THE SUPREME COURT

326 & 327/00

Keane C.J.
Denham J.
Murphy J.
Murray J.
Hardiman J.
Geoghegan J.
Fennelly J.
Between:

JAMIE SINNOTT
A PERSON OF UNSOUND MIND NOT SO FOUND
SUING BY HIS MOTHER AND NEXT FRIEND KATHRYN SINNOTT

Plaintiff/Respondent

and

THE MINISTER FOR EDUCATION, IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

and

Between:

KATHRYN SINNOTT

Plaintiff/Respondent

and

THE MINISTER FOR EDUCATION, IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

JUDGMENT of Hardiman J. delivered the 12th day of July, 2001.

1. The first of these cases arises from the tragic handicap which has blighted the life of the Plaintiff, and from the response of the State to it. The learned trial judge made declarations and mandatory orders, awarded damages, and adjourned the case for further consideration in 2003. He did so in a manner wholly satisfactory to the Plaintiff's advisers who seek no alteration in his orders. We have been told that these orders have brought about considerable benefit to the Plaintiff: his condition has improved and the improvement has been maintained. We have also been told that, regardless of the outcome of the appeal, the sums awarded will be paid and the regime available to the Plaintiff under the terms of the learned trial judge's order will continue to be available.

2. If the result of the appeal depended on whether the regime mandated by the judge's order was, on the evidence, the best prescription for the Plaintiff, I would agree that it is. But that is not the issue, nor does it form any part of the questions raised by this appeal. Equally, the appeal is not concerned with the general rights of the Plaintiff or of handicapped persons as a class. As argued in this Court the appeal raises narrower, but important, issues which may be summarised as follows:-

> (1) Whether Article 42.4 of the Constitution confers the right claimed in the circumstances of this case to lifelong free primary education.
>
> (2) What order, if any should be made in respect of the Plaintiff's education? In particular, has the Court power to make orders, including mandatory orders, formulating the policy to be followed in the education of the Plaintiff, directing in some detail the application of that policy to him and ordering the State to provide, or pay for the provision of services along these lines? If such powers exist in principle, is the present an appropriate case for the making of such orders?

Specific issues not arising.

3. Each party has by deliberate steps arranged that specific issues do not arise on this appeal.

4. The State has conceded that the Plaintiff's rights to free primary education as a child were breached, at least for long periods of time.

5. Accordingly no question arises as to whether the highly specialised services determined by the learned trial judge to be required by the Plaintiff fall within the scope of "primary education" as those words are used in Article 42. The Court approaches the present case on the basis of this concession. But a concession is not a proper basis for an authoritative construction of a constitutional provision. See *State (Quinn) v. Ryan* [1965] IR 70 at 120.

6. Still more significantly, the Plaintiff's advisers have very consciously based their claims exclusively on the first line of Article 42.4:-

> "The State shall provide for free primary education.....".

7. Although other articles of the Constitution are referred to in the pleadings and the judgment, this provision emerged clearly as the sole basis of the Plaintiff's contentions on the appeal.

8. This decision has the consequence that the Plaintiff's case prescinds, not only from any alternative constitutional basis, but from any basis at all in the very significant and specific statutory provisions in relation to education and otherwise, and notably from the Education Act, 1998. In answer to a specific question, Counsel for the Plaintiff stated that he did not rely at all on the provisions of this Act, even as an alternative to his preferred argument. He also confirmed that this reluctance did not arise from a view that any of the Acts provisions were repugnant to the Constitution.

9. The case was argued as well as a case could be, and the express narrowing of the Plaintiff's claim was done in pursuance of a very deliberate strategy. This strategy, in turn, is based on a very precisely articulated view of Article 42.4. This is that the right conferred by that provision, unique amongst all the constitutional provisions securing rights to citizens, is a wholly unqualified one *and* extends throughout life if needed. No consideration of expense, or of competing values, alternative claims on State expenditure or of debatable policy, on this view, can interfere with the State's obligation in relation to primary education. This obligation was contended

to be "a constitutional transaction of the very highest order"; "one of a very small number of mandatory expenditures in the Constitution"; a right ranking in priority to any other; the consequence of a decision by the people in 1937 that "we will splash out on this one thing only". It was contended that Article 42.4 "puts this item of national expenditure on a plane apart from and above all other expenditure". The reason expressly given for the decision not to rely on the terms of the Education Act, 1998 was that, even though the statutory rights in relation to education might be broader than the Constitution provides for (and certainly makes specific reference to persons with disabilities) yet those rights are subject to constraints in terms of available resources which, it is contended, Article 42 is *entirely* independent of.

10. This drastic and deliberate limitation of the basis of the Plaintiff's claim has obvious consequences. In order to achieve the claimed unqualified and limitless access, on a lifelong basis, to primary education the Plaintiff's case must establish that Article 42.4 indeed bears the unique construction which is claimed for it. The strategy of the Plaintiff's advisers involve the rejection of any easier routes to public provision for his needs. These remain wholly unexplored: I think this is unfortunate as it runs the risk of making the best the enemy of the good. And if either of the issues identified is resolved unfavourably to the Plaintiff, fresh proceedings may become necessary to deal with issues which, one might think, could have been agitated here. I will return to the statutory provisions, however, later in this judgment since, although they are not relied upon on behalf of the Plaintiff, I consider their existence to be of relevance at least in so far as remedies are concerned.

Article 42 of the Constitution.

11. The first question that arises is as to whether Article 42 of the Constitution confers the right claimed for the Plaintiff to lifelong free primary education. The learned High Court judge found that it did, and this finding is strongly challenged by the Appellants.

12. It is important to point out, and it follows from what has been said in the preceding section of this judgment, that the Appellants are not, as I understand it, denying the Plaintiff's entitlement to services appropriate to his condition. They are denying, however, an entitlement to the only type of service specifically claimed i.e. free primary education on a lifelong basis. The Court is solely concerned with the Plaintiffs claim as so formulated.

The High Court judge's findings.

13. At pages 49 and 50 of his judgment, the learned High Court judge considered this topic. He held:-

> "There is nothing in Article 42.4 which supports the contention that there is an age limitation on a citizen's right to ongoing primary education provided by or on behalf of the State..... It has been conceded on behalf of the Minister for Education that Jamie Sinnott at 23 years of age requires ongoing primary education and training and that he will probably continue to do so indefinitely. However it is submitted that his entitlement in that regard is not derived from Article 42.4 but, it seems, is an undefined 'right' which is likely to be granted to him only by way of ministerial grace and favour".

14. On the hearing of this appeal it was strongly contended on behalf of the Appellants that they had not conceded that the Plaintiff required ongoing *primary* education or training. They had however contended that the duty to provide primary education under Article 42.4 existed exclusively in relation to children. This appears to be a correct summary of what was contended in the High Court.

