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'Cinneide 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

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REVISITING OLD GROUND – *TD, SINNOTT* AND THE DANGERS OF CLINGING TOO TIGHTLY TO SEPARATION OF POWERS ORTHODOXY

Abstract: This article seeks to reassess the TD and Sinnott cases in Irish constitutional law. It explores the context of these cases, and why they are regarded as important and closely linked in Irish constitutional discourse. It then analyses their reasoning to consider whether they withstand scrutiny after two decades. It concludes that the judgments painted with too broad a brush, reaching some questionable conclusions, drawing overly categorical distinctions between branches of government, and creating conceptual confusion.

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Introduction: Looking Back to See Anew

Revisiting past judgments can be an illuminating process – especially those viewed as significant turning points in the evolution of the constitutional canon. Reading such judgments again is an opportunity to place them in historical context, and to assess their contemporary significance.[1] Do they deserve to retain their authoritative status? Or should their precedential value be downgraded – or, at least, qualified with an asterisk of concern? Is it time to think again about the possible case-law paths they shut off, or leave the ghosts of alternative legal possibilities well alone?[2]

This paper re-assesses one such judgment, the much-debated Supreme Court judgment of *TD v Minister for Education*, now over two decades old.[3] Or, to be more precise, it examines the significance of this judgment and another Supreme Court decision with which it is closely associated – namely *Sinnott v Minister for Education*,[4] decided six months previously back in July 2001. It analyses (i) why these two judgments can be considered to be 'coupled' together, despite the distinct legal arguments at issue in each case; (ii) the relevant background context to both judgments; (iii) why they are regarded as important turning points in the development of Irish constitutional jurisprudence; and (iv) how well their reasoning has stood up to the test of time.

In essence, the particular significance of the *TD* and *Sinnott* judgments lies in how the majority of the Supreme Court pushed back against new approaches to protecting rights which had become highly fashionable by the end of the 1990s – favouring instead a more traditional, rigid approach to separation of powers, which limits how far courts can go in vindicating constitutional rights through the use of mandamus orders and other forms of supervisory relief. Re-visiting the two judgments, it is striking how the majority painted with a broad brush in reaching its conclusions, and reached some doctrinally messy and

[1] For a re-assessment of a Supreme Court judgment from a slightly later period, see Colm Ó Cinnéide, '*Equality Authority v Portmarnock Golf Club* – Revisited' (2022) DULJ, forthcoming. For a sustained re-appraisal of key Irish precedent through a feminist lens, see Mairead Enright and others, *Northern/Irish Feminist Judgments* (Hart 2017).

[2] This could be viewed as part of a constitutional 'self-correcting learning process', as Habermas puts it: Jurgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Pol. Theory 766, 766–769.

[3] [2001] 4 I.R. 259.

[4] [2001] 2 I.R. 545.

conceptually questionable results. As such, it is time to rethink the precedential value of *TD* coupled with *Sinnott* – and to think anew about how separation of powers should be conceptualised within Irish constitutional law.

TD V Minister for Education and its 'Coupling' with *Sinnott v Minster for Education*

Few cases in the *corpus* of Irish constitutional law provide as much fertile ground for such a process of re-assessment than *TD v Minister for Education*. As a judgment, it offers so much to think about. When might court intervention be justified in response to state neglect of its responsibilities towards vulnerable children? How far can courts go in fashioning effective remedies designed to vindicate constitutional rights? Are there limits to the judicial role in this regard, arising out of the need to respect separation of powers?

In its judgment, the majority of the Supreme Court decisively confirmed that there were such limits to judicial power. It upheld the State's appeal against a wide-ranging set of mandatory orders issued by Kelly J in the High Court. These orders had required the respondents to 'take all steps necessary' to proceed with the agreed policy objective of building ten 'high support' or 'special care' units capable of accommodating children with analogous care needs to the applicants - in order to vindicate their unenumerated constitutional rights, which were interpreted as including a right to be provided with sufficiently secure accommodation so as to enable them to receive an adequate education.[5] In overturning these orders, the majority of the Court (with Denham CJ dissenting) affirmed that the judicial branch should not assume a role in supervising the adequacy of the implementation of state policy, even when it potentially impacted on the enjoyment of constitutional rights power, unless 'absolutely exceptional circumstances' were in play.[6]

The Supreme Court majority went on to emphasise that courts should adhere to a much more restrained concept of their appropriate role within the separation of powers, and show due respect to the democratically accountable political branches of the state. At the most, only declarative relief should have been granted to the applicants – and several of the judges in the majority, including in particular Murphy J and Hardiman J, expressed substantial reservations as to how ready Irish courts should be to recognise the existence of constitutionally mandated socio-economic entitlements.

Significantly, this judgment came six months or so after a similar decision by the Supreme Court in *Sinnott v Minister for Education*. In this judgment, the majority of the Court granted a limited appeal against the decision of Barr J in the High Court to grant the plaintiffs a mandatory injunction, declaration and damages on the basis that the right to receive a basic elementary education as recognised by Article 42.4 of the Constitution had been repeatedly violated. The majority held that the first plaintiff, a 23-year old with severe autism and associated mental and physical disabilities, was entitled to a declaration that his constitutional rights had been breached by the failure of the defendants to provide him with appropriate educational facilities up to the age of 18 years. (This point had been essentially uncontested by the State.) However, the majority of the Court expressed doubt as to whether the scope of this right extended further than this age cut-off point – and all agreed, save for Denham J in dissent, that the second plaintiff, his mother, had no constitutional rights in play that were affected by the issues at hand. Furthermore, the majority also agreed that it had been

[5] This at least was Keane CJ's description of what he understood to be the unenumerated constitutional right at issue in the litigation: (n 3) 279.

[6] Hardiman J (n 3) 372; cited approvingly by Charleton J in *Burke v Minister for Education* [2022] IESC 1 [26].

constitutionally inappropriate for the High Court to retain supervisory jurisdiction over the future provision of educational facilities to the first plaintiff.

In reaching this second conclusion, the majority also stressed the need for courts to respect the limits of their constitutional role, and to avoid trespassing on the terrain of executive action – setting out arguments that they would repeat and re-emphasise later that year in *TD* Murphy and Hardiman JJ also expressed reservations about judicial over-reach into the socio-economic sphere, in terms that closely echoed their views later set out in *TD* Indeed, in their *TD* judgments, both judges cross-referred extensively to their *Sinnott* opinions.

As such, *TD* and *Sinnott* can in many ways be seen as coupled judgments – with legal arguments articulated in the first case surfacing again in the second one, despite the variations in subject matter. Both judgments are often cited together, as authority for how courts should respect separation of powers. Furthermore, a particular narrative has grown up around these two judgments over the last two decades, which views them as an assertion of constitutional orthodoxy in the face of new approaches to protecting rights through law which had become highly fashionable by the end of the 1990s. To understand this narrative, it is necessary to sketch out the background context to both judgments – which has both a wide global focus, and also a specifically Irish dimension.

The Background Context – Global and Irish

The 1990s were heady times for constitutional law across the world. The idea that courts should play an active role in protecting constitutional rights had become normalised, with for example the UK enacting the Human Rights Act 1998. Furthermore, it had become commonplace for courts to adopt a 'living instrument' approach to constitutional interpretation.[7] The emergence of new human rights conceptual frameworks, in particular those focused on children's rights, disability rights and non-discrimination, was particularly influential in this regard; they gradually came to exert a growing influence on how constitutional rights were interpreted and applied, helping to ensure they were increasingly read as imposing positive obligations on public authorities to take proactive steps to ensure the active enjoyment of rights.[8] Socio-economic rights were increasingly viewed as the 'next frontier' of this evolutionary process, notwithstanding the persistent controversy that surrounded their status and legal enforceability.

More generally, traditional concepts of separation of powers had begun to crumble under the influence of this new emerging order of rights-centred constitutionalism.[9] As the scope of rights protection widened, courts began to intervene in a wider range of issues – some of them, like the provision of education or housing, historically seen as the exclusive responsibility of the executive and legislative branches of the state. Furthermore, the relationship between the different arms of the state was increasingly conceptualised as in

[7] For an overview of the development of the 'living instrument' approach in the context of ECHR jurisprudence, see George Letsas, 'The ECHR as a Living Instrument: Its meaning and legitimacy', in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 106-141.

[8] For an early and highly significant manifestation of this trend, see *X and Y v Netherlands* (A/91) (1986) E.H.R.R. 235.

[9] For discussion of the casual factors underlying this trend, see Stephen Gardbaum, 'Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?) (2014) 62(3) American Journal of Comparative Law 613-639.

'experimental', 'dialogic' or what now be called 'collaborative' terms[10] – with the judicial, executive and legislative branches viewed as engaged in a common and mutually influencing project of achieving good rights-based governance, rather than as operating in separate spheres of authority.[11]

In line with this trend, courts in many common law jurisdictions had begun to develop innovative new ways of vindicating rights claims – in particular through the use of structural remedies, whereby courts assumed a supervisory jurisdiction over the implementation of certain state policies deemed to be essential to secure the enjoyment and vindication of certain fundamental rights.[12] This began with the use of 'bussing orders' in the US, in the wake of the Supreme Court's desegregation decision in *Brown v Board of Education*. By the 1990s, New York State courts were supervising the level of funding allocated to New York City schools, the Indian courts had assumed supervisory jurisdiction over a range of different forms of socio-economic resource provision, and the South African courts were breaking new ground in issuing structural indicts designed to ensure adequate state implementation of the right to housing.[13]

More generally, civil society activists, pressure groups and campaigners were increasingly turning to the courts as a way of achieving social reform. Furthermore, as rights consciousness developed, individuals and families were quicker to challenge state neglect. This inevitably fed into the type of rights claims that began to come before courts, as well as demands for legal reform more generally.[14]

Ireland was not immune to these broad trends. Indeed, if anything, it seemed to offer fertile ground for their flourishing – not least because roots could be found for them in existing case-law and doctrine, as distinct from requiring the importation of exotic foreign doctrines.[15] Irish constitutional law has a strong tradition of judicial rights protection, based around a variant of 'living interpretation' methodology. Furthermore, the Irish Supreme Court has repeatedly emphasised the importance of the role of the courts in protecting fundamental rights,[16] and has regularly intervened in matters traditionally assumed to be the exclusive competency of the executive and legislative branches in order to vindicate such rights, as well as fidelity to core constitutional principles more generally.[17]

Now, in judgments like *MhicMathúna*, the Supreme Court had recognised that matters of social policy generally fell within the purview of the executive and legislative branches.[18] But this case-law had left open some room for the possibility of judicial intervention if necessary to uphold fundamental rights – with the wording of various provisions of the Constitution lending textual support to this view, in particular the provisions of Article 42.4 relating to

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[10] Aileen Kavanagh, *The Collaborative Constitution* (forthcoming) (CUP 2023). Gerstenberg has argued that dialogic and experimental processes lie at the heart of 'Euroconstitutionalism' as it has developed over the last few decades: Oliver Gerstenberg, *Euroconstitutionalism and its Discontents* (OUP 2018).

[11] Chris Thornhill, 'Rights and Constituent Power in the Global Constitution' (2014) 10(3) International Journal of Law in Context 357-396.

[12] R. L. Weaver, 'The Rise and Decline of Structural Remedies' (2004) 41 San Diego L. Rev. 1617.

[13] For a comprehensive overview, see Malcolm Langford, Cesar Rodriguez-Garavito and Julieta Rossi (eds) *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017).

[14] See in general Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP 2011).

[15] See in general Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA 2002).

[16] *State (Quinn v Ryan)* [1965] IR 70.

[17] *Boland v An Taoiseach* [1974] I.R. 338.

[18] *MhicMathúna v Ireland* [1995] I.R. 484; and *Madigan v Attorney General* [1986] I.L.R.M. 136.

the role of the state in educational provision.[19] Furthermore, the rapid changing nature of Irish society in the 1990s brought issues of children's rights in particular to the forefront of public debate, with parents and campaigners highlighting the patently inadequate nature of Irish educational provision for children with special needs.

Thus, when confronted by repeated and persisting failures by the state to provide secure accommodation facilities of the type which expert opinion deemed necessary to meet the particular needs of the plaintiffs in *TD*, it is perhaps not surprising that Kelly J issued the wide-ranging mandamus orders that he did. A previous 1995 judgment by Geoghegan J in *FN v Minister for Education*, cited extensively by Kelly J, had set out a template for such an approach.[20] Similarly, the relief granted by Barr J in *Sinnott* built on previous precedent – namely the 1993 judgment of O'Hanlon J in *O'Donoghue v Minister for Health*, which had held that children with severe mental disabilities had a constitutional right to receive appropriate elementary education from the state.[21] (In his judgment in *Sinnott,* Barr J described this decision as a 'major landmark').[22]

Thus, the High Court judgments in *TD* and *Sinnott* had a reasonably solid basis in recent precedent. More generally, a good case could be made that they reflected the emphasis on vindicating rights that had animated previous Supreme Court jurisprudence – and were also in line with broader trends in the common law world. In this respect, it is significant that an eminent judge like Denham CJ in her dissenting opinions was ready to endorse their approach. However, the majority of the Court took a different view, and chose to rein in this expansive approach to vindicating constitutional rights – effectively repudiating, in so doing, some of the more ambitious currents of the 1990s rights *Zeitgeist*.

TD and *Sinnott* – Traditional Separation of Powers Orthodoxy Affirmed

Two specific elements of the *TD* and *Sinnott* judgments stand out in this regard. First of all, the majority were at pains to emphasise the undesirability of courts claiming a supervisory role over the implementation of government policy and consequent resource allocation, even if done in the name of vindicating rights. Murray J's judgment in *TD* was particularly focused on this procedural point. It outlined the dangers inherent in courts assuming such a supervisory role, which he argued could disrupt conventional lines of political responsibility and take judges into areas of decision-making where they lack particular expertise. Keane CJ and Hardiman J made similar comments in their judgments in both cases, with both downplaying the capacity of judicial intervention to plug gaps in provision left by existing law and policy.[23]

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[19] ibid 499. Finlay P, in delivering the single judgment of the Supreme Court, left open the possibility that 'under certain circumstances statutory provisions…removing in its entirety financial support for the family' might be unconstitutional.

[20] [1995] 1 IR 409. Geoghegan J had concluded that a similar failure to provide appropriate accommodation had breached the constitutional rights of the applicant: declaratory relief had been granted, but only after close judicial consideration of the suitability of new secured accommodation offered to the applicant by the state.

[21] [1996] 2 I.R. 20. O'Hanlon J had concluded this obligation had been breached by the failure of the respondents to provide the applicant with sufficiently resourced facilities, which he defined by reference to expert evidence as requiring a pupil-teacher ratio of 6:1 and also two childcare assistants per class.

[22] *Sinnott* (n 4) 571-2.

[23] Hardiman J extensively cited Costello J in *O'Reilly v Limerick Corporation* [1989] I.L.R.M. 181 to this effect.

More generally, the majority in both cases also endorsed a relatively rigid and traditional understanding of separation of powers, whereby matters of policy formation, expenditure and implementation should generally be left in the hands of the political branches of the state – in particular insofar as they relate to socio-economic matters, and/or involve issues of resource allocation. This approach underpins the Court's conclusion that the grant of mandamus relief was not justified in either case, despite it leaving open the possibility that such a grant could be justified in 'absolutely exceptional circumstances'. This exception was deemed not to apply in either *TD* or *Sinnott*, even though state neglect had obviously already had a serious negative impact on the plaintiffs in both cases.[24] It also underpinned the strong reservations expressed by Murphy and Hardiman JJ in both cases about extending constitutional rights protection into the socio-economic sphere.

In general, the majority of the Court concluded that the rights protective functions of the Irish courts were in effect cabined by the need to respect traditional separation of powers boundaries. In so doing, they effectively rejected the 'rights-centric' approaches that had increasingly found favour elsewhere. Indeed, Hardiman J was very explicit in signalling his dislike of such fashionable approaches. In *Sinnott*, he went out of his way to include a paragraph attacking John Rawls as a theorist whose work was emblematic of a wider contemporary tendency 'to view political philosophy as a branch of jurisprudence'. As Hardiman J put it:

> [t]heorists of this view consider that they can provide a body of principles which can be interpreted and applied by courts, to the virtual exclusion or marginalisation of the political process…I[f] judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role.[25]

This is an idiosyncratic reading of Rawls's work. But it does illustrate how keen the majority were in both *TD* and *Sinnott* to re-assert traditional separation of powers orthodoxy, in the face of the fashionable new thinking of the late 1990s *Zeitgeist*.

Looking Back: The Unsatisfactory Framing of Separation of Powers in *TD* and *Sinnott*

So, two decades on, how should the coupled judgments of *TD* and *Sinnott* be re-assessed? With the benefit of critical hindsight, were the majority correct to stick to a traditional approach to separation of powers, and rein in the enthusiasm of the High Court? Has their cautious conservative constitutionalism been vindicated over time?

The first thing to note is that things have changed since the late 1990s. The heady embrace of court-centred rights activism that characterised that era has given way in many circles to a more sober focus on the possibilities and limits of the judicial role. There is greater recognition now, both overseas and in Ireland, of the potential dangers of judicial over-reach.[26] As Murray J argued in *TD,* courts assuming a supervisory role in respect of the implementation of state policy can undermine political accountability, distort resource

[24] As discussed below, this dimension of the case was strikingly under-discussed in the judgments themselves.
[25] *Sinnott* (n 4) 711.
[26] Jeff King, 'The Future of Social Rights: Social Rights as Capstone', in Katherine Young (ed), *The Future of Economic and Social Rights* (CUP 2019), 289-323.

allocation decisions and give sharp-elbowed litigants an unfair advantage.[27] Furthermore, it is widely acknowledged that legislation will usually be a more effective mechanism for achieving social progress than litigation – a point made by Hardiman J in both judgments.

The reservations expressed by the majorities in both *TD* and *Sinnott* about freewheeling judicial knight-errantry are thus not easy to dismiss. There is some wisdom in their instinctive disapproval of courts rushing to fill gaps left by executive inertia, and their preference for declaratory orders over other forms of relief – especially in situations as in *TD* where the relief sought is relatively wide-ranging, and the rights alleged to be violated are somewhat lacking in definition. There is no guarantee that such interventions will necessarily lead to better outcomes, and a real risk that they might distort incremental legislative reform measures as and when they are introduced.[28]

However, the majority in both judgments over-egged the pudding. Instead of just focusing on these procedural issues, the Court also used *TD* and *Sinnott* as opportunities to affirm the traditional model of separation of powers. And the passage of time has arguably been less favourable to this element of the judgment.

Re-reading both judgments again, it is striking how eager the majority were to draw categorical distinctions between the roles of the different branches of the state. Several judges in the majority, in particular Murphy and Hardiman JJ, went beyond what was strictly necessary to decide the two cases and cast doubt more generally over the legitimacy of judicial intervention in the sphere of positive state provision, in particular when issues of socio-economic resource allocation and 'policy implementation' were at issue. At times, this area of state activity comes close to being conceptualised as a judicial 'no go' zone – with for example the threshold for the grant of mandamus relief being set at 'absolutely exceptional circumstances', and several judges in both *TD* and *Sinnott* giving a narrow reading to the scope of Art. 42.4 and other constitutional rights which seem to open up limited exceptions to the basic separation of powers norm.[29]

This approach is problematic, as has been highlighted by case-law developments over the last two decades. First of all, as Conor O'Mahony notes in his contribution to this collection of papers, it is difficult to reconcile with both the text of *Bunreacht na hÉireann* and other established elements of the Court's case-law.[30] Provisions like Art. 42.4 clearly envisage the state as having positive obligations to provide particular forms of social provision to particular groups in need, as confirmed ironically in both *TD* and *Sinnott* – and the courts are not precluded from enforcing this obligation, unlike the case with the Directive Principles set out in Art. 45. In other areas of case-law, the Supreme Court has also been prepared to recognise that the scope of legally enforceable constitutional rights can extend into areas of socio-economic policy.[31] Indeed, it is difficult to see how judicial protection of the Art. 40.1 right to equality could not but blur the categorical lines the majority try to draw in *TD* and *Sinnott* – if the case-law in this area were ever to evolve out of its current embryonic stage.[32]

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[27] Octavio Ferraz, 'Harming the Poor Through Social Rights Litigation' (2011) 89 Texas L. Rev. 1643-1668.

[28] See the provisions of the Education of Persons with Special Educational Needs Act 2004, which were introduced partially in response to the outcome of *Sinnott*.

[29] See Murphy J's judgment in *Sinnott*, where he was reluctant to accept that the state was subject to a positive obligation to provide primary education to children over the age of 12.

[30] Conor O'Mahony, 'I Would Do Anything For Rights – But I Won't Do That' 2022 6(3) Irish Judicial Studies Journal 29.

[31] See *N.H.V. v Minister for Justice & Equality* [2017] I.E.S.C. 35.

[32] In this respect, the conclusion by the majority in *Sinnott* that the plaintiff's mother's rights were not engaged by the state neglect of her son's basic educational needs now seems obviously wrong: her situation would now

All this suggests that it was questionable for the majority in *TD* and *Sinnott* to adopt a concept of separation of powers based on categorical, broad-bush distinctions between the appropriate spheres of judicial, executive and legislative activity. Indeed, the Court's approach has caused subsequent confusion and uncertainty. For example, in its recent decision in *Burke v Minister for Education*, the Supreme Court had to clarify and add shades of nuance to Hardiman J's suggestion that judges should only be prepared to review executive policy implementation in exceptional circumstances.[33]

Furthermore, the Court in *TD* and *Sinnott* was so keen to affirm the traditional model of separation of powers that the claims of the plaintiffs get somewhat lost in the mix. There is no sustained discussion in either judgment as to whether the shocking history of state neglect in both cases might warrant the courts intervening in areas where they would normally not tread. There is also little or no recognition of the extent or gravity of the rights violations at issue, or the ongoing nature of the damage being potentially inflicted on the plaintiffs as the litigation proceeds.[34] The majority in both cases gesture towards the important role that courts play in vindicating constitutional rights, citing judgments like *State (Quinn v Ryan)*.[35] However, there is no real acknowledgement that the Irish courts have in the past crossed traditional separation of powers boundary lines in reviewing executive compliance with constitutional rights and principles – which of course begs the question why a similar approach was not adopted in *TD* and *Sinnott*.

From the perspective of hindsight, this failure to engage seriously with the rights concerns at issue particularly stands out, as well as the neglect of the disability and gender equality dimension to both cases. It highlights what Keith Ewing has described as the problem of the 'unbalanced constitution': the way particular types of rights claims – usually egalitarian or redistributionist in nature – are often side-lined within separation of powers frameworks.[36] Furthermore, much of the argumentative scaffolding erected by the majority to justify its conclusions lacks relevance to the particular situation of the plaintiffs in both cases. For example, Hardiman J in the extract from his *Sinnott* judgment quoted above waxes lyrical about the importance of the political process – but the primary plaintiffs in both *TD* and *Sinnott* are classic examples of individuals whose needs and perspectives are easily lost within the churn of democratic debate. Indeed, given the extent to which both judgments push back against the rights centrism of the late 1990s legal *Zeitgeist*, it is striking how little they engage with some of the arguments generally put forward to justify its focus on judicial remedies as a means of compensating for political blind-spots.

None of this is to suggest there is nothing of value in the majority's position. The same concerns that justify judicial caution at the procedural level of remedies are also relevant to wider debates – and Hardiman J's attack on the depoliticising tendencies of much of the 1990s *Zeitgeist* is on point. However, the broad brush with which the majority paint, and the unconvincing way in which they fit the doctrinal and normative flux of Irish constitutional law within a rigid separation of powers frame, is less than convincing. Both judgments might have been improved if the Supreme Court had been more delineating on the rare

form the basis of an indirect sex discrimination claim, as well as a claim for discrimination based on caring association with a disabled person.

[33] *Burke* (n 6).

[34] I am grateful to Professor Gerry Whyte for this point.

[35] O'Dálaigh CJ's judgment in *Quinn* (n 16) was extensively cited in both cases, by both judges in the majority and Denham CJ dissenting.

[36] Keith Ewing, 'The Unbalanced Constitution', in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001), 103–118.

circumstances when supervisory relief might be appropriate, and less concerned with rhetorical push back against what it considered to be questionable legal fashions.

Conclusion

Some of the Supreme Court's reasoning in *TD* (and *Sinnott*) holds up to this day – in particular, the majority's view that it is *prima facie* undesirable for courts to assume too active a role in supervising the detailed implementation of state policy. But, in general, the Court adopted an unduly broad-brush, rigid and artificially constrained approach to separation of powers. As such, it is time to rethink the precedential value of *TD* coupled with *Sinnott*, and to cast a somewhat sceptical eye on the majority's rush to repudiate the fashionable cutting edge of the late 1990s legal *Zeitgeist*. They were perhaps too quick to throw the baby out with the bathwater – and too slow to engage constructively with some of the fresh thinking about separation of powers that emerged from that era.

THE *TD* CASE AND APPROACHES TO THE SEPARATION OF POWERS IN IRELAND

Abstract: The case of TD v Minister for Education is a great microcosmic example of the varying philosophies of the separation of powers and the role of the judge under the Constitution and for many years it set a very high standard for the review of executive power, but perhaps the wind is changing on these issues. This article will briefly consider the various perspectives given by the judges in the TD case on the separation of powers before moving on to a more recent example to assess whether the vision of formalism espoused by the TD judgment is now falling out of favour.

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Introduction

The operation of the separation of powers under the Irish Constitution is something that has occupied the mind of many a judge and scholar in Ireland over the years. While there is no overt statement on the doctrine in Bunreacht na hÉireann, the document clearly incorporates the idea of separating the key elements of governmental power in the State. Whether it does so in a manner which implies a complete separation of governmental functions or whether it envisages a supervisory element is a question which is not settled and the tension between these differing visions of the separation of powers doctrine is evident and forms a key part of the *TD* case.[1] The judgments in the *TD* decision have had a major impact on the interpretation of various aspects of Irish law, including the attitude towards socio-economic rights and distributive justice and 21 years later, it is worth asking whether the position taken on the separation of powers question still holds favour.

The issues involved in the *TD* case required the judges to consider what kind of separation of powers is intended in the Constitution – a strict separation incorporating only the checks and balances that are actually enumerated or a more flexible, functional doctrine which involves a general supervisory element. Interestingly, the interpretation given differs depending on the judge's own conception of the role of a judge under the Constitution. This article will briefly consider the approaches of the various judgments in the *TD* case before moving on to consider whether the approach to the doctrine has now changed, using the context of a recent major case involving similar issues.

