

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

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 ejection: *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.