I WOULD DO ANYTHING FOR RIGHTS – BUT I WON'T DO *THAT*

Abstract: For all its influence and renown, TD v Minister for Education is arguably an outlier among the many decisions of the Irish courts on the topic of rights enforcement against the executive. This paper illustrates this by reference to case law before TD, and discusses recent reaffirmation of this by the Supreme Court. It then considers various possible explanations for this outlier status, and suggests that the best explanation might be deep discomfort on the part of the judiciary with enforcement of economic and social rights. It concludes by noting that this discomfort could transcend constitutional text, so that even if further rights of this sort were inserted into the Constitution, the courts might refuse to strongly enforce them.

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Introduction

In the study of Irish constitutional law, *TD v Minster for Education* looms large.[1] Its influence extends beyond the principles established governing the (extremely limited) circumstances in which a court may grant a mandatory injunction compelling the executive to undertake a specified course of action. Together with its companion decision from five months earlier in *Sinnott v Minister for Education*,[2] *TD* was seen as signaling a new, more restrained direction for Irish constitutional jurisprudence that continued for the next two decades. It has become, as David Kenny argues in his contribution to this volume, a key component of our constitutional culture.[3]

While this is a largely accurate characterisation, it is not the whole story. On a broad view, it is true that *TD* was an important step in a shift towards a more restrained and deferential posture on the part of the courts. It is easy to form the impression that it is in perfect harmony with the surrounding jurisprudence. However, on the specific issue of the power of the courts to grant an effective remedy in cases where an existing constitutional right has been violated, it is in fact remarkably difficult to reconcile *TD* with a large number of Supreme Court decisions that have not been overturned or discredited – or, for that matter, with some significant cases decided after it. For all its canonical status in Irish constitutional law, *TD* is in some ways an outlier rather than part of the mainstream, at least within the corpus of Irish constitutional case law.[4]

This brief reflection will situate *TD* in a wider body of Supreme Court jurisprudence considering the enforcement of constitutional rights in cases where they are violated by the executive. It will argue that the general principle is that the courts have both the power and duty to enforce rights in these circumstances, and that they have all powers necessary to do

[1] [2001] 4 IR 259.
[2] [2001] 2 IR 545.
[3] David Kenny, 'TD v Minister for Education, Culture, and Constitutional Dark Matter' (2022) 6(3) IJSJ 39.
[4] Elsewhere in this volume, Brice Dickson argues that *TD* is not an outlier in comparative terms, since the courts of several similar jurisdictions are reluctant to interfere in executive affairs: see Brice Dickson, 'Judicial Enforcement of Social Rights in a Comparative Perspective' (2022) 6(3) IJSJ 82. Note, however, that of the jurisdictions discussed by Dickson, only South Africa has a written constitution that includes enforceable socio-economic rights provisions. As such, the specific issue of whether courts are willing to use mandatory injunctions as an ultimate enforcement mechanism for constitutionally-protected socio-economic rights receives little attention.

so. *TD* has carved out a single exception to this rule – one that can only be explained by reference to the fact that the right at issue was socio-economic in nature. The reluctance of the Irish judiciary to enforce socio-economic rights even where they are clearly protected by the Constitution has implications for the future development of existing provisions such as Article 42A, as well as for the potential impact of proposed amendments to the Constitution.

Case Law on Unconstitutional Executive Action

In his judgment in *Ryan v Attorney General*, Kenny J observed that Article 40 of the Irish Constitution is 'in many ways the most important in the Constitution, for Article 5 declares that Ireland is a democratic State and what can be more important in a democratic State than the personal rights of the citizens'.[5] This statement is notable for several reasons. First, it suggests that personal rights are the most important value in the Irish Constitution. Second, it justifies this position by reference to the democratic nature of Irish society, and the importance to democracy of the protection of fundamental rights. (The significance of this point will become clearer below in the context of case law and commentary emphasising the importance of democracy to the separation of powers.)[6] Third, it is far from an isolated passage; on the contrary, it can be situated in a long line of Supreme Court decisions that have repeatedly emphasised that, where the protection of fundamental rights so requires, the separation of powers should give way, and the courts should have the power to intervene in matters that would ordinarily be considered to be the domain of the legislature or the executive.

