ONTARIO (ATTORNEY GENERAL) V G AND 'PRINCIPLED' REMEDIAL DISCRETION: LESSONS FOR IRELAND

Abstract: This article provides an overview and critical analysis of the Supreme Court of Canada's recent decision in Ontario (Attorney General) v G [2020] SCC 38 ('G'). In G, the Supreme Court of Canada purported to 'clarify' and 'update' the principles governing its remedial practice in cases where it finds a violation of the Canadian Charter of Rights and Freedoms has occurred. The Court held that rather than adopt on overly rigid remedial approach, or an approach which afforded unrestrained remedial discretion to judges, courts should instead exercise a 'principled' approach to remedial discretion. Mindful of judicial and academic criticism that their use had become 'unprincipled', the Court attempted to narrow the grounds on which suspended declarations of invalidity could be granted. The Court also appeared to create something approaching a presumption for the use of 'tailored' remedies such as reading in, reading down, and severance where Charter violations are found. This article argues that Irish courts should consider greater use of tailored remedies for laws which violate constitutional rights, and that while it is not without its difficulties, there is helpful analysis in the judgment of G regarding both the circumstances in which tailored remedies should be deployed and the circumstances in which suspended declarations are an appropriate remedy.

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Introduction

In its recent decision in *Ontario (Attorney General) v G*, the Supreme Court of Canada (the "Court") purported to 'clarify' and 'update' the principles governing the remedies available for laws which violate the Canadian Charter of Fundamental Rights and Freedoms (the "Charter").[2] In particular, the Court considered the principles applicable to the use of suspended declarations of invalidity and attempted to narrow the basis on which suspensions can be granted when the Court declares legislation which conflicts with the Charter to be of no force or effect.

Having conducted a comprehensive review of its remedial jurisprudence, the Court concluded that four foundational principles govern its remedial practice for Charter violations: (1) Charter rights should be safeguarded through effective remedies; (2) the public has an interest in the constitutional compliance of legislation; (3) the public is entitled to the benefit of legislation; and (4) courts and legislatures play different institutional roles. The Court held that these principles, and the language of the Charter itself, suggested that, where the separation of powers allowed and where the rule of law so required, 'tailored' remedies for Charter violations - such as reading in, reading down, and severance - should be used instead of traditional invalidation.[3]

On suspended declarations specifically, the Court concluded that they should be granted rarely, and where an identifiable public interest grounded in the Constitution is endangered. The Court further held that a suspension should only be granted where that constitutionally

[1] *Many thanks to Tom Hickey and Sorcha Montgomery for their comments on previous versions of this article. All errors or omissions are the author's alone.*

[2] *Ontario (Attorney General) v G* [2020] SCC 38 [107].

[3] Reading in is when courts read in words to a statute to fix a constitutional flaw. Reading down is when courts limit a law's reach to a precisely defined extent to cure its unconstitutionality. Severance is when courts remove words from a statute to make what remains constitutionally compliant.

grounded public interest is shown to be endangered by an immediate declaration to such an extent that it outweighs the potentially harmful impacts of delaying the declaration's effect.[4] The Court also noted that, if it was appropriate and just to do so, individualised exemptions from those suspensions should be granted to successful claimants in the absence of compelling reasons not to.[5] It appears, then, that the Court attempted to constrain the discretion afforded to judges when it comes to suspending declarations of invalidity without unduly hampering their ability to grant them in appropriate cases, while also effectively creating a presumption for individual exemptions from the effects of suspension.

Though the facts of the case are relatively unexceptional, the judgment in *G* is nonetheless noteworthy because the Court attempted to both summarise and, in parts at least, restate the principles governing its remedial practice in Charter review cases, an exercise prompted by academic criticism in recent years that its remedial approach had become unprincipled and lacking in transparency.[6] The decision in *G* will now be analysed, along with an assessment as to the lessons Irish judges, practitioners, and academics can learn from it. Ultimately, it will be argued that while the Court in *G* did not bring complete conceptual clarity to Canadian remedial practice, the judgment can nonetheless helpfully inform the Irish courts as they continue to develop their remedial jurisprudence after the judgment in *PC v Minister for Social Welfare*, where the Canadian remedial experience was considered at length.[7]

