

## ***TD V MINISTER FOR EDUCATION, CONSTITUTIONAL CULTURE, AND CONSTITUTIONAL DARK MATTER***

*Abstract: This paper suggests that the true influence of the TD case is seen not in its formal legal significance but in its less obvious impact on Irish constitutional culture. Drawing on Tribe's notion of landmark cases curving constitutional space, it suggests TD is a form of constitutional dark matter, warping the fabric constitutional law invisibly by entrenching a highly cautious judicial culture and a political culture that is less sensitive to rights infringements caused by policy failures.*

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Every Irish law student, and every lawyer educated here after the case came down, knows *TD*.<sup>1</sup> They have probably had their constitutional law lecturer tell them – with some varying degree of hyperbole – about how they will never understand or pass constitutional law until they have understood it. Almost every practitioner knows it too – there are few areas of practice so insulated from constitutional law that this will not have filtered down to those who began their work long before the case came down. But its influence is even deeper than this, I think it animates and dominates our constitutional culture.

As we mark its 20<sup>th</sup> anniversary, however, there is a tendency that runs somewhat counter to this. More formalistically inclined legal commentators sometimes suggest that the centring of *TD* in our constitutional law goes too far.<sup>2</sup> There are several ways that this is anecdotally evidenced: it doesn't really come up that much in court; its impact in determining major cases is modest; it is not on the tip of the tongues of politicians and civil servants they deal with. This viewpoint, with respect, entirely misses the point, and shows, I think, the limitations of a formalist and legalist perspective when it comes to something like the *TD* case. *TD*'s holding was narrow, and in strict formal, legal effects, did not have sweeping impact. But *TD* does not *need* to have these effects; it is far too important for that. *TD* is now a core part of the frame, the background fabric, the stage in which Irish constitutional law plays out. To put it another way, we cannot just think of *TD* as a constitutional law case. We have to see it as a foundational element of contemporary Irish constitutional law culture. The language of culture, I think, gives us a way to articulate the vast, informal impact of this case on our constitutional law.

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<sup>1</sup> *TD v Minister for Education* [2001] 4 IR 259.

<sup>2</sup> This is different, I think, from Tom Hickey's argument in this volume, which I take to be a case that we should limit our understanding of what *TD* did to its strict legal holding. To use the language I use here, he suggests we should try to limit its cultural impact to the specific aspect of the order in the case, rather than allow it to have large reach beyond that. (see Tom Hickey, 'Reading *TD* Down' 2022 6(3) *Irish Judicial Studies Journal* 19. I would agree. But if I am wrong in this reading, and it is Hickey's argument that *TD* did *not* have broader effects on our constitutional law because the holding of the case does not legally support them, I would think this to not just to miss wood for trees, but to miss the trees for the bark, and this would be precisely the sort of failure to see cultural impact that I am trying to highlight here.

## Constitutional culture

I believe that culture may be the most important thing in the study of law.<sup>3</sup> I have, in recent years, directly<sup>4</sup> and indirectly<sup>5</sup> argued for its importance in Irish and comparative constitutional law. I have defined culture in a constitutional law context as ‘the broad set of norms, suppositions, assumptions, modes of thought, values and social beliefs held by state officials and by ordinary citizens that are engaged when they interpret or consider the constitution’.<sup>6</sup>

This culture will be different for different groups – politicians, lawyers, judges, the media, the people – and even *within* these groups as disagreements emerge as to what the Constitution is for. These are beliefs that we need to read the Constitution, to understand it, to take its underspecified language and values and put them into action. It is an ‘intermediate layer between concrete legal rules and their realisation and application, shaping and filtering their reading through a set of fundamental and foundational views that undergird the legal order’.<sup>7</sup> One could not lack such a culture, because without it we would have no contextual frames of reference in which constitutional understandings could develop.

