TD V MINISTER FOR EDUCATION: HARD CASE, BAD LAW

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

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[33] ibid [16].

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

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

[36] ibid [19].

[37] ibid [81].

[38] ibid [99].

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

[40] ibid [135].

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

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

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

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

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

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

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

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

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

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

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

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

[49] ibid [43].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

[81] See Brady (n 3).