15. The learned trial judge found, at page 49:-

> "In my opinion, in the absence of a specific provision in terms, it would be wrong to imply any age limitation on the constitutional obligation of the State to provide for the primary education of those who suffer severe or profound mental handicap. In the light of the foregoing I am satisfied that the constitutional obligation of the State under Article 42.4 to provide and continue to provide for primary education and related ancillary services for Jamie Sinnott is open ended and will continue as long as such education and services are reasonably required by him."

16. The rationale for the foregoing is perhaps to be gleaned from the following passage in the judgment:-

> "In my opinion the ultimate criteria in interpreting the State's constitutional obligation to provide for primary education of the grievously disabled is 'need' and not 'age'. If a child's disability is such that he or she requires ongoing specialist primary education and training for life then the obligation of the State to provide for that service will continue into adulthood for the lifetime of the child. To cut off a crucial educational lifeline because a child has reached his or her majority and thereby to condemn the sufferer to the risk of regression in hard earned gains which would have enhanced his or her life would amount to an appalling loss, the effect of which might to be negative the advantages of the constitutional right to education (if provided) enjoyed by the sufferer for many years during infancy".

17. It can be seen, therefore, that the learned trial judge, noting the absence in Article 42.4, of an age at which the State's obligation to provide free primary education ended, inferred that such education was to end only when the need for it ended. On this basis, the right to have free primary education provided might, depending on individual circumstances, subsist on a lifelong basis, to pension age and beyond.

18. In this case, the Plaintiff commenced his proceedings when he was nineteen years of age and he was twenty-two at the time judgment was given. He was thus obviously beyond the age at which primary education normally terminates on both dates. Furthermore, the learned High Court judge was careful to stress (at page 48 of the judgment) that he was grounding the right he found the Plaintiff to possess to lifelong free primary education exclusively on Article 42.4 of the Constitution and not on the basis that it derived from any other article of the Constitution, or from or through an unenumerated constitutional right.

Construing Article 42.4.

Construction

19. There has been considerable academic debate, some reflected in the arguments in the hearing of this appeal, as to the correct approach to the construction of a constitutional provision. Tensions are said to exist between the methods of construction summarised in the use of adjectives such as "historical", "harmonious" and "purposive". In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction.

20. The strongest case for the limited use of a historical approach to construction is perhaps that set out by the late Professor Kelly in his contribution to *The Constitution of Ireland 1937 - 1987* (Litton Ed. Dublin 1988). It is I think beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution. No argument to the contrary was addressed to the Court.

21. More significant, however, is the question of duration of education under Article 42, as discerned from a construction of that Article in its own terms, and in its constitutional context. Here, the approach to construction outlined by Costello J. in *Attorney General v. Paperlink Ltd* [1984] ILRM 373 seems to me appropriate. He said:-

> "The Constitution is a political instrument as well as a legal document and in its interpretation the Courts should not place the same significance on differences of language used in two succeeding subparagraphs as would, for example be placed on differently drafted sub-sections of a Finance act. A purposive, rather than a strictly literal approach to the interpretation of the subparagraphs is appropriate".

22. Similarly, Dixon J. in *O'Byrne v. The Minister for Finance* [1959] IR 1 said:-

> "..... It may be that the literal meaning rather than the intention should prevail, although, in the case of a constitution, which is a unique fundamental document concerned primarily with the statement of broad principles in general language, I am inclined to the view that it is not to be parsed with the particularity appropriate to ordinary legislation and that the intention, if it can be reasonably be gathered, should prevail".

23. These two statements, I think, illustrate and expand what was aphoristically expressed by Chief Justice John Marshall in McCulloch v. Maryland (1819) 17 US 316:-

> "..... we must never forget, that it is a *constitution* we are expounding".

24. Approaching Article 42 with these things in mind, one notes first its organic link with the preceding article dealing with the family. This linkage is accomplished in the opening words of Article 42.1 where:-

> "The State acknowledges that the primary and natural educator **of the child** is the Family and guarantees to respect the inalienable right and duty of *parents* to provide, according to their means, for the religious and moral, intellectual physical and social education of their **children***".* (Emphasis added).

25. The next subsection guarantees to parents the right to provide this education in their homes, in private schools or in schools recognised or established by the State. Even a superficial examination of the remainder of the Article shows that, throughout, parents are seen as the providers of education either directly, through private schools, or through schools established by the State. Even if they avail wholly of state provided educational facilities a regard must be had for their rights (Article 42.4). Even if they fail in their duty in this respect towards their children, so that the State has to discharge their function, it must do so "with due regard for the natural and imprescriptible rights of the child".

26. Accordingly, I would respectfully endorse the conclusion of Miss Justice Laffoy in *O'Sheil v. Minister for Education* [1999] 2 IR 321. Having adopted "a global approach to the interpretation of Article 42" she concluded:-

> "In its entirety it is imbued with the concept of parental freedom of choice. While parents do not have the choice not to educate their children it recognises that all parents do not have the same financial capacity to educate their children. It is in this overall context that the obligation is imposed on the State to 'provide for free primary education'.

27. I would digress slightly to emphasise an aspect of the significance of this emphasis on parental freedom of choice. Since a child will not himself or herself be capable of making and acting upon decisions as to its own education, these decisions must be made by some person or agency on its behalf. In practice, this could only be a parent or a public body of some sort. The Article accords a primacy to the parent to make his own provision according to his means, to join with others for the purpose of providing private or corporate education, or to avail of State services. Even if the latter option is taken, parental rights must be given "due regard".

28. It is undoubtedly true that only very few parents themselves directly provide education; the reasons for this are indicated in the judgment of the learned Chief Justice. I consider, however, that parents taking other options retain a position of primacy to be exercised according to their "conscience and lawful preference". The Article envisages this, and the diversity which must follow from it. Though it is the child who is to be educated, the family is the "primary and natural educator".

29. It is thus manifest 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 as a child of such parent. This appears to me plainly to involve the consequence that the recipient of primary education would be a person who is not an adult and in respect of whom the primary educator, according to the natural order, is his family.

30. In making the contrary case, Counsel for the Plaintiff suggested that the word "child" where it occurs in Article 42 should be interpreted as meaning merely "offspring" or "descendant", terms which, they said, might apply to a person of any age. This view does not appear to me to be tenable. Firstly, it entirely ignores the language and structure of the Article, where the term "child" is never used in isolation but always with a correlative of "parent" or "Family". Secondly, it is even more difficult to maintain the construction contended for if one has regard to the primary (Irish) text, where that connotation would be expressed in a term such as "sliocht" rather than "leanbh".

31. The correlatives used for the term "child" ("leanbh") are "Family" ("Teaghlach"), and "parents" ("tuistí). Moreover, the word "clann" is used as a synonym for the recipients of education, meaning the children of a family.

32. Accordingly, I cannot accept the artificial construction advanced on behalf of the Plaintiff: that the word "child" or its equivalent in the national language should be interpreted as extending to a person of any age who has an ongoing need for education. Apart altogether from the analysis of the language and of the structure of the Article offered above, the Plaintiff's contention simply does violence to the ordinary meaning of the word.