If I am in right in this, and culture is so crucial, why is it not the centre of our studies? I think the reason is because of the difficulties of knowing culture and account for its impact. Culture is a product of (or may even be another word for) experience.<sup>8</sup> You internalise a culture gradually by being exposed to it, living it, and coming to know its contents. But this makes culture very hard to know precisely. First, culture is not static, because experience is never complete. Culture is always changing as new experiences, new problems, and new ideas are incorporated into it. Secondly, knowledge that comes from experience is gathered in most cases subconsciously; you soak it in. And the products of culture, when you are immersed in it, then issues from you ‘as naturally as breathing’.<sup>9</sup> You do not stop to think about how to read the Constitution in light of the internalised legal and constitutional culture. Instead, these meanings come to you through the frames and filters of culture without any conscious articulation of what the culture is. You

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<sup>3</sup> This phenomenon has many names: Pierre Legrand calls it *mentalité*, Stanley Fish interpretive community, Roland Barthes *doxa*. Culture seems to me a good term to make the phenomenon understood while expressing its complexity; everyone has a sense of culture’s importance, but no one thinks that it is simple or easy to define. See David Kenny, ‘Examining Constitutional Culture: Assisted Suicide in Ireland and Canada’ (2022) 17(1) *Journal of Comparative Law* 85.

<sup>4</sup> Kenny (n 3); David Kenny, ‘The Risks of Referendums: “Referendum culture” in Ireland as a solution?’ in Maria Cahill, Colm Ó Cinnéide, Conor O’Mahony, and Seán Ó Conaill (eds), *Constitutional Change and Popular Sovereignty in Ireland* (Routledge 2021) 198; David Kenny, ‘Merit, Diversity, And Interpretive Communities: The (Non-Party) Politics Of Judicial Appointments and Constitutional Adjudication’ in Laura Cahillane, Tom Hickey and James Gallen (eds.), *Politics, Judges, and the Irish Constitution*, (Manchester University Press 2017) 136.

<sup>5</sup> David Kenny and Lauryn Musgrove McCann, ‘Directive Principles, Political Constitutionalism, and Constitutional Culture: the case of Ireland’s failed Directive Principles of Social Policy’, (2022) 18(2) *European Constitutional Law Review* 207; Conor Casey and David Kenny, ‘The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019’ (2021) *Public Law* (April) 335; David Kenny, ‘Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads’ (2017) 40(2) *Dublin University Law Journal* 85.

<sup>6</sup> Kenny and Musgrove McCann (n 5) 225.

<sup>7</sup> Casey and Kenny (n 5) 372.

<sup>8</sup> See Louis Menand, *Pragmatism* (Vintage, 1997) xxi.

<sup>9</sup> Stanley Fish, *Doing What Comes Naturally* (1989) ix.

may be able to express the contents of the culture in part, but probably not in full, because you do not know exactly what you know.<sup>10</sup>

It is hard, then, to capture culture, or to tell people how to understand Irish constitutional law; as they have to internalise this culture themselves. Immersion in legal culture and exposure to legal materials and writings that embody the culture is the way we tend to do it in legal training. And as participants in the culture, as those immersed in it, we can articulate our (partial, provisional) sense of what the culture contains, or what forces made it, and what results it will produce.

### **The curvature of constitutional space and constitutional dark matter**

Laurence Tribe, in his landmark article ‘The Curvature of Constitutional Space’, argues that constitutional cases have an impact similar to matter/mass in physics: they warp the space around them.<sup>11</sup> As spacetime is warped and curves around a massive object, generating gravity and bringing other objects into its orbit, so too constitutional rulings change the social and legal space, and other objects in that space have their orbits altered by the gravity that they generate. Tribe insightfully points out that we far too often take the background – the constitutional space – for granted. Just as space was though an empty or passive backdrop before Einstein’s General Relativity, we do not often appreciate the way that the background is shaped by what the law does, and the way the background itself influences and makes the law.

I think Tribe’s metaphor is a useful way to think about culture, and in particular, major cultural objects. The more mass an object has, the greater the curvature of the space around it, and the stronger the gravitational pull it exhibits. The things that make up constitutional culture are different in scale: there are some legal cases, events, or ideas that are, in this sense, massive. Their influence is huge, their pull overwhelming, and constitutional culture bends and is remade around them. Everything, to some degree, falls into their orbit.

