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.