In order to place the decision in *TD* in context, it is worth highlighting a selection of these decisions. First, the general principle that the courts should refrain from entering the executive domain has always been stated to be subject to a clear exception: namely, that they may do so when necessary to protect constitutional rights, or where the Government acts in clear disregard of its constitutional powers and duties. For example, in *Byrne v Ireland*, Walsh J stated:

> In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights.[7]

Shortly afterwards, Fitzgerald CJ commented in *Boland v An Taoiseach*:

> … in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.[8]

[5] [1965] IR 294, 310.
[6] See Hardiman J in *Sinnott v Minister for Education* (n 2) 702: '… the constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It is not a mere administrative arrangement: it is itself a high constitutional value … It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution.'
[7] [1972] IR 241, 265.
[8] [1974] IR 338, 362.

Similar remarks were made in relation to the legislative domain by Hamilton CJ in *District Judge McMenamin v Ireland*, when he stated that 'it is not open to this Court to interfere with the manner in which this situation is dealt with by the Oireachtas unless the Oireachtas fails to have regard to its constitutional obligations in this regard'.[9] The power of the courts to review the constitutionality of legislation is admittedly more obvious from the text of the Constitution[10] than the power to review the constitutionality of executive action. Nonetheless, *Boland* and related case law clearly establish that Government policy must comply with the Constitution, and is subject to constitutional review by the courts.

The case law establishes not only that courts have a power to uphold constitutional rights (if necessary at the expense of observance of the separation of powers): they have a duty to do so. Also in *Boland*, Griffin J noted:

> In the event of the Government acting in a manner which is in contravention of some provisions of the Constitution, in my view it would be the duty and right of the Courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution is substantiated in proceedings brought before the Courts.[11]

Similarly, in *Crotty v An Taoiseach*, Finlay CJ stated:

> … this Court has on appeal from the High Court a right and a duty to interfere with the activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights.[12]

Having established that the separation of powers is subject to this specific exception, which imposes a duty of intervention on the courts, the next question is how much power it confers on the courts. An oft-quoted passage in this regard is the following from the judgment of Ó Dálaigh CJ in *State (Quinn) v Ryan*:

> It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and the Courts' powers in this regard are *as ample as the defence of the Constitution requires*.[13]

In strikingly similar terms, Hamilton CJ in *DG v Eastern Health Board* held that:

> It is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3. If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to *do all things necessary* to vindicate such rights.[14]

Importantly, this is not an old line of case law that was decisively altered by the decision in *TD*; indeed, none of the decisions cited above have been overturned. At most, the principles

[9] [1996] 3 IR 100, 136.
[10] Article 15.4.
[11] *Boland* (n 8) 370-371.
[12] [1987] IR 713, 773.
[13] [1965] IR 70, 122 (emphasis added).
[14] [1997] 3 IR 511, 522 (emphasis added).

declared in them have been subject to minor adjustments, with some of those adjustments increasing the scope for court intervention. Most recently, in *Burke v Minister for Education* in 2022, the Supreme Court held that the 'clear disregard' test established in older cases like *Boland* does not apply in cases where fundamental rights are at issue. O'Donnell J held:

> … if the Government were to infringe the constitutional rights of a person by, for example, statements considered to be damaging to the good name of the citizen, it is clear that the courts would be obliged to afford the citizen a remedy. Thus it follows, almost inescapably, from the structure and detail of the Constitution that the executive is constrained by the Constitution and that the Courts are empowered to police and, where necessary, enforce those constraints … if it is established that the actions of the Government have breached the rights of the citizen, then the courts must uphold the Constitution, and defend the rights of the citizen, in the same way and applying the same standards, as if those rights had been infringed by the actions of the legislative branch of government.[15]

It seems likely that *Burke* lowered the bar for court intervention in executive affairs in cases involving fundamental rights, and arguably would have supported the position taken by the High Court rather than by the Supreme Court in *TD*. However, even under the older and more demanding test, there can hardly be a clearer disregard of the Constitution than a case where (as in *TD*) declaratory relief had already been granted, highlighting the Government's failure to vindicate a constitutional right – and yet no action was taken.

These Supreme Court decisions are consistent and unambiguous: the separation of powers does not preclude the courts from intervening in executive affairs where necessary to protect constitutional rights. On the contrary, the courts have both the power and the duty to do so, and the powers afforded to the courts to discharge this duty of upholding constitutional rights are as extensive as necessary to vindicate the rights that are threatened by the executive. Of the above judgments, *Crotty* is particularly notable for the fact that the court granted an injunction prohibiting the executive from a particular course of action that would normally be within its exclusive remit (namely, foreign relations), but which in the circumstances of the case amounted to a violation of the Constitution.