I wish to offer another elaboration on Tribe before applying this concept to *TD*. Contemporary physics accepts the posited, but thus far unproven, existence of something known as dark matter.<sup>12</sup> There are many observations, including various effects of gravity and the behaviour of galaxies, that suggest that there must be far more mass in the universe than is visible to us. Perhaps as much of 85% of matter is this dark matter: it is not visible, does not emit radiation, and does not interact strongly with other matter. We know it from its effects, which are very real and fundamental, yet we cannot see it.

The applicability of this concept to my account of constitutional culture here will, I hope, be obvious: the impact of many cultural objects will be large, yet the obvious, visible part may account for only a small part of this impact. The unseen, invisible, subconscious forces at work may have as much or more cultural impact than that which we can see.

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<sup>10</sup> I have discussed this in detail elsewhere, drawing on Stanley Fish: David Kenny, ‘Conventions in Judicial Decision-making: Epistemology and the Limits of Critical Self Consciousness’ (2015) 38(2) *Dublin University Law Journal* 432.

<sup>11</sup> Laurence Tribe, ‘The Curvature of Constitutional Space’ (1989) 103(1) *Harvard Law Review* 1.

<sup>12</sup> See Gianfranco Bertone and Dan Hooper, ‘History of dark matter’ (2018) 90(4) *Rev. Mod. Phys.* 045002.

It is my case that *TD* is a massive cultural object in this sense, that it has bent and shaped almost all of our constitutional law. It influences ripples throughout constitutional space, and almost no constitutional concepts, doctrines, ideas are free from its pull. It has, I think, shaped our constitutional space. And I think, for all its fame and renown in Irish constitutional law, it is constitutional dark matter, because the majority of its influence is not obviously seen, overtly stated, or obviously flowing from the core holdings. It places limits on what is possible, conceivable, or imaginable in Irish constitutional law, and once established and firmly entrenched, these limits live without any need for the case to be mentioned, and indeed prevent circumstances arising where the case even needs to be mentioned. Its cultural influence can operate largely without reference to the case itself

## **TDs cultural significance**

In this section, I wish to map, as well as I can, *TD*'s impact along two axes of constitutional culture: legal and judicial culture; and political and administrative culture. I am not endorsing the idea that *TD* should have these impacts – I agree with Tom Hickey's suggestion in this volume that *TD* should be 'read down', treated as a much narrower case<sup>13</sup> – but I think that it *has* had them.

### **Legal and judicial culture**

As is obvious from the discussion in other papers, *TD* had huge impact on the legal and judicial views of the Irish constitution. First, as a formal holding of the case, the courts will not grant a mandatory order in any but the most exceptional circumstances. The broader import of this is even wider than the formal holding. Though several judges left open the possibility of such an order in principle *in extremis*, the reality is that *TD* does not leave this possibility open in any practical way. The cultural effect of *TD* is to entrench Hardiman J's view that only a circumstance where the constitutional order itself was a risk would justify such an order. Such circumstances are unlikely to arise, and such an order would be unlikely to make any difference if they did. The effect of *TD* is that we will never see such an order while the case maintains its cultural pull.

Secondly, and much less formally, *TD* marked the end of any possibility of constitutional recognition of economic, social or cultural rights in the Irish Constitution as it stands. The right in question in the case – an unenumerated ESC right – was not the subject of appeal and was conceded by the State. Keane CJ commented, *obiter*, that he had grave reservations about ever recognising such rights.<sup>14</sup> The effect of this passing statement was vast, because it was seen that this represented the prevailing judicial orthodoxy on such questions. It was enough to essentially halt any claim for such a right in Ireland. Such arguments are still not made; the cultural impact of *TD*, which is still strongly felt.

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<sup>13</sup> Tom Hickey, 'Reading TD Down' 2022 6(3) Irish Judicial Studies Journal 19.

<sup>14</sup> *TD* (n 1), 287-288. For consideration of how this dictum was used in cases concerning shelter, see Conor Casey, 'Public Interest Litigation, and Homelessness: A Commentary on Recent Case Law, (2019) 42 DULJ 191.

