OFFICIAL INDIFFERENCE AND PERSISTENT PROCRASTINATION: AN ANALYSIS OF *SINNOTT*

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I. INTRODUCTION

The Supreme Court decision in *Sinnott v. Minister for Education*,[1] though predictable, resulted in widespread disappointment among disability groups and families of people with disabilities. By a majority of six to one, the Supreme Court decision overturned the High Court, which had granted the right to primary education on the basis of need rather than age, and confirmed that the right to primary education ends at 18 years.

This paper focuses on the case raised by the plaintiff, Mr. Jamie Sinnott. As a result, it does not address the claim of the second plaintiff, Mrs. Kathryn Sinnott, in detail. The paper makes reference to the decision of the High Court and conducts a comprehensive examination of the Supreme Court decision. The analysis touches on a number of issues, including: the introduction of an age limit in primary education, the definition of education, legislative enactments in the field of education, the separation of powers and briefly, socio-economic rights under the Constitution. The paper questions the use of the judicial system as a means of asserting the socio-economic right to education in the wake of this decision. The paper posits that imposition of an age limitation is inappropriate in relation to profound intellectual disability. A subsidiary conclusion is that the judiciary have a

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[1] [2001] 2 I.R. 545.

democratic mandate to enforce the socio-economic right to education.

II. The High Court

The plaintiff is profoundly intellectually disabled and, at the age of twenty-two, he sued the State for failing to provide him with his constitutional right to free primary education under Article 42.4, which states that "The State shall provide for free primary education …" During the High Court action, it was noted that the plaintiff had received less than three years of meaningful education and training in his life. Barr J. stated that the plaintiff "has suffered grieviously through the failure of the State to meet its constitutional obligation to provide him with such services and its negligence in that regard."[2]

Barr J. was critical of the State's consistent failure to provide for the plaintiff's educational needs. He reviewed the interpretation of the term 'primary education' in order to clarify the extent of the right to education, and relied on the decision of O'Hanlon J. in *O'Donoghue v. Minister for Health*[3] and (quoting O'Hanlon J.) stated that the purpose of the constitutional obligation contained in Article 42.4 is:

> to provide for free, basic, elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him/her to make the best possible use of his/her inherent and potential capacities, physical, mental and moral, however limited these capacities may be …[4]

The High Court required the State to respond to a citizen's constitutional rights in full, and held that the obligation to provide for free primary education for the

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[2] [2001] 2 I.R. 545 at 565.

[3] [1996] 2 I.R. 20. See also the decision of Ó Dálaigh C.J. in *Ryan v. Attorney General* [1965] I.R. 294.

[4] [2001] 2 I.R. 545 at 577.

"grievously disabled is based on 'need' and not 'age.'"[5] Barr J. ordered the State to pay damages of £225,500 to the plaintiff, and in view of the fact that the right to education was based on need and not age, he required the Minister for Education to provide education to the plaintiff for as long as he was capable of benefiting from it. He also required the plaintiff to be provided with funding for applied behavioural analysis[6] for a two and a half year period, as well as some other ancillary services. Finally, he made provision for a review by the High Court of these mandatory orders in April 2003.

The second named plaintiff, his mother, also claimed a breach of her constitutional rights because of the impact upon her of the deprivation of her son's constitutional rights. Barr J. found a breach of her constitutional rights on a number of grounds including: the family's right to be protected by the State under Article 41; her own and her family's right to equality of treatment by the State under Article 40.1; and the right to free primary education under Article 42.4 for the benefit of the family as a unit as well as the individual member. These failures imposed "on her an inordinate burden, which has dominated her life, of endeavouring to provide for the education of her profoundly disabled child."[7] Consequently, Barr J. held that she was entitled to recover damages, that her constitutional rights had been breached and awarded her a total sum of £55,000 including £15,000 special damages.[8]

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[5] [2001] 2 I.R. 545 at 584.

[6] Applied behavioural analysis is a system of education for people with autism and comprises an intensive 'one to one' education programme at home supported by a multi-disciplinary team comprising speech, physiotherapy occupational and music therapists together with general medical care.

[7] [2001] 2 I.R. 545 at 589.

[8] In the Supreme Court it was decided to apply an age limit of 18 to the right to primary education and this meant that the plaintiff's constitutional rights were not being violated at the time of the action. This resulted in the courts rejecting the contention that there was a violation of the second plaintiff's constitutional rights, Denham J. dissenting.

III. State Strategy

The State response to the High Court decisions in *O'Donoghue*[9] and *Sinnott*[10] raises two issues. The first is the perception of the status of a High Court decision by the State. The second is the attitude of the Supreme Court to hypothetical actions.