Judicial Approaches in TD

The main point at issue in the Supreme Court judgment in *TD* is the remedy given by the High Court and whether it is one which is consistent with the separation of powers. Kelly J had granted a mandatory injunction in the High Court requiring the Minister to do 'all things necessary to facilitate the building and opening of secure and high support units' to cater for the needs of children with particular needs, in the context of 'a lengthy sequence of such cases in the High Court' and previous orders, which were not of a mandatory nature, not having been met.[2] The majority ultimately decided that this particular type of order was a

[1] *TD v Minister for Education* [2001] 4 IR 259
[2] ibid [1].

contravention of the separation of powers in that it involved the courts determining the policy which the executive was required to follow. The judges were greatly influenced by the 'classic statement'[3] by Costello J on the difference between judicial and executive power in *O'Reilly v. Limerick Corporation*,[4] where he drew a distinction between distributive justice, which is in the executive realm, and commutative justice, which is part of the judicial function. Also influential was the 'clear disregard' test set down originally in *Boland v An Taoiseach*,[5] regarding when the courts can interfere with the exercise of an executive power. The reasoning differs considerably amongst the judges, particularly as between the majority and minority and primarily on the issue of whether the mandatory order actually constitutes an intrusion into the executive realm and we get an interesting insight into how the judges view their role under the Constitution.

Keane J's approach

While Keane CJ takes a relatively strict approach to the separation of powers, he does recognise that the Constitution does not require an absolute separation with no supervisory role for the Courts. Indeed, in his judgment it is conceded that if the Government acts in contravention of the Constitution then the courts can intervene 'with a view to securing compliance by the Government with the requirements of the Constitution.'[6] However, he says the action taken here is without precedent (he is particularly concerned with this),[7] and he quotes Hamilton CJ in *McMenamin v Ireland*[8] to make the point that the manner in which the situation must be remedied is for the body itself, rather than the Courts.[9] He feels the mandatory order is 'inconsistent with the distribution of powers mandated by the Constitution',[10] which he says defines the boundaries of these powers. His main objection is that he sees this order as involving the court in determining policy, an area clearly allocated to the executive branch, and therefore he says that a Rubicon has been crossed.[11]

Murray J's Approach

Murray J takes an even stricter approach to the doctrine. His vision of the separation of powers means that each organ must be equal and no one organ should be paramount, as per Walsh J's dictum in *Murphy v Dublin Corp*.[12] He says there is a fundamental distinction between the Courts deciding that an executive policy is not compatible with the Constitution and the Courts taking command so as to actually exercise this function itself. He is primarily concerned about the courts usurping the role of the executive and actually exercising

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[3] ibid [336].
[4] [1989] ILRM 181.
[5] [1974] IR 338, [362].
[6] [2001] 4 IR 259, [75].
[7] However, as Francis Kieran has pointed out, 'in *O'Donoghue* [*v Minister for Health* [1996] 2IR 20], O'Hanlon J. stated: 'I reserve liberty to the applicant to apply to the court again ... should it become necessary to do so for further relief by way of mandamus or otherwise' … and the case of *Crowley v Ireland* [1980] IR 102, … 'not cited by any of the judges but [involved] a mandatory order of the High Court. Admittedly, the High Court judgment was later overruled by the Supreme Court albeit on different grounds.' Francis Kieran, 'T.D. Re-Considered: Constructing a New Approach to Enforcement of Rights' (2004) 7 Trinity C.L. Rev. 62, 74.
[8] [1996] 3 IR 100.
[9] [2001] 4 IR 259, [77].
[10] ibid [79].
[11] ibid [81].
[12] [1972] IR 215.

executive power; he emphasises that judicial review permits the Courts to place limits on the exercise of executive or legislative power but not to exercise it themselves and, like Keane CJ, he feels that requiring the Minister to comply with the mandatory order is akin to ursurpation of the executive power:

> It seems to me that in incorporating the policy programme as part of a High Court Order the policy is taken out of the hands of the Executive which is left with no discretionary powers of its own. It becomes the policy and programme of the Court which cannot be varied or any decision taken which might involve delay (or an adjustment of policy) without the permission and Order of the Court. A judicial imperative is substituted for executive policy. The Judge becomes the final decision maker. In short he is administrator of that discrete policy. That is not a judicial function within the ambit of the Constitution. [13]

On the role of the courts more generally, he acknowledges that while the court may make orders affecting, restricting or setting aside actions of the executive which are not in accordance with law or the Constitution, the Courts have no general supervisory or investigatory functions, and he takes issue with the idea that the Courts can have any sort of paramountcy in the tripartite division:

> The proposition of the learned High Court Judge that 'the Court has to attempt to fill the vacuum which exists by reason of the failure of the legislature and executive' would, it seems to me, arrogate to the Courts a paramountcy in circumstances not envisaged in the separation of powers under the Constitution and undermine core functions of the executive and the legislature in a representative democracy where their primary answerability for policy matters is to the people. [14]

Furthermore, in relation to the 'clear disregard' test set out in *Boland*,[15] on when the Courts can intervene in the exercise of an executive power, he decides this must be understood as a conscious and deliberate decision by the organ of State to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. However, this interpretation actually changes the test as previously understood and applied in other cases,[16] making it much harder to satisfy by requiring an element of intent. This leaves very little actual supervisory power for the Courts.

Hardiman J's Approach

Hardiman J's judgment has been described as the leading judgment,[17] and while he also takes a strict approach, viewing the separation of powers as the primary consideration, ahead of the vindication of rights, his later analysis, somewhat confusingly, seems to allow for some measure of intervention albeit only in extreme circumstances. Primarily however, he views the separation of powers as a higher or 'superordinate constitutional value,' as Doyle and Hickey put it, 'capable of trumping any other constitutional concern, including most

[13] [2001] 4 IR 259 [224].
[14] ibid [230].
[15] [1974] IR 338.
[16] For example, *McKenna v An Taoiseach (No. 2)* [1995] 2 IR 1, *Crotty v An Taoiseach* [1987] IR 713 and *District Judge McMenamin v Ireland* [1996] 3 IR 100.
[17] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd ed, Clarus Press 2019) 230.

pertinently a concern for the efficacy of constitutional rights.'[18] He had also articulated this view in the *Sinnott* case,[19] decided shortly before *TD*:

> [T]he 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 exists to prevent the accumulation of excessive power in any one of the organs of Government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution.[20]

In Hardiman J's mind, the doctrine of the separation of powers is not functional or flexible but is one involving a strict or rigid delineation of the powers involved and he dismisses the idea of a supervisory function. Somewhat ironically, Hardiman J pronounces that the Court has no power to 'strike its own balance' as to how the separation of powers is to be observed,[21] despite the fact that, as noted by Doyle and Hickey,[22] this is, in effect, what he is actually doing and what many of his previous judgments had also done.[23]

Hardiman J is also somewhat worried about the floodgates effect: 'if citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arms of government.'[24] Like Murray J, he is also worried that confirming such a jurisdiction for the Courts would amount to a paramountcy for this particular branch.[25] However, later on he does concede that intervention by the Courts could be possible, but only in extremely limited circumstances, something which weakens his earlier arguments about the strict limits between branches:

> such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I do not believe that any circumstances which would justify the granting of such an order have occurred since the enactment of the Constitution sixty-four years ago. I am quite certain that none are disclosed by the evidence in the present case.[26]

Thus, only in an absolutely extreme situation, the courts would have the power to intervene in the business of the other branches and he endorses Murray J's reading of the 'clear disregard' test. Because, in his view, such circumstances do not arise here, the intervention is not constitutional in this case.

Hardiman J's over-riding fear is of increasing judicial power and judicial activism and in this judgment we get a clear view of his philosophy on the role of the judge. Indeed, writing extra-judicially later and vigorously defending his position in both *Sinnott* and *TD*, he argues that had the court acceded to the applications in those cases, this would 'have represented a further very significant transfer of power to an unelected judiciary already very powerful by

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[18] ibid [230].
[19] *Sinnott v. Minister for Education* [2001] IESC 63.
[20] ibid [356].
[21] ibid [352].
[22] Doyle and Hickey (n 17) 231.
[23] See for example *Callely v Moylan* [2014] 4 IR 112.
[24] [2001] 4 IR 259, [330].
[25] ibid [331], [353].
[26] ibid [367].

the standards of most European countries',[27] and that 'departing from the traditional role of the judiciary risks giving judges uncontrolled discretionary power. Such uncontrolled power in the hands of a judge is no more acceptable than uncontrolled power in any other hands.'[28] This view was subject to stringent criticism by Gerry Whyte who pointed out that there are protections against this already built into the constitutional framework and cited examples of where judicial decisions had been reversed by both the people and by Government. Whyte also argues in response to Hardiman J that in fact it is the role of judges to step in when faced with 'egregious neglect' of rights, an argument that echoes the sentiments of Denham J below.[29]

Murphy J's Approach

Murphy J's judgment does not dwell on the separation of powers issue. Instead, he mostly takes issue with the existence of the right being declared in the first place. He endorses Costello J's statement in *O'Reilly* that the courts are unsuited to the task of assessing the validity of competing claims on national resources saying that this role has been given to the Oireachtas.[30]

Denham J's Approach

Denham J provides the minority judgment and while she agrees with the view of her colleagues that no one organ should be paramount, she sees the balance of power very differently. In a very considered judgment, she comes to the conclusion that the fact that a court decision may affect policy does not necessarily mean a breach of the separation of powers.[31]

She acknowledges that each organ of State owes respect to the other, but says this will not protect the Government if there is a clear disregard of its constitutional powers and duties. In fact, she says the courts have a duty to intervene in such circumstances because the courts are the guardians of the Constitution.[32] And here is the major difference between her vision and that of the majority. She states that in rare and exceptional cases, in order to protect constitutional rights, a court may have a jurisdiction and even a duty to make a mandatory order against another branch of government and this is because the separation of powers under the Constitution of Ireland is not rigid or absolute; it is to be applied in a functional manner. She says the doctrine of the separation of powers has to be balanced with the role given to the courts to guard constitutional rights:

> In a situation, thus, where there is a balance to be sought between the application of the doctrine of the separation of powers and protecting rights or obligations under the Constitution the courts have a specified constitutional duty to achieve a just and constitutional balance. Whilst acknowledging the separation of powers, and the respect which must be paid

[27] Adrian Hardiman, 'The Role of the Supreme Court in our Democracy, Joe Mulholland (ed), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill 2004) 32, 39.
[28] ibid 44.
[29] Gerry Whyte, 'The Role of The Supreme Court In Our Democracy: A Response To Mr Justice Hardiman' (2006) 28 DULJ 1, 9.
[30] [2001] 4 IR 259, [81]
[31] ibid [133].
[32] ibid [124].

> to all the great organs of State, if it is either a matter of protecting rights and obligations under the Constitution or upholding the validity of a statute then the Constitution must prevail. Similarly in relation to constitutional rights the appropriate institution must exercise its powers in the light of the of the Constitution. When a court is required to determine such an issue a declaratory order is the preferable procedure. On those very rare occasions when such a declaratory approach is not feasible then the court has the power and indeed the duty and responsibility to uphold the Constitution and to vindicate constitutional rights. This is at the core of the duty and responsibility of the High and Supreme Courts of Ireland.[33]

Thus she clearly believes that the judge has a particular role to play under the separation of powers and while in certain parts of the other judgments there is some hint that some action may be taken in extreme cases, almost as an emergency escape route, none of the others envisage this particular role for the courts more generally.

Summing up *TD*

This is only a very brief incursion into what are very detailed, intricate and multi-layered judgments,[34] but what is worth noting is that even though their visions of the separation of powers are quite different and the result of the majority and minority is obviously different, their positions on the factual question are actually not as distant as it might seem. This is because the majority concede, to varying degrees, that the remedy of a mandatory order affecting policy might still be possible in an exceptional case. Denham J simply has a different understanding of what is exceptional, which she defines as 'unusual, not typical'.[35] They are all agreed on what is not permitted – exercising the power of another organ. The disagreement comes in deciding whether this is what is actually happening.[36] And when it comes down to it that is a simple matter of opinion.

What we can clearly say is that while the judges in the majority all have slightly different conceptions of the separation of powers, they all subscribe to the formalist, strict separation theory and are concerned about excessive judicial intrusion into the executive realm. Various writers have commented on the conservatism generally of the Supreme Court in this period and have theorized about whether it was a response to the activism which characterised the period of the 70s and early 80s.[37] (See for example the references in *TD* to *State Quinn v Ryan* where Ó Dálaigh says that the powers of the courts are as ample as the defence of the Constitution requires and the attempts to play down that statement).[38] Certainly we do see quite a dramatic change from the interventionist approach of that era to the very conservative 90s and early 2000s. Denham J is the exception from that period and it is interesting to see

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[33] ibid [142].

[34] See also Bláthna Ruane, 'The Separation of Powers: The Granting of Mandatory Orders to Enforce Constitutional Rights' (2002) (4) Bar Review 11, and Conor O'Mahony, 'Education, Remedies and the Separation of Powers' (2002) Dublin University Law Journal 57.

[35] ibid [147]-[148].

[36] As far as Denham J is concerned, rather than usurping executive power, in making the mandatory order the Court is simply ensuring that rights are vindicated by requiring the executive to adopt the very position it had already agreed to adopt.

[37] See for example, David Gwynn Morgan, 'Judicial-o-centric Separation of Powers on the wane' (2004) Irish Jurist 142.

[38] [2001] 4 IR 259, [358].

that it is her approach which seems to be finding favour again more recently – or at least one might hesitatingly suggest that it appears things might be moving in that direction.

What is the Current Approach?

The *TD* case is a great microcosmic example of how judges consider their own role under the separation of powers. For many years after *TD*, the Supreme Court maintained the conservative approach to the separation of powers, particularly on that issue of judicial oversight of the executive realm. But recent judgments might cause us to question whether this is changing.

The recent judgment in *Elijah Burke v Minister for Education* is a case in point.[39] Obviously the remedy involved is different but it is relevant because here we have a classic example of the exercise of an executive power being challenged. We might have expected the 'clear disregard' test to be applied and a strict reading of the separation of powers but instead O'Donnell CJ seems to signal a willingness on the part of the Courts to be more flexible on this issue and he heralds a new approach to the issue of executive power, drawing a distinction between exercises of executive power that involve a bigger policy issue or 'regulating the manner in which the Government may act',[40] and those of a more administrative nature which affect individual rights. While not expressly disagreeing with any of the previous judicial dicta on this or presenting it as a major change in direction,[41] he says that where rights are at issue, it makes little sense to have such a high bar to overcome in order to challenge the exercise of this power using the 'clear disregard test' when the test for challenging something similar in the legislative context is so much lower. Instead, he says the approach must depend on whether there are rights being infringed.[42] If not – if it is a bigger policy question of the type in *Boland* and *Crotty* – then the 'clear disregard' test remains but if constitutional rights are being infringed then clearly he feels the Courts should have more power to review the exercise of the power involved and so the Court should simply ask if the Government has breached the constitution.[43] In this context he says the proportionality test provides a useful frame of analysis. So as O'Donnell CJ says, rather than applying a test based on who is exercising the power, we are now looking at what they are actually doing.[44]

In a passage which echoes Denham J's judgment in *TD*, O'Donnell CJ declares that:

> The courts' obligation is to defend and vindicate the rights of the citizen. There is no reason under the Constitution to extend deference to the executive's decision in this regard, over and above the presumption of constitutionality arising from the respect due to both of the other branches of government. But if it is established that the actions of the Government

[39] [2022] IESC 1.
[40] ibid [50].
[41] Although following O'Donnell's approach to its logical conclusion would suggest that some of the previous cases mentioned, which did involve rights considerations, were wrongly decided.
[42] [2022] IESC 1, [45-46],[61].
[43] ibid [50].
[44] He points out that normally exercises of executive power do not directly affect the rights of individual citizens in the same way as actions of the legislature routinely do – this explains why the Constitution does not expressly address the issue of judicial review of governmental action. However, pointing out that the issue here could have equally involved a statute and in that case the Court would have an obligation to vindicate individual rights effected, it does not make sense that the Court could not do so here just because the state of affairs had been brought about by executive action rather than legislative. The difference in cases like *Boland* and *Crotty* is that they did not engage individual rights.

> 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.[45]

He also appears to view the role of the Courts in a similar way to Denham J: '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.'[46]

There is no mention of Hardiman J's 'absolutely final resort' or Murray J's requirement of 'bad faith or recklessness'. Instead, those cases requiring a 'clear disregard test' are put into a category separate from those where the power affects individual rights. O'Donnell CJ appears to treat *TD* as part of the former category but this is not elaborated on and it is not altogether clear that the distinction holds up in the *TD* example.

While the various intricacies of the *Burke* judgment deserve more consideration than can be given here, and obviously there are key differences in the contexts of both cases and particularly in the form of remedy, one general observation which can be made is that there seems to be an increasing willingness to intervene in the grey areas of the separation of powers where rights are at issue. We have seen this pattern in a number of relatively recent judgments – if we go back as far as *Doherty*, we see glimmers there.[47] We see it in *Kerins*[48] and *O'Brien*[49] in the legislative realm – they all demonstrate a strong interventionist approach and need to vindicate the rights of individuals and the power of review and indeed the separation of powers more generally is viewed within that context; the vision presented is a doctrine based on checks, balances and supervision and where the Courts have a particular role to play in vindicating the rights of individuals.

It would make you wonder whether the Supreme Court has started to abandon what Hogan J refers to as the legal *seoinínsim* based on embedded common law principles and have instead decided to embrace what he calls the 'efficient part of the Constitution to ensure that the fundamental rights of the citizenry are genuinely protected in a manner which goes beyond judicial clichés and tokenism'.[50] Afterall as Gerry Whyte has observed: 'the Constitution does not preclude a model of democratic politics which tolerates judicial activism in defence of fundamental rights.'[51]

Conclusion

It is quite true that the Constitution is silent on the particular vision envisaged for the separation of powers in this jurisdiction. The Constitution not only separates power but in places it merges it and it is not always obvious where the power of one branch ends and

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[45] ibid [61].
[46] ibid [40].
[47] *Doherty v Government of Ireland & Anor* [2010] IEHC 369.
[48] *Kerins v McGuinness* [2019] IESC 11.
[49] *O'Brien v Clerk of Dáil Éireann* [2019] IESC 12.
[50] Gerard Hogan, 'Harkening to the Tristan Chords: The Constitution at 80' (2017) 40(2) DULJ 7.
[51] Gerry Whyte, 'Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights' in *Contemporary Issues in Irish Law and Politics (No. 2)*, (Round Hall, Sweet & Maxwell 1998) 227.

another begins; we have much contradictory case law to attest to this.[52] The text is flexible enough for subjective interpretations to be made depending on judicial attitudes as to what is appropriate and, in particular, what is the appropriate role of the courts. There are lots of holes in the majority decisions in *TD* about the rigidity of the separation and inconsistencies with previous caselaw, and while the minority judgment also contains some contradictions,[53] in the grand scheme of things and over a longer period of time, it seems there has been more support for the flexible doctrine than not, particularly in recent years where the court has emphasized its role as protector and vindicator of rights.

Having explored these issues, the question, which requires much more consideration, is this: if *TD* is the high watermark in the context of restricting judicial oversight of executive power, and the strict separation of powers theory more generally, does the *Burke* judgment (and perhaps other recent judgments) indicate that the tide has now started to go out?

[52] For example compare the attitudes advanced between both High and Supreme Courts in the cases *of F.(C.) v. C.* [1991] 2 IR 330 and *L v. L* [1992] 2 IR 177.

[53] For an excellent analysis of the contradictions in the reasoning of the various judgments, see Doyle and Hickey (n 17) 229-241.

READING *TD* DOWN

Abstract: This article argues that TD v Minister for Education was about something more specific than has been supposed in the academic literature. Rather than being about the justiciability of socio-economic rights in principle, or the separation of powers broadly, it was an appeal about whether a High Court judge had the jurisdiction to hand down the particular order. The order contained great policy detail and time-specificity. The article argues that the ruling in TD, when understood as such, can be readily justified as a matter of constitutional principle, and can also be reconciled with the much more considered analysis of judicial review of executive power in Elijah Burke v Minister for Education. It concludes that TD can be 'read down' in future, fading into its rightful place in the background of Irish constitutional law.

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'It's the order, stupid'

Of the four majority judgments handed down in *TD v Minister for Education*, Hardiman J's has come to enjoy the status of 'leading judgment' – and it has played a dominant role in the scholarly debates in particular.[1] There are no doubt many reasons for this. But among them, I venture, is that Hardiman J devotes so much time in his judgment to broader ideas in constitutional theory (ie relative to the time he devotes to the issues that strictly needed to be determined to decide the case) and that he slips into looser, almost debating chamber-style language as he does so. So he cites Montesquieu and the French Revolutionary Constitutions and the Constitution of the State of Virginia – on his way towards elaborating a dubiously rigid conception of the separation of powers in Irish constitutional law (and a dubiously simple conception of its purpose in democratic constitutionalism generally).[2] He quotes approvingly from Raoul Berger's *Government by Judiciary*: that a generation of scholars 'floating on a cloud of post-Warren Court euphoria' had embraced the approach suggested by the title of that book (which approach, it was implied, had informed Kelly J's ruling against the Government ministers in the High Court).[3] And he speculates that approval of Kelly J's ruling by the Supreme Court might lead over time to a decline in the vibrancy of the political organs of State – and even in the democratic virtue of the citizenry.[4]

So his judgment is ripe for scholarly critique. But the other majority judgments are more challenging for sceptics of the ruling in *TD v Minister for Education*. Keane CJ and Murray J in particular cut to the chase. The State's lawyers had not contested the question of rights before the Supreme Court. Nor had they contested that the Government was constitutionally bound

[1] Hardiman J's judgment is referred to as the 'leading majority judgment' in a book that I co-authored, for instance. See Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Materials* (Clarus Press 2019) 230. I now must point out that Oran was the lead author on that particular chapter, and that I would quibble with his designation of this status to that judgment (for reasons that should become clear). But I am happy to be able to say that that chapter is in my view among the strongest in the book.

[2] Hardiman J, [2001] 4 IR 259 (SC) 359-363. For criticism of the judgment on these fronts with which I heartily agree, see Eoin Carolan, *The New Separation of Powers* (Oxford University Press 2009) 30-31, 34-37 – and in particular his comment that the conception of the separation of powers informing the majority judgments was 'derived from unarticulated and unacknowledged assumptions of political theory.' Gerry Whyte also makes insightful criticisms on this front. See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd ed, Institute of Public Administration 2015) 28-30, 34-47.

[3] *TD v Minister for Education* [2001] 4 IR 259, 358-359, per Hardiman J.

[4] ibid 361, per Hardiman J: 'If citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arms of government.'

to fulfil the obligations insisted upon by the applicants to children with their kinds of needs. Nor had they contested that the Government ministers would in fact take all the steps necessary to fulfil them – and indeed in the manner and by the dates referred to in the High Court order. So the appeal to the Supreme Court in *TD* was not about any of those things – contrary to what might tend to be suggested by much of the academic commentary on the case. It was about something much more specific (and less intellectually arresting): whether Kelly J had been entitled under the Constitution to issue the particular mandatory order against the Government ministers that he had issued in his High Court ruling. That is, an order directing those ministers to 'take all steps necessary to facilitate the building and opening' of ten specified kinds of facilities in ten specified locations around the country and by ten specified dates: 'two six bedded high support units with ancillary educational facilities at Castleblayney in the County of Monaghan on or before the 31st December 2001,' for instance, 'a five bed special care unit for boys in the Mid-Western Health Board region on or before the 31st December 2001,' and a 'five bed high support unit at Elm House in the County of Limerick on or before the 31st October 2000.'[5]

The scholars who contributed to this volume will all be familiar with this particular court order – and with its level of detail and specificity (much as we may tend to gloss over those matters in our writing about and perhaps even teaching of *TD v Minister for Education*). And we all know that Kelly J did not pluck the details and specificity contained within from thin air, but that they had been elaborated in the first place by officials from the Government departments who had given evidence before him on behalf of the ministers (ie over the course of the drawn-out series of hearings culminating in the High Court ruling in *TD*). It was the Government's own policy, in other words – not Kelly J's policy.

This is of course reassuring for the more constitutionally-minded sceptics of the Supreme Court ruling in *TD*: it is invariably emphasised in academic writing as it was by Denham J in her dissent in the case.[6] But relevant as it is, it cannot entirely satisfy the more sensitive constitutional souls among them. Because we do not need to consult the pages of *De L'Espirit des Loix* to appreciate that in formulating the detail of this policy in the first place, the ministers had been exercising the executive power of the State. They had been exercising something that was not at its margins, but right at the core of the power that, as Art 28.2 of the Constitution puts it, '*shall*, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.' And now a High Court judge was not merely interfering with the Government in its exercise of that power – in the sense of making a determination that a particular policy was incompatible with the Constitution, or even a declaration that a failure to enact a policy was constitutionally unsatisfactory. Kelly J was incorporating a highly detailed framework into the terms of a mandatory order of the High Court. And a judge of the High Court was thus 'in substance *actually exercising*' the executive power of the State.[7]

Now I think that we have tended to lose sight of quite how pivotal this was for the judges on the majority in *TD*.[8] In his essay in this volume, for instance, Conor O'Mahony wonders

[5] ibid 323-324, per Murray J.
[6] ibid 303, per Denham J.
[7] ibid 323-324, per Murray J (emphasis added).
[8] Laura Cahillane seems to me to very much *not* lose sight of it in her essay in this volume – and rather to capture the idea well. She opens her main substantive section on the judgments as follows: 'The main point at issue in the Supreme Court judgment in *TD* is the remedy given by the High Court...' And she later says: 'The majority ultimately decided that this particular type of order was a contravention of the separation of powers in that it involved the courts determining the policy which the executive was required to follow.' See

why it was that the injunction granted against the Government in the High Court in *TD* was so objectionable when *Crotty v An Taoiseach*, more than a decade previously, had established the principle that the courts may grant injunctions aimed at ensuring that the Government acts in accordance with the Constitution. And he considers various explanations including that the order in *TD* placed demands on the public purse and that it concerned an unenumerated right – before concluding that 'the main feature that distinguishes *TD* [ie from *Crotty*] is that the right being violated was socio-economic in nature.'[9]

It is true of course that the judges in *TD* refer to these broader factors in their judgments (ie the judges in the majority in the Supreme Court in the case). And I have no hesitation in agreeing with the likes of Gerry Whyte and Eoin Carolan and Conor O'Mahony that those judges were influenced in their judgment by their thinking on these broader factors – as well as by related intuitions on similarly broad questions such as the role of the courts in a democracy and the role of the state in general.[10] But if we read what they actually say in their judgments, then it seems to me that it was the nature and form of the particular order that was decisive in *TD v Minister for Education*.[11] It was that the extent of the detail on such specific matters of policy rendered it difficult to conceive of what Kelly J had done as judicial *review* of executive action – and as anything other than the *actual exercise* of executive power by a judge of the High Court.