TD as an Outlier

To put it simply, the decision in *TD* is plainly at odds with this long-established and consistent line of case law. It held that in one specific context, in which the Government had failed to discharge its constitutional duties to vindicate a particular constitutional right – and, moreover, had failed to respond to declaratory relief granted by the courts in an effort to prompt the necessary response – the powers of the courts are not as 'ample as the defence of the Constitution requires', and they may not 'do all things necessary to vindicate such rights'. Reading *TD* together with the surrounding case law, the Supreme Court is effectively saying: 'I would do anything for rights, but I won't do *that*.'

In the line of cases leading up to *TD*, damages and declaratory relief had proven ineffective to remedy the ongoing violations; whereas a mandatory injunction in *DB v Minister for Justice*[16] had seen the rights of the applicant in that case vindicated – the only case of many before

[15] [2022] IESC 1, [40] and [61].
[16] [1999] 1 ILRM 93.

the courts in which this had occurred.[17] Thus, it appears that a mandatory injunction is the only effective remedy available.[18] This raises a vital question: what makes the circumstances of *TD* so different as to justify the courts denying themselves the power to effectively vindicate constitutional rights that were clearly being violated? Why was the injunction granted against the executive in *TD* so objectionable, when *Crotty* had established the principle that courts may (and indeed sometimes must) grant injunctions aimed at ensuring that the executive acts in accordance with the Constitution? Why is the separation of powers deemed more important than the protection of fundamental rights in this instance, and this instance only?

Although a number of possible answers to these questions may be suggested, several of them can quickly be ruled out. It has already been demonstrated that it cannot be merely that the order had implications for executive freedom of action; it has long been accepted that this is not a barrier to court intervention. Perhaps the most obvious issue is that the order placed demands on the public purse. However, this cannot be a bright line distinguishing between permissible court interventions and impermissible ones. Many court decisions in the realm of constitutional law and constitutional rights have implications for the public purse (indeed, sometimes very far-reaching implications): this is true of past decisions on issues such as criminal legal aid;[19] the taxation of married couples;[20] the translation of statutes into Irish;[21] charging arrangements for in-patient care in public nursing homes;[22] or the rules governing State pension entitlements.[23]

Another suggestion might be that *TD* concerned an unenumerated right. The existence of the unenumerated right in question was not contested by the State in the case, and was ultimately accepted by the majority of the Court.[24] However, several members of the court had expressed doubts around whether the right had been properly recognised,[25] and indeed around the recognition of unenumerated rights more broadly.[26] Nonetheless, the status of the right is not in itself sufficient to explain the stance taken in *TD* regarding the powers of

[17] See Kelly J in the High Court in *TD v Minister for Education* [2000] 3 IR 62, 84: '…on no occasion has the Executive branch of Government managed to abide by the self selected time scale chosen by it for the provision of the relevant facilities. On each review hearing I have been informed of the necessity to defer further into the future the provision of the relevant facilities. There is, of course, one exception to this. In the case of the facilities which were the subject of the injunction [in *DB*] everything has been done in accordance with the order of the Court. That is not without significance.'

[18] See further Conor O'Mahony, 'Education, Remedies and the Separation of Powers' (2002) 24 Dublin University Law Journal 57.

[19] *State (Healy) v Donoghue* [1976] IR 325.

[20] *Murphy v Attorney General* [1982] IR 241.

[21] *Ó Beoláin v Fahy* [2001] 2 IR 279.

[22] *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105.

[23] *C v Minister for Social Protection* [2017] IESC 63.

[24] See *TD* (n 1) 281-282 (Keane CJ), who noted that 'Hardiman J reserves the question as to whether this case was correctly decided and Murphy J expresses the view that it was wrong in law and should not now be followed. The correctness of the decision, however, was not challenged on behalf of the respondents in the present case or indeed in any of the previous cases to which they were parties … For the reasons there set out and in the light of the considerations so forcefully urged by Murphy J in his judgment in this case, I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as "socioeconomic rights" to be unenumerated rights guaranteed by Article 40. In my view, however, the resolution of that question must await a case in which it is fully argued. For the purposes of this case, it is sufficient to say that, assuming that the passage from the judgment of O'Higgins CJ in *G v An Bord Uchtála* [1980] IR 32 correctly states the law, Geoghegan J was clearly correct [in *FN v Minister for Education* [1995] 1 IR 409] in holding that the right claimed on behalf of the applicant in that case was one of the unenumerated rights of children which parents were obliged to protect and uphold.'

