REVISITING OLD GROUND – *TD, SINNOTT* AND THE DANGERS OF CLINGING TOO TIGHTLY TO SEPARATION OF POWERS ORTHODOXY

Abstract: This article seeks to reassess the TD and Sinnott cases in Irish constitutional law. It explores the context of these cases, and why they are regarded as important and closely linked in Irish constitutional discourse. It then analyses their reasoning to consider whether they withstand scrutiny after two decades. It concludes that the judgments painted with too broad a brush, reaching some questionable conclusions, drawing overly categorical distinctions between branches of government, and creating conceptual confusion.

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Introduction: Looking Back to See Anew

Revisiting past judgments can be an illuminating process – especially those viewed as significant turning points in the evolution of the constitutional canon. Reading such judgments again is an opportunity to place them in historical context, and to assess their contemporary significance.[1] Do they deserve to retain their authoritative status? Or should their precedential value be downgraded – or, at least, qualified with an asterisk of concern? Is it time to think again about the possible case-law paths they shut off, or leave the ghosts of alternative legal possibilities well alone?[2]

This paper re-assesses one such judgment, the much-debated Supreme Court judgment of *TD v Minister for Education*, now over two decades old.[3] Or, to be more precise, it examines the significance of this judgment and another Supreme Court decision with which it is closely associated – namely *Sinnott v Minister for Education*,[4] decided six months previously back in July 2001. It analyses (i) why these two judgments can be considered to be 'coupled' together, despite the distinct legal arguments at issue in each case; (ii) the relevant background context to both judgments; (iii) why they are regarded as important turning points in the development of Irish constitutional jurisprudence; and (iv) how well their reasoning has stood up to the test of time.

In essence, the particular significance of the *TD* and *Sinnott* judgments lies in how the majority of the Supreme Court pushed back against new approaches to protecting rights which had become highly fashionable by the end of the 1990s – favouring instead a more traditional, rigid approach to separation of powers, which limits how far courts can go in vindicating constitutional rights through the use of mandamus orders and other forms of supervisory relief. Re-visiting the two judgments, it is striking how the majority painted with a broad brush in reaching its conclusions, and reached some doctrinally messy and

[1] For a re-assessment of a Supreme Court judgment from a slightly later period, see Colm Ó Cinnéide, '*Equality Authority v Portmarnock Golf Club* – Revisited' (2022) DULJ, forthcoming. For a sustained re-appraisal of key Irish precedent through a feminist lens, see Mairead Enright and others, *Northern/Irish Feminist Judgments* (Hart 2017).

[2] This could be viewed as part of a constitutional 'self-correcting learning process', as Habermas puts it: Jurgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Pol. Theory 766, 766–769.

[3] [2001] 4 I.R. 259.

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

conceptually questionable results. As such, it is time to rethink the precedential value of *TD* coupled with *Sinnott* – and to think anew about how separation of powers should be conceptualised within Irish constitutional law.

TD V Minister for Education and its 'Coupling' with *Sinnott v Minster for Education*

Few cases in the *corpus* of Irish constitutional law provide as much fertile ground for such a process of re-assessment than *TD v Minister for Education*. As a judgment, it offers so much to think about. When might court intervention be justified in response to state neglect of its responsibilities towards vulnerable children? How far can courts go in fashioning effective remedies designed to vindicate constitutional rights? Are there limits to the judicial role in this regard, arising out of the need to respect separation of powers?

In its judgment, the majority of the Supreme Court decisively confirmed that there were such limits to judicial power. It upheld the State's appeal against a wide-ranging set of mandatory orders issued by Kelly J in the High Court. These orders had required the respondents to 'take all steps necessary' to proceed with the agreed policy objective of building ten 'high support' or 'special care' units capable of accommodating children with analogous care needs to the applicants - in order to vindicate their unenumerated constitutional rights, which were interpreted as including a right to be provided with sufficiently secure accommodation so as to enable them to receive an adequate education.[5] In overturning these orders, the majority of the Court (with Denham CJ dissenting) affirmed that the judicial branch should not assume a role in supervising the adequacy of the implementation of state policy, even when it potentially impacted on the enjoyment of constitutional rights power, unless 'absolutely exceptional circumstances' were in play.[6]

The Supreme Court majority went on to emphasise that courts should adhere to a much more restrained concept of their appropriate role within the separation of powers, and show due respect to the democratically accountable political branches of the state. At the most, only declarative relief should have been granted to the applicants – and several of the judges in the majority, including in particular Murphy J and Hardiman J, expressed substantial reservations as to how ready Irish courts should be to recognise the existence of constitutionally mandated socio-economic entitlements.