Factual Background

The applicant, Mr G, claimed that Ontario's Christopher's Law (Sex Offender Registry) 2000, S.O 2000, c.1 ("Christopher's Law") violated section 15 of the Charter. Section 15 is the Charter's equality guarantee and provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[8]

Christopher's Law required people who were found guilty of a sexual offence - or found not criminally responsible for such an offence on account of a mental disorder ("NCRMD") - to report to a police station so that their personal information could be added to Ontario's sexual offenders' registry. Registrants had to physically report in person at least once a year and, depending on the sentence they received, had to comply with the register's annual reporting requirements either for 10 years or for life. For those found guilty of sexual offences, there was an opportunity, based on an individualised examination, to be removed from the register or to be exempted from its reporting obligations. For those found NCRMD, however, no such opportunity existed, and they could never be removed from the

[4] *G* (n 1) at [83].
[5] ibid [149].
[6] For examples of such criticism, see Robert Leckey, Bills of Rights in the Common Law (CUP 2015), Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14(3) International Journal of Constitutional Law 584, and Robert Leckey 'Remedial Practice Beyond Constitutional Text' (2016) 64(1) American Journal of Comparative Law 1.
[7] [2018] IESC 57.
[8] Mr G also claimed that Christopher's Law violated section 7 of the Charter which guarantees the right to life, liberty, and security of the person and the right not to be deprived of those rights save in accordance with the principles of fundamental justice. However, this was rejected at first instance, and on appeal and the Supreme Court, having found that Mr G's section 15 Charter rights had been violated, held that it was not necessary to address the section 7 Charter claim.

registry or exempted from its reporting obligations, even if they received an absolute discharge from a review board.

In 2002, G was found NCRMD of two sexual offences. In 2003, he was absolutely discharged by a review board which considered that he no longer presented a significant risk to the public. However, in 2004, he was nonetheless placed on Ontario's sex offender registry as required by Christopher's Law.

Procedural History

Mr G challenged Christopher's Law on the basis that his inability to be removed from the register or to gain a reporting exemption, as those found guilty of sexual offences could do, violated section 15 of the Charter. At first instance, Mr G's application was dismissed but it was successful before the Ontario Court of Appeal. The Court of Appeal declared Christopher's Law to be of no force of or effect 'as it applied' to those found NCRMD and who were later granted an absolute discharge.[9] It suspended the declaration of invalidity for 12 months but granted Mr G an individual exemption from that suspension – thereby relieving him of further compliance with the legislation – and ordered that his information be deleted from the register immediately. A majority of the Supreme Court of Canada upheld the substantive decision of the Court of Appeal on the basis that the discriminatory distinctions drawn by Christopher's Law between persons found guilty of sexual offences and those found NCRMD could not be justified in a free and democratic society. The Court also upheld the remedial orders made by the Court of Appeal. The latter aspect of Court's judgment is discussed in this note. The Court held that the 'as applied' declaration of invalidity sought by Mr G was appropriate, as no issues regarding the constitutionality of other components of Christopher's Law were raised. Thus, no purpose would be served by declaring those provisions invalid. The Court further held that suspending the declaration was necessary due to the potential threat to public safety which might otherwise arise but exempted Mr G from the effects of that suspension as he no longer posed a threat to public safety.

Key Remedial Constitutional Principles

There are two key provisions of the Canadian Constitution when it comes to judicial remedies. The first is section 52(1) of the Constitution Act 1982 (the "Act"), which provides that: 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force or effect.'[10] It offers a remedy for *laws* which violate Charter rights either in purpose or effect.[11] It is a general statement that laws are subordinate to the Constitution and that unconstitutional laws will not be tolerated in the Canadian constitutional order.

The second key remedial provision of the Canadian Constitution is section 24(1) of the Charter. It allows anyone whose Charter rights or freedoms have been infringed to apply to a court to obtain such a remedy as the court thinks 'appropriate and just in the

[9] The effect of this aspect of the Court's decision is that Christopher's Law was unconstitutional only to the extent that it applied to people in Mr G's situation. It remains good law for other people in different circumstances.

[10] This provision is similar to Article 15.4.2º of the Irish Constitution which provides that: 'every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.'