33. The same result follows from a consideration of the decided cases in which this Article has been considered. Apart from *O'Sheil* cited above, these include, most relevantly, *Ryan v. The Attorney General* [1965] IR 294, *Crowley v. Ireland* [1980] IR 102 and *O'Donoghue v. Minister for Health* [1996] 2 IR 20 and *F.M. v. Minister for Education & Ors* [1995] 1 IR 409.

34. It is not disputed that, in each of these cases the recipient of education was regarded as being a child. While the precise line of demarcation of childhood may vary from time to time, and from context to context, it seems safe to say that all legal uses of the term connotes the meaning of a person other than an adult. This is so even where, as in context of criminal law, there is an intermediate status of "young person" created for certain purposes. For the purposes of the Education (Welfare) Act, 2000, a person is regarded as a "child" up to the age of sixteen (the minimum permissible school leaving age) and as a "young person" from 16 to 18. And the United Nations Convention on the Rights of the Child defines a child as a person under the age of eighteen, "unless under the law applicable to the child, majority is attained earlier" . (Article 1)

35. To this the Plaintiff's Counsel respond that, in the cases cited, the person or class of persons being considered was in fact a child as that term is normally used, so that it was unnecessary to consider whether the position would be different if he or they had passed beyond that stage of life. The cases cited, they say, may have adopted the usage "child" uncritically: or at the very least, they do not actually preclude a broader meaning being given to the word.

36. Equally, it is submitted, there is no age specified in the Article at which the condition of being a child ceases. This point appears to have weighed particularly heavily with the learned trial judge who referred to it on several occasions. On the basis of the omission to specify an end to the status of childhood, he equated the term "child" to "citizen" (page 49) and on the following page envisage that "a child" might require education into adulthood.

37. This appears to me to empty the term "child" or its Irish equivalent of all meaning and treat it as synonymous with "person" or "citizen". Indeed, Counsel for the Plaintiff specifically submitted that Article 42.4 should be read "as though primary education were guaranteed to the citizen". This is plainly not the intention of the Constitution. Both of these terms are used elsewhere in the text of the Constitution; the use of the term "child", rather than either of them in Article 42 must therefore be given significance. For example, the term "citizen" is widely used in Article 40 and, in Article 40.1., emphasis is laid on the status of each "citizen" as human persons. Article 40.4, in providing a procedure for the challenging of unlawful deprivation of liberty extends its protection to "persons":-

> "Upon complaint being made by or on behalf of any person: ....."

38. More restricted categories are envisaged in Article 41.2.1 and 2, which respectively refer to 'woman' and 'mothers'. It would be idle, I believe, to suggest that these provisions referred to a person who was neither a mother nor a woman on the basis that he devoted himself entirely to household duties and was therefore entitled to invoke their provisions. Similarly, Article 41.3.2 (iii), in the context of dissolution of marriage, envisages proper provision being made for 'the spouses, any children of either or both of them and any other person prescribed by law': it would clearly not be possible, in the absence of statutory provision, to import into this wording a constitutional obligation to make proper provision for a person who is neither a spouse nor the child of a spouse.

39. It is clear that the recipients of education under Article 42 fall into the restricted category of "children" and not the broader category of "citizens" or "persons". I believe that in equating children with "citizens" the learned trial judge fell into error and unwarrantedly extended the category of recipients of that form of education which is required by the Constitution. Article 42.1 to Article 42.5 have to be read together: it is clear on such a reading that those for whom the State provides for free primary education and/or supplements and gives aid to private and corporate educational initiative, or, when the public good provides it provides other educational facilities or institutions, are the children of the parents whose right and duty is preserved in the last phrase of Article 42.4 having been earlier recognised as "inalienable". Article 42.4 is a single sentence requiring due regard for the rights of parents in the doing of any of the things required or permitted to be done in the same sub-article. It cannot in my view be read otherwise without doing violence to the ordinary meaning of words, and ignoring its context in Article 42, and in the Constitution generally. It is not permissible, in my view, to read the final words of Article 42.4, referring to "the rights of parents" as qualifying only the obligation of the State to give aid to Non-State educational initiatives and to provide educational facilities themselves in certain circumstances. If regard is to be had for the rights of parents "especially in the matter of religious and moral formation" in relation to these obligations, it would be strange indeed if there was no obligation to have regard to those rights in relation to free primary education. This is the educational service availed of by the great majority of children, both at the present time and in 1937. To construe Section 42.4 as meaning that the State had to have regard for the rights of the parents in the matter of assisting private educational initiative (which at primary school level only ever served the minority of children), but not in providing for free primary education (which was always availed of by the great majority) would require one to ignore the spirit and historical context of the Constitution. And an obligation to have regard to the rights of parents is consistent only with a view of the recipients of primary education as children. The fact that some children are unfortunately without parental guidance does not in any way detract from this analysis: their position is specifically envisaged in Article 42.5 and they are still persons in respect of whom the primary educator, according to the natural order, would be their family.

40. Obviously, the obligation to provide for free primary education, does not restrict the State to that provision. By statute, the State has provided for free secondary education for the last thirty-four years and more recently has provided for free undergraduate university education as well. It is clear from the terms of Article 42.4 that the State may also provide "other educational facilities or

institutions"; other, that is, than primary schools or institutions provided by "private and corporate educational initiative".

41. If the term "primary education" is construed on a historic basis it is clear that what was in the mind of the drafters of the Constitution was the ordinary, scholastically oriented primary education represented by the ministerially prescribed National School curriculum. The contrary was not submitted. The highly specialised services which, according to the witnesses called on behalf of the Plaintiff at the trial he stands in need seem quite different from the ordinary content of "primary education" either in 1937 or today. Apart from anything else, conventional primary education is progressive and teleological in the sense of leading a child through a predetermined course to the end of one level of education and the beginning of the next. It is painfully clear that the services required by the Plaintiff are at a much more basic level. This is a level which the normal child achieves before starting the ordinary process of primary education and include such very basic features as continence, mobility and the ability to talk. Moreover, it is clear from the evidence that, in so far as the Plaintiff can achieve any of the things it would be at a modest level, requiring constant reinforcement because of the ever present risk of "unlearning". The Plaintiff's Counsel expressed with great clarity his client's needs. He said:-

> "The Plaintiff is not capable of learning much more than toilet training, preserving his mobility and responding to simple instructions, and perhaps a few words."

42. It must be doubted whether a child who was immobile or largely so, incontinent and almost unable to talk or communicate would be likely to benefit from primary education in the ordinary sense of that term, or whether indeed he would be accepted into the primary education system. It may be, therefore, that facilities for such a child might be provided in "other education facilities or institutions", to use the wording of Article 42.4. But this case was not made, even as an alternative. This, presumably, was on the basis that the duty to provide such institutions was qualified by the words "when the public good requires it". These words, may be thought, import a level of executive discretion, which the Plaintiff says is entirely absent from the first eight words of the sub Article. In any event, no case was made based on any other part of the sentence which constitutes Article 42.4.