Significantly, this judgment came six months or so after a similar decision by the Supreme Court in *Sinnott v Minister for Education*. In this judgment, the majority of the Court granted a limited appeal against the decision of Barr J in the High Court to grant the plaintiffs a mandatory injunction, declaration and damages on the basis that the right to receive a basic elementary education as recognised by Article 42.4 of the Constitution had been repeatedly violated. The majority held that the first plaintiff, a 23-year old with severe autism and associated mental and physical disabilities, was entitled to a declaration that his constitutional rights had been breached by the failure of the defendants to provide him with appropriate educational facilities up to the age of 18 years. (This point had been essentially uncontested by the State.) However, the majority of the Court expressed doubt as to whether the scope of this right extended further than this age cut-off point – and all agreed, save for Denham J in dissent, that the second plaintiff, his mother, had no constitutional rights in play that were affected by the issues at hand. Furthermore, the majority also agreed that it had been

[5] This at least was Keane CJ's description of what he understood to be the unenumerated constitutional right at issue in the litigation: (n 3) 279.

[6] Hardiman J (n 3) 372; cited approvingly by Charleton J in *Burke v Minister for Education* [2022] IESC 1 [26].

constitutionally inappropriate for the High Court to retain supervisory jurisdiction over the future provision of educational facilities to the first plaintiff.

In reaching this second conclusion, the majority also stressed the need for courts to respect the limits of their constitutional role, and to avoid trespassing on the terrain of executive action – setting out arguments that they would repeat and re-emphasise later that year in *TD* Murphy and Hardiman JJ also expressed reservations about judicial over-reach into the socio-economic sphere, in terms that closely echoed their views later set out in *TD* Indeed, in their *TD* judgments, both judges cross-referred extensively to their *Sinnott* opinions.

As such, *TD* and *Sinnott* can in many ways be seen as coupled judgments – with legal arguments articulated in the first case surfacing again in the second one, despite the variations in subject matter. Both judgments are often cited together, as authority for how courts should respect separation of powers. Furthermore, a particular narrative has grown up around these two judgments over the last two decades, which views them as an assertion of constitutional orthodoxy in the face of new approaches to protecting rights through law which had become highly fashionable by the end of the 1990s. To understand this narrative, it is necessary to sketch out the background context to both judgments – which has both a wide global focus, and also a specifically Irish dimension.

The Background Context – Global and Irish

The 1990s were heady times for constitutional law across the world. The idea that courts should play an active role in protecting constitutional rights had become normalised, with for example the UK enacting the Human Rights Act 1998. Furthermore, it had become commonplace for courts to adopt a 'living instrument' approach to constitutional interpretation.[7] The emergence of new human rights conceptual frameworks, in particular those focused on children's rights, disability rights and non-discrimination, was particularly influential in this regard; they gradually came to exert a growing influence on how constitutional rights were interpreted and applied, helping to ensure they were increasingly read as imposing positive obligations on public authorities to take proactive steps to ensure the active enjoyment of rights.[8] Socio-economic rights were increasingly viewed as the 'next frontier' of this evolutionary process, notwithstanding the persistent controversy that surrounded their status and legal enforceability.

More generally, traditional concepts of separation of powers had begun to crumble under the influence of this new emerging order of rights-centred constitutionalism.[9] As the scope of rights protection widened, courts began to intervene in a wider range of issues – some of them, like the provision of education or housing, historically seen as the exclusive responsibility of the executive and legislative branches of the state. Furthermore, the relationship between the different arms of the state was increasingly conceptualised as in

[7] For an overview of the development of the 'living instrument' approach in the context of ECHR jurisprudence, see George Letsas, 'The ECHR as a Living Instrument: Its meaning and legitimacy', in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 106-141.

[8] For an early and highly significant manifestation of this trend, see *X and Y v Netherlands* (A/91) (1986) E.H.R.R. 235.

[9] For discussion of the casual factors underlying this trend, see Stephen Gardbaum, 'Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?) (2014) 62(3) American Journal of Comparative Law 613-639.

