JUDICIAL ENFORCEMENT OF SOCIAL RIGHTS IN A COMPARATIVE PERSPECTIVE

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

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

The *ratio decidendi* of the *TD* case

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

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

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

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

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

Socio-economic constitutional rights in common law systems

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

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

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

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

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

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

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

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

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

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[11] For a recent survey of how socio-economic rights are protected in practice in New Zealand see the report by the New Zealand Human Rights Commission, *Economic, Social and Cultural Rights in New Zealand* (2018).
[12] Arguably another outlier is India. There, the Supreme Court, through its response to public interest litigation, has been very active in developing the provision on the right to life in the country's 1950 Constitution in a way which extends its reach into socio-economic issues. Sadly, however, most of the relevant judgments have not been effectively implemented, with the result that the Supreme Court's reputation for effectiveness has been somewhat undermined. See Sanjay Ruparelia, 'A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court' (2013) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807217 > accessed 22 September 2022; Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press 2007) 121-168.
[13] (2002) 5 SA 721 (CC).
[14] See ss 27(1) and 28(1)(c), Constitution of the Republic of South Africa.
[15] (2010) 4 SA 1 (CC).
[16] Art 28.2 states: 'The executive power of the state shall, subject to the provisions of this constitution, be exercised by or on the authority of the Government' and Art 34.1 begins: 'Justice shall be administered in courts established by law...'.
[17] See New Zealand Human Rights Commission (n 11) 5.

Socio-economic rights in the UK

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

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

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

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

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

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

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

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

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

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

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

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

The doctrine of legitimate expectations

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

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

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

Socio-economic rights in Northern Ireland

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

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

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

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[41] See *In the matter of AB (A Child) (Secure Accommodation*) [2021] NIFam 28, where Keegan J applied the approach adopted by the Court of Appeal in England and Wales (in *Re K (A Child) (Secure Accommodation Order: Right to Liberty* [2001] Fam 277) and also by the European Court of Human Rights (in *Bouamar v Belgium* (1989) 11 EHRR 1).
[42] *Committee on the Administration of Justice's Application* [2015] NIQB (Treacy J).
[43] *Conradh na Gaeilge's Application* [2017] NIQB 27 (Maguire J).
[44] *Conradh na Gaeilge's Application* [2022] NIQB 57.
[45] [2021] NIQB 120 (Scoffield J). This was a challenge to the failure of several DUP Ministers to proceed with meetings of the North-South Ministerial Council, in protest against the effects of the Northern Ireland Protocol to the UK-EU Withdrawal Agreement. At [56]-[62] the judge explained why mandatory orders are issued so infrequently and at [63]-[76] he proceeded to deny one in this case too.
[46] ibid [46].