

THE NEW TEMPORAL EQUITABLE REMEDIES

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OVERVIEW



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- Orthodox remedial outcomes:
 - A. No invalidation
 - B. Immediate retroactive invalidation
- The new temporal equitable remedies:
 1. Suspended retroactive invalidation
 2. Immediate non-retroactive invalidation
 3. Suspended non-retroactive invalidation
- Key distinctions

JUDICIAL REVIEW

1 Quashing orders

(1) After section 29 of the Senior Courts Act 1981 insert –

“29A Further provision in connection with quashing orders

- (1) A quashing order may include provision –
 - (a) for the quashing not to take effect until a date specified in the order, or
 - (b) removing or limiting any retrospective effect of the quashing.
- (2) Provision included in a quashing order under subsection (1) may be made subject to conditions.

<https://www.legislation.gov.uk/ukpga/2022/35/section/1>

3

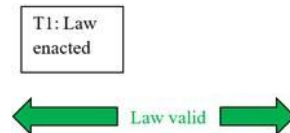


ORTHODOX REMEDIAL OUTCOMES:

- A. No invalidation
- B. Immediate retroactive invalidation

4

A. NO INVALIDATION



5

B. IMMEDIATE RETROACTIVE INVALIDATION



“An immediate retroactive declaration of invalidity renders the law invalid from the date of the declaration, back to the date the law was enacted (or to the date the constitutional provision under which it is invalid came into force, whichever came after).”

— *R. v. Albashir*, [2021 SCC 48](#), [85] (Rowe J.)

6

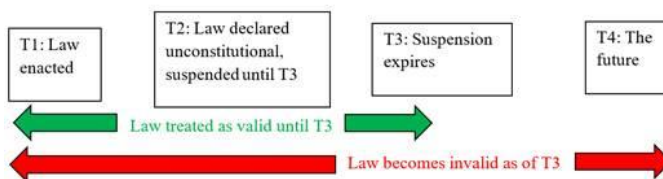
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1. Suspended retroactive invalidation
2. Immediate non-retroactive invalidation
3. Suspended non-retroactive invalidation

1. SUSPENDED RETROACTIVE INVALIDATION



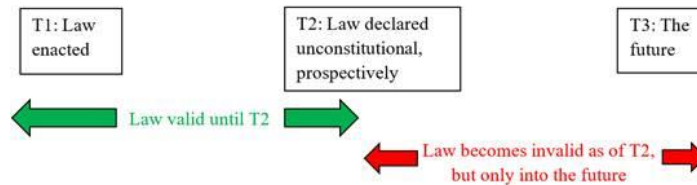
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“A suspended retroactive declaration of invalidity does the same thing, but not until the suspension period expires: the law is treated as valid for the period of the suspension, but when the suspension period expires, it is as though the law had always been invalid.”

— *R. v. Albashir*, [2021 SCC 48](#), [85] (Rowe J.)

2. IMMEDIATE NON-RETROACTIVE INVALIDATION

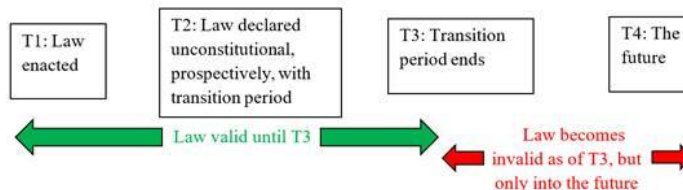


“An immediate prospective declaration of invalidity renders a law invalid from the date of the declaration forward into the future, but not back into the past. When there is a prospective declaration of invalidity, the law was and remains valid from the date it was enacted until the date of the prospective declaration.”

— *R. v. Albashir*, [2021 SCC 48](#), [85] (Rowe J.)

9

3. SUSPENDED NON-RETROACTIVE INVALIDATION



“A prospective declaration of invalidity with a suspension, often called a “transition period”, works in a similar way to an immediate prospective declaration, except that the declaration becomes effective only when the transition period ends.”

— *R. v. Albashir*, [2021 SCC 48](#), [85] (Rowe J.)

10

THE NEW TEMPORAL EQUITABLE REMEDIES



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NEW:

- ✓ Elucidated in early-20th century American case law
- ✓ Increasing recognition among 21st century judges and lawmakers

TEMPORAL:

- ✓ Departure from orthodox remedial outcomes

EQUITABLE:

- ✓ Court of Chancery's declaratory remedy
- ✓ Safety-valve on ordinary law
- ✓ Discretionary
- ✓ Traverse public and private law

REMEDIES?

11

KEY DISTINCTIONS



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- *Three* NTERs (at least) — they are distinct!
- Sources of power: legislative versus judicial
- Deferring rights versus deferring liberties
- Civil cases versus criminal cases
- Pure application versus selective application (exceptions)
- Good faith versus bad faith rules
- Justiciable claims versus non-justiciable claims

12



“Let justice be done though the heavens fall”?

- Doctrine — [‘Interference by Precedent’ in *Economic Torts and Economic Wrongs* \(Oxford: Hart Publishing, 2021\)](#)
- Policy — [‘Prospective Overruling Unravelling’ \(2022\) 41 C.J.Q. 29 \(slides\)](#)
- Comparative law — [‘Retroactive Adjudication’ \(2020\) 130 Y.L.J. 276 \(slides\)](#)
- Jurisprudence — [‘Judicial Law-making’ \(slides\)](#)
- Rule of law — [‘Prospective Overruling Offends the Rule of Law’ \(2021\) NZLJ 261 \(blog\)](#)



- Institutional roles
- Retroactive remedial legislation



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