'experimental', 'dialogic' or what now be called 'collaborative' terms[10] – with the judicial, executive and legislative branches viewed as engaged in a common and mutually influencing project of achieving good rights-based governance, rather than as operating in separate spheres of authority.[11]

In line with this trend, courts in many common law jurisdictions had begun to develop innovative new ways of vindicating rights claims – in particular through the use of structural remedies, whereby courts assumed a supervisory jurisdiction over the implementation of certain state policies deemed to be essential to secure the enjoyment and vindication of certain fundamental rights.[12] This began with the use of 'bussing orders' in the US, in the wake of the Supreme Court's desegregation decision in *Brown v Board of Education*. By the 1990s, New York State courts were supervising the level of funding allocated to New York City schools, the Indian courts had assumed supervisory jurisdiction over a range of different forms of socio-economic resource provision, and the South African courts were breaking new ground in issuing structural indicts designed to ensure adequate state implementation of the right to housing.[13]

More generally, civil society activists, pressure groups and campaigners were increasingly turning to the courts as a way of achieving social reform. Furthermore, as rights consciousness developed, individuals and families were quicker to challenge state neglect. This inevitably fed into the type of rights claims that began to come before courts, as well as demands for legal reform more generally.[14]

Ireland was not immune to these broad trends. Indeed, if anything, it seemed to offer fertile ground for their flourishing – not least because roots could be found for them in existing case-law and doctrine, as distinct from requiring the importation of exotic foreign doctrines.[15] Irish constitutional law has a strong tradition of judicial rights protection, based around a variant of 'living interpretation' methodology. Furthermore, the Irish Supreme Court has repeatedly emphasised the importance of the role of the courts in protecting fundamental rights,[16] and has regularly intervened in matters traditionally assumed to be the exclusive competency of the executive and legislative branches in order to vindicate such rights, as well as fidelity to core constitutional principles more generally.[17]

Now, in judgments like *MhicMathúna*, the Supreme Court had recognised that matters of social policy generally fell within the purview of the executive and legislative branches.[18] But this case-law had left open some room for the possibility of judicial intervention if necessary to uphold fundamental rights – with the wording of various provisions of the Constitution lending textual support to this view, in particular the provisions of Article 42.4 relating to

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[10] Aileen Kavanagh, *The Collaborative Constitution* (forthcoming) (CUP 2023). Gerstenberg has argued that dialogic and experimental processes lie at the heart of 'Euroconstitutionalism' as it has developed over the last few decades: Oliver Gerstenberg, *Euroconstitutionalism and its Discontents* (OUP 2018).

[11] Chris Thornhill, 'Rights and Constituent Power in the Global Constitution' (2014) 10(3) International Journal of Law in Context 357-396.

[12] R. L. Weaver, 'The Rise and Decline of Structural Remedies' (2004) 41 San Diego L. Rev. 1617.

[13] For a comprehensive overview, see Malcolm Langford, Cesar Rodriguez-Garavito and Julieta Rossi (eds) *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017).

[14] See in general Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP 2011).

[15] See in general Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA 2002).

[16] *State (Quinn v Ryan)* [1965] IR 70.

[17] *Boland v An Taoiseach* [1974] I.R. 338.

[18] *MhicMathúna v Ireland* [1995] I.R. 484; and *Madigan v Attorney General* [1986] I.L.R.M. 136.

the role of the state in educational provision.[19] Furthermore, the rapid changing nature of Irish society in the 1990s brought issues of children's rights in particular to the forefront of public debate, with parents and campaigners highlighting the patently inadequate nature of Irish educational provision for children with special needs.

Thus, when confronted by repeated and persisting failures by the state to provide secure accommodation facilities of the type which expert opinion deemed necessary to meet the particular needs of the plaintiffs in *TD*, it is perhaps not surprising that Kelly J issued the wide-ranging mandamus orders that he did. A previous 1995 judgment by Geoghegan J in *FN v Minister for Education*, cited extensively by Kelly J, had set out a template for such an approach.[20] Similarly, the relief granted by Barr J in *Sinnott* built on previous precedent – namely the 1993 judgment of O'Hanlon J in *O'Donoghue v Minister for Health*, which had held that children with severe mental disabilities had a constitutional right to receive appropriate elementary education from the state.[21] (In his judgment in *Sinnott,* Barr J described this decision as a 'major landmark').[22]

Thus, the High Court judgments in *TD* and *Sinnott* had a reasonably solid basis in recent precedent. More generally, a good case could be made that they reflected the emphasis on vindicating rights that had animated previous Supreme Court jurisprudence – and were also in line with broader trends in the common law world. In this respect, it is significant that an eminent judge like Denham CJ in her dissenting opinions was ready to endorse their approach. However, the majority of the Court took a different view, and chose to rein in this expansive approach to vindicating constitutional rights – effectively repudiating, in so doing, some of the more ambitious currents of the 1990s rights *Zeitgeist*.

