The Common Law, the Constitution, and Judicial Self-Identity: Constitutional Rights Adjudication in Ireland

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Introduction

One of the strengths and – paradoxically, at the same time - the weaknesses of the Constitution was that in the terminology of the 19th century English political scientist, Bagehot, the 'efficient' part of the Constitution has the potential to effect too radical a change in the structure of our legal system. This is why I contend that as they gradually realised this in the subsequent decades some of the judiciary have baulked at what has been asked of them. Most of them were instinctively happier with the traditional common law method: incremental, bit by bit change, driven often by pragmatic, fact specific and result orientated considerations. This, in musical terms, is what might be termed the C Major approach: conventional, pragmatic, appealing, less technically challenging.

By contrast, the efficient part of the Constitution... requires a quite different mind-set, namely, to judge the existing law by reference to a set of inherently generalised principles, ('due course of law', 'inviolability of the dwelling', 'defend and vindicate', 'personal rights' etc), together with the ultimate power to strike down that law in the event that it did not measure up to these constitutional standards. And there is clear evidence that the judiciary are uncomfortable - even unhappy - if they are required to give full effect to the wording of the Constitution because they privately understand that the logical corollary of doing just this would bring about too radical a break with the established world of the common law which many consider to be the true bedrock of our legal system.[2]

In the above-quoted passages, Gerard Hogan, a former judge of the Irish Court of Appeal, draws a distinction between two modes of thinking about constitutional law. On the one hand, one can imagine that constitutional law exists within, and therefore is conditioned and constrained by, the traditional common law model which has formed the basis of the Irish legal system since colonisation by the British Empire. The common law is said to be process-focused; it supposes no grand narratives, but instead allows judges to incrementally modify and clarify the law as they react to the concrete cases before them. Accordingly, judges shall attempt to do justice with respect to the Constitution in the cases which come before them, but constitutional cases shall be subject to the same rules as any other legal case. On the other

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[2] Gerard Hogan, 'Harkening to the Tristan Chords: The Constitution at 80' Constitution at 80 Conference, University of Limerick (11 November 2017) 1-2.

hand, Hogan posits that the Constitution demands an entirely different view of our constitutional order, in which judges are charged with actively realising a vision for society as reflected in the Constitution. In this view, the enforcement of constitutional rights shall be of a supreme value, and so judges should not be as deferential as the common law suggests, but instead play an active role in ensuring the constitutional compliance of the other organs, and thus attempt to realise the substantive justice which the Constitution promises.

In this paper, I draw on this distinction. I do not wish to suppose that one or the other is the better view. Instead, my objective is to show that both views persist and co-exist within the way that Irish judges think about their role within the Irish constitutional order. The reason this is significant is that, as I will argue, the boundaries of the power of Irish courts are rather fluid and largely determined by the courts' view of what their proper role is, despite supposedly rigid concepts such as 'the separation of powers.' In forming that view, I suggest that judges are torn between the two ways of thinking about constitutional law. Often, they are inclined to contain constitutional law within what they see as the logic of the common law. On other occasions, we will see that the prospect of that restrictive approach allowing persistent breaches of constitutional rights leads them to diverge from the classic common law method.

The paper proceeds as follows. In Part 1, I provide a short introduction to Irish constitutional law. I explain that in practice there is generally a bipartite division of state power in the Irish constitutional order between the political branches (executive and legislative) and the courts (the judicial power). I focus on the constraints which the courts place on the political branches under the Constitution and examine the (scarce) textual provisions which relate to the exercise of this review power. In Parts 2 and 3 , I advance two propositions with respect to this power of constitutional review. First, I argue that the outer boundaries of this power are not rigidly defined by the Constitution but instead are fluid, dependent largely on the attitudes of the judiciary themselves about their proper role within a constitutional order. Second, I contend that the attitudes adopted by Irish courts are influenced by, and torn between, the two competing legal traditions and modes of thinking that I have outlined above: the common law method and the constitutional imperative. I make these arguments in the context of a deconstructionist analysis of Irish courts' approach to two areas of constitutional law that forms the centre of this piece: in Part 2, constitutional standing rules, and in Part 3, the (non-) enforcement of socio-economic rights. In Part 4, I conclude that when faced with constitutional rights litigation Irish judges are driven by the two competing rationales I have described. In practice, they will pick and choose elements of each in fact-specific cases, striking compromises by which they attempt to do justice to both the common law and the constitutional imperative, as fits their overall interpretation of the role of courts under the Constitution.