[25] See *TD* (n 1) 281-282 (Keane CJ); ibid 345 (Hardiman J); and ibid 315-322 (Murphy J).

[26] See comments made three years earlier by Keane J (as he then was) in *IO'T v B* [1998] 2 IR 321, 369-370.

the courts to enforce this particular right. This becomes clear from a comparison between *TD* and the decision of the Supreme Court five months earlier in *Sinnott v Minister for Education*.[27] In *Sinnott*, the Supreme Court, in a lengthy *obiter* discussion, found the mandatory order made by the High Court in that case to be an impermissible breach of the separation of powers for essentially identical reasons to those relied on in *TD* – notwithstanding the fact that the decision in *Sinnott* was based on express constitutional text (namely, the right to free primary education under Article 42.4). Read together, *Sinnott* and *TD* are indicative of a clear view on the part of the Supreme Court that mandatory injunctions ordering the Government to deliver specified services to children are a violation of the separation of powers, irrespective of whether the right to receive those services is expressly stipulated in the text of the Constitution, or an unenumerated right implied in Article 40.3 and/or Article 42.5 (as it then was).

Another issue highlighted in the judgments in *TD*,[28] and extensively discussed during the symposium in Trinity College Dublin that forms the basis of this volume, was the level of detail stipulated in the order in *TD*. One view, particularly expressed by Tom Hickey in his contribution to this volume,[29] is that the real error made by Kelly J in the High Court was to include such prescriptive detail in the order that the executive was left with no real freedom of action, and would have been forced to seek court permission to make even minor amendments to its policies in the field. Kelly J's rationale in doing so was that he was simply converting the Government's existing policy into a mandatory order and compelling the Government to implement it; the Government, and not the Court, had formulated the policy in question. However, the Supreme Court took the view that once the implementation of the exact details of the policy became mandated by a court order, the Government lost the discretion and freedom of action that are a core feature of policy formation; it was no longer the Government's policy, but the court's.[30]

Might a broader and less detailed mandatory order (eg that the Government provide services necessary to vindicate the constitutional rights of the applicants) have survived on appeal, on the basis that the Government would have retained flexibility and discretion over the details of its response? Again, a comparison with *Sinnott* demonstrates that this is not a convincing basis on which to differentiate *TD* from the broader body of case law concerning unconstitutional executive actions or inactions. The order in *Sinnott* was nowhere near as detailed as that in *TD*; if anything, it was more akin to the broad direction hypothesised above, with Geoghegan J describing it as 'a wide ranging mandatory injunction directing the first defendant to provide for free education for the first plaintiff, appropriate to his needs for as long as he was capable of benefiting from same.'[31] And yet, the members of the Supreme Court in *Sinnott* who considered the issue found that the order violated the separation of powers in the same way as the order in *TD*. (Hickey argues that *Sinnott* cannot tell us too much about *TD*, since the former was primarily concerned with the question of whether the right to free primary education could extend into adulthood in some cases, and the mandatory injunction point became moot once the right was capped at age 18. However, in my view, the lengthy (if admittedly *obiter*) consideration of the separation of powers point by several judges in *Sinnott* cannot be so easily dismissed, and it is difficult to imagine that the same judges would have found a less detailed mandatory injunction acceptable just a few months later.)

[27] *Sinnott* (n 2).
[28] See *TD* (n 1) 284-288 (Keane CJ), and ibid 334-336 (Murphy J).
[29] Tom Hickey, 'Reading *TD* Down' (2022) 6(3) IJSJ 19.
[30] See *TD* (n 1) 287-288 (Keane CJ); ibid 335 (Murray J); and ibid 360-361 & 364 (Hardiman J).
[31] ibid 713.

In reality, the main feature that distinguishes *TD* from all the other cases discussed above is the same feature that *TD* has in common with *Sinnott*: it is that the right being violated was socio-economic in nature. As such, it may be violated by pure inaction on the part of the executive, in which case a mandatory order may be the only effective remedy. In this circumstance – but seemingly this circumstance only – the Supreme Court answered Kenny J's question in *Ryan* as to 'what can be more important in a democratic State than the personal rights of the citizens…' by holding that in certain circumstances (namely, where the executive fails to implement policy measures to vindicate socio-economic rights), the separation of powers is more important than the personal rights of the citizen. As Gerry Whyte has noted, this is not a position that is clearly mandated by the Constitution.[32] Instead, the position reflects judicial antipathy towards socio-economic rights, and a viewpoint that it is not really the function of the Constitution (and therefore not a function of the judiciary) to protect these rights.