Take what Keane CJ actually says in his judgment, for instance. Sure, he expresses doubts at one point as to whether the courts should recognise socio-economic rights under the unenumerated rights doctrine – and David Kenny is no doubt right that that has had a bearing on broader 'constitutional culture' over the two decades since.[12] But Keane CJ immediately qualifies the idea by pointing out that 'the resolution of that question must await a case in which it is fully argued.'[13] And we have to assume that a judge as rigorous as the then chief justice intended that line to have legal significance – indeed it has to *have* legal significance. (It might have had greater 'cultural' significance too if constitutional scholars had been more inclined to make a point of underlining it). He also goes out of his way to emphasise that the exclusive role afforded to Government in respect of executive power does *not* prevent the courts from interfering with its exercise – even where a court's constitutional concern arises from 'omission' on the part of Government.[14] He does not refer to the 'clear disregard test' for review of executive power at any point in the course of his 25-page judgment, nor the concept of deference as such. (Which I attribute to the fact that

Laura Cahillane, 'The *TD* Case and Approaches to the Separation of Powers in Ireland' 2022 6(3) Irish Judicial Studies Journal 10.

[9] See Conor O'Mahony, 'I Would Do Anything For Rights – But I Won't Do That' 2022 6(3) Irish Judicial Studies Journal 29. I would argue that the order in *Crotty* is a world away from the order in *TD*: for one thing, it contains no policy detail whatsoever, and is prohibitory, whereas the order in the later case has a mind-numbing level of policy detail and is mandatory in nature.

[10] See Carolan (n 2) 30-31, 34-37; and Whyte (n 2) 28-30, 34-47.

[11] Conor O'Mahony disagrees with me on this, pointing to the fact that the order handed down by the High Court in *Sinnott v Minister for Education* was 'nowhere near as detailed as that in *TD*.' See O'Mahony (n 9) 32. But I would counter that the issue in *Sinnott* was whether a person's right to free primary education extended beyond the age of 18. That was what decided the case, ie a majority of the judges found that it did not extent beyond 18. See Whyte (n 2) 17. In any event, *TD* is now seen as the more significant of the two cases (see David Kenny's essay for one perspective on its impact – David Kenny, 'TD v Minister For Education, Constitutional Culture, and Constitutional Dark Matter' 2022 6(3) Irish Judicial Studies Journal 39). And in my view we must read *TD* on its own terms.

[12] See David Kenny, 'TD v Minister For Education, Constitutional Culture, and Constitutional Dark Matter' 2022 6(3) Irish Judicial Studies Journal 39.

[13] *TD* (n 3) 282, per Keane CJ (emphasis added).

[14] ibid 286, per Keane CJ.

the case was about judicial exercise of executive power rather than judicial review of executive power).[15] And he decides the case in the course of two short paragraphs towards the end – on the simple ground that the High Court had not been entitled 'to make an order *specifying in detail* the *manner in which* [the Government ministers] were to carry out their functions so as to remedy the breach.'[16]

Much the same might be said of Murray J's judgment. Sure, he goes all in on Montesquieu and adds a little Alexander Hamilton for good measure (though he avoids endorsing quite so rigid and implausible a conception of the separation of powers as did Hardiman J).[17] And while he addresses 'clear disregard' and the question as to the extent of the deference owed by courts in respect of mandatory orders against Government generally, this comes at the tail end of his judgment – and very much after he has already reached his conclusion on the issue to be determined in the case.[18] But for Murray J there is no question but that the courts have jurisdiction to make orders 'affecting, restricting or setting aside actions of the Executive…or to make declaratory orders *as to its obligations*.'[19] And he too seems to decide the case in a few simple paragraphs: that the High Court judge had erred in failing to distinguish adequately between 'determining' whether a policy is compatible with the Constitution, on the one hand, and '*taking command* of [policy] matters so as to *actually exercise* a core constitutional function' of Government, on the other.[20]

This may be dismissed as the fussy constitutional detail of a 'formalistically inclined legal commentator' – as Kenny might put it.[21] But I think that a case can be of limited import in strict legal terms while casting a long and dark shadow over the constitutional system more generally. (That is, it could be at once true that *TD* has quite limited legal implications – as I argue it has – and that it has had a great impact on the broader constitutional culture – as Kenny argues it has had).[22] And if both of those things are true of *TD v Minister for Education*, then we might ask ourselves who is to blame (ie for its apparently outsized influence on the constitutional 'culture.') Sure, the judges must bear some responsibility: waxing lyrical about Montesquieu and Warren-Court euphoria will tend to distract. But are we constitutional scholars not partial to hyperbole too? Because critique of Hardiman J's neo-liberal take on the separation of powers, I venture, makes for better lecture theatre copy than does analysis

[15] If this may be taken to suggest scepticism on my part as to the justiciability of socio-economic rights, I would point out that Keane CJ and Murray J made a point of emphasising that declaratory orders against Government were a different matter – and were entirely open to the courts. Speaking for myself, I would have no concerns in principle about declaratory orders in this context, nor would I object to mandatory orders that were more general in nature (ie avoiding the extraordinary detail and specificity of Kelly J's order. I would see my own position on the matter of constitutionalising social rights, and indeed on judging social rights, as largely in line with Jeff King's – hardly a sceptic. See Jeff King, *Judging Social Rights* (Cambridge University Press 2012).
[16] TD (n 3) 287, per Keane CJ (emphasis added).
[17] ibid 322, per Murray J.
[18] ibid 336-337, per Murray J. Indeed, that same point can be made in respect of what Hardiman J says on this front – though like Murray J he uses terribly dramatic language on the point. Yet that aspect of the *TD* ruling is so prominent in the literature. For example, in his essay in this volume, David Kenny describes the *TD* ruling as having had the effect of 'centring…a narrow reading of the 'clear disregard' test' in Irish constitutional law. See Kenny (n 12) 40.
[19] TD (n 3) 331, per Murray J (emphasis added).
[20] ibid 331 (emphasis added).
[21] See Kenny (n 12) 36.
[22] For the record, I would not quite go so far as Kenny when he suggests that *TD* represents 'a massive cultural object…that has bent and shaped almost all of our constitutional law.' See my comments in the closing paragraphs of this article, including for instance in (n 44) in respect of the fluid-not-rigid conception of the separation of powers preferred by the likes of Susan Denham, Frank Clarke and Donal O'Donnell – each of whom served as chief justice in the period since *TD* was handed down, and each of whose judgments on constitutional law have carried great weight over the past decade (or two).

of the place of 'an additional two Special Care Units for girls in the Gleann Alainn unit in County Cork on or before the 31st July 2001' in the terms of a mandatory court order. (I know which works better for my first year constitutional law students of a wet Wednesday morning in XG22).

And if I am right that what was actually decided in *TD* has been obscured somewhat over the past two decades, then there must be an attendant propensity to miss the ways in which the ruling might be justifiable as a matter of constitutional principle. (The ruling in strict legal terms, that is. Or as I am arguing it ought to be understood). First of all, it seems to me to make constitutional sense that the constitutional function apparently being exercised in or by the terms of that High Court order would be exercised by a Government minister rather than by a High Court judge. Consider for a moment the nature of the task of facilitating the building *and opening* of even one of those high support units. It must involve all kinds of complications around securing a site and planning and architects and builders and contractors and safety regulators and resources and staff. And as I think Jeff King's work on judging social rights in particular attests, courts just cannot aspire to doing this necessarily improvisational and day-to-day work effectively – certainly not by comparison to a Government department (ie one constitutional organ is set up to do precisely this kind of constitutional work, where the other is set up to do a very different kind of constitutional work). [23]

As for the related matter of constitutional answerability, recall that the question before the Supreme Court in *TD* was not as to *whether* the constitutional rights of the applicants were to be vindicated by the expenditure by the State of public money – that was conceded by lawyers for the State. The question before the Supreme Court was concerned with the details as to *how* to do it (eg should we place six beds here in Cork and eight there in Limerick, or vice versa – and might we dedicate all our resources in Cork now, given the extent of the emergency there, and proceed later to Limerick, or are we better to split our resources equally even if it means neither will open quite as quickly?). And that is something that seems to me to unavoidably involve 'broad-based political judgment' (keep the phrase in mind). In other words, it is precisely the kind of constitutional business for which Government should be answerable in the first place to Dáil Éireann – as per those eight simple words in Art 28.4.1. Yet now, following Kelly J's ruling in the High Court, a minister can effectively evade such constitutional answerability by pointing out to the Opposition spokesperson in the Dáil 'that his hands were tied by an Order of the High Court.' [24]

[23] King places much emphasis on the polycentric nature of issues concerning social rights, and the attendant need for expertise and flexibility. He accordingly argues for what he calls for an 'incremental' approach on the part of judges: 'Incremental steps are those that require only a small departure from the status quo, or which, when addressing significant macro-level policy, allow for substantial administrative or legislative flexibility by way of response.' See King (n 15) 9. Kelly J did allow for this to some extent in his High Court judgment in a forerunner case insofar as he grants that the ministers can apply for a variation of the injunction if required. But, as Murray J points out, his qualification that such a variation would be granted only if 'objectively justifiable reasons' are furnished seems to overlook the extent to which the implementation of policy requires such day-to-day improvisation and is often so fundamentally subjective. TD (n 3) 334. The position taken by Keane CJ, incidentally, seems to me to chime in particular with Jeff King's thinking, ie with no objection in principle to declaratory orders in respect of socio-economic rights, but with serious concerns around highly detailed, highly prescriptive mandatory orders.

[24] TD (n 3) 323-324, per Murray J.

Elijah Burke as a 'rolling back' on *TD*?

It is often challenging to categorise a particular exercise of power as definitively 'executive' or 'legislative' or 'judicial' in nature, as the mind-boggling conundrums in the likes of *Re Solicitors Act* and *Zalewski* attest.[25] But in *TD* just as in *Crotty v An Taoiseach* – and indeed in other landmarks such as *Boland v An Taoiseach* and *McKenna v An Taoiseach* – there was no doubt but that the constitutional actors in question (i.e. the Government, or the Taoiseach, or the Government ministers) were exercising the executive power of the State.[26] And that was again the case in *Elijah Burke v Minister for Education*, decided just days in advance of the 20th anniversary of the Supreme Court ruling in *TD*.[27] The minister had established a 'Calculated Grades Scheme' at the height of a Covid lockdown – in lieu of the Leaving Cert exam that traditionally determined which second-level students would get places in which third level courses. But Elijah Burke was excluded. He had been home-schooled all his life by his mother, and the minister had not managed to find a workaround that would enable the award of calculated grades in such circumstances that would facilitate Elijah Burke's entry into third-level along with his more conventionally-educated comrades.

Burke's lawyers did argue the point as it happens: they claimed that the minister, in designing the Scheme, had been exercising a mere 'administrative' function. And they did so in order to avoid having to surmount that highly deferential 'clear disregard' standard of review that had been established in *Boland v An Taoiseach* as applicable in Irish constitutional law in cases involving judicial review of executive action. The argument got short shrift in the Supreme Court: of course this was the exercise of executive power. But Burke's case was not lost, because the failure of the minister to figure a way of awarding him grades engaged his constitutionally protected freedom to receive education in the home (derived from Art 42). And so now, twenty years on from *TD*, we had another case where a young person's constitutional rights had been placed in jeopardy not by a legislative enactment, but by executive action – indeed by a *failure of the executive to find a way* to account for the circumstances of a young person in an atypical situation.

Elijah Burke won his case at the Supreme Court. And in the course of the most significant paragraph in the most considered judgment on judicial review of executive action in Irish constitutional law, O'Donnell CJ presents what will likely prove its most enduring line:

> 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.[28]

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[25] *Re Solicitors Act 1954* [1960] IR 239, *Tomas Zalewski v Workplace Relations Commission* [2021] IESC 24.
[26] *Boland v An Taoiseach* [1974] IR 338, *Crotty v An Taoiseach* [1987] 1 IR 713, *McKenna v An Taoiseach (No 2)* [1995] 2 IR 1. For analysis, see Doyle and Hickey (n 1) 165-167, 201-213.
[27] [2022] IESC 1 (SC). For discussion of *Burke* in the context of *TD*, see two short videos on my YouTube channel: 'Elijah Burke & TD v Minister for Education (Part 1)' at <https://www.youtube.com/watch?v=oO4z_11pFu4> and 'Elijah Burke & TD v Minister for Education (Part 2)' at <https://www.youtube.com/watch?v=POXZVWFXAlw> (accessed September 2022). For an overview of *Elijah Burke*, see Conor Casey, 'Ireland – Superior Courts Address Important Separation of Powers Cases' (2022) 4 Public Law 667-670.
[28] Burke (n 27) [61], per O'Donnell CJ.

So where does this leave the ruling in *TD*? Well my scholarly colleagues sense an important shift. For Laura Cahillane the line 'has echoes of Denham J's [dissenting] judgment in *TD*.'[29] For David Kenny the judgment 'rolled back the most extreme implications of *TD* for rights review.'[30] And for Conor O'Mahony, it has '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 the Supreme Court in *TD*.'[31] But I am not quite so sure. Because *TD* seems to me to play a curious and under-developed role in O'Donnell CJ's judgment for the unanimous Supreme Court in *Elijah Burke*.

That key line just set out is effectively the culmination of O'Donnell CJ's reasoning on the central question in the *Elijah Burke* case: did 'clear disregard' apply? The Government's lawyers had argued that it applied in *all* cases concerning executive power: that the express provision in Art 28.4.1 for the answerability of Government to the Dáil renders that the primary constitutional check on Government – and that that places scrutiny by the courts in a subsidiary role, hence the blanket applicability of the highly deferential standard of review.[32] But O'Donnell CJ rejects that thesis. The deferential standard would apply in some cases, but not in all. And one of the main considerations in determining the matter was whether constitutional rights were at stake in the case. (As per the logic of that key line carrying echoes of Denham J's dissent in *TD*).

So far, so apparently indicative of a 'rolling back' of *TD*. But we can train the lens a little more sharply. Because if that is his destination in respect of the central question in *Elijah Burke*, O'Donnell CJ begins his journey towards it with the observation that deference in constitutional adjudication is not to be understood as though it were simply a matter of intuition or 'choice' on the part of the Court, but rather as 'something to be deduced from, and accordingly mandated by the Constitution.'[33] The test or level of deference to be applied in any given case, he insists, is to be justified by reference to 'what the Constitution says, and does not say,' and by 'the system and order it envisages.'[34] (The Constitution is King, in other words – not the intuitions of judges). And it is with this in mind then that O'Donnell CJ casts his eye back over a line of landmarks on judicial review of executive action stretching from *Boland v An Taoiseach* through *Crotty v An Taoiseach* and then *McKenna v An Taoiseach* to *TD v Minister for Education*.[35]

Now of these landmark precedents on executive power, O'Donnell CJ gives by far the most attention in his judgment to *Boland* and *Crotty* – and it is these two that most readily fit the doctrine he appears to be trying to develop in the case (ie the doctrine in respect of what standard of review to apply in different kinds of cases involving judicial review of executive action). Each of *Boland* and *Crotty* could be characterised as a classic 'structures' case in constitutional law (ie rather than as 'rights' cases). *Boland* concerned the so-called Sunningdale agreement in which the Irish Government accepted that there could be no change in the status of Northern Ireland until a majority of its people desired such a change – leading Kevin Boland to claim that it clashed with the territorial claim of the State 'to the whole island' in the then Art 3 (ie such that Government was acting in breach of the Constitution).

[29] See Cahillane (n 8) 15.
[30] See Kenny (n 12) 42.
[31] See O'Mahony (n 9) 30.
[32] Burke (n 27) [35].
[33] ibid [36].
[34] ibid [35].
[35] *Boland v An Taoiseach* [1974] IR 338, *Crotty v An Taoiseach* [1987] 1 IR 713, *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

And *Crotty* concerned the State's proposed ratification of a European treaty the terms of which, in Ray Crotty's view, entailed a loss of sovereignty to the State – leading him to claim that Government was not entitled to ratify it as an ordinary exercise of executive power but rather had to first secure popular approval in a referendum. And each of the cases concerned external affairs specifically – on which the Constitution was largely silent beyond expressly providing (in Art 29.4) that matters pertaining to it 'shall…be exercised by or on the authority of Government.'

So it was these factors that led the judges in those cases to apply 'clear disregard,' reasoned O'Donnell CJ. That is, that the text of the Constitution and its silences – and the system and order it envisaged – tended to suggest that it was answerability to Dáil Éireann that was the primary constitutional check on Government in these contexts, hence the applicability of the more deferential standard of review.[36]

As for *TD*, it gets nothing like the detailed consideration in O'Donnell CJ's judgment that is afforded to *Boland* and *Crotty*. But what is curious is that O'Donnell CJ places *TD* so very definitively in the same category as *Boland* and *Crotty* and a handful of other such cases: as classic constitutional 'structures' cases rather than as 'rights' cases. And he distinguishes them sharply from the case at hand – *Elijah Burke*. The cases in the *Boland-Crotty-McKenna-TD* category, he suggests, involve various constitutional actors (ie Government, or a Government minister) making various determinations (eg whether to ratify a European treaty; whether to spend public money favouring this or that side in a constitutional referendum) that all seemed to 'call for a broadly political judgment rather than a forensic determination' of the kind that might ordinarily be made by a court.[37] They all involved exercises of power that were not 'constrained by any specific restrictions or standards' (ie in the way of express or implied mandates of the Constitution).[38] And none of them – apparently – involved allegations of infringements of constitutional rights. All of which tended to indicate that 'the primary accountability of such action lies under Art 28 with the Dáil,' which in turn 'reinforces the analysis of the judicial role as arising only in cases of clear disregard.'[39]

Whereas Elijah Burke's case was different. It *did* involve a claim of a breach of constitutional rights (ie it was not a 'structures' case; it was a 'rights' case). And that led straightforwardly to what I have described as the key line in the *Elijah Burke* judgment (the 'echoes of Denham J line').[40] The higher standard of deference did not apply, but rather the regular proportionality standard that typically applies in cases involving rights-based claims made in respect legislative provisions (ie why would it matter that a breach of rights had occurred on foot of executive rather than legislative action?). This of course opened up the possibility that Burke might win his case – and he did. And O'Donnell CJ is surely right that it should make no difference in principle whether a breach of rights can be said to arise from executive rather than legislative action. But we are left to wonder how it was that *TD* was quite so definitively in the *Boland-Crotty-McKenna* category – and so apparently definitively distinguishable from *Elijah Burke*. Because much as the question to be determined in the Supreme Court appeal in *TD* had so much in common with those 'structural' questions to be determined in *Boland* and *Crotty* – and much as the rights dimension of the case was not contested by the State at that stage of the case – constitutional rights were undeniably

[36] Burke (n 27) [57].
[37] ibid [59].
[38] ibid [60].
[39] ibid.
[40] ibid [61].

engaged in *TD* more generally (ie in a manner that they were not in *Boland* and *Crotty*). And so, *TD* does not seem to fit quite as neatly into the *Boland-Crotty* category as O'Donnell CJ appears to suppose in his judgment in *Elijah Burke*.

Reading down *TD*

But there is a way of making sense of it. O'Donnell CJ sees that insofar as rights were engaged in *TD*, there was never any question but that a declaratory order against the Government ministers was warranted. (Remember that Keane CJ and Murray J made a point of emphasising that such orders were entirely open to the courts in these circumstances – and 'clear disregard' was actually only addressed at the tail end of Hardiman and Murray JJs' judgments – and parenthetically). And so O'Donnell CJ sees the Supreme Court ruling in *TD* for what it actually was – rather than for what its critics and those curators of the broader constitutional 'culture' might have made it out to be over the past two decades. It was a highly distinctive appeal concerning the question as to whether a High Court judge had been entitled under the Constitution to hand down a mandatory order directing Government ministers to take all necessary steps to facilitate the building and opening of a five bed high support unit at Elm House in the County of Limerick on or before the 31st October 2000.[41] And the question as to whether such a support unit should be built in such a place and with precisely such a number of beds seems to me about as good an illustration of the kind of question calling for 'broad-based political judgment' as it might be possible to imagine – and about as far from amenable to 'forensic determination' as it might be possible to imagine. And it seems about as good an illustration one could find of the kind of mundane yet highly important constitutional matter for which Government should be answerable to Dáil Éireann – that is, under the text of the Constitution, and in light of the system and order it appears to envisage. (The Constitution is King – not the intuitions of judges).

That is why I just cannot agree with Conor O'Mahony's suggestion that the judgment in *Elijah Burke* could be interpreted as supporting 'the position taken by the High Court rather than the Supreme Court in *TD*.'[42] On the contrary, it supports the position taken by the Supreme Court in *TD* – certainly in respect of the key legal question that fell to be determined at that stage of the case. That is not to say that the O'Donnell CJ judgment does not, as Cahillane puts it, carry 'echoes' of Denham J's dissent in *TD* (and even of certain aspects of Kelly J's judgment in the High Court). It surely does: in respect of the fluid-not-rigid conception of the separation of powers, for instance, and in respect of the role of the courts generally in vindicating constitutional rights. But I would say that in those respects *Elijah Burke* was nothing particularly new under the sun. Denham J, lest we forget, went on to serve 17 more years on the Supreme Court following her dissent in *TD* – including seven as chief justice. And she always applied that more fluid conception of the separation of powers, as did other leading judges of the past two decades (not least Clarke CJ and O'Donnell CJ – who always emphasise the rejection in the Irish system of Montesquieu's 'hermetically sealed

[41] This chimes with what O'Donnell CJ actually says about *TD* in his judgment in *Burke*, limited though it was. He simply said: '*TD* concerned the appeal to the Supreme Court from a mandatory order made in the High Court directing the defendant, the Minister for Education, to take all necessary steps to facilitate the building and opening of secure and high support units for troubled children at a number of specified locations. The Supreme Court overturned the order on the grounds that it offended the separation of powers. However, Murray J also expressed the view that a mandatory order should only be made against another organ of the State in exceptional circumstances, if such an order had disregarded its constitutional obligations in exemplary fashion.' ibid [58].

[42] See O'Mahony (n 9) 30.

branches' thesis).[43] As for the rights element of *TD*, there was never any question but that a declaratory order was warranted in the circumstances.

So to my mind *Elijah Burke* largely clarifies what was already latent in the jurisprudence. And what I would take from it in respect of the standing and status of *TD v Minister for Education* is that that old landmark was highly distinctive and that it should be read accordingly into the future.[44] It should be read down, in other words. (Or *read*, perhaps?) If it was ever true that it 'marked the end of any possibility of constitutional recognition of economic, social or cultural rights in the Irish Constitution as it stands,'[45] then let us cast the idea aside – because the appeal to the Supreme Court in *TD* was never about that question. (Whether such rights should be derived from the text or structure as is stands is another question, but it should be seen as independent of the ruling in *TD*). If it was ever true that it 'marked and stands for the end of unenumerated rights,'[46] let us shed that notion too (though of course we now have an emerging 'derived rights doctrine' in any event – which looks to me like an eminently more plausible way to go than the way suggested by *Ryan v Attorney General*).[47] And if it stood for the precluding of rigorous review of executive action, or for that rigid-not-fluid conception of the separation of powers, or for a 'small view of the judicial power'[48] – then we should be clear that we need not take it to stand for those things either. Because *TD v Minister for Education* was never really about those things. It was about the order, stupid.

[43] In nearly every one of the several major judgments concerning constitutional law that Donal O'Donnell has handed down since his appointment in 2010 he has made a point of emphasising how fundamentally inter-dependent are the three great organs of State. See for example his judgment in *Pringle v Government of Ireland* [2012] 3 IR 1, especially at 102-103, and his judgment in *Callely v Moylan* [2014] 4 IR 112, jointly written with Clarke J (as he then was).

[44] As James Rooney puts it in his contribution to this volume, *TD* was 'a hard case… Whilst on the one hand it can be distilled to a simple question of: '*should children in need be provided with necessary state care*,' ultimately the claim was for a novel constitutional remedy, never before ordered by the Supreme Court, to vindicate an ill-defined, unenumerated, social right imposing immediate obligations on the state.' See James Rooney, 'TD v Minister for Education: Hard Case, Bad Law' (2022) 6(3) IJSJ 71.

[45] See Kenny (n 12) 39.

[46] ibid.

[47] *Ryan v Attorney General* [1965] IR 245.

[48] See Kenny (n 12) 40.

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.

TD V MINISTER FOR EDUCATION, CONSTITUTIONAL CULTURE, AND CONSTITUTIONAL DARK MATTER

Abstract: This paper suggests that the true influence of the TD case is seen not in its formal legal significanæ but in its less obvious impact on Irish constitutional culture. Drawing on Tribe's notion of landmark cases curving constitutional space, it suggests TD is a form of constitutional dark matter, warping the fabric constitutional law invisibly by entrenching a highly cautious judicial culture and a political culture that is less sensitive to rights infringements caused by policy failures.

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Every Irish law student, and every lawyer educated here after the case came down, knows *TD*.[1] They have probably had their constitutional law lecturer tell them – with some varying degree of hyperbole – about how they will never understand or pass constitutional law until they have understood it. Almost every practitioner knows it too – there are few areas of practice so insulated from constitutional law that this will not have filtered down to those who began their work long before the case came down. But its influence is even deeper than this, I think it animates and dominates our constitutional culture.

As we mark its 20th anniversary, however, there is a tendency that runs somewhat counter to this. More formalistically inclined legal commentators sometimes suggest that the centring of *TD* in our constitutional law goes too far.[2] There are several ways that this is anecdotally evidenced: it doesn't really come up that much in court; its impact in determining major cases is modest; it is not on the tip of the tongues of politicians and civil servants they deal with. This viewpoint, with respect, entirely misses the point, and shows, I think, the limitations of a formalist and legalist perspective when it comes to something like the *TD* case. *TD's* holding was narrow, and in strict formal, legal effects, did not have sweeping impact. But *TD* does not *need* to have these effects; it is far too important for that. *TD* is now a core part of the frame, the background fabric, the stage in which Irish constitutional law plays out. To put it another way, we cannot just think of *TD* as a constitutional law case. We have to see it as a foundational element of contemporary Irish constitutional law culture. The language of culture, I think, gives us a way to articulate the vast, informal impact of this case on our constitutional law.

[1] *TD v Minister for Education* [2001] 4 IR 259.

[2] This is different, I think, from Tom Hickey's argument in this volume, which I take to be a case that we should limit our understanding of what *TD* did to its strict legal holding. To use the language I use here, he suggests we should try to limit its cultural impact to the specific aspect of the order in the case, rather than allow it to have large reach beyond that. (see Tom Hickey, 'Reading *TD* Down' 2022 6(3) Irish Judicial Studies Journal 19. I would agree. But if I am wrong in this reading, and it is Hickey's argument that *TD* did *not* have broader effects on our constitutional law because the holding of the case does not legally support them, I would think this to not just to miss wood for trees, but to miss the trees for the bark, and this would be precisely the sort of failure to see cultural impact that I am trying to highlight here.

