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.

Author: Dr Laura Cahillane, Senior Lecturer in Law, University of Limerick

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.