Possible preclusion.

43. I have considered whether the judgment of the learned High Court judge and the omission of the State to pursue an appeal against the award of damages for breach of the Plaintiff's right to education up to the date of the order, preclude the State from arguing that the Plaintiff's right to free primary education does not extend beyond the age of 18. I do not believe that the State is so precluded, substantially for the reasons given by Mr. Justice Geoghegan in his judgment in this case. The claim that the State has an ongoing liability to provide the Plaintiff with free primary education on an indefinite basis will clearly have implications into the future. Though the State's position is not fully consistent, perhaps wholly or partly for the reasons discussed later in this judgment, I consider that its omission to focus a ground of appeal specifically on the period between his eighteenth birthday and the present time is in ease of the Plaintiff and does not, logically or in law, preclude them from maintaining what has always been their position i.e. that the State is obliged to provide for free primary education, as a matter of constitutional duty under Article 42.4, only to children.

An unqualified duty?

44. It was strongly contended on behalf of the Plaintiff that the opening words of Article 42.4, impose an absolutely unqualified duty on the State. No consideration of limitation of means, policy choices, competing demands, or alternative priorities can arise, it was submitted. These words, they said, imposed a duty on the State of a sort which is almost unique. On a consideration of the Constitution, it was submitted on behalf of the Plaintiff, the only similarly unqualified duties were the duty to provide a residence for the President in or near Dublin and the duty to hold elections at the constitutionally required intervals, unless a shorter interval is prescribed by law. In the course of later argument, it was submitted that the duty, arising under Article 25.4, to provide an official translation of a bill signed by the President in one only of the official languages, was the only other example of such an imperative, unqualified duty.

45. It will be observed that each of the other three alleged examples of an unqualified duty is infinitely more specific, and limited, than the alleged duty in relation to education. A translation of the Statutes is a simple and specific requirement: it can be seen at a glance whether it has been done or not. No question of policy is involved in complying with this requirement: the only policy decision that arises has already been taken and expressed in a constitutional provision. The expense of complying with this provision is, certainly considered as a percentage of the education budget, tiny. The other examples may be somewhat more expensive but are of the same general sort.

46. By comparison, the duty to provide for free primary education is a complex one, involving enormous annual expense, and requiring for its implementation the taking and constant reviewing of decisions on policy both by the legislature and by the executive. The content of the education provided for, the standard to which that content is to be taught, the mode of teaching, the age at which it is to commence and end, and many other matters must be decided upon and provided for.

47. Moreover, the enormous expense of educational provision must be provided in the manner laid down by the Constitution. That is to say, monies must be provided under legislation giving effect to the annual financial resolutions. The appropriation of such monies to publicly provided or supported education can only be secured in accordance with Article 17.2. of the Constitution which provides:-

> "Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public monies unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

48. It seems to me that the constitutional requirements for the conduct of public business, and in particular the expenditure of public monies, as exemplified in this Article and other provisions to be considered later, emphasise that the duty imposed by Article 42 must be discharged in a manner approved by the legislature on the recommendation of the executive. It is true that neither of these organs of Government are in a position to disregard a constitutional duty and that the Courts have powers and duties in the unlikely event of such disregard. But, excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged in the manner endorsed by the legislature and executive who must necessarily have a wide measure of discretion having regard to available resources and having regard to policy considerations of which they must be the judges.

49. This, in my view, is inconsistent with a concept of the duty imposed by the first eight words of Article 42.4 as a simple one, or as one different in kind from all other obligations imposed on the State or its organs. Nor can the duty be regarded as existing, as it was contended, on a higher plane than any other such duty. The right to education is undoubtedly a central and important one but it cannot logically be regarded as in some way outranking the right to life, or to bodily integrity, without which a right to education may be redundant. In this context, it is appropriate to recall what is said by Henchy J. in *The People (DPP) v. O'Shea* [1982] IR 384:-

> "Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit harmoniously into the general constitutional order and of modulation. It may be said of such a Constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision..... may be isolated and construed with undeviating literalness".

50. I would therefore reject two central planks of the Plaintiff's case viz that the duty on the State, under Article 42, in relation to primary education is of a qualitatively different sort to any other duty (including, for example the duty to vindicate the citizen's right to life). I would also reject, for the reasons already given, the proposition that the duty to provide for primary education is open ended and may extend throughout a persons life, or into old age. Any terminal point would be to some extent arbitrary, but the age of eighteen as advanced by the State has the merit of being the latest at which a person could, with any element of reality, be regarded as a child.

51. This is not to say that a person, such as the Plaintiff, with profound and obvious needs, is not entitled to have them appropriately met after this age, but simply that they cannot be compulsorily met thereafter (whatever about before) on the basis of the single part of the single constitutional Article on which this appeal was argued.

Statutory Provisions.

52. Accepting for the purposes of the case, and on the basis of the concessions referred to earlier in this judgment, that the Plaintiff's needs or any of them are to be met through a service properly described as primary education, as used in the Constitution, the Plaintiff's claim in respect of future services might be put in other ways. The Education Act 1998 has a long title which begins as follows:-

> "An Act to make provision in the interests of the common good for the education of every person in the State, including any person with a disability or who has other special educational needs.....".

53. Section 6 of the Act requires every person concerned with the implementation of the Act to "have regard to the following objects in pursuance of which the Oireachtas has enacted this Act": these include:-

> (a) To give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs....."
>
> (b) To promote opportunities for adults, in particular adults who as children did not avail of or benefit from education in schools, to avail of educational opportunity to adult and continuing education".

54. Section 7 confirms as a function of the Minister under the Act:-

> "(a) To ensure subject to the provisions of this Act, that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person".

55. Section 32 of the Act provides for the establishment of an "Educational Disadvantage Committee" whose functions are described in the Act. Section 38 provides for the establishment of the National Council for Curriculum and Assessment. Section 41(2) continues "..... It shall be the function of the Council:

> "..... (f) to advise the Minister on requirements, as regards curriculum and syllabuses, of students with a disability or other special educational needs".

56. 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 the disabilities which have afflicted the Plaintiff in one degree or another.

57. It must be perfectly clear that these provisions are, as one would expect, at least in some respects considerably broader than the constitutionally laid down minima. Section 7 of the Act came into operation during the hearing of the present case, which continued over a period of months thereafter. It is a striking feature that no attempt was made to utilise the new provision in relation to the Plaintiff's future treatment.

The reliefs granted.