1. Constitutional Review in Ireland

The Irish Constitution (Bunreacht na hÉireann) divides state power into three parts,[3] with each part assigned to a particular organ of the state – executive power to the government,[4] legislative power to the parliament (the Oireachtas),[5] and judicial power to the courts.[6] Yet since the enactment of the Constitution in 1937, the separation of powers has been in practice not tripartite, but bipartite.[7] The reason for this is that the government is dominant over the legislature, by reason of the political party 'whip' system. Typically, when a general election occurs, either one party wins an outright majority of seats in the parliament or it builds a coalition which has such a majority. Then, members of the government parties are in practice obliged to vote with the party, lest their membership be terminated. In this way, the government can pass legislation through the parliament virtually without constraint (save, of course, for political constraints on what they might do), and so the executive and legislative branches are in practice fused as one.[8]

Under the Constitution, the Courts are empowered to directly review the exercise of executive power,[9] and administrative power through the procedure of judicial review.[10] Furthermore, and perhaps most significantly, Irish courts have the power to review the constitutionality of legislation. Article 34 of the Constitution provides that justice shall be administered in courts established by law. In Ireland, there is no specialist constitutional court, but instead the Superior Courts – the High Court, the Court of Appeal, and the Supreme Court – are

[3] Article 6, Bunreacht na hÉireann.
[4] Article 28.2.
[5] Article 15.2.1.
[6] Article 34.1.
[7] For a fuller account of this argument see Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) 19-20. Following a general election in 2016, in an unusual turn of events, the political party which had won the most seats was unable to form a coalition majority and so they instead entered a minority government with a 'confidence and supply' agreement with the second largest party. As a result of this electoral quirk, perhaps for the first time in Irish history, our separation of powers approximates a tripartite structure, with the minority government reliant on the votes and support of their political rivals and the latter being empowered to pull the plug at any moment. Nonetheless, it should be understood that this division between government and legislature is the exception rather than the rule. It is generally the case that the government dominates the legislature, and accordingly it is the judicial power which places the greatest legal and constitutional restraint on the government's exercise of state power. See ibid 21.
[8] This is not to diminish the importance of the Oireachtas - among other things, opposition parties can effectively use their seats to draw popular attention to political issues and put pressure on the government to accept their solutions. However, it nonetheless does not act as independently from the government as one might imagine from a plain reading of the Constitution.
[9] The courts may interfere with the exercise of executive power where it is in 'clear disregard' of its duties under the Constitution. See *Boland v An Taoiseach* [1975] 108 ILTR. 13.
[10] By way of judicial review courts may interfere with administrative decisions where there is a flaw with the procedure by which the decision-maker arrived at their decision, however they are in principle not entitled to interrogate the substance of the decision, which is viewed as solely within the discretion of the decision-maker.

empowered to decide on constitutional matters. Their power to review legislation arises first as a result of Article 15.4 which states that the parliament shall not enact any law that is repugnant to the Constitution, and that any such law would be, but to the extent of its repugnancy, invalid. By Article 34.4, the task of determining the validity or otherwise of laws with respect to the Constitution is assigned to the Superior Courts. The courts have interpreted this mandate to mean that unconstitutional laws, or provisions thereof, are ultra vires the legislature, and should be declared *void ab initio* by the courts.[11] Accordingly, it is a matter of well-established law that Irish courts have the power of strong form, as opposed to weak form, judicial review.[12]

So, it is clear that under the Constitution the courts are empowered to strike down legislation, and, albeit in rare circumstances, invalidate executive actions. However, beyond this, the Constitution does not provide much guidance on how these powers should be exercised. The Constitution does provide for a separation of powers between the organs, however, as I argue below, this only invites further debate as to what the boundaries between the powers ought to be. How have Irish courts determined the boundaries of the judicial power? What is their conception of the proper separation of powers? And what are the ideological influences acting on judges arriving at these conclusions? I shall describe the interpretations courts have given to these boundaries and attempt an explanation of how they have come about through the prism of two areas of substantive law: first, the standing rules which the courts have fashioned to regulate their intake of constitutional review cases; and second, the judicial disagreement over the enforceability of socio-economic rights.