O'Hanlon J. decided the *O'Donoghue* case in 1992, and held that all children are educable and are entitled to free primary education. There was no State compliance with this decision for at least five years.[11] In the *Sinnott* case, eight years after *O'Donoghue,* it was acknowledged that the plaintiff had only received three years primary education at the time of the action. Barr J. in the High Court stated that the plaintiff had suffered harm and damage by reason of the "breach of constitutional duty of the State," which was "aggravated by persistent failure to honour the terms of the judgment of O'Hanlon J. in *O'Donoghue* …"[12] In *Sinnott,* the appeal strategy used by the State involved conceding those elements of the High Court order relating to damages for the failure to provide education to the plaintiff between the ages of 18 and 22. Keane C.J. questioned the State's power to concede elements of the High Court decision and stated:

> The High Court is the only court with full original jurisdiction in all constitutional issues in this jurisdiction and its judgments are not to be treated as in some sense qualified as authoritative statements of the law because they have not yet been reviewed by this court.[13]

The State's reluctance to accept these High Court decisions raises the suspicion that the State does not consider

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[9] [1996] 2 I.R. 20.

[10] [2001] 2 I.R. 545.

[11] [2001] 2 I.R. 545 at 580.

[12] [2001] 2 I.R. 545 at 592.

[13] [2001] 2 I.R. 545 at 635.

itself bound by that Court. As Keane C.J. observed, the judgement of the High Court "constitutes the law in this country unless and until another judge of the High Court or this court takes a different view of the law."[14]

While Keane C.J. was at pains to point out that High Court rulings are binding on the State, the reality in this decision is that the other members of the Court did not address this issue and permitted the State to concede those matters. The State, on the basis of political expediency, appealed only the substantive element of the High Court decision as it was unwilling to be seen to challenge the award of a vulnerable person. This, in effect, meant that the State was permitted to subvert the authority of the High Court by avoiding the necessity to appeal what would be perceived as politically unpalatable.

The State 'conceded' that the plaintiff was entitled to damages for a breach of his constitutional right to education up to the age of 22, and then challenged the general right to education for people with disabilities beyond the age of 18. As a result, the Supreme Court granted what could be described as an advisory judgment. It remains to be seen if this decision heralds a new approach by the Supreme Court to decisions of general application.

IV. Age Limitation

The State appealed a number of issues to the Supreme Court and a central point in this decision was the age at which a child becomes an adult. Nowhere within the terms of Article 42.4 is there a suggestion that there is a limit on this right, which states that the "State shall provide for free primary education ...". The Article effectively requires the State to set aside a proportion of national resources to ensure that priority is given to this constitutional right. Generally the courts may not intervene in issues concerning the allocation of the national budget, as these are matters of political choice. The issue before the court was whether Article 42.4 created an obligation on the State to provide free primary education, regardless of age.

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[14] [2001] 2 I.R. 545 at 635.

Murphy J. in the Supreme Court used the historic approach to interpretation and stated that:

> In my view primary education as identified in the Constitution is education provided for children the age limits of which were determined historically by the Education (Ireland) Act, 1892, which required parents to send their children between the ages of 6 and 14 years to receive certain schooling.[15]

This approach serves to keep education in the permafrost of 1937. It appears, however, that Murphy J. was not as generous as the 1892 Act, despite State acceptance in *O'Donoghue v. The Minister for Education*[16] that the right persisted to 18, and the fact that the 1892 Act referred to the obligation to send children to school up to fourteen, Murphy J. held that the constitutional right to primary education ceases at the age of twelve.[17] This is a narrow reading of the Constitution and fails to acknowledge any educational developments since its enactment. To carry this argument to its logical conclusion, the right to primary education cannot be extended beyond that comprehended in 1937.

A majority of the Supreme Court were unwilling to read Article 42.4 in isolation, or confine the right to education as it was apparently understood in 1937, and instead reviewed the whole of Article 42. Article 42.4 makes no reference to 'children'. It refers to 'parents' and the remaining provisions of Article 42 as a whole make several references to both 'child' and 'parent.' Denham J. held:

> It is reasonable to construe the Constitution as granting this childhood right as including persons up to the age of 18. This is a broad interpretation in light of the more usual age when free primary education ceases but is

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[15] [2001] 2 I.R. 545 at 675.

[16] [1996] 2 I.R. 20.

[17] [2001] 2 I.R. 545 at 675.

> consistent with recognizing the special needs of some children and cherishing all children.[18]

The focus of the majority became the age at which a person is no longer a child, or alternatively has reached adulthood. Geoghegan J. said he could not accept that there was no such thing as a mentally handicapped adult and stated that "the arbitrary choice by the State of the age 18 is not necessarily illogical. In the perception of most people a child becomes an adult at 18."[19]

Hardiman J. utilised both the Irish and English text of the Constitution to interpret the meaning of 'child.'[20] He stated that 'whether one reads the Constitution in its Irish or English text, the primary provider of education is seen as the parent, and the recipient is seen as the child of such parent.'[21] He rejected the contention by the plaintiff that the term 'child' could be interpreted as meaning offspring, or descendent, which terms could apply to a person of any age. Relying on the Irish text, he made the point that the term *leanbh* as used in the Constitution suggests child, whereas the correct term to suggest offspring or descendent would be *sliocht*. In addition he suggested that the plaintiff's contention "simply does violence to the ordinary meaning of the word."[22] Ultimately he put forward the age of 18 as "being the latest at which a person could … be regarded as a child."[23] Murray J. and Fennelly J. agreed with the proposition that the State was not obliged to provide for education beyond the age of 18, which they regarded as the age at which adulthood begins.

