

Editorial

Welcome to the third edition of the Irish Judicial Studies Journal 2022. This edition builds on a conference which was held in April 2022, organised by the Trinity Centre for Constitutional Governance – one year late, due to COVID delays – to mark the 20th anniversary of *TD v Minister for Education*. Inviting academics with distinctive viewpoints and broad expertise in Irish public law, it sought to tease out the implications of this landmark case, one of the most famous in the Irish constitutional law canon. The articles in this edition are expansions of and elaborations on many of these presentations, and reflect the dominant important themes of the conference.

A common refrain at the conference was that *TD* dominated the education and academic careers of those in the room. Many of the presenters were in various stages of their legal education when the case, along with the *Sinnott* case, came down. Reacting to it, in whatever manner, shaped the thinking of that generation of academics. Its centrality to Irish constitutional thought means that it has similarly shaped everyone who has been legally educated since.

It is fascinating, then, to see that one of the primary themes of these articles is the question of how large *TD*'s impact truly is, and how big it *should* be. The various articles consider this question in different ways, but there is a general consensus that the importance given to *TD* should probably be reduced.

Colm O'Conneide argues that the *TD* majority, in painting their judgment in broad brush strokes, reached some questionable conclusions and ended up in a conceptual mess, making rigid, categorical distinctions between the functions of the branches of government that could not be right. It is time, he thinks, to revisit this old ground and reconsider at least some of its more extreme aspects.

Laura Cahillane conducts a close analysis of the *TD* case's impact on the separation of powers, and some of the most extreme effects of this, such as the extent of review of executive action for rights infringements. She notes that the recent case of *Burke v Minister for Education* suggests some of these extremities are being rolled back in favour of somewhat different orthodoxy.

Tom Hickey suggests that *TD*, as a precedent, should be read narrowly, and not given the sweeping significance it is often attributed. The case, he says, is fundamentally about the extraordinary order made in the High Court; reading it more much broadly than this is a mistake. He sees the *Burke* case not as a pivot away from *TD*'s orthodoxy, but a reassertion of the proper meaning of *TD*, which never had such a broad sweep.

Conor O'Mahony and David Kenny continue this exploration with a slightly different focus. O'Mahony conducts a close analysis of precedent before *TD*, and suggests that its stance on review and remedy for rights violations is was an outlier in Irish constitutional law; any move away this is a restoration of a prior orthodoxy. He goes on to suggest that what *TD* really illustrated was in fact a deep and abiding judicial reluctance in Ireland to engage with social and economic rights, something which he notes could persist even if such rights were inserted into the constitutional text.

Kenny picks up a similar theme, suggesting that *TD*'s true importance and impact was not its formal holdings, but its impact on culture. The case epitomised and instantiated a highly non-interventionist constitutional culture in the judiciary and hugely influenced political culture as well. He suggests its cultural impact – in shaping the understanding and feel of Irish constitutional law – has been vast, and compares the case to constitutional dark matter: a gravitational force invisibly warping our constitutional space.

Shivaun Quinlivan picks up some similar themes while moving onto to consider concrete effects of *TD* in discrete policy areas. Looking at the impact of the case, she argues that it created a chilling effect on litigation about the right to education. In light of persistent state failures to provide appropriate education to people with disabilities, it is surprising that there has been a scarcity of litigation on this topic, and she suggests the *TD* case holds the reason why.

Rachael Walsh and Padraic Kenna then consider in detail the effects *TD* had in respect of the crucial area of housing. Kenna suggests that *TD* is at least partly responsible for the reluctance to treat housing as a rights issue in Ireland. He contrasts the Irish State's willingness to fund housing policy with a refusal to consider housing itself as a right, and considers how *TD* might have influenced or embedded this viewpoint.

Walsh's article makes an interesting suggestion – that *TD*'s vision of the separation of powers, and the proper role of the judiciary, is in fact inconsistent with the property rights decisions of the courts that are said to limit state intervention to address housing issues. She suggests that if courts addressed this inconsistency and clarified that the courts would not intervene in housing policy for reasons similar to *TD*, this could spur a new wave of state action to better protect this core social entitlement.

Finally, two articles situate *TD* in a comparative perspective. Brice Dixon contextualises *TD* by comparing its core holding on social and economic rights to similar principles in a several appropriate comparator jurisdictions: the UK, the US, Canada, Australia etc. He concludes that the principle at the heart of *TD* bears many similarities cases in these other jurisdictions, suggesting it is not an outlier. James Rooney undertakes a close comparison of Ireland and South Africa, a jurisdiction known for its constitutional protection of social and economic rights. He concludes that South Africa progressively and gradually developed remedial powers for ESC rights that, overall, are roughly comparable to those used in the High Court in *TD*. He suggests that Irish courts might have been more willing to gradually expand remedial powers if the issue had not been presented by such a hard case.

This series of articles casts fascinating new light on *TD* by reconsidering and recasting it with the benefit of hindsight. We think the quality and depth of these articles shows the enduring interest of *TD* in Irish legal thought. But this also presents the question of whether this is right: should we focus on *TD* as much as we do, or should we try to draw attention away from it? In 20 years, will *TD* still be so vigorously debated and considered, or will it be consigned to a (very significant) historical footnote? Time – and a new generation of scholars – will tell.

David Kenny, Conor Casey, and Aileen Kavanagh
Guest Editors