Constitutional culture

I believe that culture may be the most important thing in the study of law.[3] I have, in recent years, directly[4] and indirectly[5] argued for its importance in Irish and comparative constitutional law. I have defined culture in a constitutional law context as 'the broad set of norms, suppositions, assumptions, modes of thought, values and social beliefs held by state officials and by ordinary citizens that are engaged when they interpret or consider the constitution'.[6]

This culture will be different for different groups – politicians, lawyers, judges, the media, the people – and even *within* these groups as disagreements emerge as to what the Constitution is for. These are beliefs that we need to read the Constitution, to understand it, to take its underspecified language and values and put them into action. It is an 'intermediate layer between concrete legal rules and their realisation and application, shaping and filtering their reading through a set of fundamental and foundational views that undergird the legal order'.[7] One could not lack such a culture, because without it we would have no contextual frames of reference in which constitutional understandings could develop.

If I am in right in this, and culture is so crucial, why is it not the centre of our studies? I think the reason is because of the difficulties of knowing culture and account for its impact. Culture is a product of (or may even be another word for) experience.[8] You internalise a culture gradually by being exposed to it, living it, and coming to know its contents. But this makes culture very hard to know precisely. First, culture is not static, because experience is never complete. Culture is always changing as new experiences, new problems, and new ideas are incorporated into it. Secondly, knowledge that comes from experience is gathered in most cases subconsciously; you soak it in. And the products of culture, when you are immersed it, then issues from you 'as naturally as breathing'.[9] You do not stop to think about how to read the Constitution in light of the internalised legal and constitutional culture. Instead, these meanings come to you through the frames and filters of culture without any conscious articulation of what the culture is. You

[3] This phenomenon has many names: Pierre Legrand calls it mentalité, Stanley Fish interpretive community, Roland Barthes doxa. Culture seems to me a good term to make the phenomenon understood while expressing its complexity; everyone has a sense of culture's importance, but no one thinks that it is simple or easy to define. See David Kenny, 'Examining Constitutional Culture: Assisted Suicide in Ireland and Canada' (2022) 17(1) Journal of Comparative Law 85.

[4] Kenny (n 3); David Kenny, 'The Risks of Referendums: "Referendum culture" in Ireland as a solution?' in Maria Cahill, Colm Ó Cinnéide, Conor O'Mahony, and Seán Ó Conaill (eds), *Constitutional Change and Popular Sovereignty in Ireland* (Routledge 2021) 198; David Kenny, 'Merit, Diversity, And Interpretive Communities: The (Non-Party) Politics Of Judicial Appointments and Constitutional Adjudication' in Laura Cahillane, Tom Hickey and James Gallen (eds.), *Politics, Judges, and the Irish Constitution*, (Manchester University Press 2017) 136.

[5] David Kenny and Lauryn Musgrove McCann, Directive Principles, 'Political Constitutionalism, and Constitutional Culture: the case of Ireland's failed Directive Principles of Social Policy', (2022) 18(2) European Constitutional Law Review 207; Conor Casey and David Kenny, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019' (2021) Public Law (April) 335; David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2017) 40(2) Dublin University Law Journal 85.

[6] Kenny and Musgrove McCann (n 5) 225.

[7] Casey and Kenny (n 5) 372.

[8] See Louis Menand, *Pragmatism* (Vintage, 1997) xxi.

[9] Stanley Fish, *Doing What Comes Naturally* (1989) ix.

may be able to express the contents of the culture in part, but probably not in full, because you do not know exactly what you know.[10]
It is hard, then, to capture culture, or to tell people how to understand Irish constitutional law; as they have to internalise this culture themselves. Immersion in legal culture and exposure to legal materials and writings that embody the culture is the way we tend to do it in legal training. And as participants in the culture, as those immersed in it, we can articulate our (partial, provisional) sense of what the culture contains, or what forces made it, and what results it will produce.

The curvature of constitutional space and constitutional dark matter

Laurence Tribe, in his landmark article 'The Curvature of Constitutional Space', argues that constitutional cases have an impact similar to matter/mass in physics: they warp the space around them.[11] As spacetime is warped and curves around a massive object, generating gravity and bringing other objects into its orbit, so too constitutional rulings change the social and legal space, and other objects in that space have their orbits altered by the gravity that they generate. Tribe insightfully points out that we far too often take the background – the constitutional space – for granted. Just as space was though an empty or passive backdrop before Einstein's General Relatively, we do not often appreciate the way that the background is shaped by what the law does, and the way the background itself influences and makes the law.

I think Tribe's metaphor is a useful way to think about culture, and in particular, major cultural objects. The more mass an object has, the greater the curvature of the space around it, and the stronger the gravitational pull it exhibits. The things that make up constitutional culture are different in scale: there are some legal cases, events, or ideas that are, in this sense, massive. Their influence is huge, their pull overwhelming, and constitutional culture bends and is remade around them. Everything, to some degree, falls into their orbit.

I wish to offer another elaboration on Tribe before applying this concept to *TD*. Contemporary physics accepts the posited, but thus far unproven, existence of something known as dark matter.[12] There are many observations, including various effects of gravity and the behaviour of galaxies, that suggest that there must be far more mass in the universe than is visible to us. Perhaps as much of 85% of matter is this dark matter: it is not visible, does not emit radiation, and does not interact strongly with other matter. We know it from its effects, which are very real and fundamental, yet we cannot see it.

The applicability of this concept to my account of constitutional culture here will, I hope, be obvious: the impact of many cultural objects will be large, yet the obvious, visible part may account for only a small part of this impact. The unseen, invisible, subconscious forces at work may have as much or more cultural impact than that which we can see.

[10] I have discussed this in detail elsewhere, drawing on Stanley Fish: David Kenny, 'Conventions in Judicial Decision-making: Epistemology and the Limits of Critical Self Consciousness' (2015) 38(2) Dublin University Law Journal 432.
[11] Laurence Tribe, 'The Curvature of Constitutional Space' (1989) 103(1) Harvard Law Review 1.
[12] See Gianfranco Bertone and Dan Hooper, 'History of dark matter' (2018) 90(4) Rev. Mod. Phys. 045002.

It is my case that *TD* is a massive cultural object in this sense, that it has bent and shaped almost all of our constitutional law. It influences ripples throughout constitutional space, and almost no constitutional concepts, doctrines, ideas are free from its pull. It has, I think, shaped our constitutional space. And I think, for all its fame and renown in Irish constitutional law, it is constitutional dark matter, because the majority of its influence is not obviously seen, overtly stated, or obviously flowing from the core holdings. It places limits on what it possible, conceivable, or imaginable in Irish constitutional law, and once established and firmly entrenched, these limits live without any need for the case to be mentioned, and indeed prevent circumstances arising where the case even needs to be mentioned. Its cultural influence can operates largely without reference to the case itself

TDs cultural significance

In this section, I wish to map, as well as I can, *TD*'s impact along two axes of constitutional culture: legal and judicial culture; and political and administrative culture. I am not endorsing the idea that *TD* should have these impacts – I agree with Tom Hickey's suggestion in this volume that *TD* should be 'read down', treated as a much narrower case[13] – but I think that it *has* had them.

Legal and judicial culture

As is obvious from the discussion in other papers, *TD* had huge impact on the legal and judicial views of the Irish constitution. First, as a formal holding of the case, the courts will not grant a mandatory order in any but the most exceptional circumstances. The broader import of this is even wider than the formal holding. Though several judges left open the possibility of such an order in principle *in extremis*, the reality is that *TD* does not leave this possibility open in any practical way. The cultural effect of *TD* is to entrench Hardiman J's view that only a circumstance where the constitutional order itself was a risk would justify such an order. Such circumstances are unlikely to arise, and such an order would be unlikely to make any difference if they did. The effect of *TD* is that we will never see such an order while the case maintains its cultural pull.

Secondly, and much less formally, *TD* marked the end of any possibility of constitutional recognition of economic, social or cultural rights in the Irish Constitution as it stands. The right in question in the case – an unenumerated ESC right – was not the subject of appeal and was conceded by the State. Keane CJ commented, *obiter*, that he had grave reservations about ever recognising such rights.[14] The effect of this passing statement was vast, because it was seen that this represented the prevailing judicial orthodoxy on such questions. It was enough to essentially halt any claim for such a right in Ireland. Such arguments are still not made; the cultural impact of *TD*, which is still strongly felt.

[13] Tom Hickey, 'Reading TD Down' 2022 6(3) Irish Judicial Studies Journal 19.

[14] *TD* (n 1), 287-288. For consideration of how this dictum was used in cases concerning shelter, see Conor Casey, 'Public Interest Litigation, and Homelessness: A Commentary on Recent Case Law, (2019) 42 DULJ 191.

Thirdly, and relatedly, *TD* marked and stands for the end of unenumerated rights, in spite of the fact *TD* does not say anything about this, in terms. It has often been noted that there is no case where the Irish Supreme Court repudiates this doctrine.[15] But *TD*'s scepticism about expansive judicial power and ESC rights was taken as a final signal from the judiciary that unenumerated rights arguments were simply not welcome in Irish constitutional law. There were certainly intimations of this earlier, but new rights were still recognised until shortly before *TD*, albeit not without controversy.[16] After *TD*, and because of the culture it instilled, these rights came to an end.

Fourthly, *TD* precludes rigorous review of executive action. Part of this derives from its holding – its centring and narrow reading of the 'clear disregard' test[17] – but again its effect seems broader. *TD*'s clear dissatisfaction with judicial intervention in government action led to a generalised view that the judiciary should give government a wide berth, and this is precisely what happened.

Finally – and this is perhaps the core of the matter, with the preceding elements specific instances of this – *TD* embedded a small view of the judicial power. This was not a function of just the *TD* case, of course; it did not fall out of the sky. It was rather the epitome and manifestation of a cultural mood that was building in the judiciary from at least 1995, and perhaps earlier, and that lasted until at least 2015. I have elsewhere called this outlook 'liberal judicial conservatism'.[18] It is the use of the judicial power to advance, in broad terms, core values of enlightenment liberalism, including and especially procedural fairness and individual liberty interests as against the State. But this ideology is advanced by methods that are conservative (in the Burkean sense): not by judicial action, but by inaction. Things will tend to get gradually better if left alone by the judiciary; intervention is only necessary and appropriate when areas of core liberal values – criminal process rights, say – are under threat and need to be advanced. The need for this was relatively rare, and so the period after *TD* – which, in its tone and feeling announced and cemented this viewpoint – the courts did very little.

In short, *TD* set a benchmark for judicial action – or inaction – that dominated the Irish constitutional landscape, and is only now, perhaps, being slowly departed from. This benchmark was internalised by lawyers, who know best of all what will and will not succeed before the courts, what judges will want to hear. This means that the arguments do not get made, the cases do not get taken, and the biggest effects of *TD* are absences, inaction, passivity. The part we can

[15] See Conor O'Mahony, 'Unenumerated Rights after NHV' (2017) 40(2) DULJ 171; Oran Doyle, *Constitutional Law* (Clarus 2008) 108; Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) DULJ 191.
[16] See *I O'T v B [1998] 2 IR 321*.
[17] The test was enunciated in *Boland v An Taoiseach* [1974] IR 338; its applicability to rights matters such as TD was, to say the least, unclear. It was not until the recent *Burke* case, as mentioned below, that it was held that this standard did not apply to all executive action. The fact that this holding was treated as so significant by observers suggests that in the interceding period, the clear disregard standard was all that was thought to apply.
[18] David Kenny, 'Merit, Diversity, And Interpretive Communities: The (Non-Party) Politics of Judicial Appointments and Constitutional Adjudication' in Laura Cahillane, Tom Hickey and James Gallen (eds), *Politics, Judges, and the Irish Constitution*, (Manchester University Press, 2017) 136. Hardiman J, in particular, seemed to embody this philosophy, in the *TD* case and in much of his other writing.

see if only a fraction of the full effect, and we will tend to underestimate the unseen. As Conor O'Mahony puts it in his paper in this volume, this is the 'considerable shadow' cast by TD.[19]

Political and administrative culture

Political and administrative culture tends to be less well-documented than legal culture, and so I am relying here on experience of working closely in formal and informal contexts with politicians of various sorts and civil servants on matters that touch upon constitutional law. In the political and administrative context, *TD* – and the changes it attitudes that accompanied and followed it – were taken as a signal that the courts were out of the game when it came to oversight of policy. The message was received that in respect of social and economic issues, and in terms of rights-based review of policy, the courts would not be getting involved. The political and bureaucratic arms of the State, as a result, became less afraid of court intervention and more assertive and trenchant in pressing policy preferences and decisions in areas cognate to *TD*. This was done without individuals acquiring specific knowledge of the case, necessarily; it came from legal advice, briefings, common understandings that took hold after the cultural shift of *TD* came into focus. It became part of the culture of politics.

Our political and bureaucratic cultures are highly legalistic and formalist. Legal arguments are treated with a special class of deference and given a special kind of weight.[20] Constitutional objections, particularly from the Attorney General but also from other legal advisors,[21] are not contested and tend to end any argument. This amounts, I think, to a near-total failure of political constitutionalism, where the political branches have a core role in developing and engaging with constitutional meaning. This failure is further seen in a lack of any influence of Article 45's directive principles of social policy on policy,[22] and in the even rules of the Dáil.[23] (The courts, incidentally, are categorically not to blame for this; they have been very clear that the political branches play a crucial role in developing constitutional meaning and balancing rights.)[24]

The effect of this is that the Constitution is an obstacle, a roadblock to politics, and very little else. There is no ethic of constitutionalism beyond the courts, no sense of deep responsibility to act in the spirit of the Constitution even if the courts will not tell you that you are wrong. In such a formalist legalistic culture, the judicial non-intervention of *TD* is treated as licence: since the courts won't intervene, you cannot be constitutionally wrong.

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[19] Conor O'Mahony, 'I Would Do Anything For Rights – But I Won't Do That' 2022 6(3) Irish Judicial Studies Journal 29.

[20] Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17(2) European Constitutional Law Review 202.

[21] See David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan', (2020) 18(1) International Journal of Constitutional Law (ICON) 51. Advice from the Office of Parliamentary Legal Advisors has also been influential, including on the constitutionality of remote Dáil sittings in the pandemic.

[22] See Kenny and Musgrove McCann (n 5) for an account of this.

[23] The Salient Rulings of the Chair of Dáil Éireann, a compendium of decisions made by the Ceann Comhairle over time, includes several comments on law and the Constitution that are perhaps well-meaning or correct in part, but could not be defended as written. Perhaps the most problematic of these is ruling 316: 'It is not for Chair or House to interpret Constitution'.

[24] To take just some examples, *Ryan v Attorney General* [1965] IR 294 *at 312; Tuohy v Courtney* [1994] 3 IR 1; and *Fleming v Ireland* [2013] 2 I.R. 417.

The curvature of our constitutional space caused by *TD* tolerated bureaucratic unresponsiveness even where the rights of the vulnerable and marginalised were at stake. It gave judicial and constitutional imprimatur to sclerotic public sector governance where many problems are simply not addressed in a timely fashion, even when rights and welfare are at stake.

Another impact of *TD* is seen when the case, and the concerns it expressed about interbranch relations, are regularly held out in political circles as a reason to not insert ESC rights in the Constitution.[25] The rightness of the *TD* case, and its emphatic rejection of judicial action to improve policy, is so embedded in the status quo that even popular constitutional change to enable is seen as wrong. Even the current government's vague commitment to have a referendum on housing faces opposition on this ground, and I suspect the ultimate proposal will be limited to offset fears of blurring the 'proper' boundary – the one set by *TD* – between the courts and the elected branches.

The confirmation, not creation, of a culture

While the *TD* case massively curves our constitutional space, it is important to acknowledge that the case was not solely responsible for the creation of this culture. It was rather the final development, confirmation, and identification of a culture that was building for some time. It was developing in the judiciary throughout the 1990s, with a creeping unease with the breadth of the judicial power. There were other landmarks in the withering of unenumerated rights;[26] but it is only later, after *TD* finishes this process that we can see those intimations clearly as part of trend. Similarly, it is not my claim that political and bureaucratic culture was excellent before the *TD* case and the retreat of the judiciary; it self-evidently wasn't, as it gave rise to the facts of *TD*. But the *TD* case's cultural impact was to affirm and exacerbate certain negative cultural trends, and this culture might have been better – it certainly would have been *different* – if the *TD* case had come out the other way.

Conclusion: future cultural change

The impact of TD on our constitutional culture was immense. But it is important remember that culture is always changing, because experience is never complete. Even the most entrenched cultural suppositions can, if the right circumstances arise, be upended. Culture is hard to predict and cannot readily be controlled.

I see no great signs of change in our policy or bureaucratic culture that *TD* inspired, but who knows what tomorrow will bring. Possible changes in constitutional ESC rights protection with a right to housing and lobbying for a broader ESC rights amendment might bring some change in this respect; only time will tell.

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[25] *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 5 October 2022.

[26] These would include *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 and *I O'T* (n 16). See also (n 15).

I do think there are signs of a change in some of what *TD* embedded in our legal and judicial cultures. I wrote before that the *NHV* case in 2017 suggested some cultural change – though it was not clear how much – in recognising a semi-novel right and introducing new remedial practices that might presage a more somewhat active judiciary.[27] Writing shortly afterwards, I noted that the Supreme Court was at a kind of cultural crossroads, and it was unclear exactly where this would lead. It is slightly clearer five years on. The judiciary are more willing to recognise new rights derived from constitutional language and values, though this is will not be likely radical.[28] The remedial innovations were real, albeit not revolutionary.[29] A recent development in the *Burke* case – the most important case since *TD* on questions of oversight of executive action affecting rights – rolled back the most extreme implications of *TD* for rights review, or as Tom Hickey suggests, *clarified* the proper impact of *TD* in this space.[30] A recent case stopping the eviction of travellers from public land accommodation *might* suggest a slightly less deferential stance on social rights questions.[31] The centrality of *TD* to our constitutional culture – its gravitational pull in our constitutional space – is lessening, though there are no signs yet of this leading to a marked increase in the courts' general level of intervention.

To be clear, my point in this paper is not that the cultural impact of *TD* means the case was 'wrongly decided'. My case is that *TD*'s legacy – whether you approve or disapprove of the case – must be judged by its impact on broad constitutional culture in both the political and legal sphere, not on the strict limits of its holdings. And this point applies to constitutional law in general: we are deceived if we think about it as a formal enterprise, that the legal limits of holdings are the limits of a case's influence. Constitutional law is suffused with a complex, informal culture that gives it life, that makes it real. We should seek to know that culture, as far as we can, and always consider critically the constitutional space that it creates.

[27] David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2017) 40(2) Dublin University Law Journal 85.
[28] See *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49; *Fox v Minister for Justice* [2021] IESC 67.
[29] See *PC v Minister for Social Protection* [2018] IESC 57; Davy Lawlor, '*Ontario (AG) v G* and Principled Remedial Discretion: Lessons for Ireland' (2021) 5(2) Judicial Studies Institute Journal 55.
[30] *Burke v Minister for Education* [2022] IESC 1; and Tom Hickey, 'Reading TD Down' 2022 6(3) Irish Judicial Studies Journal 19. For further discussion of Burke, see Laura Cahillane, 'The TD Case and Approaches to the Separation of Powers in Ireland' 2022 6(3) Irish Judicial Studies Journal 10.
[31] *Clare County Council v McDonagh* [2022] IESC 2.

TD V MINISTER FOR EDUCATION: A CHILLING EFFECT ON WOULD-BE LITIGANTS?

Abstract: Given that litigation is the last resort for those in need of education, and that there are ongoing challenges for those with disabilities in particular accessing appropriate education, there is a surprising paucity of contemporary cases seeking to enforce the right to education under the Irish Constitution. This article considers the causes of this, and the underexplored possibility that the TD case had a serious chilling effect on litigation on this constitutional right.

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Introduction

This article suggests that the decision in *TD v Minister for Education*[1] has a chilling effect on would-be litigants of the right to education. The focus of this paper is on the right to education of children with disabilities, as protected by Article 42 of the Constitution. It is argued here that the time-bound nature of the right to education, the failure to provide effective legislative tools, the failure of adequate educational provision coupled with the impact of the decision in *TD v Minister for Education* has the effect of compromising the right to education for children with disabilities. It is suggested here that the most appropriate way to enforce the right to education would be through the introduction of legislation with effective and timely enforcement mechanisms. However, in the absence of such legislative intervention, and the absence of adequate, appropriate or any educational provision, constitutional litigation is often the only option or remedy available. This article highlights the ongoing issues faced by children with disabilities in accessing and maintaining a full school place and the surprising lack of attendant cases to enforce the right to education. It then posits that there are two reasons for the paucity of current cases: increased educational provision and the impact of *TD v Minister for Education,* which has discouraged litigation to enforce an express right in the Constitution.

Constitutional Context

Article 42.4 obliges the state to provide free primary education for all children. In the context of disability, *O'Donoghue v Minister for Health,*[2] perhaps the preeminent case on the right to education, established that all children with disabilities are educable, that they have a right to education, and that limited provision does not necessarily fulfil that obligation.

To determine whether all children were educable, O'Hanlon J provided a constitutional understanding of the term education. In so doing, he referred to Ó Dálaigh CJ's definition of education in *Ryan v Attorney General,*[3] where he stated that the purpose of education was to 'make the best possible use of his [or her] inherent and potential capacities, physical, mental and moral,'[4] adding the words, 'however limited those capacities may be.'[5] The term education as used in the Constitution is therefore broader than purely scholastic education and ensures that all children are encapsulated by the definition. O'Hanlon J held that Article

[1] *TD v Minister for Education* [2001] 4 IR 259.
[2] *O'Donoghue v Minister for Health* [1993] 2 IR 20.
[3] *Ryan v Attorney General* [1965] 1 IR 294 [37].
[4] *Ryan* (n 3) 350.
[5] *O'Donoghue* (n 2) 65.

42.4 imposed a constitutional obligation on the State to provide for free basic elementary education for all children and that this included children with profound disabilities. The importance of the decision in *O'Donoghue* cannot be over-estimated as it established that all children had a right to education, not one granted based on 'grace and concession.'[6] Of note, evidence adduced during the trial suggested that the extent of the education provision in this instance was not sufficient to meet the threshold of the right to education. It was highlighted that the pupils in the plaintiff's class were in receipt of reduced educational provision, and it was suggested that this reduced provision fulfilled the applicant's right to education. O'Hanlon J held that the respondents were:

> misled in their belief that the arrangements already made to provide a place for the applicant at the Cope Foundation are sufficient of themselves to satisfy any claim that may arise in his favour under the provisions of the Constitution to have free primary education provided for his benefit.[7]

The *O'Donoghue* case thus established that children with severe or profound learning difficulties were constitutionally entitled to free primary education, and importantly that access to some level of education is not necessarily sufficient to satisfy the constitutional right to education. This point is of interest when we consider the wide use of reduced timetables later in this paper. O'Hanlon J held that the State had an obligation: 'to respond to such findings by providing for free primary education for this group of children in as full and positive a manner as it has done for all other children in the community.'[8]

The Supreme Court, however, substituted the High Court declaration with an arguably less onerous obligation, stating that 'the infant applicant is entitled to free primary education in accordance with Article 42, s4 of the Constitution and the State is under an obligation to provide for such education.'[9]

In the aftermath of *O'Donoghue*, numerous cases were taken attempting to enforce the right to education for children with disabilities. These cases primarily sought specialised or specific educational interventions. The cases were notable due to the absence of legislation providing redress mechanisms; the level of acrimony between the parties;[10] and the difficulties children with disabilities and their parents faced in getting adequate, timely, local educational provision for their children, as evidenced by the sheer number of cases. [11]

Among those cases was *Sinnott v Minister for Education*.[12] One issue before the court was the extent of free primary education under Article 42.4 of the Constitution, and whether it was based on 'need' or 'age.' On this point, the Supreme Court held that the duty to provide for free primary education was owed to children and not to adults. This ensured that the right to education is a time-constrained right, only exercisable by a person with a disability up to the age of eighteen. In practice, this means that the right to education is only applicable for

[6] ibid 68.
[7] ibid 71.
[8] ibid 67.
[9] *O'Donoghue* (n 2).
[10] See *Cronin v Minister for Education* [2004] IEHC 255; [2004] 3 IR 205; *O'Carolan v Minister for Education* [2005] IEHC 296.
[11] See for example 'Department of Education besieged by 272 law cases' *Irish Independent* (March 10, 1998).
[12] *Sinnott v Minister for Education* [2001] 2 IR 545.

a short period of time; hence, delays and failures to provide education impact significantly on a person's ability to avail of that right. Timely interventions are therefore vital in this context, adding to the need for effective and prompt legislative redress mechanisms.

A second issue before the Supreme Court in *Sinnott*, was whether the Court had the power to grant mandatory injunctions, having regard to the doctrine of the separation of powers. The Court suggested that mandatory orders should only be granted when the State ignores or defies a court declaration, but did maintain the jurisdiction to grant mandatory orders in a 'rare and exceptional case,'[13] or where a constitutional right had been flouted 'without justification or reasonable excuse of any kind' in 'very exceptional circumstances.'[14]

Sinnott was followed by *TD v Minister for Education.*[15] The majority in that case held that mandatory orders were permissible where the Executive had disregarded its constitutional obligations in an 'exemplary fashion.'[16] Murray J defined the term 'clear disregard' as meaning:

> *a conscious and deliberate decision* by the organ of state to act in breach of its constitutional obligation to other parties, *accompanied by bad faith or recklessness.* A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would *impinge on the observance by the State party concerned of any declaratory order* made by the court.[17]

This an extraordinarily onerous hurdle for any would-be litigant to overcome, and the impact is exacerbated when we consider the nature of the cases taken under both Article 42.4 and former Article 42.5, involving as they did children with disabilities and vulnerable children, many of whom were in State care. The test suggests that *mere* 'official indifference and persistent procrastination'[18] or 'official inactivity'[19] would not amount to a clear disregard for a child's constitutional right to education. Furthermore, obtaining a mandatory order would also first require a declaratory order to be obtained and flouted, adding significant time concerns to any potential litigant in respect of a time-constrained right.

The ability to enforce any socio-economic right without a 'constitutional amendment or by the adoption of an entirely new constitution'[20] was questioned in *TD v Minister for Education,* suggesting that such actions were the sole preserve of other organs of Government. This reading of the Constitution appears to raise the principle of the separation of powers to a higher level than express constitutional rights, such as the right to education. The notion of judicial restraint required by this fixed view of the separation of powers is not one expressed within the Constitution, suggesting that it is as much a choice for the court as judicial activism.[21] It is hard to square this position with the ability to enforce an express

[13] *Sinnott* (n 12) 656.
[14] ibid 724.
[15] *TD* (n 1).
[16] ibid 724.
[17] ibid, emphasis added.
[18] *Sinnott* (n 12) 553.
[19] Niall Osborough, 'Education in the Irish Law and Constitution' (1978) 13 Irish Jurist 145, 66.
[20] *Sinnott* (n 12) para 319.
[21] Oran Doyle, 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222.

constitutional right to education.