58. The reliefs granted in this case are unusual and far reaching. They include damages for breach of constitutional rights and mandatory orders the effect of which is to lay down, in detail, the regime of treatment or instruction which the Plaintiff is to undergo until the year 2003 at which time the judgment envisages that the Court may make further orders of the same sort. These orders,

clearly, are in the nature of instructions to the Defendant and amount to total acquiescence by the trial judge in the demand advanced on behalf of the Plaintiff for a home based programme of a sort being developed in England. It is however to be noted that when issues of this sort have been litigated in that jurisdiction, as in *Bromley London Borough Council v. Special Educational Needs Tribunal* [1999] 3 AER 587, this has occurred against the background of a detailed statutory structure to deal with cases of educational disadvantage. This structure has, as an integral part of it, procedures for the resolution of disputes arising as to how individual students are to be treated. This structure has no direct counterpart here and, as noted above, no attempt was made to rely upon our statutory provisions.

59. A number of cases from other jurisdictions were cited on the hearing of this appeal, and in the similar case of *O'Donoghue v. Minister for Health and Ors.* [1996] IR 20. In relation to the cases from the United States and the United Kingdom, it is important to stress that each of these jurisdictions has an elaborate statutory scheme relating to the education of handicapped persons. Of particular relevance are the U.S. Education of the Handicapped Act 1975 and a number of the British statutes now most relevantly The Education Act, 1996. These laid down in considerable detail how an individual handicapped child is to be assessed and what services are to be provided to him or her. This is done by the making, under statutory authority, of an "individualised education programme" in the United States and a " a statement of special educational needs" in the United Kingdom. In the latter jurisdiction, at least, there is a statutory right of appeal to a special educational needs tribunal and perhaps a further review in the High Court and beyond. Decisions of the tribunal and the bodies below it which feed into it may, if the usual conditions are met, be subject to judicial review. But the basis of the existing scheme, in each case, is statutory and the procedures whereby the needs of a handicapped child are assessed and met is a precise one, drawing heavily on the evidence of experts. Indeed, one of the witnesses who gave evidence in this case was an educational psychologist in private practice whose work, to a significant degree, consisted of advising one party or other in the statutory decision making schemes.

60. Accordingly it seems a fair observation that without any legislative authority, and based wholly on the first eight words of Article 42.4, the learned High Court judge has derived a power to make highly specific, and binding, prescriptions for how the Plaintiff is to be treated by the State authorities. The next question that arises is whether a court has jurisdiction to do this where it relies on no statutory authority.

61. Since the order made by the learned judge depends wholly on the correctness of his interpretation of Article 42.4, it may be unnecessary to consider its form further if it is held that persons other than children cannot be beneficiaries of a duty to provide for free primary education. But even if the learned judge were correct in his interpretation on that Article, I would still have grave reservations about a court's jurisdiction to grant the reliefs actually granted, other than the declarations, for the reasons set out below.

Jurisdiction to make orders of this sort.

62. An order of this nature is a most unusual one for a Court to make. It appears, on the face of it, to make a decision, and to enforce it on the executive authorities, in relation to a matter normally within the discretion of the Executive. This is the matter of the services to be provided to the Plaintiff the recruitment of persons to provide services, the mode of assessing the result of the provision of these services and the costs of the services. The Court has in effect taken these decisions in lieu of any other body.

63. Decisions of this sort are normally a matter for the legislative and executive arms of government. This is not merely a matter of demarcation or administrative convenience. It is a reflection of the constitutionally mandated division of the general powers of government, set out in Article 6 of the Constitution. A system of separation of powers of this sort is a part of the constitutional arrangements of all free societies. In the leading case of *Buckley & Ors (Sinn Féin) v. Attorney General & Anor*. [1950] IR 67, the Supreme Court addressed this topic as follows:-

> "The manifest object of (Article 6) was to recognise and ordain that, in the State, all powers of government should be exercised in accordance with the well recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers".

64. Both the basis of the principle of separation, and its application in practice, are dealt with in the illuminating judgment of Costello J. (as he then was) in *O'Reilly & Ors. v. Limerick Corporation, Minister for the Environment & Ireland* [1989] ILRM 181. This was a claim by various members of the travelling community who lived on unofficial sites in Limerick in conditions of considerable poverty and deprivation. They wanted to be provided with halting sites. They sought a mandatory injunction directing the local authority to provide them with such sites, pursuant to a statutory duty alleged to exist under the Housing Act, 1966. They also claimed that the State should pay them damages for past sufferings which they would have undergone, on the basis that the conditions in which they had been required to live amounted to a breach of their constitutional rights.

65. It is the last section of the judgment, at pages 192 - 195, which are of relevance here. Costello J. held that their claims in relation to damages "should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts". I believe that the reasons for this decision are of the greatest relevance here.

66. Costello J. first noted that the claim for a mandatory injunction was based wholly on statute, and the breach of constitutional duty was alleged to ground an award of damages only. He said that "This seems to me to imply an admission that the Court would not have jurisdiction to make such an order and to raise the question why if the Court lacks jurisdiction to make a mandatory order for the present breach of a constitutional duty it has jurisdiction to award damages for past breaches?".

67. The learned judge pointed out that the jurisdiction claimed would apply equally to breaches of other constitutional rights, and he instances specifically the right to education. He then said:-

> "The question raised by the claim is this; can the Courts with constitutional propriety adjudicate on an allegation that the organs of government responsible for the distribution of the Nation's wealth have improperly exercised their powers? Or would such an adjudication be an infringement by the Courts of the role which the Constitution has conferred on them?"

68. It seems to me that similar questions arise, at least in part, in the present case.

69. Mr. Justice Costello then went on to develop the basis of the constitutional separation of powers. He traced it to the distinction, acknowledged since classical times, between distributive justice and commutative justice:

> "There is an important distinction to be made between the relationship which arises in dealings between individuals..... and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated."

70. Having further discussed the basis of the distinction the learned judge went on, in a passage of crucial importance:-

> "An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and **no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due**. This situation is very different in the case of commutative justice. What is due to an individual from another individual (including a public authority) from a relationship arising from their mutual dealings can be ascertained and is due to him exclusively and the precepts of commutative justice will enable an arbitrator such as a court to decide what is properly due should the matter be disputed. This distinction explains why the Court has jurisdiction to award damages against the State when a servant of the State for whose activity it is vicariously liable commits a wrong and why it may not get jurisdiction in cases where the claim is for damages based on a failure to distribute adequately in the Plaintiff's favour a portion of the community's wealth". (Emphasis added)

71. This passage, amongst other things, illustrates the fallacy of one of the important arguments deployed by the Plaintiff. In seeking to rebut suggestions that the relief claimed in the present proceedings offended the separation of powers, it was argued forcibly that the relief was no different in principle to that which would readily be afforded against a state authority which had committed a tort such as negligence or trespass. But relief in such a case is plainly a matter of commutative justice, arising from a specific wrongful interference by the State with an individual or his property. It is not a claim made by a citizen as such, or one of a class of citizens, to have distributed to him in money or monies worth, a specific part of the community's wealth, or sufficient of it for a particular purpose.