[11] Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (7th edn, Irwin Law 2021) at 492.

circumstances.'[12] In contrast to section 52(1), it provides a remedy for *government acts* that violate Charter rights.[13] As Kent Roach has pointed out, section 24(1) was inserted into the Charter partly as a means of compensating for the failure of judges to award meaningful remedies to litigants for violations of the rights contained in the Charter's predecessor, the Canadian Bill of Rights.[14] As the Court itself had previously noted, it is difficult to imagine a provision which could confer broader discretionary powers on judges.[15] Although in previous case law the Court had held that remedies under section 52(1) and 24(1) should be rarely combined,[16] as illustrated below, the Court in *G* appeared to eschew such an approach in holding that the defining feature of section 24(1) of the Charter is its flexibility and the Court appeared reluctant to reach any conclusions which might limit that flexibility.[17]

Judgment of the Court

Writing for the majority, Karakatsanis J said that the Court's jurisprudence on remedies generally – and on suspended declarations in particular – had been subject to considerable criticism.[18] Two core critiques had been made against the Court in the academic literature. First, that the Court's approach to remedies had become unprincipled and lacking in transparency.[19] Second, that alternative remedial devices such as suspended declarations do not meaningfully protect rights.[20] Taken together, the majority and minority judgments in *G* run to 177 pages, so an exhaustive examination of both is beyond the scope of this article. Moreover, the judgment's relative recency means their impact is hard to gauge. Nevertheless, it is possible to distil three key aspects of the majority judgment: first, the majority's statement of the principles applicable to the use of tailored remedies for charter violations; second, the Court's enunciation of some generally applicable remedial principles; and third, the Court's attempt to restate the principles applicable to suspended declarations specifically.

The first aspect: principles applicable to tailored remedies

The Court noted in *G* that section 52(1) of the Act required it to engage in a two-step remedial process. First, it had to determine the extent of a law's unconstitutionality as the nature and extent of the violation would ultimately determine the breadth of the remedy.[21] For example, the Court noted that it could declare *all* groups of people and *all* sets of circumstances exempt from a law's application, or it could declare a law to be of no force or effect *only* to the extent it violated rights, preserving its constitutionally compliant effects as it applied to particular groups of people or particular sets of circumstances.[22] Second, it had to decide on the remedy for that unconstitutionality.[23] The Court noted that it had commonly resorted to three tailored remedies where it considered that full invalidation was not

[12] *G* (n 1) [140]–[152]. This provision has some similarities with section 172(1) of the South African Constitution which equips the South African Constitutional Court with a wide remedial jurisdiction.
[13] Sharpe and Roach (n 11) at 492.
[14] Kent Roach, 'Principled Remedial Discretion Under the Charter' (2004) 25 Supreme Court Law Review 101, 104-105.
[15] Judgment of *McIntyre J in R v Mills* [1986] 1 SCR 863, 965.
[16] See *Schachter v Canada* [1992] 2 SCR 679.
[17] *G* (n 1) [142].
[18] ibid [81].
[19] See, for example, Grant Hoole, 'Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law' (2011) 49 Alberta Law Review 107.
[20] See Leckey, Bills of Rights (n 6).
[21] *G* (n 1) [86] and [108]-[109].
[22] ibid [111] (emphasis added).
[23] The Court did note, at [85], that while section 52(1) did not explicitly confer on the Court a remedial jurisdiction, such a jurisdiction had been deemed to be part of the Court's inherent powers.

appropriate: reading down (limiting the reach of legislation by declaring it to be of no force and effect to a precisely defined set of circumstances where the statute's offending portion can be clearly identified); reading in (broadening the reach of legislation by adding in words or phrases where the statute improperly excludes a particular category); and severance (deleting certain words or phrases to either limit or broaden the legislation's reach where the offending words or phrases are clearly identifiable).[24] At paragraph 116 of its judgment, the Court summarised the different tailored remedies it had available to it and the principles governing their deployment:

> In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the Charter violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, *remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved* (Schachter, at p. 700; Vriend, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance*, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court.* This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible. (Emphasis added.)

In this statement, there is much interest in the principles applicable to tailored remedies, but three key points emerge. First, the Court seemed to indicate a preference, where possible, for the use of remedies other than full invalidation. Second, it seems implicit in the Court's analysis that whether a case is suitable for a tailored remedy will be a matter of degree and will ultimately turn on the facts of individual cases. Third, the Court highlighted its awareness of the different institutional roles and capacities of legislatures and courts and was at pains to point out that its preference for tailored remedies stemmed from a deep respect for the separation of powers.[25] In particular, the Court noted that tailored remedies could not be granted where they would interfere with the law's overall objective.[26] The Court's summary at paragraph 116 of its judgment is largely consistent with its earlier jurisprudence on tailored remedies.