Socio-economic rights do not sit well with how Irish judges normally think about rights; they generally conceive of rights as negative freedoms from State interference, violations of which are remedied by invalidating legislation or policies. In *PH v John Murphy & Sons Ltd,* Costello J stated:

> It must be remembered that the court is construing a constitutional document whose primary purpose in the field of fundamental rights is to protect them [ie citizens] from unjust laws enacted by the legislature and from arbitrary acts committed by State officials.[33]

Although not referenced in any of the judgments in *TD*, this passage was quoted with approval by Hardiman J in the Supreme Court in the same year as *TD* in *North Western Health Board v HW*.[34] What this betrays is a phenomenon identified in the US context by Susan Bandes – ie a tendency on the part of judges to view the Constitution as exclusively a charter of negative liberties, with no role whatsoever in the field of positive entitlements and positive obligations:

> The idea of the Constitution as a charter of negative liberties, which pervades the judicial way of talking about constitutional rights, is much more than a rhetorical flourish. It translates into a restrictive series of assumptions about governmental action which serves to exclude whole categories of government misconduct and individual suffering from the ambit of constitutional protection. These assumptions have been treated as virtually sacrosanct.[35]

This position runs into difficulty when confronted with the reality that the Irish Constitution *does* include protection for socio-economic rights that impose positive obligations on the State, and that may be violated by executive inaction rather than executive action. The right to free primary education is expressly protected, while the line of case law leading up to *TD* developed the unenumerated right to be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, the child's appropriate education.[36] It would seem that senior members of the Irish judiciary would prefer if the Irish Constitution did not include protection for these rights; and this predisposition filtered into their

[32] Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' (2006) 28 Dublin University Law Journal 1.
[33] [1987] IR 621, 626.
[34] [2001] 3 IR 622, 763.
[35] Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88 Michigan Law Review 2271, 2308.
[36] See, in particular, *FN v Minister for Education* [1995] 1 IR 409.

reasoning about the level of enforceability of the rights that are protected. For example, Hardiman J stated in *TD*:

> It would of course be possible by constitutional amendment or by the adoption of an entirely new constitution, to vest the courts with powers and responsibilities in social, economic and other areas which are presently the preserve of the other organs of government. This, perhaps, would give immediate satisfaction to those who thought the courts more likely to adopt their views of the merits of certain social or economic questions than the legislature or executive. But it would vest responsibility in these areas in a body without special qualifications to discharge it which, if its views fell into disfavour, would not easily be replaced by another more congenial. It would also render technical and legalistic discussions, which should, properly be conducted in quite a different manner. And if courts extend their powers to questions which are essentially political they will soon either fossilise developments on such issues or lose that basis in formal and technical logic and consistency which is an essential hallmark of legal, though not necessarily of political, discourse.[37]

The salient point, of course, is that no amendment is needed here; the rights at issue in *Sinnott* and *TD* are already constitutionally protected and justiciable (and, as such, not 'essentially political' matters at all). Oran Doyle has cogently observed that the key reasons given by the Supreme Court in *TD* for not granting the mandatory injunction (ie concerns around judicial activism and democratic legitimacy) were the same arguments advanced by the Constitution Review Group for not including additional socio-economic rights in the Constitution:

> It is puzzling that precisely the same arguments are considered relevant both to proposed amendments of the Constitution and to actual interpretations of the Constitution. One wonders whether those who oppose judicial activism, believing that it leads judges to substitute their own preferences for what the Constitution requires, have themselves succumbed to the siren voices telling one to identify the constitutional conception of democracy with one's own.[38]

The judgments in *TD* were heavily influenced by the judgment of the High Court in *O'Reilly v Limerick Corporation*.[39] However, the reasoning of Costello J in that case around commutative and distributive justice was applied as a justification for declining to recognise a new unenumerated socio-economic right sought by the plaintiffs that had no basis in either the text of the Constitution or in previous case law. *TD* (and *Sinnott* before it) took this reasoning and applied it as justification for not enforcing a socio-economic right that was already constitutionally protected – which is obviously a very different situation. Again, this is indicative of judicial preferences around what types of rights should be constitutionally protected, and not of any pre-ordained constitutional principle around the scope of the judicial power to intervene in executive affairs.