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[18] [2001] 2 I.R. 545 at 668.

[19] [2001] 2 I.R. 545 at 720.

[20] Kelly, *The Irish Constitution* (3rd. ed., 1994), p. 205, refers to the use of the Irish text to elucidate the English text. See also Article 25.5.4, which provides that when there is a conflict between the texts the Irish language shall prevail.

[21] [2001] 2 I.R. 545 at 690.

[22] [2001] 2 I.R. 545.

[23] [2001] 2 I.R. 545 at 696.

The judges failed to address the commonly understood reality of adulthood – independent existence – a state that will never be achieved by the plaintiff and others similarly situated. Those with severe and profound learning disabilities will never achieve independence and remain dependent on their families for life. There is statutory recognition of this dependence in a number of enactments, including the following: Guardianship of Infants Act, 1964; Family Law (Maintenance of Spouses and Children) Act, 1976;[24] Status of Children Act, 1987;[25] Family Law Act, 1995;[26] and Family Law (Divorce) Act, 1996.[27] There is explicit recognition that dependency may continue after the age of 18, and parents may be under a legal obligation to continue maintaining their dependant child.[28] A dependant child over 18 is recognised in two specific circumstances: first, where the child is receiving full time education up to the age of 23; and second, where he is suffering from a mental, or physical disability to such an extent that it is not reasonably possible for the person to maintain himself fully.[29] The second plaintiff, as a parent, clearly has a statutory obligation to maintain her dependent child indefinitely.[30] The Supreme Court's decision is incongruous with this statutory reality. The majority confirmed that Article 42.4 cannot be read in isolation and that adulthood begins at 18. In response to the Court's position, Whyte asks the following question in relation to children with learning difficulties:

> If such parents abandon their offspring once the latter reach the age of eighteen, is the State powerless to intervene, given that Article 42.5

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[24] Section 3.

[25] Section 16.

[26] Section 43(a)(ii).

[27] Section 52(o)(i).

[28] The Age of Majority Act, 1985, preserved 21 as the age up to which maintenance orders may be made and remain in force for the support of dependant children.

[29] Shatter, *Family Law* (4th. ed., 1997).

[30] The Family Law Act, 1995.

> only authorises State intervention in cases where parents fail in their duty towards their children? If this is not the case, then what is the basis for arguing that the State duty towards such children under Article 42.5 continues to exist after they reach the age of eighteen while the State's duty to provide for free primary education expires at that point?[31]

The impact of the Supreme Court reasoning, may as Whyte has pointed out, result in "undesirable consequences in other contexts."[32] The choice of 18 years does not reflect a society occupied by the severely or profoundly disabled citizens of the State. Keane C.J. highlighted the arbitrary nature of any age limit; he listed various legal milestones, including the age of thirty-five as being the age of eligibility for the office of President. He then queried "[w]here in this spectrum can it be said with any semblance of truth that the first plaintiff passed from childhood to adulthood?"[33] Keane C.J. stated:

> If it is the law that a person in the position of the plaintiff ceases to be entitled to free primary education at the stage in his life when he becomes an adult, it is for the courts alone, in the absence of any specific age limit to be found in Article 42, to determine when that stage would be reached … it is certainly not the function of the Minister to determine the age at which the constitutional right of a person in the position of the plaintiff ceases.[34]

The Supreme Court have now determined that the right to primary education ceases at the age of 18.

V. EDUCATION

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[31] Whyte, *Social Inclusion and the Legal System,* p. 345.

[32] Whyte, *Social Inclusion and the Legal System,* p. 345.

[33] [2001] 2 I.R. 545 at 639.

[34] [2001] 2 I.R. 545 at 638.

There is no definition of education contained within the Constitution, even though an entire Article is devoted to the topic. The first substantive interpretation of the term 'education' came in *Ryan v. Attorney General*.[35] The plaintiff, a mother, alleged that government coerced use of fluoridated water violated her parental right to educate her children. The High Court was then required to look at the meaning of 'education.' Education was interpreted narrowly by that court where Kenny J. stated:

> The education referred to … must … be one of a scholastic nature. It seems to me, therefore, that the fluoridation of the public water supply (even if it be harmful) does not interfere with or violate the rights given to the family and to the parents by Article 42 of the Constitution.[36]

Ó Dálaigh C.J. in the Supreme Court in *Ryan v. Attorney General* defined education as follows:

> Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.[37]

In the later case, *O'Donoghue v. The Minister for Health,*[38] O'Hanlon J. reinforced Ó Dálaigh C.J.'s definition of education, when he stated that the task of education was to enable the individual:

> ... "to make the best possible use of his [or her] inherent and potential capacities, physical, mental and moral" – however limited those capacities may be.[39]

Both O'Hanlon J. and Ó Dálaigh C.J. construed education in a broader sense than the purely scholastic

[35] [1965] I.R. 294 at 310.

[36] [1965] I.R. 294.

[37] [1965] I.R. 294 at 350.

[38] [1996] 2 I.R. 20.

[39] [1996] 2 I.R. 20 at 62.

definition espoused by Kenny J. The wording of the Constitution lends itself to this broader interpretation, as Article 42 repeatedly refers to education as including a moral, physical and a social dimension. Barr J. affirmed this interpretation in the High Court.