The second aspect: general remedial principles

[24] *G* (n 1) [113].

[25] For a detailed examination of the separation of powers issues which remedial discretion poses, see Eoin Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity' (2011) 46 Irish Jurist 180 and Eoin Carolan, 'A Dialogue Oriented Departure in Constitutional Remedies? The Implications of *NHV v Minister for Justice* for Inter-branch Roles and Relationships' (2017) 40(1) Dublin University Law Journal 191.

[26] *G* (n 1) [114].

The Court held that fashioning constitutional remedies pursuant to section 52(1) of the Act, which recognises the supremacy of the Constitution and the Charter guarantees contained within it, inevitably implicates other – at times competing – constitutional values.[27] And to strike an appropriate balance between giving effect to section 52(1) and these potentially competing values, the Court held that it must exercise a 'principled' remedial discretion which: 'requires judges to consider multiple, competing remedial principles and resolve conflicts between them while justifying their prioritization of certain considerations over others.'[28] The Court held that four key principles had influenced its remedial practice in the past and should inform the basis for the exercise of its 'principled' remedial discretion in the future: (1) that Charter rights should be safeguarded through effective remedies; (2) that the public has an interest in the constitutional compliance of legislation; (3) that the public is entitled to the benefit of legislation; and (4) that courts and legislatures play different institutional roles.[29] Each of these principles, the Court said, must be borne in mind and transparently considered when deciding on the appropriate remedy for an unconstitutional law. There is no doubt that the Court in *G* was attempting to offer a principled basis for the exercise of its future remedial discretion. However, in one of two minority dissents, Rowe J said that the four principles identified by the majority lack 'analytic structure' and are 'so indeterminate' such that they do not provide any meaningful guidance for the exercise of remedial discretion.[30] Additionally, Rowe J held that section 52(1) of the Act conferred no remedial discretion on the Court and it was only by way of competing constitutional principle or ambiguity within section 52(1) itself which could confer remedial discretion on the Court.[31] It is a matter of debate to what extent the four principles identified by the majority are observable in, and consistent with, the Court's previous jurisprudence. In the second minority judgment, Côté and Brown JJ were critical of the majority's reasoning. They held that a reading of the Court's jurisprudence on remedies revealed none of the four principles identified by the majority,[32] and further held that future application of those principles would promote uncertainty and unpredictability in the law instead of bringing the majority's hoped for clarity.[33] Consequently, it remains to be seen whether the remedial principles discussed by the majority will meaningfully impact on Canadian remedial practice.

The third aspect: principles applicable to suspended declarations

Attempting to provide conceptual coherence on the use of suspended declarations of invalidity was the majority's primary focus in *G*. In its seminal 1992 decision of *R v Schachter*, the Court had held that a declaration of invalidity should only be suspended in three types of cases.[34] First, where immediate invalidation would threaten the rule of law, second, where it would pose a threat to public safety, and third, where it would deprive all subjects of the protection of a statute which the Court had found to be under-inclusive in respect of the categories of person on whom the statute conferred benefits. After reviewing the Court's jurisprudence on the remedy, the majority acknowledged that many of the Court's decisions had gone beyond these initial categorical limitations and that *G* presented it with an

[27] ibid [84].
[28] ibid [92].
[29] ibid [94].
[30] ibid [204].
[31] ibid [206].
[32] ibid [218].
[33] ibid [251].
[34] *Schachter* (n 15).

opportunity to 'recalibrate' the principles governing the use of suspended declarations.[35] In conducting this recalibration, the majority made five key points:-

First, it noted that nothing in the Act or the Charter gave the Court the power to suspend a declaration of invalidity, holding that such a power must instead be understood as both stemming from the need to accommodate broader constitutional considerations and being inherent in the power to declare legislation invalid.[36] The Court also noted that giving immediate and complete retroactive effect to the fundamental rights and freedoms guaranteed by the Charter must sometimes yield to other imperatives.[37] This reflects the observation made in many jurisdictions and academic work that there is a distinction between declaring an Act unconstitutional and the practical and legal effects which flow from that declaration. While this might be seen as a pragmatic distinction which arguably fails to consider the relationship between the doctrine of nullity and the consequences which flow from a declaration of invalidity,[38] it is nonetheless an accepted feature of many courts' constitutional review jurisprudence.[39]