2. Standing

As a matter of well-established tradition, two doctrines govern the eligibility of persons to take a legal claim alleging the unconstitutionality of legislation in Ireland. First, the doctrine of *locus standi* requires that a plaintiff must in some way be personally prejudiced by the provision. The burden for a prospective plaintiff is to demonstrate an 'injury or prejudice which he has either suffered or is in imminent danger of suffering' as a consequence of the impugned provision.[13] It appears that the plaintiff must have a 'special interest' in the proceedings, as a result of a distinct prejudice to him over and above whatever prejudice might exist towards the population generally.[14] Second, relatedly, the principle of *jus tertii* states that a plaintiff is limited to reliance on his own rights, and is thus precluded from relying upon arguments which invoke the rights of hypothetical third parties. So, for example, an unmarried gay man challenging a law criminalising homosexuality could not invoke a

[11] See, for example, *Murphy v Attorney General* [1982] IR 237, 309.

[12] I am using here the terminology described by Mark Tushnet. See: Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) chapter 2.

[13] *Cahill v Sutton* [1980] IR 269, 284.

[14] *State (Sheehan) v Government of Ireland* [1988] ILRM 437.

right to marital privacy – he was restricted to rights which he himself enjoyed.[15] These two rules, *locus standi* and *jus tertii*, may be seen as two sides of the same coin, operating in a complementary fashion with the ultimate aim of limiting justiciable claims to those connected to a concrete and particularised injury. Hereinafter I refer to them collectively as the rules of standing.

The first thing to observe about these rules is that, notwithstanding that they have a profound effect on the number of persons who are empowered to challenge the constitutionality of legislation, they have no textual basis in the Constitution. In fact, all that the Constitution states is that unconstitutional laws shall be invalid,[16] with the task of determining such validity or invalidity explicitly assigned to the courts.[17] No express mention is made of a limitation on who might raise such an issue.

Nonetheless, the Irish courts in their case-law have developed standing rules which limit the scope of constitutional cases they can hear. The point here is not to criticise this development, indeed, anyone who has the slightest acquaintance with the day-to-day operation of courts will be acutely aware of the need to regulate their intake of cases in the interest of, among other things, judicial economy.[18] Moreover, it could be said that, reading the Constitution as a whole, the reservation of the legislative power to the Oireachtas precludes the courts from embarking upon legal issues entirely in the abstract. In the absence of any standing rules, the courts would be empowered, apropos of nothing, to scrutinise any law that was passed and strike it down if it did not fit with their interpretation of the Constitution. In so doing they would be exercising a power practically indistinguishable from the power to legislate, in a manner that would likely violate any understanding of the constitutional separation of powers.

The point I wish to make is that the extent to which Irish courts apply standing rules depends not on the text of the Constitution or indeed on any other external law or principle, but on the courts' attitudes regarding what is required by the separation of powers. The separation of powers is not a definitive, self-executing value, but one which may be subject to many interpretations. By its plain words, it requires that certain powers are reserved to certain organs of the state. But of course, the boundaries of these powers are fluid and open to contest, and indeed, as they are written into the Constitution, they are open to judicial interpretation. In other words, to a great extent, the limitation on the judicial power comes from within. The judiciary take a view as to their own proper role within the constitutional order, and this view

[15] *Norris v Attorney General* [1984] IR 36, 58.
[16] Article 15.4.2, Bunreacht na hÉireann.
[17] Article 34.3.2.
[18] See the comments of O'Higgins CJ in *Cahill v Sutton* [1980] IR269, 277 that the courts must not become 'the happy hunting ground of the busybody and the crank'.

becomes expressed through, inter alia, the strictness or otherwise of standing rules. And so, the scope of the judicial power may be seen as a matter of judicial self-perception.