The Supreme Court did not dwell on the definition of education, as Murray J. stated:

> In my view the case is not concerned with the content or quality of what constitutes primary education within the meaning of Article 42.4 since this point was not appealed and must be considered as moot for present purposes.[40]

Other members of the Court reflected this viewpoint, and three of the Supreme Court judges analysed what is meant by the term 'primary' education. Among these was Murphy J., who recognised the unique commitment expressed in Article 42 and agreed that the plaintiff is educable.[41] He differentiated between primary education and the type of education appropriate to the plaintiff's needs when he opined:

> Primary education is provided by teachers in classrooms. It was and is a basic scholastic education in the sense that it is a first stepping stone on a career which may lead to secondary level and ideally graduate to the third level. It is distinguishable from secondary level education on the one hand and nursery schools, or any other form of pre-primary education, on the other.[42]

Had the majority agreed with his interpretation of 'primary education', it would have ensured that children with severe or profound disabilities remained unentitled to benefit from the constitutional right to education. Murphy J.'s interpretation is consistent in that it time-locks the

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[40] [2001] 2 I.R. 545 at 677.

[41] [2001] 2 I.R. 545 at 673.

[42] [2001] 2 I.R. 545 at 675.

constitutional concept of primary education in 1937, and does not acknowledge developments since then. It is worth quoting Denham J.:

> The Constitution is a constitution of the people expressing principles for its society. It sets the norms for the community. It is a document for the people of Ireland, not an economy or a commercial company. … [Article 42 represents] the promise given by the people of Ireland to future generations that the State would provide for free primary education for its children. The promise is an acknowledgement of the great importance placed by the people of Ireland on the education of children.[43]

The very concept of education involves advancement and development, which cannot be fixated in the past. Murphy J.'s position is therefore difficult, if not impossible, to reconcile with Denham J.'s position and with the prior jurisprudence of the Supreme Court, such as Walsh J. in *McGee v. Attorney General* when he stated that "… no interpretation of the Constitution is intended to be final for all times. It is given in the light of prevailing ideas and concepts."[44] The question remains: did the people in 1937 wish this 'promise' to remain undeveloped for all times?

Geoghegan J., in his judgment, endorsed O'Hanlon J.'s definition of primary education elucidated in the *O'Donoghue* case.[45] He held that primary education must include suitable education for disabled children "in the light of modern knowledge of the educational requirements of handicapped children which are totally different from that

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[43] [2001] 2 I.R. 545 at 664.

[44] [1974] I.R. 284 at 319. See also O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325, McCarthy J. in *Norris v. Attorney General* [1984] I.R. 36 and Henchy J. in *The People (DPP) v. O'Shea* [1982] I.R. 384.

[45] [2001] 2 I.R. 545 at 721.

which was perceived in 1937."[46] Geoghegan J. concentrated on the specific difficulties that arise for people with autism, and particularly the problem of 'unlearning,'[47] and was willing to consider whether different criteria should apply to those specific needs. Geoghegan J., in his defence of the right of all disabled people to education, stated:

> The word 'educate' in its Latin derivation refers to bringing or leading out. If a handicapped child, unlike a normal child, cannot naturally acquire skills in the home but has to have special training to acquire them then I cannot see why that special training would be inappropriately described as 'education'. At any rate I do not think that health therapy and education requirements are mutually exclusive of each other. They can overlap and can be given a double if not a treble description. I, therefore, find no fault in the trial judge's interpretation of 'education' in the case of an autistic child.[48]

In light of this statement on the meaning of education, it could be argued that this process will necessarily be different for people of differing abilities. Therefore, the definition supports the plaintiff's argument that he was entitled to education beyond the age of 18. However, Geoghegan J. also said that this would amount to an "excessive straining" of the wording of Article 42.4.[49]

Keane C.J. was the only member of the Court to uphold the High Court judgment that the right to education was based on need and not age. He agreed with the definition of education given in the High Court in the *O'Donoghue*

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[46] [2001] 2 I.R. 545 at 718-719.

[47] Evidence adduced at trial showed that people with autism were likely to unlearn what had been learned unless they had access to continuous education.

[48] [2001] 2 I.R. 545 at 724.

[49] [2001] 2 I.R. 545 at 720.

case[50] and supported the trial judge's position that "education … should, ideally, continue as long as the ability for development is discernible."[51] The central issue in this decision is age, particularly the age at which the constitutional right to free primary education ceases. The definition, purpose and any analysis of the concept of primary education or the ongoing developments in education were largely ignored in this decision.

VI. Educational Enactments

A number of the judges indicated that the plaintiff should have relied on legislative enactments, including the Education Act, 1998, the Education (Welfare) Act, 2000 and the Equal Status Act, 2000 to assert a right to education.