72. In further, and perhaps even more directly relevant, explanation of his decision, Mr. Justice Costello said:-

> "The State (against whom damages were sought) is the legal embodiment of the political community whose affairs are regulated by the Constitution. The powers of government of the State are to be exercised by the organs of State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in court established by law. In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Éireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure, and the raising of taxes, is given in the first instance by Dáil Éireann and later by the Oireachtas by the enactment of the annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas, although laws enacted by the Oireachtas may give wide discretionary powers to public authorities, and public officials (including Ministers) as to their distribution in individual cases."

73. Turning to the suggestion that the Courts should in some way oversee the work of the other organs of government Mr. Justice Costello said:-

> "The Courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated in the Constitution. What could be involved in the exercise of the suggested jurisdiction would be the imposition by the Court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources the correct priority to be given to them and the financial implications of the Plaintiff's claim..... In exercising this function the Court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise namely an adjudication on the fairness or otherwise of the manner in which other organs of state had administered public resources".

74. Costello J. went on to point out that apart from these considerations "the judiciary have no special qualification to undertake such a function".

In my view all of the considerations mentioned by Costello J. are of prime importance in dealing with the present case. In particular, the constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It is not a mere administrative arrangement: it is itself a high constitutional value. It exists to prevent the accumulation of excessive power in any one of the organs of government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution.

75. The principles set out by Costello J. were approved by the Supreme Court in *Mhic Mathúna v. Ireland* [1995] 1 IR 484. There, the Plaintiffs, who were a married couple with nine children, complained that, over time, the tax free allowance to married couples in respect of dependent children had been reduced to nil, while unmarried mothers and other categories of parent continued to enjoy a tax free allowance in respect of such children. Furthermore they claimed that their other benefits had been increased at a rate less

than the rate of inflation whereas benefits received by other categories of parent had increased to more than keep pace with it. They claimed they were discriminated against and that their rights under Article 41 of the Constitution had been infringed.

76. The Court upheld the High Court's decision to the effect that the judicial arm of government lacked the power, by declaration or otherwise, to direct the Oireachtas to initiate and pass legislation in any particular form. In relation to the alleged breach of constitutional rights, the Court held as follows:-

> "With regard to the provisions of Article 41 of the Constitution, it is clearly conceivable that under certain circumstances statutory provisions, particularly those removing in its entirety financial support for the family, could constitute a breach of the constitutional duty of the State under Article 41. This is not a case where in which such total removal of support or absence of support can be asserted. What is asserted here is that the measure of support over a period has become insufficient.
>
> It is clear that the provisions of a social welfare allowance for children of married parents living together is not by any means the only form of financial support provided by the State for the upbringing of children by married parents. Such matters as the contributions of the State to free primary and secondary education, provision of free or assisted medical services and other matters would all go into the question as to whether the support was a proper discharge of the constitutional duty. Added to that would be the vital question as to whether it was a proper discharge of the duty of the State under Article 41 bearing in mind the other constitutional duties of the State and the other demands properly made upon the resources of the State.
>
> As is already indicated in this judgment these are peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, that cannot be adjudicated upon by the Courts."

77. Similar principles have been expounded in a number of other cases including *Boland v. An Taoiseach* [1974] IR 338 and *Riordan v. An Taoiseach* Supreme Court (unreported) 21st July, 2000.

78. Indeed, these principles appear to have been accepted by the learned trial judge in part at least of his judgment. Thus, at pages 30 and 31, having made certain observations critical of the State authorities, he said:-

> "..... I recognise that I should not trespass into the realm of executive or administrative decision making by the State in which under the doctrine of Separation of Powers the Court has no function. However, the evidence herein establishes that the difficulties encountered by Jamie Sinnott and his mother in pursuing their rights against the State are symptomatic of a widespread malaise. It seems to me that the Court as the guardian of the constitutional rights of the citizen has a duty to criticise the response of the State to such claims. In the instant case the grounds for criticism are overwhelmingly. In my view the Court will be failing in its responsibility as guardian of such rights if it did not allude to the perceived problem areas which appear to have collectively contributed to the failure of the State to honour its constitutional obligations to the Plaintiffs which comprise rights into the future as well as in the past. It is now a matter for the State to assess the problem areas in its administrative and decision making structure which have brought about the failure to honour constitutional obligation to the Plaintiff and other similar claimants and to remedy the situation thus revealed as in its wisdom it deems most appropriate."

79. However, when the learned trial judge moved to consider the question of remedies, he did not content himself with declarations, criticisms, or allusions to specific problems. He not merely held (pp 64/65) that the Plaintiff should have the best available primary education and training but he went on to prescribe in considerable detail what precisely that the process should involve. Because the learned trial judge had been "much impressed by the evidence of Mr. Alan Willis about the Applied Behaviour Analysis home based programme.... which is presently being successfully pioneered in England", the judge required this to be provided by mandatory order, together with funding for home based ancillary services, speech, physiotherapy, occupational and music therapies. If necessary, he said, the experts required for providing the programme may be recruited in England or elsewhere. He prescribed the length of this ABA programme as being 2½ years, awarded damages based on the cost of this programme, provided for review by the Court in April 2003 at which time the question of further damages might arise.

Legal basis for the foregoing

80. A lengthy section of the learned trial judge's judgment, between pages 31 and 45, is entitled "The Law". The only case mentioned in this section apart from a reference to the definition of Education as deriving from *Ryan v. A.G.* [1965] IR 294 at 350, is *O'Donoghue v. Minister for Health, Minister for Education, Ireland and the Attorney General* [1996] 2 IR 20. The case is described by the learned trial judge as "a major landmark in Irish constitutional law and jurisprudence". The learned trial judge's judgment contains many and lengthy quotations from the judgment in *O'Donoghue*, summaries of further portions of it, and quotations from documentary material relied upon in it. It is therefore clear that the *O'Donoghue* judgment was profoundly influential on the learned trial judge.

81. Despite this, the form of the order in this case is quite different from that found in *O'Donoghue*. There, Mr. Justice O'Hanlon granted declaratory relief only. This was so despite the fact that the judgment detailed his "strong conviction" that effective primary education for a person such as the Plaintiff in that case required a "new approach" in respect of the various specific matters which he detailed including the teacher pupil ratio to be observed and the number of care assistants (2 per 6 students).

82. There are a number of aspects of the *O'Donoghue* decision on which I wish to reserve my position until they are raised in an appeal to this Court. However, I am in agreement with O'Hanlon J. in his reasons for confining the relief granted to declarations. He said:-

> "In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful Applicant. I therefore propose to make no further order at the present time, save in relation to the costs of the proceedings, but I reserve liberty to the Applicant to apply to the Court again in the future should it become necessary to do so for further relief by way of mandamus or otherwise as may come within the scope of the present proceedings. A general liberty to apply will also be given to all the parties to the proceedings".

83. The form of the declaration granted by O'Hanlon J. in O'Donoghue was as follows:-

> "......That the Respondents, in failing to provide for free primary education for the Applicant and in discriminating against him as compared with other children, have deprived him of constitutional rights arising under Article 42 of the Constitution, with particular reference to Article 42.3.2 and Article 42.3.4 thereof."