The next question is: what drives the views of judges about what is required by the separation of powers? What are the ideologies which influence their perception of their own proper role in reviewing legislation? In the case of standing rules, I would suggest that the traditional rules I have described, which emphasise the need for a distinct, personal prejudice to the plaintiff, reflect an ideology associated with the common law. According to the model of common law adjudication, the law develops as judges are called upon to resolve disputes. However, they are only empowered to act upon certain kinds of disputes – those which are *legal* in character. As has been observed by Sunstein, disputes which are typically considered judicially cognisable at common law are those which have the form and character of a private law dispute, meaning that they are grounded upon a concrete and particularised injury.[19] Irish constitutional standing rules, especially through their insistence upon injuries of an essentially private law character, represent an attempt to impose this form of common law thinking on constitutional law cases. In essence, such rules ensure that the courts will only embark upon considering the constitutionality of legislation where there is a dispute which is concrete, individualised and bipolar, that being the form best known to the private law roots of the common law.[20]

I have elsewhere argued that the application of such rules in a constitutional context is a site of tension between the common law and constitutional law traditions.[21] Where legislation is said to violate the Constitution, the injury claimed is often of a different character entirely than that known to the common law. First, legislation, unlike the actions of private individuals, is likely to affect people in a generalised, undifferentiated way.[22] Consider briefly that environmental legislation is undoubtedly of great significance to a great many people; however, its effects are often difficult to individualise because the legislation affects everyone in general rather than someone in particular.[23] Similarly, legislation may have probabilistic or uncertain effects.[24] Where a law aims to reduce the risk of injury to large numbers of people, as much modern regulation does, the effects of altered enforcement for one person are 'unavoidably speculative'.[25]

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[19] Cass R Sunstein, 'Standing and the Privatization of Public Law' (1988) 88 Colum LR 1432, 1447.
[20] ibid 1436.
[21] Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' (2018) 21(1) Trinity College Law Review 315.
[22] David Feldman, 'The Human Rights Act 1998 and constitutional principles' (1999) 19 J Legal Stud. 165.
[23] Oran Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin, Clarus Press 2008) 435.
[24] Daniel J Meltzer, 'Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General' (1988) 88 Colum LR 304.
[25] Sunstein (n 19) 1458.

If one approaches this from the common law perspective that I have described, such disputes fall outside the scope of justiciability and accordingly do not require resolution by the courts. My point here is not to criticise this approach, but merely to observe that, if instead, one thinks about the problem from the perspective of the constitutional law tradition, one might reach another conclusion. If one sees the objective of the judicial power not as the resolution of concrete and particular disputes, but as the enforcement of constitutional rights, then the rules must be altered such that the constitutional breaches are prevented. As it happens, Irish courts appear to have, in some cases, accepted this constitutional enforcement rationale, and accordingly they have developed exceptions to the traditional standing rules. First, the Supreme Court has ruled that where a legal issue affects the whole constitutional and political structure of the society in which the plaintiff lives, he may be permitted to take a case notwithstanding that there is no special prejudice to him arising from the legislation.[26] Second, the Court has also found that a surrogate applicant acting *bona fide* may be permitted to challenge legislation on behalf of persons who are not in a position to themselves bring suit, although that exception may be more limited to its own facts.[27] More recently, in *Mohan v Ireland*, the Supreme Court found that a male member of a political party and prospective election candidate was entitled to challenge legislation which provided that public funding for parties would be cut if they failed to meet certain gender quotas for election candidates.[28] In doing so the Court overturned the judgment of the High Court, upheld by the Court of Appeal, which had essentially held that the mooted harm to the plaintiff was too indirect, the plaintiff having failed to prove that, 'in the absence of a coercive statutory candidate gender quota, the party would not have sought to implement a candidate gender quota at all.[29] In other words, the alleged injurious effect of the legislation on the plaintiff relied on intermediating actions by the political party, which had to be, and had not been, proven to result from the legislation. In his judgment for the Supreme Court, O'Donnell J quoted the authors of *Kelly: The Irish Constitution* (5th ed, Bloomsbury Professional, 2018) to the effect that the standard of proof required by the High Court 'would be impossible to prove given the complexity of the factors involved'.[30]