Second, the Court held that the correct test to be applied in deciding if a suspension of a declaration is justified is whether the protection of a compelling public interest – specifically identified and supported by evidence –[40] necessitates a suspension.[41] The Court resisted the temptation to set down *Schacter*-like categories of what compelling public interests might be but instead said that they will usually be related to some constitutional principle such as the public being entitled to the benefit of legislation or the different institutional competences and roles of courts and legislatures.[42] However, the Court qualified the institutional competence point by noting that the desire to afford the legislature the opportunity to fix a constitutional flaw can be a relevant factor, but only where an immediately effective declaration would 'significantly impair' the legislature's ability to legislate.[43] The Court also held that the harm avoided, or benefit achieved, by suspension must be transparently weighed against fundamental constitutional principles such as Charter rights needing effective protection.[44]

Third, the Court noted that suspensions should be rarely granted. Indeed, the thrust of the Court's judgment is that while suspension remains a useful remedial tool, there is something approaching a presumption against it. Interestingly, the Court also appeared to have carried out some basic empirical analysis in noting that it had suspended declarations of invalidity in 23 out of approximately 90 cases where it had declared legislation to be of no force or effect, but added that most declarations of invalidity issued in the last 20 years had been suspended.[45]

Fourth, as to the length of time for which declarations should be suspended, the Court held that the onus for demonstrating the need for a specified period of time remained on the

[35] *G* (n 1) [118].
[36] ibid [121].
[37] ibid.
[38] Robert Noonan, Declarations of Unconstitutionality in the Common Law Tradition: A Comparative and Theoretical Analysis (Ph.D Thesis, Trinity College Dublin 2019) available at http://www.tara.tcd.ie/handle/2262/86117 (last accessed 10 October 2021).
[39] For example, in the United States, see *Chicot County Drainage District v. Baxter State Bank* [1940] 308 U.S. 371, and in Ireland see *Murphy v Attorney General* [1982] IR 241 and *A v Governor of Arbour Hill* [2006] 4 IR 88.
[40] *G* (n 1) [133].
[41] ibid [126].
[42] ibid.
[43] ibid [129].
[44] ibid [130].
[45] ibid.

government and that there was no 'default' suspension period of 12 months, which some academic commentary claimed had become standard practice.[46] The Court did not attempt to provide any guidance as to what appropriate lengths of time might be, beyond stating that the period of suspension should be long enough to give the legislature the amount of time it has demonstrated it requires to remedy the constitutional defect.[47] The Court also noted that this would have to be balanced with recognition of the fact that delays to the invalidation taking effect could harm individual rights.[48]

Finally, the Court endorsed the use of individual exemptions from suspension, largely on the basis that Charter rights require effective protection. This was bolstered by the Court's reference to section 24(1) of the Charter, specifically by rejecting the notion that a section 24(1) remedy could not be combined with a section 52(1) remedy, as remedial discretion is a 'fundamental' feature of the Charter.[49] The Attorney General had argued that if the Court decided to suspend a declaration of invalidity, then it could not grant an individualised exemption from that suspension. The Court rejected this and noted that such a rule would improperly fetter the broad remedial discretion afforded to the Court by section 24(1).[50] The Court was emphatic on this point when it noted that there must be a 'compelling reason' to deny the individual claimant who had brought the successful challenge an immediately effective remedy, thereby seemingly creating a presumption for individual exemptions from suspended declarations.[51] The Court said that threats to public safety or the impossibility of granting a large class of claimants individualised exemptions were two possible examples of compelling reasons which could justify not granting a successful claimant an immediately effective remedy.[52] This analysis that section 24(1) of the Charter gives the Court the power to grant individualised exemptions from the effects of suspension seems unobjectionable. However, the Court engaged in limited discussion about the merits of granting individual exemptions beyond highlighting the need to reward successful litigants who have expended time and money in bringing a constitutional challenge to court.