Thirdly, and relatedly, *TD* marked and stands for the end of unenumerated rights, in spite of the fact *TD* does not say anything about this, in terms. It has often been noted that there is no case where the Irish Supreme Court repudiates this doctrine.<sup>15</sup> But *TD*'s scepticism about expansive judicial power and ESC rights was taken as a final signal from the judiciary that unenumerated rights arguments were simply not welcome in Irish constitutional law. There were certainly intimations of this earlier, but new rights were still recognised until shortly before *TD*, albeit not without controversy.<sup>16</sup> After *TD*, and because of the culture it instilled, these rights came to an end.

Fourthly, *TD* precludes rigorous review of executive action. Part of this derives from its holding – its centring and narrow reading of the ‘clear disregard’ test<sup>17</sup> – but again its effect seems broader. *TD*'s clear dissatisfaction with judicial intervention in government action led to a generalised view that the judiciary should give government a wide berth, and this is precisely what happened.

Finally – and this is perhaps the core of the matter, with the preceding elements specific instances of this – *TD* embedded a small view of the judicial power. This was not a function of just the *TD* case, of course; it did not fall out of the sky. It was rather the epitome and manifestation of a cultural mood that was building in the judiciary from at least 1995, and perhaps earlier, and that lasted until at least 2015. I have elsewhere called this outlook ‘liberal judicial conservatism’.<sup>18</sup> It is the use of the judicial power to advance, in broad terms, core values of enlightenment liberalism, including and especially procedural fairness and individual liberty interests as against the State. But this ideology is advanced by methods that are conservative (in the Burkean sense): not by judicial action, but by inaction. Things will tend to get gradually better if left alone by the judiciary; intervention is only necessary and appropriate when areas of core liberal values – criminal process rights, say – are under threat and need to be advanced. The need for this was relatively rare, and so the period after *TD* – which, in its tone and feeling announced and cemented this viewpoint – the courts did very little.

In short, *TD* set a benchmark for judicial action – or inaction – that dominated the Irish constitutional landscape, and is only now, perhaps, being slowly departed from. This benchmark was internalised by lawyers, who know best of all what will and will not succeed before the courts, what judges will want to hear. This means that the arguments do not get made, the cases do not get taken, and the biggest effects of *TD* are absences, inaction, passivity. The part we can

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<sup>15</sup> See Conor O'Mahony, ‘Unenumerated Rights after NHV’ (2017) 40(2) DULJ 171; Oran Doyle, *Constitutional Law* (Clarus 2008) 108; Donal O'Donnell, ‘The Sleep of Reason’ (2017) 40(2) DULJ 191.

<sup>16</sup> See *I O'T v B* [1998] 2 IR 321.

<sup>17</sup> The test was enunciated in *Boland v An Taoiseach* [1974] IR 338; its applicability to rights matters such as *TD* was, to say the least, unclear. It was not until the recent *Burke* case, as mentioned below, that it was held that this standard did not apply to all executive action. The fact that this holding was treated as so significant by observers suggests that in the interceding period, the clear disregard standard was all that was thought to apply.

<sup>18</sup> David Kenny, ‘Merit, Diversity, And Interpretive Communities: The (Non-Party) Politics of Judicial Appointments and Constitutional Adjudication’ in Laura Cahillane, Tom Hickey and James Gallen (eds), *Politics, Judges, and the Irish Constitution*, (Manchester University Press, 2017) 136. Hardiman J, in particular, seemed to embody this philosophy, in the *TD* case and in much of his other writing.

see if only a fraction of the full effect, and we will tend to underestimate the unseen. As Conor O'Mahony puts it in his paper in this volume, this is the 'considerable shadow' cast by TD.<sup>19</sup>

### Political and administrative culture

Political and administrative culture tends to be less well-documented than legal culture, and so I am relying here on experience of working closely in formal and informal contexts with politicians of various sorts and civil servants on matters that touch upon constitutional law. In the political and administrative context, TD – and the changes in attitudes that accompanied and followed it – were taken as a signal that the courts were out of the game when it came to oversight of policy. The message was received that in respect of social and economic issues, and in terms of rights-based review of policy, the courts would not be getting involved. The political and bureaucratic arms of the State, as a result, became less afraid of court intervention and more assertive and trenchant in pressing policy preferences and decisions in areas cognate to TD. This was done without individuals acquiring specific knowledge of the case, necessarily; it came from legal advice, briefings, common understandings that took hold after the cultural shift of TD came into focus. It became part of the culture of politics.