Legislative and Policy Response

In the aftermath of the decision in *O'Donoghue,* numerous cases were taken seeking to enforce the right to education for children with disabilities. Those cases have slowed to a trickle if not a full stop, suggestive of one of two things.[22] One is that the State responded by making adequate educational provision for all children. The other is that the decision in *TD* has had a chilling effect on would-be litigants. It is suggested here that both of those statements are to an extent accurate: there was in fact increased educational provision; however, if you are not in receipt of education, or sufficient education, then the effectiveness of relying directly on the Constitution is questionable, not least due to time concerns.

Positive Actions Post-litigation

In the immediate aftermath of *Sinnott,* the then Government committed to the introduction of legislation. This eventually resulted in the adoption of the Education for Persons with Special Educational Needs Act, 2004 (EPSEN Act). Among the provisions of the Act were the introduction of:

- a comprehensive framework for the assessment of educational needs,
- legal entitlement to necessary services,
- the ability to require a school to take children with disabilities,
- a mechanism to address demarcation disputes,
- provision for individualised education plans (IEP), among other tangible ways to ensure that children with disabilities could access education.

There is also evidence of additional provision, albeit on a segregated basis.[23] For example, Banks highlights that in 2001 there were just 39 autism units; by 2014 that had increased to 627.[24] In response to a parliamentary question on education provision in 2018, we see that that figure had increased again to 1,456 special classes, with 1,192 of those being autism classes.[25] These are significant actions highlighting the response of the political system to an ongoing issue; this will also undoubtedly account for much of the reduction in litigation. While positive, it is important to highlight that there are ongoing problems and signs of significant slippage in provision.

[22] More recently there has been a marked increase in litigation on the right to education, however, much of that litigation relates to the cancellation of the Leaving Certificate in 2020 due to the pandemic. See Jess Casey, 'Cancelled exams see doubling of legal actions against Department of Education' *Irish Examiner* (28 July, 2021) https://www.irishexaminer.com/news/arid-40347518.html> Accessed 16 September 2022.

[23] United Nations Convention on the Rights of Persons with Disabilities vol A/RES/61/06. Ireland ratified the Convention in 2018, which enshrines a right to inclusive education. It is questionable whether this significant expansion in segregated provision is compliant with Ireland's international obligations.

[24] Joanne Banks, 'Examining the Cost of Special Education' in Umesh Sharma (ed), *Oxford Research Encyclopedia of Education* (OUP Oxford 2020) fig 3.

[25] Minister for Education and Skills, John Bruton, Dáil Deb 4 October 2018, ≤https://www.oireachtas.ie/en/debates/question/2018-10-04/90/> Accessed 5 October 2022.

Lack of Legislative Redress Mechanisms

First, large elements of the EPSEN Act remain un-commenced, so are unenforceable. The sections commenced establish the National Council for Special Education (NCSE) and some other functions; however, the substantive elements, in particular the sections addressing IEPs, assessments and appeals, have yet to be commenced. Of most concern is that the redress mechanisms are not in force, so the Act does not provide an effective means to enforce the right to education for children with disabilities.

Another potential legislative tool available to the Minister for Education is section 37A of the Education Act 1998-2018. This grants the Minister for Education and Science the power to direct a school to provide additional special educational places and to ensure that there are sufficient places provided for all children with disabilities in the State. In July 2022 the Minister for Education confirmed that the 37A process has been initiated only twice in 24 years and that those processes took between 6 and 18 months to complete.[26] In response to an ongoing crisis of provision, and the unacceptable delays associated with section 37A, the Government introduced emergency legislation, the Education (Provision in Respect of Children with Special Educational Needs) Act 2022, which seeks to strengthen the effectiveness of section 37A and requires School Boards of Management to cooperate with the NCSE with regard to provision of education for children with disabilities. Actions to make the section 37A process more timely and effective are welcome, however, the question as to why successive Ministers for Education have not used section 37A in the face of ongoing issues regarding the enrolment of children with disabilities remains unanswered.

In addition, section 29 of the Education Act 1998 allows a parent or child to challenge a decision to exclude, suspend or refuse to enrol a student in a school. However, as initially drafted, section 29 did not apply in the context of schools that are oversubscribed. The Children's Rights Alliance have noted:

> Despite the increased allocation of resources, some special schools are oversubscribed and there are hundreds of children on waiting lists for special classes in mainstream schools; in many cases, the only place that parents can find may be far outside the local school-catchment area.[27]

Therefore section 29 as originally drafted did not offer a route for parents to address a refusal to enrol in the context of oversubscribed schools, even though the data available suggest that that was the primary reason for a refusal to enrol. Section 29 was revised in late 2020 and now provides a process of appeal for failure to enrol a pupil due to oversubscription.[28] This too is to be welcomed, but it is not yet evident that this process is effective, especially given the most recent crisis in provision of educational places for children with disabilities, outlined below.

Ongoing Failure of Educational Provision

The lack of school places for children with disabilities has been widely reported. In July 2022, an estimated 160 pupils were without a school place for the upcoming academic year.[29] In

[26] Minister for Education and Skills, Norma Foley, Dáil Debates, 1 July 2022, vol 1024, col 6 <https://www.oireachtas.ie/en/debates/debate/dail/2022-07-01/3/> Accessed 5 October 2022.
[27] Children's Rights Alliance, 'Report Card 2020: Is Government Keeping Its Promises to Children?' (2020) 27.
[28] School (Admissions to Schools) Act, 2018, relevant section commenced November 2020.
[29] "Roughly 160' children without place in special schools' (*RTE News*) 19 May 2022 <https://www.rte.ie/news/2022/0519/1300031-school-places/> Accessed 16 September 2022.

addition to this immediate crisis, there have been ongoing reports over a number of years that a significant number of children with disabilities are in receipt of home tuition because they do not have an appropriate school place.[30] Most recently, it was suggested that as many as 800 children were in receipt of home tuition in lieu of an appropriate school place.[31] Non-Governmental Organisations (NGOs), such as Children's Rights Alliance,[32] Barnardo's,[33] Inclusion Ireland,[34] and AsIAm[35] have raised ongoing issues with education provision for children with disabilities. On the issue of home tuition, the Children's Rights Alliance highlighted:

> A significant number of children are being educated at home with the support of home tuition grants because a school place has not been made available meaning they are missing out on the key social development elements of being in an educational setting.[36]

It is questionable whether this form of educational provision could be considered as complying with the right to education.[37] Additionally of concern is the less obvious exclusion from education of both children with disabilities and children from other minority groups, via the use of reduced timetables, where children are provided with (often significantly) less tuition than others.[38] On the issue of reduced timetables, Inclusion Ireland commissioned research that highlighted that one in four children with an intellectual disability or developmental disability was on a reduced timetable; many were on reduced timetables for extended periods of time; many are missing certain subjects either partially or entirely; and that children with autism were more likely to experience reduced timetables.[39] Reduced timetables are akin to exclusion, even if it is partial exclusion. Based on the decision in *O'Donoghue,* it is hard to see how this form of educational provision could be considered a discharge of the State's educational duties. Moreover, it was, until recently, a hidden practice, as the Department of Education collected no data on its prevalence and all relevant information came from NGOs in the sector. In 2021, the government responded to the ongoing use of reduced timetables and introduced guidelines governing their use with the view to ensuring that this intervention is used only where absolutely necessary and that when it is used, Tusla Education Support Services are notified.[40]

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[30] Carl O'Brien, 'Children without school places: "It's heart-breaking and a national disgrace"' (*The Irish Times*) 29 October 2019 <https://www.irishtimes.com/news/education/children-without-school-places-it-s-heart-breaking-and-a-national-disgrace-1.4059028> Accessed 16 September 2022.

[31] Carl O'Brien, 'More than 800 children in receipt of home tuition due to lack of appropriate school places' (*The Irish Times*) 11 July 2022 <https://www.irishtimes.com/ireland/education/2022/07/11/more-than-800-children-in-receipt-of-home-tuition-due-to-lack-of-appropriate-school-places/> Accessed 16 September 2022.

[32] Children's Rights Alliance (n 27).

[33] Barnardo's, 'Barriers to Education Facing Vulnerable Groups' (June 2018).

[34] Deborah Brennan and Harry Browne, 'Education, Behaviour and Exclusion: The Experience and Impact of Short School Days on Children with Disabilities and Their Families in the Republic of Ireland' (Inclusion Ireland September 2019).

[35] AsIAM, 'Invisible Children: Survey on School Absence & Withdrawal in Ireland's Autism Community' (2019).

[36] Children's Rights Alliance (n 27) 27–28.

[37] See *McD v The Minister for Education and Science* IEHC 265 (2008).

[38] Kitty Holland, 'Children on reduced timetables "denied education"' (*The Irish Times*) 16 November 2018 <https://www.irishtimes.com/news/social-affairs/children-on-reduced-timetables-denied-education-1.3699181> Accessed 16 September 2022.

[39] Brennan and Browne (n 34) 2.

[40] Department of Education and Tusla Education Support Service, 'The Use of Reduced School Days Guidelines for Schools on Recording and Notification of the Use of Reduced School Days' (Department of Education September 2021).

It is evident that the Government and legislature have responded at various points in response to high profile issues in respect of education for children with disabilities, leading to some progress, albeit coupled with significant gaps. However, what is also evident is a paucity of cases on the right to education for children with disabilities. This is particularly noteworthy in light of the continuing gaps in provision, and when we consider the level of litigation on this issue in the late 1990s and the early 2000s.

TD v Minister for Education – A Chilling Effect?

While the various responses by the executive and legislature to the lack of educational provision for children with disabilities must be acknowledged, the curious lack of legal cases in the context of ongoing failure to provide adequate or sufficient educational provision does raise some questions. One of the few exceptions to the general dearth of caselaw is the High Court case *A McD v The Minister for Education,*[41] where the applicant sought a mandatory order to direct the State to provide a school place. This was an interlocutory hearing pending the full trial of the issues.[42]

The child at the centre of this case was diagnosed with a number of disabilities and had challenging behaviour. The evidence adduced at trial indicated that the applicant was expelled from school in 2012 as a result of a violent episode. At the time of the hearing, the State had not managed to find her an appropriate school place and she was instead in receipt of home tuition. At the time of the interlocutory hearing the applicant had been in receipt of home tuition for fourteen months, even though it 'was only ever meant to be a stop-gap measure.'[43] O'Malley J accepted that 'she is entitled to a school place, she does not have one',[44] that 'her social education is gravely deficient,'[45] and if she was not found a place then her 'future life will be difficult in the extreme.'[46] The court then went on to hold that, while there were clear shortcomings to her educational provision, she had not discharged the burden of proof. In particular, the court referred to the fact that the applicant did not meet the very high standard required for a mandatory interlocutory order. Citing both *Sinnott* and *TD,* O'Malley J acknowledged that in extreme cases a mandatory order may be made, however, this case was not sufficiently extreme.[47] In particular O'Malley J highlighted that there was no 'element of bad faith, no matter how it might be described. This is not a situation where the rights of A have been consciously and deliberately disregarded or flouted.'[48]

It is evident that the shadow of both *TD* and *Sinnott* loomed large in this case. Moreover, it is hard not to conclude that the right to education for this student had been significantly compromised by the delay in finding her adequate educational provision. What is striking is the very clear recognition, by the court, of the impact the lack of a school place had on the child, yet the judge felt constrained in the remedies available to her. The decision also indicates the difficulty in litigating the right to education and the inability to meet the very

[41] *AMcD v Minister for Education and Skills* IEHC 175 (2013).
[42] It is of note that in both *Cronin* (n 10); *Nagle v The South Western Area Health Board and ors* (HC 30 October 2001) mandatory orders were granted at interlocutory stage.
[43] *AMcD* (n 41) [33].
[44] ibid [34].
[45] ibid [33].
[46] ibid.
[47] ibid [34].
[48] ibid.

onerous burden of proof imposed by both *Sinnott* and *TD*, even in the face of very significant failure to provide adequate access to that right.

Conclusion

O'Donoghue v Minister for Health established that all children had a right to free primary education, one that was later deemed to continue in the case of children with disabilities until they are eighteen years of age.[49] It can be argued that *O'Donoghue* drove the provision of additional educational provision, thereby ensuring that many others gained access to the right to education. It also triggered a series of cases on behalf of children with disabilities, including the decision in *Sinnott*. That decision resulted in the commitment to legislate to give effect to the right to education – which became the EPSEN Act 2004.

However, the unfortunate reality is that the EPSEN Act remains largely un-commenced, while successive Ministers have failed to use section 37A of the Education Act 1998 to direct schools to enrol students with disabilities. Section 29 of the Education Act also failed to provide a remedy to address schools that are oversubscribed, a fact only recently rectified. The impact of these failures is demonstrated by the fact that the government had to introduce emergency legislation in 2022 to ensure that 160 students with disabilities had access to a school place. Reports indicate that hundreds of children are in receipt of home tuition due to a lack of appropriate school places, and there has been widespread and inappropriate use of reduced timetables. Those applicants that still have to fight to enforce their express constitutional right to education – a right that is time-sensitive – face a Herculean battle, as evidenced in the decision in *A McD v Minister for Education*. The inescapable conclusion appears to be that the impact of both *Sinnott* and *TD* coupled with ongoing failures in provision has been to compromise the right to education expressed in the Constitution.

[49] *Sinnott* (n 12).

SITUATING SOCIAL RIGHTS: HOUSING AND DISTRIBUTIVE JUSTICE – POST TD

Abstract: This article considers the impact of TD on housing rights in Ireland. While Ireland has signed up to multiple housing rights protections in the international human rights context, it has failed to implement them. TD ensures no constitutional intervention from the courts in this context. Despite generous Irish State funded social housing over the past century, access to shelter or housing is not treated as a rights issue.

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Introduction

The *TD*[1] case marked a watershed in Irish law in many ways, and its implications for housing and housing rights still reverbate today. What seemed a simple case of curial oversight of the provision of services for a young vulnerable person became a touchstone for Irish constitutional socio-economic rights enforcement. Since the need for such services is concentrated among those with few resources, or indeed, political power, the 'last resort' role of courts becomes all the more significant. This article begins by providing some insights into the nature of housing in Ireland, and the nature of international housing rights adopted by Ireland – albeit as a dualist State. It then considers some issues of distributive justice in the modern Irish housing context, where historically the Irish State has heavily and generously funded social housing, leading to a relatively healthy (if unaffordable) housing system, but where applied human rights have no role.

Housing

Housing, for most public commentators, is primarily about buildings. How and where we build them, how much they cost to build and maintain, how we pay for them, who can access them, and for how long, what purposes can we use them for, and, of course, what is their value? Actually there is a very clear gender perspective hidden in this approach – and it describes a very male view of housing. Womens' descriptions and views on housing are quite different. Here, we see terms like home, household, place of care and support. Lorna Fox-'O Mahony has described home as a building plus an 'x-factor,' representing the social, psychological, and cultural values that a physical structure acquires through use as a home. [2]

It is therefore, not surprising that when we translate the debate about housing into constitutional or property law that analogous conceptual divisions emerge. Can we give someone access to a building or caravan site, or not? Alternately, we might ask what physical and social supports can the State provide to support and enhance the lives of people without resources. This is not to say that male judges are blind to the second approach, just that constitutional and property law is generally framed in this way. Thus, it is not surprising that arguments about recognising constitutional rights to housing (and support services as in TD) seem to always come down to questions of buildings, land, money and the power to allocate

[1] *TD v Ireland* [2001] IESC 101.

[2] Lorna Fox-'O Mahony, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge? (2002) 29(4) Journal of Law and Society 580.

these. Some of these debates are being applied to the way courts regard property rights in Ireland, highlighting the potential for a more expansive approach.[3]

Of course, we must begin any discussion on housing by recognising that homelessness in a modern developed country like Ireland is a violation of human rights. Homeless people are the most marginalised, vulnerable and poorest people in society. In July 2022, there were some 10,568 homeless people (including 3,137 children) living in emergency accommodation, who cannot enjoy the normal rights which are the expectation of every one in Irish society.[4] Their life opportunities and those of their children are diminished. They suffer socio-economic discrimination – a principle not recognised within the panoply of the life, liberty and property rights model of the Irish constitution.

Separation of Powers

In Irish constitutional law doctrines on the separation of powers, courts can refuse to acknowledge that the legislature [government] or the executive [Minister and civil service] have any binding responsibility to safeguard or promote any rights beyond the basic eighteenth century liberal principles of life, liberty and property. In the earlier iconic housing case of *O' Reilly v Limerick Corporation,* Costello J had already spelt out the respective tripartite elements of the State.

> The powers of Government [legislature] of the State are to be exercised by the organs of State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive [Minister and civil service] power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law.[5]

This orthodox Irish constitutional position, based on the principles of Montesqieu, was echoed by Hardiman J in *TD*:

> The elaboration of the theory by Montesquieu in his *De l'Esprit des Loix* (1748) was influential with the framers of the French revolutionary constitutions and, more historically significant, of the United States Constitution. The principle is set out with unusual clarity in the Constitution of State of Virginia (1776)…[6]

However, it is worth noting that Denham J (later Chief Justice) took a more nuanced and less absolutist approach:

> In general the courts do not favour the making of mandatory orders against the executive. If a constitutional issue arises relevant to executive actions then the best practice is for the courts to make a finding and declare a right in a situation where the executive has indicated that it will abide by the

[3] See Rachael Walsh, 'Distributing Collective Burdens and Benefits: O' Reilly, TD and the Housing Crisis' (2022) 6(3) IJSJ 63; and Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: CUP 2021).

[4] Department of Housing, Local Government and Heritage Monthly Homelessness Report July 2022 (26 August 2022) <https://www.gov.ie/en/publication/7d630-homeless-report-july-2022/> Accessed 5 October 2022.

[5] [1989] ILRM 181 at 194/5.

[6] *TD* (n 1), per Hardiman J, [74]-[75].

> determination of the court. In consequence a mandatory order is unnecessary, a simple declaratory order suffices. As a matter of practice it happens regularly that counsel indicate to a court that should the decision be against the executive (be it a Minister or other body) then a mandatory order would not be necessary. This is an illustration of the two institutions (the court and the executive) exercising their powers for the ultimate benefit of the State as a whole, with the interest of the State and the people as the fundamental concern.[7]

The separation of powers doctrine has most significance in the tussle over who should authorise State expenditure on socio-economic rights derived from the Constitution. Much of this can be traced to the iconic case of *O' Reilly v Limerick Corporation,*[8] where the applicants sought damages arising from a breach of their unenumerated personal constitutional rights of bodily integrity under Article 40.3.2.[9] In *Ryan v Attorney General,* [10] Kenny J held that Article 40.3.2 enumerated a number of particular rights such as the right to bodily integrity, based on the 'Christian and democratic nature of the State'. Costello J had set the scene for the *TD* case when he pointed out in *O' Reilly v Limerick* that the judiciary have no special qualifications to deal with public expenditure levels or priorities, and concluded with the iconic phrase that:

> I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.[11]

Hardiman J in *TD* echoed this statement that responsibility for ensuring that any socio-economic rights were realized must be sought in Leinster House and not the Four Courts. He also set out very clearly that judges should not determine or approve a particular policy or make detailed orders for its execution using public money.

> Under our Constitution, all political power in the State derives from the people. By Article 6, this general power is divided into the three major powers of government, the legislative, the executive and the judicial. These powers are separate and distinct in order to prevent any one power, or the individuals who hold it, from becoming dominant. The legislative power makes laws and elects the executive government which is responsible to it. These branches of government are responsible for the formulation and implementation of policy on a vast range of issues of importance to the community as a whole. They are jointly responsible for the expenditure of public monies. Each of these two powers are directly or indirectly elected and are liable to recall and replacement by the democratic process. Their independence of the judiciary

[7] ibid, per Denham J. See also See Gerard Hogan and others, *Kelly: The Irish Constitution* (5th ed, Bloomsbury Professional 2018).
[8] [1989] ILRM 181.
[9] Gerry Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland, (*2nd ed, 2015 IPA). Article 40.3.2 of the Irish Constitution provides that: 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'
[10] [1965] IR 294.
[11] [1989] ILRM 181.

> is essential if the great democratic value of popular sovereignty is to be maintained.[12]

Of course, the *TD* case is also significant for the announcement by Keane CJ of the demise of the Irish curial powers to create enforceable unenumerated rights from Article 40.3.2 of the Constitution. The Chief Justice stated that he had the 'gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as 'socio-economic rights' to be unenumerated rights guaranteed by Article 40'. [13]

All this might sound quite academically fanciful, but it had a profound effect on the role of courts in the enforcement of even the most basic of human rights protections for needy and vulnerable groups in society. For instance, in *O'Donnell v South Dublin County Council,*[14] McMenamin J held that it was only in exceptional cases, where there was clear evidence of inhuman and degrading treatment, that a court could marshall State resources, even to protect the right to bodily integrity, and order the executive branch of the State to provide essential services.

For those who work in housing and associated areas, the decision of TD and similar constitutional cases exemplified something of a 'pass the parcel' approach to socio-economic rights. Housing advocates are dismayed that—even where there is a clear constitutional obligation to provide a service—there are three different State actors involved, and a labyrinth of rules, that can be used to avoid any enforceable obligation on any part of the State.

Housing Rights

Ireland prides itself, at international level, on its human rights record, with its promotion and ratification of international human rights. Of course, these international human rights instruments are currently non-justiciable in Irish courts,[15] (except those in the EU Charter of Fundamental Rights in the context of an EU law issue), and therefore there are no binding obligations at national level to respect or promote these rights. Ireland's dualist approach to international public law ensures that courts will not enforce these rights – in another 'pass the parcel' legal acrobatic exercise within the Irish State.

Ireland has adopted the UN *Universal Declaration on Human Rights* (1948) which refers to housing rights as part of the right to an adequate standard of living.[16] In 1989, Ireland also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966)[17], which obliges Ireland to respect, protect and fulfil these rights. Some obligations, known as 'minimum core obligations' have immediate effect (on ratifying a UN human rights instrument) guaranteeing the minimum core obligation of shelter, in an equal and non-discriminatory manner.[18] The priority in allocation of increasing resources, however,

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[12] *TD* (n 1) judgment of Hardiman J, [3].
[13] *TD* (n 1), per Keane CJ
[14] [2015] IESC 28.
[15] See *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 reiterating that under Articles 29.6 and 15.2.1. of the Constitution, UN and Council of Europe treaties are not part of Irish domestic law, and are not binding on courts.
[16] Universal Declaration of Human Rights, UNGA Resolution 2200A (XX1) UN Doc A/810. Article 25.
[17] Article 11 ICESCR (1966) UN Doc. A/6316 states: 'The States Parties [. . .] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate [. . .] housing'..
[18] UN HABITAT The Right to Adequate Housing Fact Sheet No. 21/Rev.1. <https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> Accessed 16 September

must be to address those most in need.[19] Beyond the minimum core obligations, the principle of 'progressive realization' of rights requires that the State gradually and fully implement the rights, as resources permit, with no unjustified regression. A UN Monitoring Report for Ireland suggested making ICESCR rights part of domestic law.[20]

> The Committee [UNCESCR] reiterates its recommendation that the State party [Ireland] take all appropriate measures to ensure the direct applicability of Covenant provisions, including through incorporation of the Covenant in its domestic legal order, and enhanced training for judges, lawyers and public officials.

Further relevant UN instruments ratified by Ireland as a State, which promote the right to housing, include the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979)[21], the *Convention on the Rights of the Child (CRC)*(1989),[22] the *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families (1990),*[23] the *UN Convention Relating to the Status of Refugees* (1951),[24] and the *Convention on the Rights of Persons with Disabilities (CRPD) (2006)*.[25]

Ireland has also ratified the European Social Charter (ESC) and Revised Charter (RESC) of the Council of Europe since 1964, with a range of housing rights for disabled persons, families, migrant workers, elderly persons, and those experiencing poverty and social exclusion. However, the Irish State has refused to ratify Article 31 RESC, on the right to housing, on the basis that:

> Article 31 of the Charter [on the right to housing] could not be accepted because of existing provisions in the Irish Constitution which have not changed since the ratification of the Charter… The issue of accepting Article 31 will be re-examined if and when the constitutional position changes. [26]

Modern Housing and Distributive Justice

In *O' Reilly v Limerick Corporation* Costello J had already spelt out the respective tripartite element of the State:

2022; and Padraic Kenna, 'Housing Rights after the Treaty of Lisbon - Are they Minimum Core Obligations?' 2014 3(1) Cyprus Human Rights Law Review 13.

[19] See UN Doc. E/1992/23. Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing. Para 11. states: 'States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.'

[20] UN Doc. E/C/12/IRL/CO/3 UNCESCR *Concluding Observations on the Third Periodic Report of* Ireland, 2.

[21] UN Doc. CEDAW/C/TUN/3-4 [2000].

[22] UN Doc. CRC/C/GC/10 [1989].

[23] UN Doc. A/RES/45/158.

[24] UN Doc. A/RES/429.

[25] UN Doc. A/RES/61/106.

[26] See European Committee of Social Rights (ECSR) (2021) *Fourth Report on Non-Accepted Provisions of the European Social Charter – Ireland,* 6 <https://rm.coe.int/4th-report-on-non-accepted-provisions-of-the-esc-by-ireland-2021/1680a3c1b4> Accessed 16 September 2022. The ECSR 'considers that the legislative and practical measures, including funding, taken by the Irish authorities to ensure the right to housing open the possibility for Ireland to accept Article 31 of the Charter. It therefore encourages the Irish authorities to consider accepting this provision in the near future'.

> … In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Eireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation.[27]

But this view represents something of a dated concept of the modern State. Young suggests that two legal concepts have become fundamental to questions of resource allocation in the modern state: rights and queues. Rights in modern States give rise to queues, which are the basic template for allocating State resources in modern liberal capitalist democracies. As rights are increasingly recognised in areas such as housing, so too are queues used to administer access to State provision, especially in conditions of scarcity.[28] In some ways, discussions on the right to housing default into priorities in the social housing queue, and opportunistic breaches of this queue (queue-jumping). And yet, the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the allocation of publicly-subsidized housing.