In addition to the five key points from the majority's decision outlined above, the minority judgments also contain interesting comments on suspended declarations. For his part, Rowe J held that the Court should reaffirm the original categories it had laid down in *Schachter* and only depart from them where immediate invalidation would threaten some constitutional principle.[53] In the other dissenting judgment, Côté and Brown JJ held that suspended declarations ought to be granted as a measure of last resort and only where suspension was necessary to protect the rule of law.[54] They held that three reasons necessitated this.[55] The first was that a threat to the rule of law was what had prompted the Court to issue its first suspended declaration in the famous *Manitoba Language Rights* case.[56] There, the Court found that a failure to translate legislation passed by the Manitoba provincial legislature into French breached the Manitoba Language Act 1870, a failure which rendered all such legislation of no force or effect. The Court suspended that declaration of invalidity, however, as immediate invalidation would have left Manitoba without any state laws, an obviously undesirable

[46] ibid [135].
[47] ibid [139].
[48] ibid.
[49] ibid at [146].
[50] ibid.
[51] ibid [149].
[52] ibid [150]–[151].
[53] ibid [186].
[54] ibid [218].
[55] ibid [225].
[56] Re Manitoba Language Rights [1985] 1 SCR 721.

situation. The second reason was that the text of section 52(1) of the Act demanded immediate invalidation, save where the rule of law was threatened. Côté and Brown JJ rested their analysis here on the presence of '*is* of no force or effect' in section 52(1) (ie that the present tense phrasing of the provision required immediate invalidation), and further held that suspension was permitted only where the rule of law was threatened due to the centrality of that principle to the Canadian constitutional system.[57] The final reason related to some of - what they termed - the 'practical implications' of suspended declarations.[58] Chief amongst these was that overuse of suspended declarations had pulled courts beyond their institutional competence, with the two judges stating that the legislature had, in several cases, chosen not to enact new legislation where the Court had suspended a declaration of invalidity.[59] They also said that courts were ill-equipped to decide on the amount of time necessary to implement remedial legislation, making judges' choices as to the length of suspension somewhat arbitrary.[60] Côté and Brown JJ also expressed considerable discomfort with individualised exemptions from suspension, noting that if, on their analysis, suspension should be rare, an individualised exemption from that suspension should be rarer still.[61] The judges held that an individual exemption is only appropriate in highly unusual cases where additional relief was necessary to provide the claimant with an effective remedy.[62] They further held that such a remedy ought only be granted where it was necessary to prevent some irreparable harm which the Charter was designed to protect.[63] The primary issues Côté and Brown JJ saw with individual exemptions were institutional competence concerns and the differing treatment of similarly situated classes of persons.

Analysis and Lessons for Ireland

In recent years, the Irish courts have cautiously expanded the toolkit they can utilise to remedy unconstitutional legislation. In *PC v Minister for Social Welfare*, the Supreme Court expressly approved of the use of suspended declarations of invalidity and suggested that there is scope for 'as applied' constitutional challenges in the Irish constitutional order.[64] Thus, the judgment in *G* comes at an opportune moment for the Irish courts given the influence that Canadian remedial practice seemed to have on the Irish Supreme Court in *PC*. Consequently, it is tentatively suggested that there are four points from *G* which might prove instructive for Irish courts.

First, the Court held that the use of tailored remedies should be encouraged, wherever possible, to ensure that the public retains the benefit of legislation. This approach, which is different to the Irish approach where full and immediate invalidation is the primary rule of redress, is potentially of value in an Irish context due to: (1) the terms of Article 15.4.2º of the Constitution, which provides that laws shall be invalid *only* to the extent of their repugnancy; and (2) the presumption of constitutionality which Irish legislation enjoys.[65] Indeed, the judgment in *G* seems to echo sentiments of O'Donnell J in *PC* where he expressed approval for nuanced solutions to complex constitutional problems.[66] While it is

[57] *G* (n 1) at [237] (emphasis added).
[58] ibid [225].
[59] ibid [254].
[60] ibid [256].
[61] ibid [273].
[62] ibid.
[63] ibid [274].
[64] *PC* (n 7) [30] of the judgment of MacMenamin J.
[65] Of course, only post-1937 legislation enjoys this presumption. See *Pigs Marketing Board v Donnelly* [1939] IR 413 and *McDonald v Bord na gCon* [1965] IR 217.
[66] *PC* (n 7) [20] of the judgment of O'Donnell J.

a matter for further debate as to whether Irish courts should go as far as their Canadian counterparts in creating a presumption for the use of tailored remedies – and it must also be pointed out that MacMenamin J in *PC* said that the remedy of reading in is not available in Ireland - it is nonetheless intriguing to see that the Court in *G* encouraged courts to make considerable efforts to avoid making findings of full invalidation.[67] However, the Court in *G* was careful to modulate its approach when it said that tailored remedies ought not to be used where it appears unlikely that the tailored version of the statute would have been enacted by the legislature or where their use would interfere with the overarching purpose of the law. Such a modulated approach would, of course, also be appropriate in Ireland.