This innate judicial reluctance to enforce socio-economic rights, even where they are expressly protected in justiciable provisions of the Constitution, is highly consequential for the future development of Irish constitutional law. First, it will stymie the development of other existing provisions – most obviously the effectively unenumerated children's rights guaranteed by Article 42A.1. By their nature, many children's rights – whether under the

[37] *TD* (n 1) 358.
[38] Oran Doyle, *Constitutional Equality Law* (Thomson Round Hall 2004) 46.
[39] [1989] ILRM 181.

protection, provision or participation headings – are socio-economic in nature and have significant implications for public expenditure.[40] The considerable shadow cast by *TD* means that any litigant seeking to leverage Article 42A to secure better services for a child is likely to be advised by their lawyer that they have a steep (and possibly insurmountable) hill to climb. In this, as Kenny argues, *TD* 'places limits on what it possible, conceivable, or imaginable in Irish constitutional law', with the result that 'the arguments do not get made, the cases do not get taken, and the biggest effects of *TD* are absences, inaction, passivity.'[41]

Second, this tendency raises considerable question marks over how the Irish judiciary would react to the addition of any further socio-economic rights to the text of the Constitution – whether along the lines recommended by the Constitutional Convention in 2014,[42] or more immediately, in the context of the constitutional amendment on housing that is under development pursuant to the current programme for Government.[43] Even if any such rights are added to the text of the Constitution, *Sinnott* and *TD* demonstrate that there is no guarantee that judges would be willing to embrace them and strongly enforce them.

Conclusion

Over two decades of constitutional scholarship, *TD* has come to be seen as a crucial inflection point in the development of Irish constitutional law. It has been followed by a number of other Supreme Court decisions in which judicial restraint and deference have played a central role in determining the outcome.[44] It may seem counter-intuitive to describe a decision such as this as an outlier. And yet, when jurisprudence concerning the powers of the courts to intervene in executive affairs to enforce constitutional rights is examined, the only decisions that take the same extreme line as *TD* are cases concerning the enforcement of socio-economic rights, whether the right to free primary education under Article 42.4, or the unenumerated right to secure accommodation and education that was at issue in *TD*.[45]

A narrow view of *TD* is to say that it draws a bright line around courts dictating policy to the executive. A more holistic view of *TD* shows that it is widely accepted in Irish constitutional jurisprudence that the courts may tell the executive *not* to do things, with the justification being that the separation of powers must give way to the need to enforce constitutional rights. *TD* and related case law say that the courts cannot tell the executive that it *must* do things; no allowance is made for the fact that the rights at issue in those cases are violated not by executive action, but executive inaction. So what *TD* is really telling us – mostly by implication, but sometimes more expressly – is that the Court did not think that the judiciary

[40] For a detailed consideration of judicial enforcement of children's socio-economic rights, see Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011).
[41] Kenny (n 3).
[42] *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights* (March 2014) <http://www.atdireland.ie/wp/wp-content/uploads/2015/07/ESCRights-Const-Conv-Report.pdf> accessed 29 August 2022.
[43] Government of Ireland, *Programme for Government: Our Shared Future* (October 2020), 120 <https://assets.gov.ie/130911/fe93e24e-dfe0-40ff-9934-def2b44b7b52.pdf> accessed 29 August 2022. See also <https://www.gov.ie/en/publication/127ea-conference-on-a-referendum-on-housing-in-ireland/> accessed 29 August 2022.
[44] See *MD (a minor) v Ireland* [2012] 1 IR 697; *Fleming v Ireland* [2013] 2 IR 417; and *MR v An tArd Chláratheoir* [2014] 3 IR 533.
[45] Apart from *Sinnott*, a further example is *McD (a minor) v Minister for Education* [2013] IEHC 175. Even these cases have not consistently followed the position set down in *TD*; see *Cronin v Minister for Education* [2004] 3 IR 205, as discussed by Conor O'Mahony, 'A New Slant on Educational Rights and Mandatory Injunctions?' (2005) 27 Dublin University Law Journal 363.

has any business enforcing such rights; indeed, socio-economic rights shouldn't really be in the Constitution to begin with. If a large majority of the Supreme Court can come to this conclusion about rights that are expressly protected or previously established as unenumerated rights, there is every possibility that future courts would reach the same conclusion about any additional socio-economic rights that are added by amendment in the future.

Constitutional text alone does not suffice to ensure specific outcomes in future litigation. As such, those who believe that judges have a valuable contribution to make in the enforcement of socio-economic rights must continue to make the case for how this can be achieved in a justifiable and workable way, so that lawyers are more open to making those arguments, and that judges may be more receptive to them – whether in the interpretation of existing provisions like Articles 42 and 42A, or any potential new provisions on housing, disability rights, or any other rights of a socio-economic character.