84. On appeal, a new form of declaration was substituted for the one just quoted, by consent of the parties. This was:-

> "..... That the infant applicant is entitled to free primary education in accordance with Article 42.4 of the Constitution and the State is under an obligation to provide for such education".

85. The events which occurred on appeal are the subject of an editorial note after the report of *O'Donoghue* in the official reports. It is at page 72. From this it appears:-

> (a) That the Court was informed by both parties that the State was then "providing for the infant applicant education appropriate to his current condition".
>
> (b) Counsel for the Minister and the other Respondents stated that the Respondents were not to be taken as accepting the manner in which the learned trial judge had interpreted the obligation to provide primary education to the Applicant.
>
> (c) Counsel for the Applicant stated that he was not to be taken as acknowledging any error in the manner in which the learned trial judge had interpreted the said obligation.

86. It thus appears that the appeal in *O'Donoghue* was dealt with in a manner satisfactory to the parties at the time but without a resolution of the legal issues involved by this Court. In the present case, as noted at the start of this judgment, certain concessions and limitations of the scope of argument by one side or the other has again led to a situation in which the issues before the Court are much narrower than those originally raised on the pleadings. The State appear to have adopted an attitude of "nolo contendere" to the findings of Mr. Justice O'Hanlon in *O'Donoghue*, and certain findings of the learned trial judge in this case. The State does not wish to be taken as accepting certain aspects of the judgment of O'Hanlon J., but neither has it persisted in appealing them on either of the two effective opportunities which were available. This stance may relate to the fact that, in each case, the Plaintiff was in fact receiving services agreed to be appropriate by the time the case came before this Court, and to the transformation of the legal landscape in relation to education effected by the 1998 Act and other statutory interventions since this case commenced. But it has the effect of leaving an area of uncertainty to whether the State in fact accept, as opposed to conceding for the purposes of a particular case, the main features of findings of O'Hanlon J. and the learned trial in this case in relation to the type of services to be provided to persons in the position of the respective Plaintiffs.

87. This, in turn, seems to reflect the concern within aspects of the Public Service at any rate with the nature of the High Court's decision in *O'Donoghue*, rather than the details of it. The judgment in the present case has attached to it, as the third appendix, certain correspondence between departments of State. These include the comment:-

> "..... it is the strong view of the Minister that the decision of the High Court should be appealed to the Supreme Court in view of the wider implications of having policy issues determined by the Courts".

88. In another document, dealing with the basis of the State's appeal in *O'Donoghue*, the following was said:-

> "(1) In appealing the decision of the High Court in the case of Paul O'Donoghue, the State was not appealing the central element of the High Court judgment - that a profoundly handicapped child is educable. The State accepted that education in a formal school setting, including integration in the conventional school environment, can be of real benefit to children with disabilities.
>
> (2) However, the judgment raised issues of more general concern, primarily relating to the proper separation of the powers and duties of the executive and judicial arms of government and the appropriate relationship between the two. These were viewed as constitutional matters of the utmost importance, having relevance across the entire spectrum of State activities".

89. It appears to me that the concerns raised in the Public Service are serious ones entirely appropriate to be considered by the executive and by persons holding important positions in the service of the State. In so far as the learned trial judge's judgment in this case can be read as critical of the decision to appeal, I would respectfully demur. Where an appellate jurisdiction exists it is the right of every party, the State itself no less than the humblest citizen, to invoke it. It is also inappropriate in any case to embarrass or criticise a party for having exercised his right of appeal. According to reports, there has been public comment of this sort in connection with the present case.

90. In *Buckley & Ors. V. Attorney General* [1950] IR 67, the High Court and the Supreme Court affirmed in strong terms the Courts' independence of the other branches of government, and specifically the unconstitutionality of a legislative measure purporting to determine the disposal of funds when the Courts were seized of the issue. The striking affirmation in that case of the separation of powers has already been quoted. It appears to me that the Courts must be equally concerned not to infringe upon the proper prerogatives and area of operations of the other branches of government. The functions of these branches, like those of the Courts, are themselves of constitutional origin and constitutionally defined.

91. In my view, the foregoing principles underlie the essential distinction drawn by Mr. Justice Costello between issues which can be

pursued in the Four Courts and issues which, to comply with the Constitution, must be pursued in Leinster House. It is easy to imagine a particular case in which a party might think, and might convince a judge, that a particular act or omission of the legislature or executive was clearly wrong and that another course of action (outlined perhaps in considerable detail in uncontradicted evidence) clearly right or at least preferable. That indeed was what happened in *O'Reilly's* case. But even if a court were quite satisfied that this situation existed, that fact alone would not justify it in purporting to take a decision properly within the remit of the legislature or the executive. I reiterate that it is an independent constitutional value, essential to the maintenance of parliamentary democracy, that the legislature and the executive retain their proper independence in their respective spheres of action. In these spheres, the executive is answerable to Dáil Éireann and the members of the legislature are answerable to the electorate.

92. Moreover, the independence of these organs of government within their spheres must be real and not merely nominal. This is imperatively required by the Constitution. Article 15.2.1 provides:-

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

93. Equally, Article 28.2 provides that:-

> "The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government".

94. Article 28.4.1 provides that:-

> "The Government shall be responsible to Dáil Éireann."

95. The provisions under which, alone, public monies may be appropriated to particular uses have already been cited.

Suggested basis of Court intervention.

96. The foregoing matters were extensively canvassed in the course of argument and the difficulty of reconciling the mandatory relief claimed and granted in the High Court with the constitutional provisions cited was fully acknowledged. The basis on which, it was said, the Court's intervention was nonetheless justified was expounded in some detail. It rests on a number of strongly worded statements of eminent judges over a period of years. I propose to deal with this point on the basis of the strongest of them, that of O'Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] IR 70 at 122. The learned Chief Justice said:-

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and the Courts were the custodians of these rights. As a necessary corollary it follows that no-one can with impunity set these rights or nought or circumvent them, and that the Courts powers in this regard are as ample as the defence of the Constitution requires".

97. This passage was the subject of special reliance, in particular the last phrase in it as to the scope of the Courts power.

98. *Quinn's* case related to the notorious circumstances in which Mr. Quinn, having an obtained an absolute order of habeas corpus, was re-arrested and bundled out of the jurisdiction in a manner characterised by subterfuge and deceit. His right of access to the Courts was wholly subverted. Those responsible for this state of affairs were found guilty of contempt, though this fact did not avail Mr. Quinn who remained in custody abroad. Certain foreign police officers found guilty of contempt tendered an apology through Counsel and were discharged without penalty. A perusal of the report shows a sustained campaign to spirit Mr. Quinn out of the country and to deceive his Solicitor as to his whereabouts.