The use of tailored remedies inevitably raises separation of powers concerns in that they arguably give judges more choices about how to exercise their power. And any such choices will inevitably be political – in the sense of values based – choices, thereby potentially allowing judges to slip into the legislative domain. Against that, however, judicial determinations and interpretations of laws undoubtedly have consequences for the meaning and effect of those laws, something which has, at the very least, similarities to a law-making function. And, in Ireland, it is emphatically the province of courts to authoritatively interpret statutes and assess them for compatibility with the Constitution. As David Kenny has pointed out, the line between law-making, as opposed to interpretation, which the courts already legitimately do, is not immediately obvious, particularly in constitutional review.[68] Of course, that is not a sufficient reason for the wholesale adoption of a presumption for the use tailored remedies. There is potentially a significant difference between traditional judicial 'gap-filling' in the common law and tailored interpretative remedies of legislation. In the former situation, the legislature may not have thought about the matter at all, while in the latter situation it will have thought about an issue, and authoritatively pronounced on it.[69] Nonetheless, the 'elusive divide' between interpretation and law-making does suggest that, so long as they continue their incremental, restrained approach to remedies, and remain mindful of the respect due to legislative pronouncements, Irish courts could embrace tailored remedies to a greater degree than they currently do without fear of straying beyond their proper role.[70] Additionally, as Aileen Kavanagh and John Gardner have pointed out, if judicial interpretation does have something akin to a law-making function, then this is not unduly problematic, as judges are performing that law-making function in line with the traditional role of the common law judge – developing legal rules and principles through reasoned deliberation by reference to existing legal rules and principles.[71] Therefore, so long as judges remain within the bounds of their proper competence (an admittedly difficult task in constitutional review of legislation), there is no bar to greater use of tailored remedies by Irish courts.

The second lesson which can be taken from *G* is that the Canadian experience suggests that attempting to delineate precise categories of cases where the use of suspended declarations is justifiable is probably unnecessary. Over time, it is likely that those categories would be

[67] ibid [21] of the judgment of MacMenamin J.

[68] David Kenny, 'The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) at 108.

[69] The author is grateful to Tom Hickey for this point.

[70] Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation Under the Human Rights Act 1998' (2004) 24(2) Oxford Journal of Legal Studies 259.

[71] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) and John Gardner, *Law as a Leap of Faith* (OUP 2012). Gardner contrasts this judicial law-making function with the legislative law-making function, which is the power to make novel legal rules and principles without needing to have recourse to existing ones.

ignored anyway, leading to conceptual confusion about the correct operation of the remedy. Instead, it makes sense to tie their use to broader ideas of constitutional principle, as MacMenamin J seemed to do in *PC,* where he suggested that suspended declarations could, in the right circumstances, help to uphold the rule of law. The Court's suggestion in *G*, then, that the use of suspended declarations should be rare, be required on the basis of some compelling public interest, and be confined to circumstances where the harms of immediate invalidation would outweigh the potential harms of delayed invalidation, seems sensible. Such grounding principles would seem to achieve a useful balance between retaining the essential flexibility of the remedy, thereby allowing judges to assess its suitability for individual cases, whilst also mooring it in the constitutional principle of the rule of law. They also seem to share some similarities to the circumstances in which O'Donnell J suggested in *PC* that suspended declarations would be appropriate in an Irish context.[72] Additionally, emphasising the need for courts to clearly justify why they have chosen to suspend a declaration would encourage robust reasoning, thereby hopefully avoiding the conceptual confusion which can dog remedial practice. However, the language that the Court used in *G* does seem to permit suspended declarations to be used in a greater range of circumstances than what was suggested in *PC*. In *PC*, both MacMenamin J and O'Donnell J said that the use of suspended declarations should be 'exceptional'.[73] It may be the case that a 'compelling public interest' will always be an 'exceptional' circumstance, but, as long as they continue to have a presumption against the use of suspended declarations, Irish courts could potentially unduly hamper appropriate use of what is potentially a very valuable remedy if they restrict its use to 'exceptional' circumstances.