Hardiman J. observed that the obligation to provide for free primary education "does not restrict the State to that provision."[52] Hardiman J. continued that various legislative provisions would impose duties on public authorities which would be relevant to the plaintiff. He specifically referred to sections 32, 38 and 41(2) of the Education Act, 1998 which establish the Educational Disadvantage Committee and the National Council for Curriculum and Assessment and which deal with ministerial advice on disability and special needs. He states:

> It appears that these provisions together with those of the Equal Status Act, 2000 and the Education (Welfare) Act, 2000, impose duties on public authorities which may be relevant to a person in the position of the plaintiff, or to a child afflicted with disabilities which have afflicted the plaintiff in one degree or another. … It is a striking feature that no attempt was

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[50] [1996] 2 I.R. 20.

[51] [2001] 2 I.R. 545 at 627.

[52] [2001] 2 I.R. 545 at 692.

> made to utilise the new provision in relation to the plaintiff's future treatment.[53]

This legislation merits discussion to clarify whether such rights as perceived by Hardiman J. could be gleaned from the text of the legislation.

First, section 32(9) of the Education Act, 1998 states:

> 'educational disadvantage' means the impediments to education arising from social or economic disadvantage which prevent students from deriving appropriate benefit from education in schools.

While this could include disabled people, it seems to stretch the legislative intention, in that the Education Act, 1998 is quite specific in terms of educational provision for people with disabilities.[54] The policy behind the term 'educational disadvantage' would seem to indicate that it refers to social and economic criteria. At the launch of the Educational Disadvantage Committee, the Minister for Education and Science, Dr. Woods, referred to the need to tackle educational disadvantage, and specifically mentioned concerns in respect of literacy, numeracy, second chance education, and the problem of early school leavers.[55] There was no reference to disability. Second, section 38 provides for the establishment of the National Council for Curriculum and Assessment and section 41(2) deals with the functions of the Council. One of its functions is to advise the Minister on the curriculum needs of "students with a disability or other special educational needs."[56] It is not clear what aspect of these provisions the plaintiff could have relied on to assert a right to continued primary education.

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[53] [2001] 2 I.R. 545 at 697. The provision Hardiman J. is referring to is section 7 of the Education Act, 1998 which addresses the education of people with disabilities.

[54] See sections 7, 9, 13, 21 among others, of the Education Act, 1998.

[55] Department of Education and Science, Press release, 28 March 2002. *Launch of Educational Disadvantage Committee*.

[56] Education Act, 1998, s. 41(2)(f),.

The Education Act, 1998 uses rights language, yet the relevant provisions are couched in limiting terms such as: "as the Minister deems appropriate" and "as resources permit."[57] Having regard to the deference shown to the role of the Oireachtas by the Court, it is difficult to envisage a scenario where the Court would require the executive to fund education for an individual in a similar situation to the plaintiff where the statute provides for ministerial discretion. Hardiman J. is clearly correct that the Education Act, 1998 will prove to be of assistance to many people with disabilities; it is questionable though, whether people at the margins, such as the plaintiff, will be able to assert a right to education under the Act.

Hardiman J. referred also to the Equal Status Act, 2000. The relevant requirement in this Act is that educational establishments may not discriminate on the grounds of a person's disability and that a refusal to provide reasonable accommodation may amount to discrimination.[58] The non-provision of reasonable accommodation by an educational establishment will not amount to discrimination where it gives rise to more than a "nominal cost."[59] The educational requirements of the plaintiff, as highlighted in the High Court, are cost intensive.[60] The Equal Status Act, 2000 would not, therefore, seem to provide any solution due to the nominal cost limitation.

The third enactment referred to is the Education (Welfare) Act, 2000. It should be noted that at the time of this decision the Act was not in force and would not be for a further year in accordance with section 1(3). The then Minister for Education and Science, Mr. Martin, stated in the Seanad at the second stage in the Oireachtas debates that:

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[57] See generally s. 7, which refers to the provision of support services for students with disabilities among other issues.

[58] Equal Status Act, 2000, ss. 7 and 4.

[59] The reason for the inclusion of the 'nominal cost' proviso is as a result of the Supreme Court decision in *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321. See also *Re Article 26 and the Equal Status Bill, 1997* [1997] 2 I.R. 387.

[60] [2001] 2 I.R. 545 at 596.

> The specific aims of the Bill are to raise the minimum school leaving age to sixteen years or the completion of three years of junior cycle education, whichever is later; establish a comprehensive legislative and administrative system for dealing with school attendance problems and issues relating to the educational welfare of children generally; and amend and update existing school attendance legislation.[61]

The focus of this piece of legislation is clearly not on the educational needs of people with disabilities. Hardiman J. implied that the educational needs of people like the plaintiff can be met in existing legislation.[62] It is difficult then to reconcile the apparent willingness of Hardiman J. to read duties into the above-mentioned legislation with his assertions on the separation of powers and particularly his unwillingness to utilise judicial power to require the State to comply with duties in respect of constitutional rights.[63] He advocated judicial restraint in social and economic questions, warning against unwarranted interference with the legislative and executive functions and emphasising the separation of powers doctrine.[64] The issue of the supremacy of the Constitution in the context of the separation of powers was not addressed.