99. The passage relied upon is in response to the answer made by one of the members of the Gardaí whose conduct was impugned. This answer, as it is summarised in the judgment of the learned Chief Justice in two paragraphs immediately before the passage relied upon is as follows:-

> "On behalf of Inspector Ryan it has been submitted that the return he makes to the order of this Court is good and sufficient: that he no longer has custody of the Prosecutor.
>
> The action which Inspector Ryan took with regard to the Prosecutor was taken in disregard of the Prosecutor's constitutional rights, and the return he makes to the order of this Court is in effect this: that he should not be held answerable by this Court because he has succeeded by reason of careful planning and the celerity of his action in preventing the Prosecutor from obtaining effective relief in the Courts".

100. In my view it is essential to read the passage relied upon in its context. So read, it is clear that it is not an assertion of an unrestricted general power in the judicial arm of government but rather a strong and entirely appropriate statement that a petty fogging, legalistic response to an order in the terms of Article 40.4 of the Constitution will not be permitted to obscure the realities of the case, or to preclude appropriate action by the Courts.

101. Counsel for the Plaintiff argued with more effect there must be residual power in the Court to ensure that a persons constitutional rights were not circumvented or denied. They instanced a situation in which a hypothetical legislature and government simply ceased to make any provision whatever for free primary education: in such circumstances, they said, the Court must retain the

jurisdiction to enforce the constitutional right under Article 42.4.

102. In my view, it is neither logically sound nor desirable to ground an argument by hypothesising an altogether extreme situation which admittedly has no applicability to the facts of the instant case, and to contend that the powers necessarily available to deal with so acute an emergency are therefore equally available to deal with an altogether different situation.

103. A position in which a hypothetical government would not only ignore a constitutional imperative, and presumably defy a court declaration on the topic, is indeed an extreme one. It is a situation expressively described by Mr. Gleeson S.C. for the Plaintiff as one of "meltdown".

104. The Courts have, however, always retained necessary discretion to deal with such circumstances. In the *MacMathúna* case, cited above, the Court declined to interfere with the Social Welfare and other provisions in issue. This was on the basis that the Plaintiff's complaints relate to ".....matters peculiarly within the field of national policy, to be decided by a combination of the executive and the legislature, but cannot be adjudicated upon by the Courts". But the Supreme Court specifically stated that it was "clearly conceivable that under certain circumstances statutory provisions, particularly those removing in its entirety financial support from the family could constitute a breach of the constitutional duty of the State under Article 41" thus requiring Court intervention.

105. The fact that powers to deal with extreme circumstances must be retained cannot be a basis for the exercise of such powers in any other circumstances. Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the Courts into the taking of decisions in areas in which they have no special qualification or experience. Thirdly, it would permit the Courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the Court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.

Challenge to the separation of powers.

106. The view of the separation of powers summarised above was for many years implicitly accepted by lawyers and jurists. It can be found in most if not all of the great constitutional documents and in the writings of such commanding figures as Aristotle, Locke, Montesquieu and the founding fathers of the United States. Central to this view is a recognition that there is a proper sphere for both elected representatives of the people and the executive elected or endorsed by them in the taking of social and economic and legislative decisions, as well as another sphere where the judiciary is solely competent.

107. In the last quarter century, there has arisen another point of view whose major manifestation in a quasi legal context is found in the works of the American academic John Rawls. It subordinates politics to a theory of justice, seeming to view political philosophy as a branch of jurisprudence. Theorists of this view consider that they can provide a body of principles which can be interpreted and applied by courts, to the virtual exclusion or marginalisation of the political process. Preferably, but not essentially, the mechanism of this process is to enshrine the selected principles in some form of code or charter. Failing this, one can try to imply them into older texts. The political process thus avoided or marginalised is regarded as too diverse, clamorous, and populist in values to be worth preserving as more than an inferior organ of government.

108. In my view, conflicts of priorities, values, modes of administration or sentiments cannot be avoided or ignored by adopting an agreed or imposed exclusive theory of justice. And if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role. The views of aspirants to judicial office on such social and economic questions are not canvassed for the good reason that they are thought to be irrelevant. They have no mandate in these areas. And the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate. That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas. To abandon this restraint would be unacceptably and I believe unconstitutionally to limit the proper freedom of action of the legislature and the executive branch of government.

109. I wish to emphasise that this is not a case in which the law has no remedy for the Plaintiff on the fraught and moving question of what is to be done for him in the future. This is a case where, in my view, the Plaintiff is not entitled to succeed in the single, limited avenue which, to the exclusion of all others, was pursued on his behalf. In particular, recent statutory provisions have effected a revolution in educational legislation which will undoubtedly be explored by some person with grievances about educational services, but this has not been done here. Similarly, the Court retains its wide jurisdiction to ascertain and enforce the rights of individuals, whatever their origin in law or in the Constitution. The rejection of the very specific and unique claim advanced by the Plaintiff in this Action does not alter the fact that the Courts will continue to develop the jurisprudence of individual rights and enforce such rights on all appropriate occasions.

110. It is hardly necessary to point out that a case based on a duty to provide services imposed by statute would avoid the difficulties of principle described in O'Reilly v. Limerick Corporation and elsewhere. It is clearly not possible to say, in the abstract, whether other difficulties might await a specific case, but the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention. The cases on autism cited from the United Kingdom and the United States have proceeded on the basis of a statutory duty.

111. I agree with the Chief Justice that the High Court had no power to retain jurisdiction in this case after final judgment.

112. I agree with the alteration proposed to the Declaratory Order by Geoghegan J. Otherwise, I would allow the appeal and vary the order of the learned High Court Judge by deleting the entirety of it save for the award of damages. The State have agreed that these will be paid regardless of the outcome of the appeal. The State has also agreed to pay the costs of the appeal.

113. In relation to the second action, that of Katherine Sinnott, I agree with the judgments of the Chief Justice and of Mr. Justice Geoghegan and I would concur in the orders they propose.

114. In reaching the contrary conclusion Denham J. in a memorable aphorism says that the "Constitution of Ireland is a constitution for the people of Ireland, not an economy". It may not be necessary to distinguish so rigidly between the people and their economy. I would prefer to say that the Constitution is not solely or primarily about the economic as opposed to other attributes of the people. But the Constitution *is* directly concerned with such economic topics as natural resources, with the gathering and allocation of public money, with the human rights to earn a livelihood and hold property and with the regulation of these rights in the interest of the common good.

115. But however one rephrases the aphorism I do not see it as relevant to the question as to whether Mrs. Sinnott has a cause of action. The reasons for the conclusion that she has no such cause are not economic in character, but legal and constitutional. It is true that if she were found to have such a cause of action, the economic consequences might be very great. This might impact on the State or on any other party found to have committed a constitutional wrong, as a Trade Union was in *Conway v. INTO* [1991] ILRM 497.

116. But these consequences would not be a reason to deny her relief if a cause of action existed, and are irrelevant to the question of whether it exists or not. The existence and scope of a duty whose breach gives rise to liability requires to be firmly identified in law if liability is justly to be imposed. In my view this has not been done in Mrs. Sinnotts case for the reasons given in the judgments to which I have referred.