Third, to ensure that rights are meaningfully protected, and to ameliorate some of the potential concerns associated with suspended declarations not meaningfully protecting rights, the Irish courts ought to consider the possibility of individualised exemptions from delayed invalidation. While the courts have expressed reluctance in some cases to grant individualised public law remedies, there does not seem to be a principled constitutional bar to the granting of individualised remedies and exemptions.[74] Additionally, the Irish courts have, in several cases, taken steps to limit the retroactive effect of their decisions, steps which have arguably led to individuals in similar factual circumstances being treated differently before the law in service of the attainment of the 'true social order'.[75] That line of authority shows that the Irish courts can come up with pragmatic solutions which safeguard the rights of individuals, whilst also respecting the rule of law and protecting broader public interests. And while the *Bunreacht* does not possess an equivalent power to section 24(1) of the Charter, there does seem to be enough scope within the Irish constitutional order for greater use of individualised remedies.[76]

Finally, the declaration in *G* was made in response to an 'as applied' challenge, meaning that Christopher's Law is now only of no force or effect 'as it applies' to those people in *G*'s circumstances. The constitutionally compliant portions of the law have been retained. As the Supreme Court noted in *PC*, there is scope for 'as applied' challenges in the Irish

[72] *PC* (n 7) [14] of the judgment of O'Donnell J.
[73] ibid at [28] of the judgment of MacMenamin J and at [21] of the judgment of O'Donnell J.
[74] David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2018) 40(2) Dublin University Law Journal 85, 99.
[75] See *Murphy* and *AG* (n 39).
[76] For example, O'Donnell J noted at [20] of his judgment in *PC* that complex solutions sometimes required nuanced solutions. There does not seem to be any principled bar for that 'nuance' to include individualised remedies.

constitutional order. Moreover, as Kenny has pointed out, their use, rather than wholesale challenges to legislation, is possibly even called for because of the text of Article 15.4.2º.[77]

Conclusion

The lessons Ireland can take from *G* are not an exhaustive prescription as to how Irish courts ought to exercise their remedial discretion, nor do they ignore some of the concerns scholars and judges (including the dissenting judgments in *G*) have suggested about the improper exercise of this aspect of constitutional review. As the Court noted itself in *G*, the principles it laid down will not always lead to agreement on the correct remedial outcome, as such things are inevitably a matter of reasonable disagreement and their value is in the transparency they will hopefully bring to the remedial process.[78]

Good constitutional governance demands at least a certain degree of flexibility to avoid arbitrary and irrational results. However, it also demands principled application of norms to ensure at least some level of certainty and predictability. It is beyond the scope of this paper to fully assess the sustainability of the principles enunciated by the Court in *G* as a meaningful guide for the exercise of remedial judicial discretion. It may be the case that attempting to offer a coherent basis for the use of remedies – which is what the court in *G* seemed to attempt to do – in the inherently fact specific process of constitutional review is impractical. Perhaps it is sufficient for courts to say that what good governance requires will inevitably vary from circumstance to circumstance and context to context, and some indeterminacy is not objectionable so long as certain key constitutional principles are borne in mind and respected.[79]

Nonetheless, given that the Irish courts have begun to dip their toes into more expansive remedial waters, there is much value to be learned from the Canadian remedial experience. That experience suggests that it is possible for courts to slip into conceptually challenging remedial terrain if it is not mindful of certain foundational constitutional principles. The Court in *G* offered some useful suggestions both as to how that 'slip' can be avoided and the appropriate use of tailored remedies and suspended declarations more specifically. Vigilance by the courts, practitioners, and academics, then, on the use of tailored remedies and suspended declarations on a case-by-case basis seems, for now at least, the best method of ensuring clarity and transparency in the Irish courts' remedial practice.

[77] For a full exploration of this point, see David Kenny, 'Grounding Constitutional Remedies in Reality: The Case for As-Applied Constitutional Challenges in Ireland' (2014) 37(1) Dublin University Law Journal 53.
[78] *G* (n 1) [159].
[79] On the demands of the rule of law being context specific, see N.W. Barber, *The Principles of Constitutionalism* (OUP 2018) and Timothy Endicott, *Vagueness in Law* (OUP 2000).