Keane C.J. addressed the contention by the defendants that under section 7(1) of the Education Act, 1998, the plaintiff is entitled to the benefit of support services and a level and quality of education appropriate to his needs. He states, however:

> The claim made on behalf of the first plaintiff is, accordingly, resisted by the Minister solely on the ground that he was not entitled to those services as a matter of constitutional right

[61] 159 *Seanad Debates* 754.

[62] See also Kimber, "Equality and Disability (Part II)", (2001) 7(2) *Bar Review* 66, 67.

[63] [2001] 2 I.R. 545 at 708–710.

[64] [2001] 2 I.R. 545 at 711.

> beyond the age of 18. However, whether the plaintiff is entitled to them as a matter of legal or constitutional right would, it might be thought, be a matter of indifference to the Minister, unless he proposed at some time in the future to withdraw them or to urge the Oireachtas so to do, a course of action which he predictably assures the court he does not contemplate. The same considerations would apply to those suffering from severe mental handicap who are in the same position as the plaintiff.
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> The Minister's concerns, accordingly, arise because of what are seen as the more far-reaching implications of adults, as distinct from children, being entitled to free primary education. [65]

Since the Supreme Court decision in *Sinnott*, the Government have published the Education for Persons with Disabilities Bill, 2002. This Bill defines 'child' as a person "not less than 3 nor more than 18 years of age."[66] The legislation specifically refers to education for adults with disabilities and provides for the continuation of the person's education beyond the age of 18 for a further year, where the new statutory body, the National Council for Special Education, deems it appropriate.[67] The focus of this Bill is to develop the person's capabilities to be in a position to benefit from training or employment services. Where a person will not be able to so benefit, provision may be made for that

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[65] [2001] 2 I.R. 545 at 633.

[66] Education for Persons with Disabilities Bill, 2002, s. 1(1) .

[67] Education for Persons with Disabilities Bill, 2002, s. 16. The Council referred to here is the National Council for Special Education and consist of a chairperson and ten ordinary members appointed by the Minister with persons who have a special interest in or knowledge relating to the education of 'children' with disabilities. There is no reference to representation from people with experience or special interest in adults with disabilities, nor is there reference to parental representation on the Council.

person to participate in a programme of continuing education and personal development. The decision as to who may continue in education lies with the National Council for Special Education and the Health Board.[68] While the overall thrust of the Bill is positive, it does not provide a right to education appropriate to the needs of people like the plaintiff. Clearly, the State will be required to provide for adults with disabilities and to establish necessary bodies under the Act, but the fundamental issue remains unresolved. There is no guarantee of a right to education for the plaintiff, and others similarly situated.

VI. Separation of Powers

Having decided that the obligation to provide education was owed only to those under 18, a number of the judges claimed, the separation of powers argument became moot.[69] While it seems clear that the issue was moot, the majority were willing to express opinions on the matter. The core issue became the use of mandatory orders, including the supervision of the mandatory order granted in the High Court.

A consensus appears to have been reached among those members of the judiciary willing to discuss the issue that the High Court should only grant mandatory orders in exceptional circumstances, or where a declaratory order has been flouted. On the issue of the exceptional case, Denham J. stated:

> ... I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order.[70]

Geoghegan J., using very similar language, stated that:

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[68] Education for Persons With Disabilities Bill, 2002, s. 16(6).

[69] See the decisions of Murray J., Fennelly J., and Murphy J.

[70] [2001] 2 I.R. 545 at 656.

> ... [I]n very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind.[71]

While not ruling out the possibility of mandatory orders, the Supreme Court remains hesitant to issue them. A mandatory order, unlike a declaratory order, compels certain actions to take place. The implication of the Supreme Court's stance is that the State may only be compelled to take certain actions in 'exceptional' or 'rare' situations. Therefore, the High Court should, it seems, grant only declaratory relief at first instance. In addition, Keane C.J. maintained that the appropriate relief in this instance should have been a declaratory order because a mandatory order involved the "raising of taxes and the appropriation of public monies [which are] quintessentially matters for Dáil Éireann alone."[72] He empathised with the misgivings of the trial judge and understood the granting of the mandatory order, in light of what he describes as circumstances where "the State have conspicuously failed in their constitutional obligation to provide the education to which a citizen is entitled …"[73] Despite the criticism of State inaction by Keane C.J., he did not consider this an appropriate case for a mandatory order.

It is clearly established that children with intellectual disabilities have a constitutional right to primary education. When this right is denied, through lack of provision or inappropriate provision, the only course open to parents presently is to seek redress in the courts. *Sinnott* provides that plaintiffs in these actions are entitled to declaratory orders when their constitutional rights have been breached, and mandatory orders will only be granted in rare and exceptional circumstances, or where the declaratory order has been flouted. What would be regarded as exceptional or rare for the purposes of a mandatory order is unclear, and the required

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[71] [2001] 2 I.R. 545 at 724.

[72] [2001] 2 I.R. 545 at 640.