The provision and sale to tenants of over 240,000 social housing units, along with grants and other supports for home-ownership, in the first century of the State, have been described as laying the basis for a distinct Irish asset-based welfare system.[29] This State support for housing-as-property, promoting a distinct style of political society – a 'property-owning democracy,' has resulted in a situation where housing accounts for two-thirds of net worth household wealth of €830bn.[30] The financialisation of housing has utterly changed established housing models, even the established tenets of social housing.[31]

The Modern State

The role of the State has expanded enormously since the decision of Costello J and *TD*. Indeed, eligibility for 'social housing support' is comparatively generous in Ireland, with eligibility based on annual income for a single person no more than €35,000 in the main cities, €30,000 in smaller towns and €25,000 elsewhere, with slightly higher levels for households with children.[32] Indeed, more than 50% of the population, based on current income deciles, would, in principle, be eligible for social housing support, but, of course, most are already satisfactorily housed.[33] While the Local Authority Summary of Assessments of Housing Need (2020)[34] showed some 61,880 applicants were deemed eligible for social housing support, the tenure/housing occupancy of these ranged from private rented housing 28,194 (45.6%) (50% of whom were in receipt with rent supplement); living with parents 14,825 (24%); living with friends/relatives 6,431 (10.4%); living in emergency

[27] ibid 194-5.

[28] Katherine G. Young, 'Rights and Queues: On Distributive Contests in the Modern State', (2017) Boston College Law School: Legal Studies Research Paper Series, No 431.

[29] See Michelle Norris, *Property, Family and the Irish Welfare State* (Palgrave Macmillan 2016).

[30] See Faris Bader and Cormac O' Sullivan, *New High in Irish Household Wealth: What is Different this Time?* (Central Bank of Ireland 2019) <https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/a-new-high-in-irish-household-wealth-what-is-different-this-time> Accessed 16 September 2022.

[31] Mark Stephens, 'How Housing Systems are Changing and Why: A Critique of Kemeny's Theory of Housing Regimes', (2020) 37(5) Housing, Theory and Society 521; and Manuel B. Aalbers, *The Financialization of Housing* (2016 Routledge).

[32] See Guidance Notes on the Household Means Policy (March 2021. Circular 11 of 2021 relating to the Social Housing Assessment (Amendment) Regulations 2021 (S.I. 116 of 2021).

[33] CSO Survey on Income and Living Conditions (SILC) 2020, Table 2.6.

[34] See Housing Agency - The Summary of Social Housing Assessments <https://www.housingagency.ie/sites/default/files/2021-03/SSHA-2020.pdf> Accessed 16 September 2022.

accommodation 6,188 (10%); other 4,562 (7.4%) and owner-occupier at risk of losing homes 1,680 (2.7%). However, almost 40,000 had been waiting for accommodation for 2 years or more, and 16,832 have been waiting in excess of 7 years. The Irish State has committed in *Housing for All* (2021) to spend €4bn. (on average) per year in State supported housing between 2021 and 2030. [35] A Report by the Houses of the Oireachtas, Parliamentary Budget Office (PBO) in 2022 calculates that, applying normative assumptions with regards to household size and required rooms, the capital cost of meeting the housing needs of those inadequately housed would be approximately €29 billion. [36]
Compared with other European countries, Ireland has among the lowest average housing costs, and homes with the most rooms per person in the EU, with one third of home-owners owning their property outright. [37] In 2020, some 17.5% of the EU population lived in an overcrowded household ranging from less than 5% in Cyprus, Ireland, Malta and the Netherlands, to more than 30% in Slovakia, Croatia, Poland, Bulgaria, Latvia and Romania.[38] Across the EU as a whole, some 4.3% of the population suffered from severe housing deprivation in 2020 – Ireland had the fourth lowest severe deprivation rate at 1.4%, after Finland and Malta (both 1%) and Germany (1.2%). The housing cost overburden rate is the percentage of the population living in households where the total housing costs ('net' of housing allowances) represent more than 40% of disposable income ('net' of housing allowances). The housing cost overburden rate for the EU was 7.8% in 2020 and the figure for Ireland was 4.5% - among the lowest of EU Member States.

The average size of housing can be measured as the average number of rooms per person: there were on average 1.6 rooms per person in the EU in 2020. The largest number was recorded in Malta (2.3 rooms), followed by Belgium and Ireland (both 2.1 rooms).[39] Eurostat data for 2020 also showed that Ireland had almost twice the EU-27 average (9.6%) of tenants who occupied tenancies at reduced (subsidised) rents (17.2%) - third only to France at 21% and Slovenia at 19.8%. Thus, there is a very high level of State support for tenants and those in housing need in Ireland. At the same time, there is a crisis among those seeking affordable rented housing in Ireland and over 10,000 people are living in emergency housing due to homelessness, representing the complexity of Irish housing.

Conclusion

The *TD* case marked a watershed in Irish constitutional law and the end of curial development of unenumerated constitutional socio-economic rights. It also reflects the conundrum of human rights in Ireland – where the State adopts a high visibility in terms of

[35] Department of Housing, Local Government and Heritage, *Housing for All* (Government of Ireland, 2021) <https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/> Accessed 16 September 2022.
[36] Houses of the Oireachtas, Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001-2020,* 37.
<https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf> Accessed September 2022.
[37] See Eurostat, *Housing in Europe – Statistics Visualised*
<https://ec.europa.eu/eurostat/cache/digpub/housing/images/pdf/Housing-DigitalPublication-2020_en.pdf?lang=en> Accessed 16 September 2022.
[38] Eurostat, *Statistics Explained : Living conditions in Europe – housing*, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_housing#Key_findings> Accessed 16 September 2022.
[39] Eurostat, *Size of Housing*, available at <https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-1b.html?lang=en> Accessed 16 September 2022.

human rights, ratifying many instruments and securing a position on the UN Human Rights Council, but ensuring that none of these are legally enforceable at home. Paradoxically, while the Irish State has expended enormous resources in housing, creating wide levels of owner-occupation, and the largest and overall cheapest housing in the EU, this took place without granting any enforceable rights to housing. Cases raising constitutional rights to minimum shelter (or raising similar issues in care in TD) have emerged when this generous machinery of the State has failed, or political inertia or non-action, exposes people to life threatening situations – where courts are called upon to rise to the great liberal society challenge of protecting life, liberty and property. But in this great response of one element of the State, the courts, it is impossible to ignore the 'pass the parcel' analogy, which is visible to those asserting their rights. Enforceable socio-economic rights in Ireland are something of a conundrum, within an enigmatic constitutional order and a complex social-democratic, but globalised housing system.

DISTRIBUTING COLLECTIVE BURDENS AND BENEFITS: *O'REILLY, TD*, AND THE HOUSING CRISIS

Abstract: This article considers the underexplored nexus between the debates about housing rights and the TD debate, and the question of the appropriateness of judicial intervention in the social and economic arena. It contends that the property rights decisions that make responses to the housing crisis problematic are in fact inconsistent with the division of labour between courts and elected branches of government suggested in TD, and explores possible resolutions to this inconsistency.

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Introduction

Amongst economic, social, and cultural rights, housing is currently in the spotlight in Ireland. The Housing Commission is, at the time of writing, concluding a public consultation on a referendum on housing, with submissions likely to touch upon both the case for, and the appropriate content of, any right to housing that might be proposed for addition to the Constitution.[1] This follows an academic conference held by the Commission on the case for a constitutional amendment on housing in May 2022.[2] The Commission was established by the current Government in part in fulfilment of its commitment to hold a referendum on a right to housing.[3] In the legal context, housing issues have been increasingly 'constitutionalised' through an expanded interpretation of the function of Article 40.5 of the Constitution's protection for the 'inviolability of the dwelling'.[4] However, the connection between the current debate on a right to housing and the core social rights debates in Irish constitutional law centred around *O'Reilly v Minister for Justice*,[5] *TD v Minister for Education*,[6] and related Supreme Court decisions,[7] has been underexplored. Housing has been subtly (and at times perhaps subconsciously) treated in political and legal debate as somehow different to other social rights.

In reflecting on *TD's* 21st anniversary, this short article aims to reconnect the current housing rights debate with the legal debate centred around *TD* concerning the appropriateness of judicially enforceable economic and social rights within the framework for the separation of powers established by the Irish Constitution. In particular, it explores what the division of labour between the courts and the elected branches of government that was articulated so

[1] For details of the public consultation, see <https://www.gov.ie/en/press-release/daa14-housing-commission-launches-public-consultation-on-a-referendum-on-housing-in-ireland/> Accessed 5 September 2022.

[2] For details of that conference, including the papers and presentations delivered by expert speakers, see <https://www.gov.ie/en/publication/127ea-conference-on-a-referendum-on-housing-in-ireland/#papers-and-presentations> Accessed 5 September 2022).

[3] See *Programme for Government: Our Shared Future* <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> Accessed 5 September 2022, 120-121.

[4] See in particular the Supreme Court's decision in *Clare County Council v McDonagh* [2022] IESC 2 and the discussion of the development of Article 40.5 in Gerard Hogan and others, *Kelly: The Irish Constitution* (5th ed, Bloomsbury 2018), 2019-2057.

[5] [1989] ILRM 181.

[6] [2001] 4 IR 259.

[7] Various Supreme Court decisions adopt the approach taken in *O'Reilly*, perhaps most notably *Sinnott v Minister for Education* [2001] 2 IR 545. See also *S O'C v Minister for Education* [2007] IEHC 170, *O' Donnell v South Dublin County Council* [2007] IEHC 204, and *O'Donoghue v AIB Mortgage Banks* [2017] IEHC 344.

firmly in *O'Reilly* and *TD* means for the current housing crisis. Has it any implications for how we have gotten here and how we should respond?

The first part of the article highlights the relevance of *TD* and related decisions to current debates on housing rights. It then goes on to analyse the doctrinal dimensions of that relationship, showing how the property rights decisions that are most problematic in responding to the housing crisis are inconsistent with the division of labour between courts and elected branches of government that was approved in *TD*. It finally considers how that inconsistency could be addressed.

Connecting *TD* and Housing Rights

Most of the focus of constitutional scholarship on *TD* and related case-law has been on its future implications for judicial recognition of social and economic rights, and on its resistance to the issuing of mandatory orders requiring expenditure and specific policy implementation by the elected branches of government.[8] What has perhaps slipped through the net in this analysis is the fact that judicial supervision of regulatory measures that distribute collective *burdens* amongst citizens, eg by restricting the rights of some people to secure benefits for others, is equally problematic according to the vision of the separation of powers that is articulated and defended in these decisions.

As Costello J put it in *O'Reilly*, '[d]istributive justice is concerned with the distribution and allocation of common goods and common burdens.'[9] He went on to famously advocate that while the Constitution's conception of justice captures both distributive and commutative justice, distributive justice should be pursued and achieved through political channels, not through the courts.[10] This key distinction between distributive and commutative justice, and between the respective roles of the courts, the legislature, and the executive, was endorsed and reinforced in *TD*. Circumstantially, subsequent cases applying *O'Reilly* happened to concern the distribution of *benefits* and the availability of mandatory orders as a means of controlling that distribution of benefits. As such, the implications of the vision of the separation of powers that was adopted in *O'Reilly* and *TD* for the distribution of collective *burdens* was not explored.

Why is this relevant and worth considering afresh in the context of ongoing debate in Ireland about the need for a referendum on a constitutional right to housing? As noted above, at least one of the drivers for such a referendum is the concern that existing judicial precedents interpreting the Constitution's property rights provisions create barriers to effective legislative responses to the housing crisis.[11] The relevant precedents, which are explored in the next section, all turn on the Supreme Court's view that it can intervene where it determines that the distribution of collective burdens in respect of a particular social and

[8] See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd ed, 2015), 16-31; 'Judicial Capacity to Enforce Socio-Economic Rights Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 *DULJ* 203; Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Ir Jur (ns) 174.

[9] O'Reilly (n 5) 194.

[10] ibid 195.

[11] See notably the statement by the Home for Good coalition campaign group explaining its case for a referendum on housing, arguing '[i]nserting a right to housing in our Constitution will eliminate any doubt that property rights can be appropriately restricted to allow access to decent, affordable, and secure housing for all.' <https://www.homeforgood.ie/referendum/> Accessed 5 September 2022.

economic problem that has been arrived at by the legislature is unfair: landlords should not be charged with solving the problem of access to affordable housing; employers should not bear the costs of creating accessible workplaces. This case-law clashes with the distinction between distributive and commutative justice that was drawn in *O'Reilly*, which identified the distribution of *both* collective benefits and burdens as falling outside the judicial role. However, in the 'anti-redistribution' case-law, as the next section will show, that is precisely the role that the Supreme Court assumed.

The Anti-Redistributive Dimension of Irish Property Rights Protection

An underappreciated connection between *O'Reilly, TD,* and related cases on the one hand, and the current housing crisis on the other hand, concerns the position of collective burdens within the Irish constitutional framework for the allocation of powers between courts and the legislative and executive branches of government. I suggest that if the stated logic of that framework was consistently followed through in the context of constitutional property rights adjudication, a substantial plank of the case for a referendum on a right to housing would fall away. This is because *O'Reilly* in particular provides the current Supreme Court with the means of coherently overruling the outlier property rights decisions that can most plausibly be interpreted as impeding ambitious legislative reform in the housing sphere.

The Constitution's protection for property rights in Articles 40.3.2° and 43 of the Constitution is the focus of considerable attention in the context of the current housing crisis. The Government frequently cites these protections as preventing the adoption of legislative responses to various aspects of that crisis.[12] Sometimes the advice of the Attorney General is referred to in support of this position.[13] In some cases, direct reference is made to the constitutional property rights provisions to bolster the Government's position.[14] The current political support for a referendum on a right to housing appears to be at least in part motivated by a desire to reduce the constraint imposed on the legislature by the Constitution's protection for property rights. That aim also forms part of the goals of civil society groups in arguing for a constitutional right to housing.[15]

In fact, when Irish constitutional property doctrine is looked at in the round, the Irish courts have usually upheld legislation that restricts the exercise of property rights, even where compensation is not paid to an owner to off-set any losses suffered.[16] Proportionality balancing in the property rights context tends to give significant weight to the public objective being pursued by a restriction, with comparatively little attention given to the

[12] On this trend, see Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2012) 65 Irish Jurist 87, and Finn Keyes, 'Property Rights and Housing Legislation', Oireachtas Library and Research Centre Briefing Paper (19 June 2019).

[13] See Minister for Housing, Planning and Local Government Eoghan Murphy's comments in Dáil Éireann responding to the Residential Tenancies (Prevention of Family Homelessness) Bill 2018: Dáil Deb 28 March 2019, vol 981, col 2. He characterised the Bill as unconstitutional 'because it is an unjust attack on a sub-group of people for a societal problem that is far more complex than simply someone selling property'. The Bill would have prevented the sale of a property for rent with tenants in situ, which the Minister stated on the advice of the Attorney General, was unconstitutional.

[14] For example, in response to the Housing Emergency Measures in the Public Interest Bill 2018, the Urban Regeneration and Housing (Amendment) Bill 2018, the Residential Tenancies (Greater Security of Tenure and Rent Certainty) Bill 2018, the Mortgage Arrears Resolution (Family Home) Bill 2017, Media Ownership Bill 2017, Pensions (Amendment) (No. 2) Bill 2017, Anti-Evictions Bill 2016, and Central Bank (Variable Rate Mortgages) 2016.

[15] See the stated aims of Home for Good in campaigning for a referendum on housing, (n 11).

[16] Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge, CUP 2021).

impact on the adversely affected rights-holder.[17] However, there is one line of inconsistently applied case-law that supports the argument that the Constitution's protection for property rights forecloses certain responses to the housing crisis (for example, rent freezes or changes to planning laws with immediate or retrospective effect). Such decisions function as what Carol Rose aptly termed 'anti-regulatory ammunition', creating doubt around the permissible scope of regulatory control of privately owned property and thereby chilling legislative action.[18]

The first in this line of decisions is the much-discussed decision of the Supreme Court to strike down rent control legislation as unconstitutional in *Blake v Attorney General*.[19] *Blake* concerned the constitutionality of Parts II and IV of the Rent Restrictions Act 1960 as amended by the Rent Restrictions (Amendment) Act 1967 and the Landlord and Tenant (Amendment) Act 1971. These provisions applied restrictions on chargeable rent to properties of a specified rateable value, limiting the rents payable by tenants to 1966 levels.[20] In fact, many of the properties were subject to an accumulation of rent restrictions under earlier temporary schemes, with those reduced rents carried forward in 1966. As such, most rents were capped at 1946 levels, with some fixed at 1914 levels. In addition, under the statutory scheme, landlords remained liable for repairs and were heavily restricted in their ability to recover possession. The scheme was challenged as an unjust attack on constitutionally protected property rights.

In the Supreme Court, O'Higgins CJ determined that the Act interfered with the exercise of property rights. Against the backdrop of this identification of an interference with property rights, O'Higgins CJ considered whether that interference amounted to an 'unjust attack', contrary to Article 40.3.2° of the Constitution. He held that the Act permanently restricted rents in certain cases without any rational basis for the selection of controlled properties.[21] There was no compensation provision and no review mechanism. Consequently, O'Higgins CJ concluded that the rent control scheme was arbitrary and unfair and unjustly attacked the affected landlords' property rights. Crucially, in impugning the legislative scheme, he highlighted its distributive effects, saying '…the provisions of Part II of the Act of 1960 (as amended) restrict the property rights of one group of citizens for the benefit of another group.'[22]

From here emerged the germ of the idea that part of the Constitution's protective function for property rights is to shield owners from public law measures with redistributive effects that take effect through property rights restrictions. Ronan Keane frames the question posed by this understanding of constitutional property rights as: '…is the legislature unjustly forcing particular sections of the community to subsidise a desirable social object that should be the responsibility of society as a whole?'[23] The potentially restrictive consequences of such an inquiry from the perspective of legislative freedom cannot be overstated. It raises the

[17] Rachael Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 DULJ 1.
[18] Carol M. Rose, 'Rations and Takings' (2020) 2020 Wis. L. Rev. 343, 350-351.
[19] [1982] IR 117.
[20] Under the terms of the Act, properties outside the valuation limits, and all properties built after 1941, were exempt from rent control. Local authorities were exempted from the application of the Act in cases where they were landlords.
[21] [1982] IR 117, at 138.
[22] ibid, 139-140.
[23] Ronan Keane, 'Property in the Constitution and in the Courts', in Brian Farrell ed, *De Valera's Constitution and Ours* (Gill and MacMillan 1988) 137, 143-144.

possibility that all measures that burden particular groups or individuals in pursuance of some collective benefit, or to benefit another (usually more vulnerable) group in society, are unconstitutional, at least absent provision for compensation. Such provision would render such measures prohibitively costly and defeat their purpose. As Frank Michelman puts it, 'to insist on full compensation to every interest which is disproportionately burdened by a social measure dictated by efficiency would be to call a halt to the collective pursuit of efficiency.'[24]

The legislature responded to *Blake* with new rent control legislation, which was the subject of an Article 26 reference determined by the Supreme Court in *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981*.[25] The bill provided that rent for controlled properties should be either agreed or fixed by the District Court on essentially a market value basis. However, under s. 9 of the bill, provision was made for a phased transition to market rents, presumably in recognition of the potential hardship to tenants.[26] Tenants whose rents were increased would pay their old rent plus 40% of the increase in 1982, rising to 55% of the increase in 1984, 70% in 1985, reaching the full amount in 1986. As well as phasing in market rents, the bill made it easier for a landlord to recover possession of a controlled property, for example by removing the entitlement of a tenant to assign the controlled tenancy and by limiting the rights of the family of such a tenant to take over the tenancy. Despite these adjustments, the Supreme Court held that the bill was unconstitutional because it deferred payment of the 'just rent' and as such involved '…different but no less unjust deprivations' than the Act struck down in Blake.[27] It suggested that any hardship imposed on tenants would have to be remedied by the State rather than through restrictions on private rights.[28] Accordingly, the decision in *Re Article 26 and the Housing (Private Rented Dwellings) Bill* seemed to consolidate the anti-redistribution function for constitutional property rights that had emerged in *Blake*.

The last in the trio of anti-redistribution property rights decisions was another Supreme Court decision on an Article 26 reference, *Re Article 26 and the Employment Equality Bill, 1996*.[29] S. 16 of the referred bill required employers to take all reasonable steps to accommodate the needs of disabled persons, including by making provision where necessary for special treatment or facilities that would enable a disabled person to perform the duties and tasks associated with a job. S. 35 created an exemption from this obligation where, having regard to all the relevant circumstances, it would cause undue hardship to an employer. The financial circumstances of an individual employer could be considered in decisions on exemptions. The Supreme Court held that despite the public interest advanced by the bill, it was unjust to impose the costs of workplace adaptations on employers. Its reasoning echoed *Blake*, holding, '…the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group'.[30]

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[24] Frank Michelman, 'Property, Utility and Fairness Comments on the Ethical Foundations of 'Just Compensation' Law' (1967) 80 Harv L Rev 1165, 1178.
[25] [1983] IR 181.
[26] Notably, the Supreme Court in *Blake* had noted the likely hardship that would be caused to tenants as a result of its decision and urged the legislature to respond swiftly to address that hardship. It suggested that pending new legislation, applications for possession by landlords of controlled premises should be adjourned, or granted with an appropriate stay, where hardship would be caused by ejectment: *Blake* (n 19) 141-142.
[27] (n 25) 191.
[28] See O'Higgins CJ noting, '…having regard to the obligation imposed on the State by the Constitution to act in accordance with the principles of social justice, the Court recognises the presumption that any such hardship will be provided for adequately by the State': ibid, 192.
[29] [1997] 2 IR 321.
[30] ibid 367-368.

While *Blake* in particular has been explained as fundamentally a decision about irrational, arbitrary legislation,[31] a key principle underpinning these decisions is the idea that discrete groups in society should not be singled out for unusual burdens aimed at securing collective goods, like affordable housing or equality of access to places of employment. This anti-redistribution line of decisions has not been consistently applied by the courts in subsequent property rights decisions. For example, in argument in *Re Article 26 and Part V of the Planning and Development Bill 1999*, counsel appointed to argue against the constitutionality of the Bill raised the anti-redistribution precedents and argued that the Bill was unconstitutional because it required developers to bear the cost of providing social and affordable housing.[32] However, the Supreme Court did not accept that argument and upheld the constitutionality of the bill without expressly distinguishing or overruling the anti-redistribution precedents. Equally, in constitutional challenges to austerity measures, targeted burdens were objected to on constitutional property rights grounds, but were accepted by the courts to be constitutionally permissible.[33] Most recently, the Court of Appeal in *Dowling v Minister for Finance* introduced the idea of 'legitimate burden-sharing' as a justification for targeted burdens.[34] Such an idea seems squarely at odds with the anti-redistribution decisions, but any such inconsistency was not addressed in *Dowling*.

Notwithstanding this apparent lack of contemporary judicial enthusiasm towards the anti-redistribution decisions, those Supreme Court precedents have not been overruled or even formally distinguished. This means that at present, they must be accounted for in legal advice on proposed measures that interfere with property rights, which may in part explain why successive governments have adopted a narrow interpretation of the scope for restrictions on property rights allowed by the Constitution. Those decisions raise the prospect of constitutional property rights challenges being brought against any legislative measures or administrative decisions that have the effect of redistributing property from one individual or group to another individual or group otherwise than through general taxation. Such a prospect is likely to cast a significant shadow over *ex ante* legislative decisions in respect of the initiation of new measures that interfere with property rights.

Responding to the Inconsistency between *TD* and the Anti-Redistribution Decisions

There are at least two possible routes by which the doctrinal inconsistency (and deeper conceptual inconsistency) highlighted in the previous parts could be addressed. The anti-redistribution line of property rights case-law could be held to be wrong, in part for requiring judges to assume a role in respect of distributive justice that is illegitimate from a separation of powers perspective. That line of case-law could be overruled, thereby freeing up legislative space for action on housing. When collective burdens are brought back into focus, *O'Reilly*,

[31] See eg Hogan et al (n 4) 2400-2402.

[32] [2000] 2 IR 321, 338, where the report notes '[i]t was submitted that, while it was undoubtedly important and indeed essential for the executive and the legislature to do everything within their power to remedy the serious socio-economic problems resulting from the high level of house prices now prevailing, it should not be done by requiring one section of the population – owners legitimately wishing to develop their land – to bear a disproportionate share of alleviating the social ills in question.'

[33] See *J & J Haire & Co. v Minister for Finance* [2009] IEHC 562; and *Unite the Union v Minister for Finance* [2010] IEHC 354.

[34] [2018] IECA 300.

TD and related cases provide a clear basis for such overruling, on the basis that a key feature of the appropriate distribution of labour between the branches of government was missed in the prior anti-redistribution decisions.

Alternatively, the anti-redistribution case-law could be endorsed by the current Supreme Court. However, that would require the Court to explain why judicial supervision of democratically-agreed distributions of collective burdens is less problematic than judicial supervision of the distribution of collective benefits. Taking Hardiman J's statement of reasons in *Sinnott v Minister for Education* as to why courts should not adjudicate upon socio-economic rights issues as a starting point, how might such a case plausibly be made?[35]

First, the role of the courts in respect of the distribution of burdens might be deemed to be, at least on a formal basis, less offensive to separation of powers on the basis that it involves issuing a negative injunction to the legislature or executive rather than positive, mandatory injunction. The signal from the courts is to close off an area for legislative action, rather than to require specific legislative action. However, both forms of intervention impose substantive constraint on legislative freedom in respect of the distribution of resources. As the current housing crisis so starkly demonstrates, the demarcation of a legislative 'no-go' zone may be highly problematic from a policy perspective and have significant systemic impacts. Second, in terms of democratic accountability, questions of the distribution of burdens and benefits appear to raise similar concerns. In respect of expertise, it is difficult to suggest that different levels and/or types of expertise are required in deciding how to distribute collective burdens as compared to collective benefits. Both have systemic economic implications and involve multi-faceted policy analysis. Third, concerns about the ability of adversarial legal processes to resolve disputes about the distribution of collective benefits appear to apply equally to disputes about the distribution of collective burdens.

As such, the Supreme Court would face a considerable task in justifying, by reference to its existing understanding of the separation of powers, a different judicial role in respect of the distribution of collective burdens in the constitutional property rights context as compared to the distribution of collective benefits in the social rights context. Given the lack of contemporary enthusiasm shown by courts for the anti-redistribution strand of Irish constitutional property law, I suggest that the more likely impact of *O'Reilly* and *TD* would be to assist the current Supreme Court in grounding an overruling of that line of precedent.

Conclusions

All of this means that somewhat paradoxically, *O'Reilly*, *TD*, and their progeny may provide the key to unlocking solutions to a pressing socio-economic problem in Ireland. They highlight that the role assumed by the Supreme Court in the anti-redistribution decisions that most plausibly impede ambitious legislative action on housing involved, on the Court's own terms, an inappropriate assumption of power in respect of the distribution of collective burdens. If those decisions were to be clearly overruled, the path would be definitively cleared in constitutional terms for more ambitious legislative responses to the housing crisis, for example on issues like rent control and vacant site levies. Such a move would not only be consistent with *TD*, but also with the broadly progressive, pro-public interest tenor of Irish constitutional property law. The courts have generally deferred to the primary role of

[35] [2001] 2 IR 545, 710.

democratically accountable decision-makers in determining the requirements of the common good and social justice.[36] Judicial recognition of the inconsistency between the outlier property rights decisions that buck that trend on the one hand, and *TD* on the other hand, could provide a useful springboard for over-rulings that would confirm that the Constitution's protection for property rights does not bar the legislature from enacting measures with redistributive effects.