Using my framework, this judgment confirms that some relaxation of standing rules is appropriate to incorporate forms of injury which are more probabilistic and indirect, and therefore fall slightly outside a common law conception of injury as concrete and particularised. It may be suggested that this move is a motivated by a discomfort with the notion that legislative provisions may evade constitutional review by reason that their effects

[26] *Crotty v An Taoiseach* [1987] 93 ILR 480.
[27] *Society for the Protection of the Unborn Child v Coogan* [1989] IR 734. In this case, an anti-abortion interest group was permitted to bring suit to assert the rights of unborn children, who, obviously, could not do so themselves.
[28] *Mohan v Ireland* [2019] IESC 18.
[29] *Mohan v Ireland* [2016] IEHC 35, [75].
[30] *Mohan v Ireland* [2019] IESC 18, [37].

on individuals, though palpable, are somewhat indirect. Similarly, it is my submission that the development of the above two exceptions by the courts shows their unease with a pure common law approach, insofar as that would protect constitutionally suspect behaviour from judicial scrutiny where it did not amount to a distinct and concrete breach of individual rights.[31] However, these exceptions embrace only in a limited way the constitutional enforcement rationale, in cases which meet a threshold level of public importance. It should be emphasised that the general approach of the Irish courts to constitutional standing rules has been shaped by a certain, widely shared conception of the common law, which emphasises that courts' jurisdiction to determine disputes is best reserved to cases where plaintiffs are injured in discrete, concrete and particularised ways, with only limited exceptions introduced to blunt the sharp edges of that system.

3. Socio-Economic Rights

In Ireland, it is a matter of settled law that socio-economic rights do not form part of the personal rights of the citizen protected in Article 40.3 of the Constitution.[32] This issue was discussed in several judgments of the Supreme Court in the seminal case of *TD v Minister for Education*.[33] In that case the Court was called upon to uphold a mandatory order directing the Minister to implement his policy to build a particular child detention centre. This order had been made by the High Court consequent on the constitutional right of children to positive State intervention where their parents had failed, with the detention centre being the necessary intervention in that case. By a majority, the Court overturned the mandatory order, holding that it was contrary to the separation of powers. Notwithstanding that the Court was limited to assessing the particular mandatory order before it, the various judgments addressed the more general issue of whether and in what circumstances a court could enjoin another branch of government to enforce socio-economic rights, having regard to differing conceptions of separations of powers. This discussion is illustrative for our purposes.

In the leading majority judgment, it has been suggested that Hardiman J took the view that the separation of powers was a 'superordinate constitutional value, capable of trumping any other constitutional concern'.[34] Moreover, in his view it was a precisely delineated constitutional doctrine, which created a clear-cut, rigid and non-porous division of powers between the three organs of government. Hardiman J argued that while the Constitution provided for certain checks and balances, this does not suggest that 'a court, or any other organ of government, can strike its own balance, in a particular case, as to how the separation of powers is to be observed'.[35] However, as Doyle has convincingly argued, there is an issue with this logic – if the separation of powers is a constitutional value, then it falls for

[31] Henry (n 21) 333.
[32] Hogan et al, *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) 1775.
[33] *TD v Minister for Education* [2001] IESC 101.
[34] Doyle (n 23) 363.
[35] *TD v Minister for Education* [2001] 4 I.R. 259, 368.

interpretation by the courts.[36] In fact, when faced with a breach of constitutional rights, a court must in one way or another interpret what the Constitution requires the separation of powers to mean. Indeed, that is the very task which Hardiman J himself had been engaged in. Thus, it seems that the court must have some role in determining how the separation of powers should be observed.

