing devoted to remedial issues could stimulate much-needed written reasons for suspended declarations. Muscular remedial procedure consolidates the cohesive bond between rights and remedies, while avoiding the "tail wagging the dog"³⁵⁰ and – in Leckey's words – the "embolden[ing]" of judges.³⁵¹ The Court's commitment in principle to guard individual and minority interests would be equaled with a commitment in practice. Precedent and predictability would be produced for future litigants and lower courts, and the overall judgment would be imbued with legitimacy through transparently articulated, demonstrable justification. This approach acquiesces to modern reality: governing and enforcing constitutional rights must grow along with the complexities of systemic and polycentric issues. To quote *Bedford*, "considering all of the interests at stake"³⁵² may mean that a final remedy eludes the judiciary's grasp, but all of those interests do not have to be irreconcilable. Even a tourniquet is better than an open wound.

III. CONCLUSION

In their current version, suspended declarations are an unwieldy tool employed for an ambitious mandate: to protect the public, to uphold the rule of law, to maintain equality, and to engage government institutions in democratic dialogue with individuals about fundamental rights and freedoms. Such critical tasks demand careful precision. Yet combing *Bedford's* wake has revealed that the suspended declaration not only missed these remedial functions, it may have impaired them. Along the way, we

³⁵⁰ Bishop, *supra* note 121 at 9–22 (discussing the causation theory of remedial equilibrium).

³⁵¹ Leckey, "Enforcing Laws," *supra* note 17 at 6, 8–9.

³⁵² *Bedford*, *supra* note 1 at para 169.

have also observed that remedial discretion is inextricably woven with unpredictable political factors. It is therefore unfair to hold the judiciary wholly culpable for larger democratic fractures when the legal landscape is transformed in the aftermath of constitutional litigation. Insofar as sex work can be construed as part of broader gender equality and minority rights projects, *Bedford* conveys that a full outlook in systemic advocacy may require adopting political tactics before, alongside, or instead of litigation.³⁵³ Adjudicative reform cannot cure the pains of Parliament. But ignoring the inexorable democratic dimensions of judicial remedies will corrode the legitimacy of Canada's legal institutions, curtail their capacity to provide just and appropriate remedies, and constrict the values of Canada's free and democratic society. While this examination has sought to lay bare the hollows and hazards of utilizing *Charter* litigation alone to achieve systemic social change, constitutional remedies can nevertheless contribute to that change if we are open to learning from the past and adapting to the future. Seen in this light, the more pragmatic question is how those contributions should be made.

Rather than tampering with Canada's theory of constitutional supremacy to reflect problems of remedial practice, revising remedial practice to reflect constitutional supremacy is a viable option.³⁵⁴ To buttress inventive doctrinal directions that do resonate with constitutional supremacy, I have proposed deliberative remedial procedure for suspending declarations of invalidity. This framework is predicated upon a purposive, principled approach to remedial discretion. It aims to avail of adjudication's unique structure for focused, informed, fair deliberation, and tries to tap into the executive's policy expertise, as well as the legislatures' democratic advantages. Accepting that the best cure for constitutional afflictions may lay beyond the judiciary's reach should not absolve judges from their

³⁵³ Rittich, *supra* note 248 (although not discussing sex work specifically, Rittich criticizes using litigation for attaining gender equality); Canadian Alliance for Sex Work Law Reform, *Joint Submission for Canada's Review before the UN Committee on the Elimination of All Forms of Discrimination Against Women, 65th Session, CEDAW, 65th Sess.* (Vancouver: Pivot Legal Society, October 2016), online: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CAN&Lang=EN> (invoking Canada's international obligations to call for the repeal of Bill C-36); Moulard, *supra* note 251.

³⁵⁴ Leckey, "Harms," *supra* note 17 at 603 asserts that if judges do not alter their remedial practice, "the theory of constitutional supremacy requires change."

constitutional duty to secure the channel to that final remedial destination. This requires fulfilling the traditional judicial role to protect and empower individuals, who know and can express their own needs better than anyone else. More than that though, it bears reminding that the judiciary has assumed an implied power to delay a constitutional imperative. The logical corollary to that assumption of power is an assumption of responsibility for what happens during the delay. Concomitant to that responsibility is a need for transparent justification. I hope that a deliberative, evidence-based, inclusive remedial process will encourage frank, thoughtful decisions for mending acute and chronic constitutional violations, and attending to the democratic impacts of those decisions.

The time is nigh for courts to devote sober thought to how they suspend declarations of invalidity. How this thought is to be provoked is another fruitful question. It should not take irreparable harm to the right to life, liberty and security - nor any *Charter* right - during a suspended declaration to impel the judiciary to remedy the remedy. Given it is a distinct action of the judiciary - not Parliament, and not the executive - that instigates the delay, perhaps a savvy litigator will launch a *Charter* challenge to hold the Court liable for irreparable harm during a suspended declaration. Robert Leckey's account of horizontal inequity to accused inspires one possible basis for doing so. Since the unconstitutional difficulty of unequal treatment starts from the Court's discretionary action of ordering the delay, the unconstitutional impact could be conceived as a distinct deprivation of rights, "beyond the unconstitutional enactment,"³⁵⁵ so as to trigger s. 24(1)'s distinct remedial power.³⁵⁶ This strategy may not be all that far-fetched. Actions of the courts have been previously subject to *Charter* scrutiny.³⁵⁷ Even if such an application fails, it would send a strong message to the judiciary that they should take some accountability for collateral damage when they deploy their discretion.

³⁵⁵ *Ibid* at 587.

³⁵⁶ *Doucet-Boudreau*, *supra* note 21 at paras 42-43.

³⁵⁷ *R v Rahey*, [1987] 1 SCR 588, 39 DLR (4th) 481; *BCGEU v British Columbia*, [1988] 2 SCR 214, 53 DLR (4th) 1.