This could potentially obviate the need for a constitutional referendum on housing. At the very least, it would ensure that any debate about a proposed constitutional right to housing could focus on the standalone benefits of such a right rather than on its 'softening' effect on constitutional property rights protection. Discussion within a referendum campaign could address issues such as the protected status of the right to housing in international human rights law, the symbolic significance of recognising housing rights at a constitutional level, and the potential impact of a housing right on the public and private housing systems.[37] By overruling the anti-redistribution property rights case-law, the courts would clear the decks for a referendum campaign that would in fact be about housing, confining property rights to a more marginal role within the debate. This could allow the debate about housing in Ireland to reconnect with its social rights roots, which might in turn pave the way for broader social rights reform at a constitutional level. In this way, in a surprising twist, *TD* might in fact play a role in sparking a new phase of economic and social rights development in Ireland.

[36] Walsh (n 16) 252-253.

[37] On these issues, see Padraic Kenna, 'Situating Social Rights: Housing and Distributive Justice – Post *TD*' (2022) 6(3) IJSJ 55.

TD V MINISTER FOR EDUCATION: HARD CASE, BAD LAW

Abstract: This article considers TD v Minister for Education in contrast to the development of social rights protection in South Africa. It finds that South Africa developed powers similar to those exercised by Kelly J in TD incrementally. TD was a hard case, causing the possibility of incrementally developing social rights protection to be foreclosed upon. Had mandatory orders for other rights been litigated first, the possibility of social rights protection developing would be higher.

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Introduction

TD v Minister for Education[1] is the most important Irish rights decision of the first decade of the 21st Century, and 'the paradigm case on the entire subject' of social rights adjudication in Ireland.[2] Bizarrely, in *TD* the existence of an unenumerated social right latent within the Constitution was accepted by all parties and by the Court, with the disagreement centring on the extent of the court's powers to vindicate the rights breach.[3] The High Court had ordered the State to 'expeditiously'[4] provide specific sites for children in need to ensure the right to 'be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, his or her appropriate religious and moral, intellectual, physical and social education.'[5] In rejecting the premise that courts can issue mandatory orders in rights cases, the Supreme Court 'sounded the death knell of enforceable [social rights]' in Ireland.[6]

Even before this special edition, *TD* was perhaps the Supreme Court judgment that had attracted the most academic commentary, most of it critical of the court's reasoning.[7] A oft-cited contrast to the resistance of the Irish Supreme Court to social rights is the Constitutional Court of South Africa.[8] At the time *TD* was decided, mandatory orders

[1] *TD v Minister for Education* [2001] 4 IR 259

[2] Nial Fennelly, 'Judicial Decisions and Allocation of Resources' (2010) 23(3) Advocate 48, 50.

[3] [2001] 4 IR 259, 309. Alan DP Brady, 'The Vindication of Constitutional Welfare Rights: Beyond the Deprivation of Liberty?' (2017) 40(2) DULJ 127,137.

[4] *TD v Minister for Education* [2000] 3 IR 62, 84.

[5] *TD* (n 1) 280. In the High Court, this right was considered by Kelly J at [44] as the right '*of troubled minors who require placement of the type envisaged*' in *FN v Minister for Justice* [1995] 1 IR 409. [1999] 1 IR 29, 44.

[6] Caoimhe Stafford, 'The Case for a Judicially Enforceable Right to Housing' (2017) 16 Hibernian Law Journal 42, 49.

[7] Gerry Whyte, 'The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman' 28 (2006) DULJ 1; Rory O'Connell, 'From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 327; Whyte (n 48) 357-363; Claire-Michelle Smyth, 'Social and Economic Rights in the Irish Courts and the Potential for Constitutionalisation' in Laura Cahillane, James Gallen and Tom Hickey (eds) *Judges Politics, and the Irish Constitution* (MUP 2017) 289. For an outlier to the above, see Adrian Hardiman, 'The Role of the Supreme Court in our Democracy', in Mulholland (ed) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (McGill 2004) 32.

[8] Claire McHugh, 'Socio-Economic Rights in Ireland: Lessons to be Learned from South Africa and India' (2003) 4(1) Hibernian Law Journal 109; William Binchy, 'Emerging Trends in Irish High Court and

vindicating social rights were unknown in both Ireland and South Africa. However, over time, the South African judiciary developed the power to make positive orders of a magnitude similar to those rejected by the Supreme Court in *TD*. Through the development of an articulated jurisprudence of social rights protection, South Africa shows both that social rights *can* be protected within common law systems employing common law principles of precedent, *stare decisis*, and respect for the separation of powers.

In this article, I join the long list of publications comparing Irish and South African approaches to social rights protection.[9] Whilst the small sample size and myriad geographic, colonial, social and demographic dissimilarities between both jurisdictions militate against sweeping claims of similarities between both jurisdictions, there are important structural similarities within the judicial systems which justify making this comparison. Both Ireland and South Africa have maintained an adversarial common law system after the end of British rule; both follow the doctrine of *stare decisis*; both have express social rights contained (to varying extents) within their bills of rights, and both have strong-form judicial rights protection, with broad constitutional license to with regard to judicial remedies.[10]

Given these juridical similarities, analysing the divergent trajectories of social rights adjudication in both jurisdictions is worthwhile and informative. Unlike the Irish literature to date, I do not use the South African jurisprudence to critique the reasoning in *TD*. Rather, I argue that the development of social rights protection in South Africa suggests that, even in systems with express recognition of social rights and constitutional license to issue mandatory orders, a judicial culture of protecting social rights through positive orders develops incrementally over time.[11]

It took two decades from the passage of the Constitution of South Africa, and over a decade from the first successful social rights decision,[12] before the South African courts made orders comparable in scope to that proposed in *TD*. That is, orders which prescribed the content of an immediately realisable social right and mandated specific state action to cure their breach.[13] During the intervening period, case by case, the Court developed a jurisprudence on both mandatory orders and social rights protection which

Supreme Court Jurisprudence' (2005) 12(1) Irish Journal of European Law 331; Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28(1) DULJ 1; Aoife Nolan, 'Litigating Housing Rights: Experiences and Issues' (2006) 28(1) DULJ 145; Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 DULJ 203; Sandra Liebenberg, 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 DULJ 137; Stafford (n 4).

[9] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014); and Ran Hirschl 'From Comparative; Constitutional Law to Comparative Constitutional Studies' (2013) 11 International Journal of Constitutional Law 1.

[10] Both legal systems also share a trend whereby the bench is composed largely, but not wholly, of members of the bar, a proportionately small pool of candidates which – whether by demography, by class, or both – is unrepresentative of the wider society.

[11] Jeff King, *Judging Social Rights* (2012 CUP) 121-151; Jeff King, 'Institutional Approaches to Legal Restraint' (2008) 28(3) OJLS 409.

[12] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19

[13] *Governing Body of the Juma Musjid Primary School v MEC for Education, KwaZulu-Natal* [2011] ZACC 13; Kate Paterson, 'Constitutional Adjudication on the Right to Basic Education: Are we asking the State to do the Impossible?' (2018) 34 SAJHR 112.

enabled the eventual emergence of strong mandatory protection of social rights, akin to the order sort sought by Kelly J in *TD*.

It is trite that hard cases make bad law. I consider *TD* a hard case. The claim was for a novel constitutional remedy, never before ordered by the Supreme Court, to vindicate an ill-defined, unenumerated, social right imposing immediate obligations on the state. Furthermore, the case arose during a period of judicial retrenchment away from unenumerated rights reasoning.[14] Far from finding in the South African case law an alternative approach the Court could have adopted in this case, from studying South African's social rights jurisprudence, I find that the litigating of *TD* itself may unwittingly have interrupted the slow, incremental development of judicial confidence in social rights protection and mandatory orders that otherwise could have developed, had the Court first been confronted with 'easier' cases to expand its rights-protection powers .

This article proceeds in two parts. First, I show how the South African courts took considerable time to bed-in their innovations in rights protection before successfully making orders comparable to that of Kelly J in *TD*. Then, I reflect on *TD* in light of South Africa's jurisprudence. I consider how, had other cases, involving less controversial rights claims reached the court prior to (or instead of) of *TD*, the development of judicial power necessary to vindicate social rights, including those of children such as *TD*, might have come about.[15]

The Development of South Africa's Immediately Realisable Social Rights Jurisprudence

The Constitution of South Africa expressly empowers the judiciary to 'make any order that is just and equitable' when a law is found inconsistent with the Constitution.[16] By this, the Courts are given considerable latitude to the courts to be as conservative or active as they see fit. The Constitution also contains, alongside an expansive bill of civil rights, equally justiciable social rights; which are divisible into three distinct groups: 'access rights', 'express negative rights,' and 'immediately realisable rights.'[17] Access rights, such as the right to adequate housing,[18] healthcare,[19] food and water,[20] social security,[21]

[14] Per Ó Cinnéide, the 1990s and 2000s saw 'the gradual and cautious retrenchment of the Irish constitutional jurisprudence since theactivism of the Ó Dálaigh Court and a concern to avoid judicial overstretch and excessive annexation of state power.' Colm Ó Cinnéide, 'Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?' in Dawn Oliver and Jörg Fedtke (eds) *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 213. 236.

[15] To be clear, the intention of this article is not to critique the parties who brought this claim on behalf of TD in the hope of vindicating their rights. Indeed, in *DB v Minister for Justice* [1999] 1 IR 29, Kelly J had made an almost-identical order, which was never appealed and, as Kelly J observed in *TD*, 'all of the evidence I have is that, to date, the injunction is complied with to the letter [and] until the hearing with which this judgment is concerned, there was full cooperation on the part of the Minister.' [2000] 3 IR 62, 70. Instead, this article observes regretfully that their reliefs sought in TD were more advanced and expansive than that which the Irish Judiciary was willing to order; and this article considers how a greater willingness within the Court to such cases could be fostered.

[16] Constitution of the Republic of South Africa 1996, S172(1).

[17] Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (OUP 2014) 668.

[18] Constitution of the Republic of South Africa 1996, s.26(1).

[19] ibid s.27(1)(a).

[20] ibid s.27(1)(b).

[21] ibid s.27(1)(c).

and further education,[22] oblige the state to take 'reasonable legislative and other measures within its available resources' to achieve their progressive realisation. 'Express negative rights' prohibit certain conduct such as arbitrary evictions,[23] or the refusal of emergency medical treatment;[24] rights which are not subject to any qualifications and which are enforceable by imposing exclusively negative duties on the state.

The 'immediately realisable' rights to basic education,[25] and a child's right to nutrition and shelter,[26] are not subject to progressive realisation, and thus *prima facie* impose immediate obligations upon the State. With their absence of internal limitations, it is these immediately enforceable obligations which appear most akin to the orders made by the High Court in *TD*, and consequently, it is the development of the Court's immediately realisable rights jurisprudence which is most relevant to this article.[27]

The Constitutional Court initially avoided making mandatory orders or structural interdicts for social rights breaches.[28] The first social rights claim before the Constitutional Court failed;[29] and in the second – *Government of the Republic of South Africa v Grootboom* – the Court reversed the High Court finding that the immediately realisable rights of children to shelter was breached,[30] and instead decided the case under the more textually constrained right of *access* to adequate housing. Finding a breach of this access right, the Court did not mandate the government to provide housing. Rather, on the expectation of swift action to cure the rights breach, the Court issued a declaratory order, affirming that the Constitution had been breached, but not ordering the State to devise, fund, implement and supervise measures to provide relief to the applicants. This proved ineffective, and Grootboom ultimately died without adequate housing.[31]

Instead of social rights, the Court innovated the power to issue mandatory orders in rights cases in *August v Electoral Commission*, a case in which the Court held that denying prisoners the right to vote was unconstitutional.[32] Sachs J noted that:

> The right to vote by its very nature imposes positive obligations upon the

[22] ibid s.29(1)(b).
[23] ibid s.26(3).
[24] ibid s.27(3).
[25] ibid s.29(1)(a).
[26] ibid s.28.
[27] Whilst Kelly J's order specified that 'if the Court were to take the view that all reasonable efforts had been made to deal efficiently and effectively with the problem and that the Minister's response was proportionate to the rights which fell to be protected, then normally no order of the type sought ought to be made,' the right remained an entitlement to '*expeditiously*' provided facilities, requiring immediate state action. [1999] 1 IR 29, 43.
[28] A structural interdict is a form of positive order whereby: 'First, the Court declares the respects in which government conduct falls short of its constitutional obligations; second, the court orders the government to comply with theobligations; third, the court orders the government to produce (usually under oath) a report within a specified period of time setting out steps it has taken, what future steps will be taken; four, the applicant is afforded an opportunity to respond to the report; finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of the court. A failure to comply with obligations as set out in the courtorder will then amount to contempt of court.' Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn, Juta 2005) 217.
[29] *Soobramoney v Minister of Health* [1997] ZACC 17.
[30] *Grootboom* (n 11) The population of the respondent group were 510 children and 390 adults.
[31] As Kriegler J remarked: *'Grootboom* was terribly important for lawyers, but not for people. Mrs Grootboom never got a house'. Doron Isaacs, 'Realising the Right to Education in South Africa: Lessons from the United States of America' (2010) 26 *SAJHR* 356,360.
[32] *August v Electoral Commission* [1999] ZACC 3.

> legislature and the executive. A date for elections has to bepromulgated, the secrecy of the ballot secured and the machinery established for managing the process.[33]

Given state action is necessary to provide voting facilities,the Court ordered the Electoral Commission to rectify their absence by providing polling stations in prisons, and by requiring the Commission to present to the Court an affidavit setting out exactly how they would comply with the order within two weeks of judgment. By this, the Court arrogated to itself for the first time a sweeping competence to positively mandate rights protection, through deciding a case involving the paradigmatic civil-political right: the right to vote.[34]

It was not until 2002 that the Constitutional Court would issue a mandatory order in a social rights case. In *Minister for Health v Treatment Action Campaign (No 2)*, the Constitutional Court had to assess the constitutionality of a policy that refused to make widely available nevirapine, an antiretroviral drug preventing mother-to-child transmission of HIV-AIDS.[35] The manufacturers offered to make the drug available free of charge for five years, negating scarcity issues often arising with social rights claims.[36] Given this, the Constitutional Court concluded that the restriction of nevirapine was unreasonable, and that as a result the State had failed to fulfil its constitutional obligation to guarantee the right to access healthcare.[37]

Directly citing *August*,[38] the Court affirmed that 'where a breach of any right has taken place, including a socioeconomic right, a court is under a duty to ensure that effective relief is granted [and] where necessary this may include both the issuing of a mandamus order and the exercise of supervisory jurisdiction.'[39] The Court ordered the State without delay to 'take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.'[40] This was not merely a declaration, but a *mandamus* order, requiring positive action to prevent further breach.[41]

In terms of impact, *TAC* is perhaps the most significant social rights decision ever made by a national court. As Cameron and Taylor note, after *TAC*, 'South Africa's [HIV/AIDS] programme became the largest publicly provided AIDS treatment programme in the world. Hundreds and thousands, perhaps millions, of lives have been

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[33] ibid [16].

[34] Jeremy Waldron, one of the most significant critics of contemporary judicial rights protection, deemed the right to vote 'the right of rights'; Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 251. As polling stations were subsequently provided and the breach cured, a further mandamus order making the affidavit binding was not necessary. See however *DPP v Sibiya* [2005] ZACC 6.

[35] *Minister for Education v Treatment Action Campaign (No 2)* [2002] ZACC 15. [hereinafter '*TAC*']

[36] ibid [19].

[37] ibid [81].

[38] ibid [99].

[39] ibid [106] (emphasis added).

[40] ibid [135].

[41] Per Swart, 'A positive feature of the decision is that the Constitutional Court rejected the argument that, in the field of socio-economic rights, theonly competent order a court can make is to issue a declaration of rights.' Mia Swart, 'Left out in the Cold – Crafting Constitutional Remedies for the Poorest of the Poor' 21 (2005) *SAJHR* 215, 222

saved.'[42] As the issuing of mandatory orders, and the adjudication of social rights had already occurred in cases preceding such a high-profile case, the decision was consistent with an existing chain of precedent that was developed in less politically-contentious conditions. This insulated *TAC* from allegations of illegitimacy like those which, on appeal, greeted the decision of Kelly J innovating a mandatory order and applying it to an unenumerated social right in *TD*.[43]

After *TAC*, the Constitutional Court continued to expand protections for social access rights, particularly relating to the right to access adequate housing.[44] However, only after 2011, over fifteen years after the constitutional dispensation, did the Court begin engaging substantively with immediately-realisable social rights. This development arose in the context of the right to basic education which, prior to this point, had barely been considered by the Court.[45]

In the *Juma Musjid Primary School* case, the 'watershed moment'[46] for immediately realisable rights, the eviction of a public school by a private landowner was found to be taken without due process, breaching the school's pupils right to a basic education.[47] Nkabine J held: 'unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'.[48]

Whilst with access rights, the Court had assiduously avoided defining what was the essential core of such rights, the Court here asserted that 'basic education also provides a foundation for a child's lifetime learning and work opportunities [and] to this end, access to school – an important component of the right to a basic education guaranteed to everyone by s.29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.'[49]

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[42] Edwin Cameron and Max Taylor, 'The Untapped Potential of the Mandela Constitution' (2017) Public Law 382, 395.

[43] This is not to suggest that the decision did not receive any political backlash. Indeed, two weeks before the first hearing in the Constitutional Court the ANC reversed course and announced a universal roll-out of nevirapine. Thereafter, 'the handing down of a principled decision in favour of the TAC was President Mbeki's best hope of political salvation. Completely isolated, both domestically and internationally, Mbeki's only chance of saving face lay in the issuing of a court order that would force him to do what he was in any case politically compelled to do.' Nevertheless, the fact that the order stood, and was complied with, reflects a greater acceptability within South Africa to making this order than existed in Ireland when *TD* was decided. Theunis Roux, *The Politics of Principle: The First South African Constitutional Court 1995 – 2005* (CUP 2013) 299.

[44] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; *President of the Republic of South Africa v Modderklip Boerdery* [2005] ZACC 5; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33; however note also *Residents of Joe Slovo Community v Thubelisha Homes* [2009] ZACC 16.

[45] As Brickhill and van Leeve noted in 2018, 'after a period of relative quiet in relation toeducation rights litigation in 1994, the last decade has seen S29 of theConstitution spring to life.' Jason Brickhill and Janet van Leeve, 'From the Classroom to the Courtroom: Litigating Education Rights in South Africa' in Sandra Fredman, Meghan Campbell, and Helen Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the Right to Educationfor Minorities and Disadvantaged Groups* (Policy Press 2018) 143, 165.

[46] Faranaaz Veriava and Ann Skelton, 'The Right to Basic Education: A Comparative Study of the United States, India and Brazil' 35 (2019) *SAJHR* 1, 2.

[47] *Governing Body of the Juma Musjid Primary School v MEC for Education, KwaZulu-Natal* [2011] ZACC 13. [hereinafter '*Juma Musjid*']

[48] [2011] ZACC 13 [37].

[49] ibid [43].

In *Juma Musjid*, a unanimous Constitutional Court defined the content, function, and value of the right to basic education *and* identified a conditional aspect of this right: access to school. The Court ordered the property owner to engage meaningfully with the Department to secure the maintenance of the school or, failing that, to secure alternative placement for learners. Only upon relocation of the learners, was the eviction approved.

Thereafter, citing Nkabinde J in *Juma Musjid*, the High Court and Supreme Court of Appeal have further elaborated upon what is immediately due to children under the right to basic education. Alongside immediate access to school, the right has been found to guarantee adequate school furniture,[50] teachers,[51] transport,[52] adequate toilets,[53] textbooks,[54] and school meals.[55] The right extends to all learners, including non-nationals and undocumented children.[56] Indeed, citing the Irish Supreme Court in *O'Donoghue v Minister for Health*,[57] the right to basic education imposes discrete immediate obligations upon the state for learners with special educational needs.[58]

The South African judiciary have issued a range of remedies to vindicate the right to basic education, including, *inter alia*, structural interdicts requiring court supervision,[59] appointment of independent bodies to verify needs and administer claims,[60] and *mandamus* orders.[61] Whilst compliance has not always been immediate,[62] these orders have had a largely positive impact in correcting breaches of the right to education.[63] Indicating this, the Supreme Court of Appeal observed how, 'it is undisputed that the delivery of textbooks only started taking place after the grant of an order by […] the High Court.'[64] This represents the hardest edge of South African social rights protection; and this case-law began to emerge over a decade after the first social rights cases were adjudicated. In this time, the viability of social rights adjudication bedded-in within the South African judiciary, making the development of more expansive protections for social rights feasible.

Whilst judicial rights review is frequently discussed in terms of the counter-majoritarian difficulty, rights review relies on state compliance with court orders. Prior to issuing an order, to feel confident the order will be effective, the Court must anticipate some threshold amount of State acquiescence, if not support, for their orders. With positive orders, this anticipation must be heightened, as to expect compliance the court must

[50] *Madzodzo v Minister of Basic Education* [2014] ZAECMHC 5.
[51] *Linkside v Minister of Basic Education* [2014] ZAECGHC 111.
[52] *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).
[53] *Komape v Minister of Basic Education* [2018] ZALMPPHC 18.
[54] *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP).
[55] *Equal Education v Minister for Basic Education* [2020] ZAGPPHC 306.
[56] *The School Governing Body of Phakamisa High School v Minister of Basic Education* [2019] ZAECGHC 126.
[57] *O'Donoghue v Minister for Health* [1996] 2 IR 20.
[58] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*[2010] ZAWCHC 544.
[59] [2014] ZAECMHC 5; 2013 (2) SA 40 (GNP); [2010] ZAWCHC 544.
[60] [2014] ZAECMHC 5; [2014] ZAECGHC 111.
[61] 2015 (5) SA 107 (ECG).
[62] In *Linkside,* following repeated failure to pay teachers, the Court declared teacher's salaries debts in terms of the State Liability Act, meaning, 'attorneys could immediately take steps to attach state property and have it sold at sales in execution to realise money owed. For example, steps were taken to attach the motor vehicle of the Minister of Basic Education and the debts for teachers' salaries was immediately paid.' Cameron McConnachie and Samantha Brener 'Litigating the Right to Basic Education' in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018) 281, 299.
[63] Brickhill and Van Leeve (n 46) 165.
[64] [2015] ZASCA 198 [13].

expect the state will positively change its expenditure plans from those previously planned due to the court order. Where the risks of state refusal to comply with an order are lessened by making an order regarding a particularly uncontroversial right, such as the right to vote, and by developing a custom over time of state compliance with such orders, the probability of sufficient state compliance necessary to make orders effective means of rights protection increases.[65]

By the time the South African judiciary began developing their jurisprudence on immediately realisable social rights in the wake of *Juma Musjid,* they had already significantly expanded their competence, in both social rights adjudication and in regards issuing remedies. The threshold issue of determining how to broadly social rights disputes had been overcome, and the question of whether mandatory orders could be made was settled. Under these conditions, with greater experience and comfort with social rights protection, the Courts developed their powers to include granting orders of a breadth comparable to that ordered by Kelly J in *TD*. In this way, time and incremental development of the jurisprudence appears to have played a strong conditioning role in judicial protection of social rights developing in South Africa.

TD v Minister for Education as a Hard Case making Bad Law

If the emergence of strong judicial protection for immediately realisable social rights developed in South Africa incrementally, what does this tell us about Ireland's experience with social rights adjudication? I think it tells us that, just as hard cases can make bad laws; so too 'easy' cases – for instance, cases where the rights claim is particularly uncontroversial, such as the right to vote – can allow the court's rights jurisprudence to develop into novel, otherwise inaccessible areas.

Resistance to issuing mandatory orders predates *TD*,[66] however, evidence of greater willingness to issue mandatory orders in 'easier' cases is also apparent in Ireland. Contrast Hardiman J's resistance in *TD* to issuing mandatory orders, where he deems them 'an absolute final resort in circumstances of great crisis and for the protection of the constitutional order itself'[67] – with his attitude a year later to mandating the state protect the right of equal access to the courts for Gaeilgeoirí in *Ó Beoláin v Fahy*:

> the State itself must comply with its obligations, particularly those enshrined in the Constitution and can no more be heard to complain that such compliance is irksome and onerous than can the individual citizen […] if this does not occur, it may be that some applicant will eventually be driven to seek mandatory relief in this regard.'[68]

[65] See Conrado Hubner Mendes, 'Fighting for Their Place: Constitutional Courts as Political Actors: A Reply to Heinz Klug' (2010) 3 Constitutional Court Review 33, 41.
[66] Indeed, during the height of the Irish judiciary's interest in rights-protection in the unenumerated rights period, the rights discovered all led to negative remedies. Even the right to legal aid, found in *The State (Healy) v Donoghue* [1976] IR 325 has only led to a remedy of prohibition, rather than the issuance of a mandatory order against the State to fund legal aid.
[67] *TD* (n 1) 372.
[68] *Ó Beoláin v Fahy* [2001] 2 IR 279, 353.

In *Sinnott v Minister for Education*, Hardiman J posited the relevant distinction between the social right to provide for free primary education, and the obligation to translate statutes into both languages was:

> No question of policy is involved in complying with [the latter] requirement: the only policy decision that arises has already been taken and expressed in a constitutional provision. The expense of complying with this provision is, certainly considered as a percentage of the education budget, tiny.[69]

This further suggests that, rather than a comprehensive aversion to imposing mandatory orders in rights cases, Hardiman J's stance on making *mandamus* orders was both right-specific and cost-specific.[70] Assuming Hardiman J did not believe the – ongoing – failure to translate legislation into Irish constitutes a crisis of such magnitude that orders of compulsion are necessary 'as an absolute last resort […] for the protection of the constitution itself,' his judgment in *Ó Beoláin* suggests a greater disposition to protecting this right compared to the right claimed in *TD*.[71]

Indeed, in *Doherty v Government of Ireland*, the High Court was confronted with its own voting rights case, arising from the longest delay in calling a by-election in the history of the State.[72] Kearns J observed how, 'a citizen's constitutional rights are trenched upon and significantly diluted when no effect is given to rights for representation clearly delineated in the Constitution. These are rights which might usefully be characterised as forming part ofthe "constitutional contract" between the citizen and the State.[73] While the Court ultimately only made a declaration that the delay was unconstitutional, Kearns P held:

> The court might in another case following on from this one feel constrained to take a more serious view if any government, and not justnecessarily the present one, was seen by the courts to be acting in clear disregard of an applicant's constitutional rights in continually refusing over an unreasonable period of time to move the writ for a by-election.[…] *This is not yet such a case but in my opinion it is not far short of it.*[74]

These comments again demonstrate a marked willingness to issue mandatory orders to cure breaches of these rights compared to the social rights raised in *TD* and *Sinnott*. This leads me to suspect that, had a case on the facts of *Doherty* or *Ó Beaoláin* reached the

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[69] *Sinnott v Minister for Education* [2001] IR 545, 695.