Insofar as the majority's interpretation of the Constitution is that it does not vest any organ with a residual power to exercise the powers of another organ where it feels that that organ was exercising its powers unconstitutionally, they must be correct: the Constitution reserves certain powers for certain organs. However, this conception is not very meaningful if we do not have a strong understanding of what is included within each power. And, it is notable that the Constitution is silent when it comes to defining what falls within the judicial power as against, say, the legislative. When considered this way, it becomes clear that the constitutional separation of powers is not an exhaustive, self-executing doctrine, as the boundaries between powers are not so clear-cut, but instead are open and contestable. It is perhaps telling that Hardiman J cannot provide a comprehensive account of what is entailed by, say, the judicial power as opposed to any other. Further, it surely undermines this rigid account of the separation of powers that there are explicit socio-economic rights in the Constitution; it is, at the least, not clear from the constitutional text that the enforcement of these rights is beyond the judicial power.

Indeed, it seems to me that a great part of the interpretive task with which the courts are charged is determining what might be included within the rather uncertain and fluid boundaries of each power. So understood, the real question before the Supreme Court in *TD* was whether a court issuing a mandatory order to enforce socio-economic constitutional rights is exercising a power that is properly within 'the judicial'. On this question, I suggest, the Constitution cannot provide a clear answer. Instead, again, courts must take a view as to what is within the judicial realm, and, by extension, what is the role of courts in our democracy. None of this is to say that Hardiman J's conclusion that socio-economic rights fall outside the judicial power is necessarily an unmeritorious one – it is merely to say that his view is not the only one available under the Constitution, and that in reality his view depends less on the textual provisions and more on his overall (again, perhaps worthy) view on the proper boundaries of the judicial power. Accordingly, I would conclude that the contours of the separation of powers as between the judicial and political branches do not follow inexorably from the text of the Constitution, but instead depend largely on judicial attitudes concerning the types of decisions that courts should make.[37]

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[36] Doyle (n 23) 365.

[37] Before leaving behind the text to consider the judicial attitudes at play, I should acknowledge one objection to my argument, which would re-assert the impact of constitutional text on this jurisprudence. This objection would have it that the express non-justiciability of the directive principles of social policy contained in Article 45 of the Constitution has influenced the courts in their

One attitude in particular that permeated the majority judgments was that there is a distinction to be drawn between commutative justice, which is concerned with relationships arising from the dealings between individuals, and distributive justice, which deals with the claims by individuals against a political authority in respect of the distribution of common goods and burdens.[38] The idea here is that judges should only act upon decisions of the former kind, with distributive matters left as the reserve of the political branches of government.

This is a distinction which receives little support from the Constitution; indeed it is striking that Irish courts have in other contexts enforced constitutional rights which clearly involve resource implications, such as the right to criminal legal aid.[39] Nonetheless, the reliance placed on it reveals what I suggest is the true divide between judges, which is a disagreement about the *type* of decisions they think proper for the courts to make. On the one hand, some judges are loathe to engage upon decisions which have far-reaching consequences beyond the case before them, such as those which involve the re-allocation of resources. As argued by David Gwynn Morgan:

> The focus of a court is naturally upon the individual litigants who are before it. The contest between the plaintiff (sometimes carefully selected, just because s/he amounts to an especially hard case) and the defendant before the court is not designed to bring out the general context and ramifications of the decision. Thus shrouded from the court's gaze are the different circumstances of persons not before the court; the pros and cons of alternative choices to the measure whose constitutionality is at issue; and the knock-on effects of any court case. Yet these matters are the very stuff of socio-economic policy-making.[40]

I argue that this approach is likely to be adopted by judges who more strongly adhere to the logic of traditional common law thinking. It is in keeping with the common law tradition, which is understood to prize adjudication which is pragmatic, fact-specific and incremental, that more complex and wide-ranging inquiries, as will often be required in respect of the enforcement of socio-economic rights, are eschewed. Moreover, as earlier observed, the

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reluctance to recognise socio-economic rights. Indeed, it is true that this argument was briefly implied in the judgment of Murphy J in *TD* when he stated that the non-justiciability caveat in respect of Article 45 'might be regarded as an ingenious method of ensuring that social justice should be achieved while excluding the judiciary from any role in the attainment of that objective' (*TD v Minister for Education* [2001] 4 IR 259, 317). However, it is my contention that the discussion in each of the majority judgments, including that of Murphy J, was almost entirely focused on the doctrine of separation of powers, which was claimed as the driving force preventing courts from making an order of the kind under appeal.