[73] [2001] 2 I.R. 545 at 640.

level of State failure is unknown. The State's obligations with respect to primary education for people with intellectual disabilities are beyond dispute. Should future cases come before the High Court,[74] it seems that the only course open to it is the granting of a declaratory order, and only in the event of its violation may a mandatory order be granted. The reluctance of the courts to grant mandatory relief could be perceived as collusion in the continued breach of the constitutional rights of children with disabilities.[75]

Application of recent Supreme Court rulings on this issue in the context of the right to personal liberty under Article 40.4[76] might prove an interesting exercise. Would the courts be expected to wait for an exceptional or rare denial of liberty, or a breach of the declaratory order before they could direct the release of an individual? It is highly unlikely that this reluctance to grant mandatory orders would occur in the context of the constitutional right to liberty. It therefore appears that the courts' reluctance to grant mandatory orders may stem from the category of right in question, namely the economic and social right to education.

VII. Economic and Social Rights

Human rights have traditionally been divided into two categories; namely, civil and political rights and economic and social rights. Civil and political rights are viewed as negative rights, in that they require State abstention from certain activities, whereas economic and social rights require positive action by the State.[77] This distinction is often blurred as there are many civil and political rights which would

[74] Over the past few years a number of cases have been brought under the education guarantee and numerous cases are still pending in respect of the alleged absence of appropriate provision by the State for children with disabilities.

[75] While the separation of powers argument may have been moot in this decision, in the later case of *T.D. v. Minister for Education* (Supreme Court, unreported, 17 December 2001), this position was reaffirmed.

[76] Kelly, *The Irish Constitution,* (3rd. ed., 1994), pp. 895 - 912.

[77] Irish Commission for Justice and Peace, *Re-Righting the Constitution – The Case for New Social And Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living* , p. 15.

require the State to take positive action; the right to a fair trial is one such example. Unusually for a modern Constitution, Bunreacht na hÉireann contains an express right to education in Article 42.[78] Education is a classic example of an economic and social right, because fulfilment of this right gives rise to substantial resource implications.

Article 42 may well reflect the historical position with respect to education in Ireland, in that it was introduced to protect the historic relationship between Church and State.[79] Notwithstanding this point, it is clear that de Valera understood the financial implications of this Article.[80] In the initial draft of Article 42.4, the word 'for' was omitted which would have resulted in the direct provision of education by the State. This was changed at what Glendinning termed the 'eleventh hour' in response to concerns expressed by the then Department of Finance.[81] Therefore, the first part of Article 42.4 now reads:

> The State shall provide for free primary education …

While the inclusion of this provision may be exceptional, this does detract from the fact that this economic and social right is expressly provided for in the Irish Constitution.

There is a judicial reticence when dealing with economic and social rights,[82] giving rise to the perception that enforcement within the constitutional setting is not the

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[78] See the Constitution of the Republic of South Africa for a different approach to economic and social rights.

[79] Quinn, "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order" in Costello (ed.), *Fundamental Social Rights: Current European Legal Protection & the Challenge of the EU Charter of Fundamental Rights.*

[80] Hogan, "Directive Principles, Socio-Economic Rights and the Constitution", (2001) 36 Ir. Jur. (n.s.) 174.

[81] Glendinning, *Education and the Law*. See also Hogan,"Directive Principles, Socio-Economic Rights and the Constitution", (2001) 36 Ir. Jur. (n.s.) 174, 179.

[82] *Report of the Constitutional Review Group* (1996, Pn. 2632).

role of the judiciary. This is reflected by comments within the Report of the Constitutional Review Group which cautions against the inclusion of socio-economic rights within the Constitution as it would amount to transferring decisions on major issues of policy to an un-elected judiciary, thus distorting the democratic process.[83] A second concern is in relation to the 'open ended resource commitments'[84] that economic and social rights can impose on the State. This reflects the first concern, namely, that budgetary issues are a unique function of the executive. The third objection that arises in this context is that the judiciary are not well positioned, nor do they have the expertise in determining how the wealth of the nation is distributed. This again refers to the contention that this is peculiarly the role of the policy makers.

Despite these real concerns, the Constitution remains the supreme legal document of the State and the right to education is clearly enumerated therein. The judiciary, who are obliged to uphold the Constitution, must enforce the right to education. In 1937, the people of Ireland approved the new Constitution in a referendum thereby granting democratic legitimacy to the role of the judiciary. The right to education has been enshrined in the Constitution for over sixty years and, in light of this experience, it is hard to understand the contention that democracy has been undermined, or that unmanageable claims have been made on the State's resources. There is a constitutional right to free primary education for all within the State and the Supreme Court ruled that this right extends to the age of 18 for those with an intellectual disability. The State is mandated to make resources available to meet this obligation.

Indeed the determination as to how the wealth of the nation is distributed is not the function of the judiciary. Education is, however, on a different plane to all other social and economic rights in that it is expressly provided for within

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[83] *Report of the Constitutional Review Group*, p. 235. For a detailed counter argument, see Whyte, *Social Inclusion and the Legal System*, p. 32 and Hogan, "Directive Principles, Socio-Economic Rights and the Constitution", (2001) 36 Ir. Jur. (n.s.) 174, 179.