[70] Indeed, far from being averse to making decision affecting policy or resources, four years later, Hardiman J as well as the entire court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7 would order the State to pay up to €484 million, 'more than the annual current budget of the Department of Justice' in order to protect private property rights. Ruadhán MacCormaic *The Supreme Court* (Penguin 2016) 259.

[71] In *Ó Maicín v Ireland* [2014] 4 IR 583, again concerning Irish language rights, Clarke J at [4.3.3] suggested, 'I would […] leave to a case in which the issue specifically arose, the question of whether a conflict between Irish language rights, on theone hand, and the State's allocation of scarce national resources, on theother, ought to be judged by a standard of reasonableness, practicability, or […] one of feasibility.' This suggests again a Court willing to assess the issuing of a mandamus order in this area by standards such as reasonableness, practicability or feasibility, considerably lower bars to overcome than the crisis requirements suggested by the majority in *TD*.

[72] *Doherty v Government of Ireland* [2010] IEHC 369.

[73] [2010] IEHC 369 [45]; David Prendergast, 'By-Elections and the Filling of Dáil Vacancies within a Reasonable Time' (2011) 34 DULJ 242, 249.

[74] ibid [75] (emphasis added).

courts prior to a case like *TD*, there would be a greater likelihood that the judiciary would have extended their remedial powers to include making mandatory orders to vindicate rights. Keeping in mind the South African jurisprudence, if the threshold question of whether courts could issue mandatory orders in rights cases was overcome first with reference to a civil right, this may allow the courts' remedial jurisprudence to incrementally develop, ultimately even to the point where such orders could be made on foot of social rights claims. Had, for instance, a case thereafter arisen which was similar on its facts to *O'Donoghue v Minister for Health* – wherein the educational needs of a person under 18 were not being provided for by the State – with both precedent that this was a breach of their education rights,[75] *and* precedent for mandating action to cure rights breaches, the juridical leap required for a court to vindicate the right by mandating state provision would have been so much smaller than was the case in *TD*.

Conclusion

TD concerned an unenumerated social right requiring considerable immediate financial investment by the State. In this, it was not an easy or intuitive case in which to innovate the power to issue mandatory orders to cure rights breaches. Had the Supreme Court, prior to *TD*, already engaged with a case concerning, say, legal documentation in the Irish language, an issue with marginal resource implications and which the Court appear more inclined to issue a mandatory order, the likelihood of developing a power to issue mandatory orders might have been stronger.

This observation holds, even accepting the breadth the Constitution gives the judiciary in rights cases.[76] For judicial protection of social rights to develop, the judiciary must understand that they are able to make orders that cure breaches of these rights. Given social rights often require state action to guarantee their realisation, often mandatory orders will be necessary for their protection. Thus, the judiciary must internalise an understanding that they can issue mandatory orders as a *precondition* to judicial protection of social rights. The development of South Africa's social rights jurisprudence illustrates this.

TD, as a hard case, requiring a significant leap in both the Court's rights and remedial jurisprudence, was too radical a shift for a majority of the bench of the time. In rejecting *TD*, the Court rejected mandatory orders and social rights adjudication more broadly. In this, *TD* unintentionally was a regressive decision for the development of social rights, not just in how it was decided by the Supreme Court; but also perversely, in that came before the Court before there was the necessary judicial buy-in for making mandatory orders to cure rights breaches.

[75] *O'Donoghue v Minister for Health* [1996] 2 IR 20.

[76] As noted in *Kelly*, 'neither the Constitution itself nor any other law prescribes a particular procedure as appropriate for remedying a breach of constitutional rights.' Gerard Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 1532. Indeed, the Court have found the power to issue remedies for heretofore undiscovered rights [*Ryan v Attorney General* [1965] IR 294], to impose rights obligations horizontally onto private actors [*Meskell v CIÉ* [1973] IR 121], and to suspend the application of declarations of unconstitutionality in certain circumstances. [*NHV v Minister for Justice* [2017] IESC 82] The restraint on the judiciary from issuing positive orders to cure rights breaches does not stem then from a general remedial modesty on the part of the Court.

At first, this is an unpleasant conclusion to reach for those, like myself, who support the development of social rights adjudication and who believe the Minister, instead of challenging the High Court decision, should have simply funded the provision of secure accommodation.[77] My conclusion concedes that rights bearers will be deprived of protection for their social rights until a threshold internalisation is made by the judiciary that mandatory orders *can* be made to vindicate social rights. However, there is cause for careful optimism. Over the last ten years, there has been an incremental resurgence in judicial curiosity in constitutional rights protection,[78] an increased willingness to reconsider the boundaries of the separation of powers in rights cases,[79] as well as greater remedial innovation.[80]

Admittedly, even with these developments, the Court has continued to avoid issuing mandatory orders to cure breaches of constitutional rights – whether of civil or social rights – guaranteed under the Constitution.[81] However, this reopening of judicial debate on the limits of the Court's rights protecting role is in and of itself encouraging, in that it permits of the possibility that the Court may further develop its remedial powers in the future, hopefully eventually reaching the threshold point at which they accept the propriety of making an order mandating positive action to cure a rights breach.

Considering the South African case study, assuming such an order is complied with, hopefully this would permit for the expansion over time of the use of mandatory orders to ensure the protection of social rights. Thus, whilst my conclusions on the effects of the *TD* litigation are on the one hand discouraging, there are nevertheless reasons to be cautiously hopeful that, in the current wave of rights engagement, the conditions could emerge whereby the Court *incrementally*, over time develop their remedial powers to a point that whereby, when other children in need are subject to continuing breach of their constitutional rights through State inaction, the Court will mandate their protection.

[77] Given this resistance to paying for secure facilities for children like *TD*, it is parenthetically worth noting that the Respondent, Michael Woods, would one year later, exercise his ministerial discretion to enter an indemnity arrangement with 18 holy orders against whom redress was sought over institutional clerical abuse of children. The State is estimated to have paid €1.8 billion in compensation to victims as a result of this agreement: a considerable sum, and significantly higher than the highest estimations of the financial resources required to comply with the order in *TD*. Steven Carroll, 'Woods defends his deal with church on redress for abuse' *The Irish Times* (8 January 2011).

[78] *AM v Refugee Appeals Tribunal* [2014] IEHC 373; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81; *NHV v Minister for Justice* [2017] IESC 35; *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49; See also Gerard Hogan, 'Harkening to the Tristan Chords' (2017) 40 DULJ 71; and Conor O'Mahony, 'Unenumerated Rights: Possible Future Directions after *NHV*' (2017) 40(2) DULJ 171.

[79] *Burke v Minister for Education* [2022] IESC 1

[80] *BG v Judge Murphy* [2011] IEHC 445; *Personal Digital Telephony v Minister for Public Enterprise* [2017] IESC 17; *PC v Minister for Social Protection* [2017] IESC 63; *AB v Director of Saint Loman's Hospital* [2018] IECA 123; David Kenny, 'Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads' (2017) 40(2) DULJ 85.

[81] See Brady (n 3).

JUDICIAL ENFORCEMENT OF SOCIAL RIGHTS IN A COMPARATIVE PERSPECTIVE

Abstract: This paper discusses the TD case, and its core holding about the justiciability of social rights, in comparative perspective. Canvassing the practice of courts in the US, Canada, Australia, New Zealand and South Africa, and the UK Supreme Court and the courts of Northern Ireland, it concludes that, despite the controversy surrounding the TD case's outcome, it is very much in line with Ireland's close comparator jurisdictions.

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The aim of this short contribution to the discussion of the justiciability of social rights 21 years after the Irish Supreme Court's decision in the *TD* case[1] is to put that decision into comparative perspective, with particular reference to other common law jurisdictions, including Northern Ireland.

The *ratio decidendi* of the *TD* case

When discussing the *TD* case, it is important to distinguish between its *ratio decidendi* and its *obiter dicta*. The reason for rejecting the appellants' appeal was that it was not an appropriate case in which to issue a mandatory injunction requiring the government to take certain measures. The inappropriateness lay in the fact that such an order would have involved telling the government how the resources available to it should best be allocated. The decision was therefore focused on what remedy, if any, was available to the disadvantaged children who had brought the appeal. The court did not say that it would never be appropriate to issue a mandatory injunction against the government.

All of the remarks in the judgments about whether Irish courts should ever protect socio-economic rights which are not already explicitly guaranteed by the Constitution were, strictly speaking, *obiter dicta*. They were not essential to the decision refusing a mandatory injunction. Needless to say the dicta should be given considerable weight, not least because they were lengthy and in at least one of the judgments there was an intimation that the injunction needed to be refused precisely because the case involved a socio-economic right.[2] In fact, the government was not arguing that Kelly J, in the High Court, had been wrong to hold that children in need of secure accommodation had a constitutional right to that effect. Denham J, in her dissenting judgment, relied specifically on the finding in this case that a breach of a constitutional right had been identified, whereas in *O'Reilly v Limerick Corporation*, which Hardiman J cited in support of his refusal of an injunction in *TD*, no such breach had been found. Denham J also distinguished *Sinnott v Minister for Education* on the basis that in the latter case no decision needed to be made on whether or not a mandatory injunction should be issued.[3]

Still, whatever the *ratio* of the *TD* decision, it remains clear that the *obiter dicta* of the majority still reflect the current legal position in Ireland, namely, that there is a great reluctance on the part of the courts to recognise the existence of socio-economic rights as constitutional rights

[1] *TD v Minister for Education* [2001] 4 IR 259.
[2] See ibid, per Murray J.
[3] [2001] 2 IR 545.

and to provide effective remedies for breaches of those rights even when they are recognised. In that regard, however, the Irish Supreme Court is not so different from other apex courts throughout the common law world.

Socio-economic constitutional rights in common law systems

The US Supreme Court has never been to the fore in guaranteeing socio-economic rights, mostly because they do not appear in the country's Bill of Rights (the first 10 amendments to the 1787 Constitution), although it has still managed to construct a body of jurisprudence protecting the rights to privacy, autonomy and dignity. The make-up of the current US Supreme Court is such that it is extremely unlikely to alter that stance in the near future. The overruling of the 1973 decision in *Roe v Wade* by *Dobbs v Jackson Women's Health Organization* in June 2022 is an example of the prevailing conservatism now evident in the Court.[4] A few days later, in *West Virginia v Environmental Protection Agency*, the Court held that the Agency was incorrect to think that it had a power under the Clean Air Act to devise a Clean Power Plan limiting carbon dioxide emissions from existing coal- and natural-gas-fired power plants.[5] The US Supreme Court also upholds the 'political question doctrine', whereby issues that are deemed to be the exclusive preserve of the executive should not be adjudicated upon.[6]

The Canadian Supreme Court, too, has been restrained in its development of socio-economic rights, largely because the Charter of Rights and Freedoms in 1982 is almost silent on that category of rights, referring only to the right to equality and language rights. According to leading commentators, while the Supreme Court:

> has resisted efforts to circumscribe the positive scope of Charter guarantees and it has refused to rule that socio-economic rights fall beyond the ambit of the Charter… [it has nevertheless] shied away from engaging the key issues raised in cases involving socio-economic rights and it has dismissed applications to appeal lower court decisions in which the Charter rights claims of people living in poverty have been rejected.[7]

It is still uncertain whether the Constitution's guarantee of the right to life, liberty and security of the person can be applied in the context of socio-economic rights.[8] In one prominent case, however, three of the seven Supreme Court judges did hold that a Quebec law which prohibited the sale of private health insurance was a violation of that provision.[9] As in the *TD* case, the appellants were not demanding a court order that the government spend more money on health care.

Australia has no federal Bill of Rights and the Constitution of 1900 contains very few rights-related provisions, one of which is that everyone has the right to exercise any religion.[10] New

[4] 597 U.S. ___ (2022).
[5] 597 U.S. ___ (2022).
[6] See *Rucho v Common Cause 588 U.S.* ___ (2019). Here, by 5 v 4, the Court ruled that there is no judicial standard by which a decision can be made on whether a gerrymander is so partisan as to breach the US Constitution.
[7] See Martha Jackman and Bruce Porter, 'Social and Economic Rights' in Peter Oliver (ed), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017) 843.
[8] Canadian Charter of Rights and Freedoms 1982, s 7.
[9] *Chaoulli v Quebec (Attorney General)* 2005 SCC 35. By 4 v 3 the Court held that the prohibition violated Quebec's own Charter of Rights, s 1 of which was similar to s 7 of the federal Charter.
[10] S 116, Constitution of the Commonwealth of Australia.

Zealand has no written Constitution but it has enacted the New Zealand Bill of Rights Act 1990, the content of which is based mainly on the UN's International Covenant on Civil and Political Rights. In 2013 an Independent Constitutional Advisory Panel recommended that a process be set up to explore options for inserting economic, social and cultural rights, property rights and environmental rights into the Bill of Rights Act 1990, but to date the government has ignored that proposal.[11]

One of the outlier jurisdictions in this field is South Africa, which has a mixed legal system, though mainly based on the common law.[12] The Constitution enacted in the wake of the abolition of apartheid and the election of an ANC-led government in 1994 still leads the common law world in its attention to socio-economic rights. (It would have been surpassed in that regard had the proposed new Chilean Constitution been endorsed in the referendum held on 4 September 2022.) South Africa's Constitutional Court has at times applied the Constitution's provisions in a way which has dramatically improved the protection of socio-economic rights, most notably in its 2002 decision in *Minister of Health v Treatment Action Campaign*,[13] where it held that restrictions on the supply of anti-retroviral drugs to HIV positive pregnant women was a violation of their constitutional right to health care services.[14] But in other cases the Court has disappointed activists on socio-economic rights, as in the right to water case of *Lindiwe Mazibuko v City of Johannesburg*.[15] It did not think, for example, that a court should be deciding what would be a sufficient amount of water to be supplied to an individual per day.

We must remember, however, that in almost all countries socio-economic rights can be conferred by ordinary legislation provided there is no constitutional prohibition on doing so. Ireland's difficulty in this regard is that its 1937 Constitution is quite specific on the requirement for separation of powers,[16] and it also stipulates that the Directive Principles of Social Policy in Article 45 'shall not be cognisable by any court under any of the provisions of this Constitution'. In common law countries such as New Zealand and the United Kingdom, which do not have a 'comprehensive constitutional document or entrenched legal provisions, economic, social and cultural rights are mainly provided for through legislative and policy instruments that establish corresponding services, protections and entitlements'.[17] This leads us to look more closely at the position in the UK.

[11] For a recent survey of how socio-economic rights are protected in practice in New Zealand see the report by the New Zealand Human Rights Commission, *Economic, Social and Cultural Rights in New Zealand* (2018).

[12] Arguably another outlier is India. There, the Supreme Court, through its response to public interest litigation, has been very active in developing the provision on the right to life in the country's 1950 Constitution in a way which extends its reach into socio-economic issues. Sadly, however, most of the relevant judgments have not been effectively implemented, with the result that the Supreme Court's reputation for effectiveness has been somewhat undermined. See Sanjay Ruparelia, 'A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court' (2013) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807217 > accessed 22 September 2022; Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press 2007) 121-168.

[13] (2002) 5 SA 721 (CC).

[14] See ss 27(1) and 28(1)(c), Constitution of the Republic of South Africa.

[15] (2010) 4 SA 1 (CC).

[16] Art 28.2 states: 'The executive power of the state shall, subject to the provisions of this constitution, be exercised by or on the authority of the Government' and Art 34.1 begins: 'Justice shall be administered in courts established by law...'.

[17] See New Zealand Human Rights Commission (n 11) 5.

Socio-economic rights in the UK

The UK does, naturally, adhere to the doctrine of separation of powers, but the exact parameters of the powers of each institution – the legislature, the executive and the judiciary – are not as clearly delineated as in many other countries. Following the Brexit referendum in 2016, it took a Supreme Court decision to clarify whether it was the legislature or the executive which had the power to trigger Article 50 of the Treaty on European Union, thereby beginning the two-year exiting process.[18] Three years later the Supreme Court had to decide whether the Prime Minister, as head of the executive, had the power to prorogue Parliament for an usually long period without supplying a reasonable justification for it.[19]

The UK Parliament has conferred many socio-economic rights on people in the UK, though often they are framed in terms of duties placed on public authorities (or parents). One of the best known, although it is often hedged around with qualifications, is the right to free health care at the point of use within the National Health Service.[20] Every child has the statutory right to education between the ages of five and 16.[21] Every person who meets the definition of 'not intentionally homeless' has the right to be provided with accommodation by their local housing authority.[22] When disputes about the enforcement of these rights arise they are often dealt with through applications for judicial review or (especially in the case of children) through statutory applications to a court by local authorities. In such situations it is not the existence of the right that is in question but the extent of the right. The criteria for solving those disputes are the traditional ones of judicial review (illegality, impropriety and irrationality), coupled with criteria laid down by statute (such as that in cases involving children their welfare must be the paramount consideration).[23] Increasingly the criterion of proportionality is applied too, because what is at stake is a human right.[24] Very occasionally the courts themselves will declare that a socio-economic right exists, as the House of Lords did in *R (Limbuela) v Secretary of State for the Home Department*.[25] All five judges held that an applicant for asylum in the UK, even if his or her application had not been made as soon as reasonably practicable after arrival in the country, as required by law, had a right to 'national assistance'. As Lord Bingham put it, this welfare benefit should be provided:

> when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life.[26]

The need for the benefit flowed from the state's duty under Article 3 of the ECHR not to subject anyone to inhuman or degrading treatment.

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[18] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.
[19] *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[20] There is no explicit legislative provision to that effect, but section 3(a) of the NHS's Constitution (2009) states: 'you have the right to receive NHS services free of charge, apart from certain limited exceptions sanctioned by Parliament'.
[21] Education Act 1996, ss 7 and 8.
[22] For the legislative details see Wendy Wilson and Cassie Barton, *Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland* (House of Commons Library, Briefing Paper No 7201, 5 April 2018).
[23] Children Act 1989, s 1(1); this applies whenever a court is dealing with the upbringing of a child, the administration of a child's property or the application of any income arising from that property.
[24] See illustrations of the UK Supreme Court's recent jurisprudence in Brice Dickson, *The Irish Supreme Court: Historical and Comparative Perspectives* (Oxford: Oxford University Press 2019) 134-135.
[25] [2005] UKHL 66, [2006] 1 AC 396.
[26] ibid [8].

In the past seven years the UK Supreme Court has been called upon on three occasions to consider challenges to legislation on welfare benefits, but in each of them it refused to declare the legislation to be in any way unlawful. In the first two cases the focus was on the so-called 'benefit cap', which limited household income derived from social security benefits.[27] The government said the purpose of the cap was to encourage people to find work, thereby enhancing the country's economic well-being. In *R (SG) v Secretary of State for Work and Pensions* an argument was made that the cap was indirectly discriminatory against women, who were statistically more likely to be affected by it as there are many more single mums than single dads. By three to two the Supreme Court held that the cap did not violate Article 14 of the ECHR (the non-discrimination provision) nor Article 1 of Protocol 1 to the ECHR (the right to property provision) because it was not disproportionate in the context of the aim of the legislation: the cap was not 'manifestly without reasonable foundation' and in any event the level of social security benefits that a person should receive is a political question, not a legal one.[28] Lady Hale and Lord Kerr dissented, holding that the proportionality test should be applied in light of the requirement in the UN Convention on the Rights of the Child that 'in all actions concerning children… the best interests of the child should be a primary consideration'.[29] Four years later, in *R (DA) v Secretary of State for Work and Pensions*, the Supreme Court dealt with a further argument that the benefit cap was indirectly discriminatory specifically against lone parent mothers and their children, reliance being placed not just on the two ECHR provisions considered in the *SG* case but also on Article 3 (the right not to be subjected to ill-treatment) and Article 8 (the right to a private and family life).[30] This time the Justices held by five to two that there was no violation of any ECHR right. Lady Hale and Lord Kerr again dissented, with Lord Kerr insisting that the test to be applied was not the 'manifestly without reasonable foundation' test favoured by the majority (and by himself in the *SG* case) but rather whether there was a reasonable foundation for concluding that the cap struck a fair balance.

The third of the trio of cases was *R (SC, CB and 8 children) v Secretary of State for Work and Pensions*.[31] The Welfare Reform and Work Act 2016 had imposed a limit of two on the number of children in respect of whom child tax credit or universal credit could be paid. The limit applied to nearly all children born after 6 April 2017. SC was the sole parent for her three children born after that date and CB was the mother of five such children. They argued that the two-child limit violated Articles 8, 12 and 14 of the ECHR,[32] but they lost at all court levels. Lord Reed, for a unanimous seven-judge Supreme Court (Lady Hale and Lord Kerr had retired by this stage), held that the government had provided an objective and reasonable justification for the differential impact of the two-child limit on women and on families with more than two children. He summed up the Court's view thus:

> The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards

[27] It was imposed by the Welfare Reform Act 2012 and then, at a reduced level, by the Welfare Reform and Work Act 2016. See Gráinne McKeever, 'Scrutinising Social Security Law and Protecting Social Rights: Lord Kerr and the Benefit Cap' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart Publishing 2021) Ch 7.
[28] [2015] UKSC 16, [2015] 1 WLR 1449.
[29] UNCRC, Art 3(1).
[30] [2019] UKSC 21, [2019] 1 WLR 3289.
[31] [2021] UKSC 26, [2022] AC 223.
[32] Art 12 guarantees the right to marry.

> by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.[33]

Lord Reed was at pains to stress that the judicial approach in such cases should not be influenced by provisions in human rights treaties which the UK has ratified but not incorporated into domestic law, the UN Convention on the Rights of the Child being a prime example.

The three cases just discussed, along with many others decided in recent years by the UK Supreme Court in different legal fields, have led many to conclude that the current make-up of that Court is more conservative than it has been for decades. Conor Gearty, in an excoriating article, lays the blame at the door of the current President of the Court, Lord Reed,[34] although in a comment on that piece Lord Sumption takes issue with such an attribution.[35] Lewis Graham, on the other hand, has endorsed Gearty's conclusions.[36] In a report published by the All Party Parliamentary Group on Democracy and the Constitution, it is observed that '[t]he Supreme Court, repopulated since the [first] *Miller* case, has made a total of seven reversals of its previous decisions, in relation to the government'.[37] In truth, though, it is unlikely that even in the years before Lord Reed's presidency there would have been a majority of Justices willing to challenge the socio-economic policy of the government.

The doctrine of legitimate expectations

It is conceivable, though unlikely, that an applicant for judicial review in the UK could successfully rely upon the recently developed doctrine of legitimate expectations to further a claim relating to socio-economic rights. The scope of the doctrine is still a matter of some controversy, but it has already played a part in protecting the right to property in cases on taxation,[38] and the right of a disabled person to live in accommodation of her own choosing.[39] Alison Young has suggested that when applying the doctrine courts are required to balance 'legal certainty' and 'substantive equality' and that, in public law cases, they should do so by taking into account public trust in the administration and principles of good administration.[40] Others have pointed out, quite correctly in my view, that the principle of fairness should also

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[33] *R (SC, CB and 8 children)* (n 31) [208].
[34] 'In the Shallow End', London Review of Books, Vol 44, No 2 (27 January 2022).
[35] See <https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end> (comments section) accessed 13 September 2022.
[36] Lewis Graham, 'The Reed Court by Numbers: How Shallow is the "Shallow End"?', UK. Const L. Blog (4 April 2022), available at <https://ukconstitutionallaw.org/>, accessed 13 September 2022.
[37] *An Independent Judiciary – Challenges since 2016*, 41-48. The report was produced in conjunction with the Institute for Constitutional and Democratic Research and Aidan O'Neill QC assisted with this section.
[38] See *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835, 851; *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545.
[39] *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.
[40] Alison Young 'Stuck at a crossroad? Substantive legitimate expectations in English law' (2021) 80 CLJ 179, 205.

be considered as a fundamental element in the doctrine, one that can equally well apply in private law cases.

Socio-economic rights in Northern Ireland

The law on how socio-economic rights are protected in Northern Ireland is the same as that in England and Wales. When cases arise over whether a child should be ordered to live in secure accommodation, under article 44 of the Children (NI) Order 1995, the court must assure itself that this would be consistent with the ECHR, especially Article 5, which protects the right to liberty.[41] (In the *TD* case, perhaps crucially, the ECHR was not yet part of domestic Irish law.) In a broader context, courts have issued declarations on at least two occasions when Ministers in the Northern Ireland Executive have breached their statutory duty to produce socio-economic strategies – on poverty,[42] and on the Irish language.[43] In the wake of the Executive's ongoing failure to produce the latter strategy, a further application was made asking the court to issue a mandatory injunction requiring the Executive to supply the strategy, but Scoffield J refused to issue such an injunction, limiting himself to a further declaration.[44] He said:

> As explained in [*Re Napier's Application*[45]] the courts will be slow to grant a mandatory order in judicial review proceedings in certain circumstances. One of those is where the making of the order would be such as to require political agreement on a matter of political controversy… I accept [counsel's] broad submission that this is an area where the courts will be particularly cautious. That is partly because of the practical difficulty in requiring parties to agree; partly because the threat of use of the court's punitive powers might give rise to undue pressure on the part of various ministers to capitulate to unreasonable demands, or temptation on the part of others to impose unreasonable demands, as the case may be; and partly because, in the event of non-compliance, enforcement by way of the imposition of sanctions may be difficult.[46]

This betokens a judicial reluctance to interfere in matters that are the responsibility of the executive which closely mirrors the majority's views in the *TD* case. The Irish legal system should therefore not be considered unusual in the stance it has adopted.

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[41] See *In the matter of AB (A Child) (Secure Accommodation)* [2021] NIFam 28, where Keegan J applied the approach adopted by the Court of Appeal in England and Wales (in *Re K (A Child) (Secure Accommodation Order: Right to Liberty* [2001] Fam 277) and also by the European Court of Human Rights (in *Bouamar v Belgium* (1989) 11 EHRR 1).

[42] *Committee on the Administration of Justice's Application* [2015] NIQB (Treacy J).

[43] *Conradh na Gaeilge's Application* [2017] NIQB 27 (Maguire J).

[44] *Conradh na Gaeilge's Application* [2022] NIQB 57.

[45] [2021] NIQB 120 (Scoffield J). This was a challenge to the failure of several DUP Ministers to proceed with meetings of the North-South Ministerial Council, in protest against the effects of the Northern Ireland Protocol to the UK-EU Withdrawal Agreement. At [56]-[62] the judge explained why mandatory orders are issued so infrequently and at [63]-[76] he proceeded to deny one in this case too.

[46] ibid [46].