Our political and bureaucratic cultures are highly legalistic and formalist. Legal arguments are treated with a special class of deference and given a special kind of weight.<sup>20</sup> Constitutional objections, particularly from the Attorney General but also from other legal advisors,<sup>21</sup> are not contested and tend to end any argument. This amounts, I think, to a near-total failure of political constitutionalism, where the political branches have a core role in developing and engaging with constitutional meaning. This failure is further seen in a lack of any influence of Article 45's directive principles of social policy on policy,<sup>22</sup> and in the even rules of the Dáil.<sup>23</sup> (The courts, incidentally, are categorically not to blame for this; they have been very clear that the political branches play a crucial role in developing constitutional meaning and balancing rights.)<sup>24</sup>

The effect of this is that the Constitution is an obstacle, a roadblock to politics, and very little else. There is no ethic of constitutionalism beyond the courts, no sense of deep responsibility to act in the spirit of the Constitution even if the courts will not tell you that you are wrong. In such a formalist legalistic culture, the judicial non-intervention of TD is treated as licence: since the courts won't intervene, you cannot be constitutionally wrong.

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<sup>19</sup> Conor O'Mahony, 'I Would Do Anything For Rights – But I Won't Do That' 2022 6(3) Irish Judicial Studies Journal 29.

<sup>20</sup> Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17(2) European Constitutional Law Review 202.

<sup>21</sup> See David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan', (2020) 18(1) International Journal of Constitutional Law (ICON) 51. Advice from the Office of Parliamentary Legal Advisors has also been influential, including on the constitutionality of remote Dáil sittings in the pandemic.

<sup>22</sup> See Kenny and Musgrove McCann (n 5) for an account of this.

<sup>23</sup> The Salient Rulings of the Chair of Dáil Éireann, a compendium of decisions made by the Ceann Comhairle over time, includes several comments on law and the Constitution that are perhaps well-meaning or correct in part, but could not be defended as written. Perhaps the most problematic of these is ruling 316: 'It is not for Chair or House to interpret Constitution'.

<sup>24</sup> To take just some examples, *Ryan v Attorney General* [1965] IR 294 at 312; *Tuohy v Courtney* [1994] 3 IR 1; and *Fleming v Ireland* [2013] 2 I.R. 417.

The curvature of our constitutional space caused by *TD* tolerated bureaucratic unresponsiveness even where the rights of the vulnerable and marginalised were at stake. It gave judicial and constitutional imprimatur to sclerotic public sector governance where many problems are simply not addressed in a timely fashion, even when rights and welfare are at stake.

Another impact of *TD* is seen when the case, and the concerns it expressed about interbranch relations, are regularly held out in political circles as a reason to not insert ESC rights in the Constitution.<sup>25</sup> The rightness of the *TD* case, and its emphatic rejection of judicial action to improve policy, is so embedded in the status quo that even popular constitutional change to enable is seen as wrong. Even the current government's vague commitment to have a referendum on housing faces opposition on this ground, and I suspect the ultimate proposal will be limited to offset fears of blurring the 'proper' boundary – the one set by *TD* – between the courts and the elected branches.