[38] This distinction was identified by Costello J in *O'Reilly v Limerick Corporation* [1989] I.L.R.M. 181, 194. It was approved by Hardiman and Murray JJ in their judgments in *TD.*

[39] Gerry Whyte, 'A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice' 32(1) Dublin University Law Journal 365, 378.

[40] David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, 2001) 63.

common law is largely based on a private law model, and thus is associated with and considered to most easily accommodate cases between individuals. In this context it is perhaps unsurprising that, understood this way, it may be seen as hostile to the idea that judicial decisions could or should generate more general consequences for society, rather than merely resolving the dispute before them. According to this common law inspired view, this is simply not a realm which the law should intrude upon – even if the price to pay is the enforcement of constitutional compliance, it is best left to the political branches of government.[41] My argument here is consonant with the contention of David Kenny that an ideology of liberal judicial conservatism, or Burkean incrementalism, persists within the Irish judiciary.[42] This paper develops that insight by suggesting that the ideology of this part of the judiciary is often justified by reference to a particular, popular theory and history of the common law: that it exhibits the enduring wisdom of incremental, facts-limited, case-by-case adjudication and, more generally, change. The idea here is not that the common law has a clear and essential ideological content that mandates a non-interventionist approach to constitutional rights adjudication, but that a particular reading of common law values and understandings dovetails with, and provides legal-conceptual justification for, that approach as it is espoused within the Irish judiciary.[43]

On the other side, judges who are less wedded to this common law tradition, and prize the enforcement of constitutional rights even where it means departing from that tradition, are more likely to also embrace expansive understandings of the judicial power which include the enforcement of socio-economic rights. If not so bound to the idea that constitutional cases should resemble those traditionally associated with the common law, it is more plausible that a judge will come to the conclusion, as did Denham J in *TD,* that a mandatory order of the kind under appeal could be allowed. In her judgment, Denham J stressed that 'the court has the power and indeed the duty and responsibility to uphold the Constitution and vindicate constitutional rights'.[44] Whereas judges who view incrementalism as a crucial value emerging from the common law may see that value as one which should condition and constrain their consideration of constitutional rights issue, this constraint may not arise so powerfully for judges who do not share this emphasis. In the absence of it, judges may feel it is within their legitimate role to be more interventionist in the vindication of constitutional rights. To these

[41] For an excellent general rendition of this argument, see Jonathan Sumption, 'Law's Expanding Empire' Reith Lectures (21 May 2019).

[42] David Kenny, 'Merit, Diversity, and Interpretative Communities: the (non-party) politics of judicial appointments and constitutional adjudication' in Cahillane et al, *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017) 136, 142.

[43] The image implied in my argument is that of an 'interpretive community' of judges and lawyers who come to read the history, lessons and virtues of the common law in a homogeneous way. See Fish, *Is There a Text in this Class?* (Harvard University Press, 1980) for discussion of the concept of interpretive communities as originated in literary theory.

[44] *TD v Minister for Education* [2001] 4 IR 259, 307.

judges, constitutional rights demand enforcement, and accordingly ought to be enforced even where this involves disputes and decisions which are alien to the mould of the common law.