[84] Hogan, "Directive Principles, Socio-Economic Rights and the Constitution", (2001) 36 Ir. Jur. (n.s.) 174, 176.

the Constitution. It is a judicial function to uphold constitutional rights, including those that may have resource implications. Keane C.J. referred to the House of Lords decision *R. v. East Sussex Country Council ex parte Tandy*[85] and endorses the contention that it is possible to direct a minister to apply the resources available to meet a constitutional obligation owed to a particular person[86] - in effect to prioritise spending in accordance with established constitutional rights.[87] As one commentator has noted on this issue:

> … those who argue for the constitutional protection of socio-economic rights have to be prepared to accept that one immediate consequence of this will be – unless the rights in question are to be purely paper rights – that further extensive powers will thereby be transferred to an already powerful judiciary. On the other hand, if a constitution cannot ensure a framework whereby the basic rights of the disadvantaged, the poor, the socially excluded and others for whom the democratic process seems unresponsive are protected, it may be said that constitutional law is not fulfilling one of its fundamental purposes in modern society.[88]

In the absence of mandatory orders to enforce educational rights, it is likely that these cases will continue to come before the courts.

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[85] [1998] A.C. 714

[86] [2001] 2 I.R. 545 at 631.

[87] See Whyte, *Social Inclusion and the Legal System* and Quinn "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order" in Costello (ed.), *Fundamental Social Rights: Current European Legal Protection & the Challenge of the EU Charter of Fundamental Rights*, 78 for a full discussion of this point.

[88] Hogan, "Directive Principles, Socio-Economic Rights and the Constitution", (2001) 36 Ir. Jur. (n.s.) 174, 76.

VIII. Conclusion

A number of principles may be inferred from the Supreme Court decision in *Sinnott*. The first is that there is a constitutional right to free primary education for children with intellectual disabilities. The Supreme Court has confirmed that 18 years is the maximum age to which the State has a constitutional obligation to provide for free primary education. A chronological limitation, however, is simply not realistic for intellectually disabled people whose needs will continue throughout their lives and it amounts to a fiction to set such a limit.

Second, the Supreme Court held that mandatory orders should only be granted in exceptional or rare circumstances or where a declaratory order has been flouted. It is unclear from this judgment as to what circumstances will give rise to a mandatory order. This may prove to be a further hurdle for parents who are attempting to enforce their child's right to education and could amount to an unreasonable delay in accessing education for their children. Since this decision was given, the Supreme Court has reaffirmed that mandatory orders can only be obtained in the most exceptional of circumstances.[89]

Third, the Supreme Court have stated that there is no prohibition on the State going further than that which is provided within Article 42. The Constitution is binding on all three arms of government, all of whom must aim to uphold the Constitution. The Supreme Court has expressed in two recent decisions, including *Sinnott,* an unwillingness to enforce economic and social rights.[90] It seems fair to infer from this that it is unlikely to recognise the Directive Principles of Social Policy, contrary to earlier indications that this may be possible.[91] Article 45 does state that the

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[89] *T.D. v. Minister for* Education (Supreme Court, unreported, 17 December 2001).

[90] *T.D. v. Minister for Education* (Supreme Court, unreported, 17 December 2001).

[91] *Murtagh Properties Ltd. v. Cleary* [1972] I.R. 330. See Hogan, "Directive Principles, Socio-Economic Rights and the Constitution",

principles are not cognisable by the Courts but this is not a luxury that is open to the Oireachtas. The Directive Principles operate as a 'general guidance' to the Oireachtas and should be considered by it when drafting laws. Article 45.4.1 states:

> The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm …

In light of the publication of the Education for Persons with Disabilities Bill, 2002, there appears to be considerable reluctance on the part of the Legislature to provide appropriate education for people with intellectual disabilities. This Supreme Court decision is final, but does not prevent the Oireachtas from expanding on the right to primary education as contained within the Constitution.

Finally, in the absence of State provision, the only recourse open to parents is the courts. While it is clearly not the function of the courts to determine how the state distributes the nation's wealth, the issue of the cost accrued in opposing these actions must be addressed, and a balance struck in favour of the common good. It is now almost ten years since the High Court decision in *O'Donoghue,* which recognised the right to education for children with disabilities. An adequate response from the State is still awaited. The State continues to force each individual to translate his constitutional right into a reality. Access to this right is tendered only on a case-by-case basis, so while some individuals benefit, the constituency of people with intellectual disabilities is effectively ignored. The plaintiff, in this action, may have derived some individual benefit, but the decision has failed to enshrine the right of similarly situated individuals to assert a right to education. In future cases, aggrieved parties might only have access to a declaratory order. A mandatory order will only be granted in rare and exceptional circumstances, or where the declaratory order has been flouted. Unless vulnerable groups can look to the courts for the practical enforcement of their constitutional

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(2001) 36 Ir. Jur. (n.s.) 174.

guarantees then "we have a paper Constitution decorated with printed words of equality and human dignity,"[92] but of little practical use.

The ideal response to this decision would be for the State to positively undertake to make appropriate provision to meet the educational needs of the intellectually disabled. Where the Government fails to meet those needs and the needs of vulnerable groups within society generally, then the judiciary can act very effectively to trigger a response by the government. Without judicial intervention, weaker sectors of Irish society have no other recourse in the face of government abandonment.

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[92] Binchy, "Irish Judges fail the human rights test", *The Sunday Times*, 22 July 2001.