### **The confirmation, not creation, of a culture**

While the *TD* case massively curves our constitutional space, it is important to acknowledge that the case was not solely responsible for the creation of this culture. It was rather the final development, confirmation, and identification of a culture that was building for some time. It was developing in the judiciary throughout the 1990s, with a creeping unease with the breadth of the judicial power. There were other landmarks in the withering of unenumerated rights;<sup>26</sup> but it is only later, after *TD* finishes this process that we can see those intimations clearly as part of trend. Similarly, it is not my claim that political and bureaucratic culture was excellent before the *TD* case and the retreat of the judiciary; it self-evidently wasn't, as it gave rise to the facts of *TD*. But the *TD* case's cultural impact was to affirm and exacerbate certain negative cultural trends, and this culture might have been better – it certainly would have been *different* – if the *TD* case had come out the other way.

### **Conclusion: future cultural change**

The impact of *TD* on our constitutional culture was immense. But it is important remember that culture is always changing, because experience is never complete. Even the most entrenched cultural suppositions can, if the right circumstances arise, be upended. Culture is hard to predict and cannot readily be controlled.

I see no great signs of change in our policy or bureaucratic culture that *TD* inspired, but who knows what tomorrow will bring. Possible changes in constitutional ESC rights protection with a right to housing and lobbying for a broader ESC rights amendment might bring some change in this respect; only time will tell.

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<sup>25</sup> *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights* (March 2014) <<http://www.atdireland.ie/wp/wp-content/uploads/2015/07/ESCRights-Const-Conv-Report.pdf>> Accessed 5 October 2022.

<sup>26</sup> These would include *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 and *I O'T* (n 16). See also (n 15).

I do think there are signs of a change in some of what *TD* embedded in our legal and judicial cultures. I wrote before that the *NHV* case in 2017 suggested some cultural change – though it was not clear how much – in recognising a semi-novel right and introducing new remedial practices that might presage a more somewhat active judiciary.<sup>27</sup> Writing shortly afterwards, I noted that the Supreme Court was at a kind of cultural crossroads, and it was unclear exactly where this would lead. It is slightly clearer five years on. The judiciary are more willing to recognise new rights derived from constitutional language and values, though this is will not be likely radical.<sup>28</sup> The remedial innovations were real, albeit not revolutionary.<sup>29</sup> A recent development in the *Burke* case – the most important case since *TD* on questions of oversight of executive action affecting rights – rolled back the most extreme implications of *TD* for rights review, or as Tom Hickey suggests, *clarified* the proper impact of *TD* in this space.<sup>30</sup> A recent case stopping the eviction of travellers from public land accommodation *might* suggest a slightly less deferential stance on social rights questions.<sup>31</sup> The centrality of *TD* to our constitutional culture – its gravitational pull in our constitutional space – is lessening, though there are no signs yet of this leading to a marked increase in the courts’ general level of intervention.

To be clear, my point in this paper is not that the cultural impact of *TD* means the case was ‘wrongly decided’. My case is that *TD*’s legacy – whether you approve or disapprove of the case – must be judged by its impact on broad constitutional culture in both the political and legal sphere, not on the strict limits of its holdings. And this point applies to constitutional law in general: we are deceived if we think about it as a formal enterprise, that the legal limits of holdings are the limits of a case’s influence. Constitutional law is suffused with a complex, informal culture that gives it life, that makes it real. We should seek to know that culture, as far as we can, and always consider critically the constitutional space that it creates.

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<sup>27</sup> David Kenny, ‘Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads’ (2017) 40(2) Dublin University Law Journal 85.

<sup>28</sup> See *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49; *Fox v Minister for Justice* [2021] IESC 67.

<sup>29</sup> See *PC v Minister for Social Protection* [2018] IESC 57; Davy Lawlor, ‘Ontario (*AG*) v *G* and Principled Remedial Discretion: Lessons for Ireland’ (2021) 5(2) Judicial Studies Institute Journal 55.

<sup>30</sup> *Burke v Minister for Education* [2022] IESC 1; and Tom Hickey, ‘Reading TD Down’ 2022 6(3) Irish Judicial Studies Journal 19. For further discussion of *Burke*, see Laura Cahillane, ‘The TD Case and Approaches to the Separation of Powers in Ireland’ 2022 6(3) Irish Judicial Studies Journal 10.

<sup>31</sup> *Clare County Council v McDonagh* [2022] IESC 2.