This rights enforcement rationale comes out strongly in the judgment of Denham J, who repeatedly emphasises the imperative that the courts take action against breaches of constitutional rights. While the departure from common law conceptions of adjudication that this may entail is doubtless not taken lightly by those more wedded to the constitutional imperative, we can sense a different prioritising – in particular, that sometimes the process needs to be abandoned in order to remedy a constitutional breach, and substantively realise the constitutional vision, as they interpret it. Such a form of reasoning is palpable in the judgment of Denham J in *TD,* where the minority judge argued that the separation of powers was more porous and allowing of judicial intervention than had been suggested by Hardiman J, and that a mandatory order to enforce a socio-economic rights guarantee could sometimes be justified on the grounds that constitutional rights may otherwise be 'set at nought'.[45] It is my contention that this judgment once more illustrates the thesis of this paper: that judges' views on the proper role of courts in constitutional adjudication, drawing on their assessments of the values to be drawn from common law and constitutional traditions, influence them to express a particular conception of the separation of powers, which is then said to justify the result of the case.

Conclusion

Where Irish courts are faced with difficult questions regarding the enforcement of constitutional rights, they often justify their result on the basis that it is demanded by the constitutional separation of powers. There is a sense in which this is true – the constitutional separation of powers determines the scope of the judicial power. But in a greater sense, we must know what interpretation of the separation of powers is being applied. As I have argued, the Constitution itself does not speak authoritatively to one or other separation. Ultimately, it falls to the courts to determine the boundaries of their own power, as they interpret the Constitution to require it. In so interpreting, judges will inevitably be guided, whether knowingly or not, by their internalised idea of the proper role of courts. As Sunstein has written:

> Every legal text requires interpreters to draw on background principles that they must supply. It is often true that a text has a plain meaning, or that there is no room for interpretive doubt. But when this is so, it is because there is no disagreement about the appropriate background principles. It is not because there is a pre-interpretive 'fact' that people can uncover without resort to substantive principles.
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> Those who deny the existence of such principles are without self-consciousness. They believe that their own views are so self-evident that they do not amount to interpretive

[45] ibid 311.

> principles at all, but instead are just 'part' of the text. But interpretive principles are always at work. That is no embarrassment to constitutional law, or indeed to law itself, but instead an inevitable part of the exercise of reason in human affairs. The question is not whether interpretive principles exist, but whether they can be defended in substantive terms.[46]

In our case, I have argued that a key ideological divide as between Irish judges is on whether constitutional law is to be overlaid onto the existing common law system, or whether it should exist outside of and unconstrained by it. Of course, this cannot explain everything that judges do in a constitutional context. However, it does help us to understand that, so often in constitutional rights litigation, Irish judges are torn between two rationales: one which implies that certain types of cases should not be interfered with by the courts, and another which says that the Constitution must be enforced even where it draws the court into unfamiliar territory.

In reality, most judges will not carry through either rationale to its logical conclusions, but will pick and choose between the two. In the context of standing, it was seen that in general Irish courts require that a litigant is personally affected by that which they challenge – in other words that they present with a private law style, self-contained dispute. However, there is clear discomfort amongst the judiciary at the prospect of a blanket enforcement of this common law logic. Hence, they have developed two discrete exceptions to the general rule, which allow the Constitution to be enforced even where there is no common law style dispute.[47] Moreover, in the last year the Supreme Court has slightly relaxed application of the general rule so that a plaintiff can bring a constitutional challenge where the effect of the impugned legislation on him is indirect.[48] With respect to the socio-economic rights jurisprudence, we saw a court split in two between the two competing rationales. A further illustration of the point is that even within the majority judgments, which in general ruled that socio-economic rights were unenforceable, it was acknowledged that in very exceptional circumstances, where the political branches had entirely derogated from their duties, such rights could be enforced. Again, even within one side of the Supreme Court, we can see that they were torn between the need to contain constitutional litigation within traditional common law principles, and the need to ensure that the Constitution is enforced. If the compromises which courts reach in the context of constitutional rights litigation feel unprincipled, it is because they are in fact driven by two competing rationales, with respect to both of which they attempt to do justice as they see the Constitution demanding.

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[46] Cass R Sunstein, *The Partial Constitution* (Harvard University Press, 1993) 103-104.

[47] *Crotty v An Taoiseach* [1987] 93 I.L.R. 480; *Society for the Protection of the Unborn Child v Coogan* [1989] I.R. 734.

[48] *Mohan v Ireland* [2019] IESC 18.