TD and *Sinnott* – Traditional Separation of Powers Orthodoxy Affirmed

Two specific elements of the *TD* and *Sinnott* judgments stand out in this regard. First of all, the majority were at pains to emphasise the undesirability of courts claiming a supervisory role over the implementation of government policy and consequent resource allocation, even if done in the name of vindicating rights. Murray J's judgment in *TD* was particularly focused on this procedural point. It outlined the dangers inherent in courts assuming such a supervisory role, which he argued could disrupt conventional lines of political responsibility and take judges into areas of decision-making where they lack particular expertise. Keane CJ and Hardiman J made similar comments in their judgments in both cases, with both downplaying the capacity of judicial intervention to plug gaps in provision left by existing law and policy.[23]

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[19] ibid 499. Finlay P, in delivering the single judgment of the Supreme Court, left open the possibility that 'under certain circumstances statutory provisions…removing in its entirety financial support for the family' might be unconstitutional.

[20] [1995] 1 IR 409. Geoghegan J had concluded that a similar failure to provide appropriate accommodation had breached the constitutional rights of the applicant: declaratory relief had been granted, but only after close judicial consideration of the suitability of new secured accommodation offered to the applicant by the state.

[21] [1996] 2 I.R. 20. O'Hanlon J had concluded this obligation had been breached by the failure of the respondents to provide the applicant with sufficiently resourced facilities, which he defined by reference to expert evidence as requiring a pupil-teacher ratio of 6:1 and also two childcare assistants per class.

[22] *Sinnott* (n 4) 571-2.

[23] Hardiman J extensively cited Costello J in *O'Reilly v Limerick Corporation* [1989] I.L.R.M. 181 to this effect.

More generally, the majority in both cases also endorsed a relatively rigid and traditional understanding of separation of powers, whereby matters of policy formation, expenditure and implementation should generally be left in the hands of the political branches of the state – in particular insofar as they relate to socio-economic matters, and/or involve issues of resource allocation. This approach underpins the Court's conclusion that the grant of mandamus relief was not justified in either case, despite it leaving open the possibility that such a grant could be justified in 'absolutely exceptional circumstances'. This exception was deemed not to apply in either *TD* or *Sinnott*, even though state neglect had obviously already had a serious negative impact on the plaintiffs in both cases.[24] It also underpinned the strong reservations expressed by Murphy and Hardiman JJ in both cases about extending constitutional rights protection into the socio-economic sphere.

In general, the majority of the Court concluded that the rights protective functions of the Irish courts were in effect cabined by the need to respect traditional separation of powers boundaries. In so doing, they effectively rejected the 'rights-centric' approaches that had increasingly found favour elsewhere. Indeed, Hardiman J was very explicit in signalling his dislike of such fashionable approaches. In *Sinnott*, he went out of his way to include a paragraph attacking John Rawls as a theorist whose work was emblematic of a wider contemporary tendency 'to view political philosophy as a branch of jurisprudence'. As Hardiman J put it:

> [t]heorists 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…I[f] 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.[25]

This is an idiosyncratic reading of Rawls's work. But it does illustrate how keen the majority were in both *TD* and *Sinnott* to re-assert traditional separation of powers orthodoxy, in the face of the fashionable new thinking of the late 1990s *Zeitgeist*.

Looking Back: The Unsatisfactory Framing of Separation of Powers in *TD* and *Sinnott*

So, two decades on, how should the coupled judgments of *TD* and *Sinnott* be re-assessed? With the benefit of critical hindsight, were the majority correct to stick to a traditional approach to separation of powers, and rein in the enthusiasm of the High Court? Has their cautious conservative constitutionalism been vindicated over time?

The first thing to note is that things have changed since the late 1990s. The heady embrace of court-centred rights activism that characterised that era has given way in many circles to a more sober focus on the possibilities and limits of the judicial role. There is greater recognition now, both overseas and in Ireland, of the potential dangers of judicial over-reach.[26] As Murray J argued in *TD,* courts assuming a supervisory role in respect of the implementation of state policy can undermine political accountability, distort resource

[24] As discussed below, this dimension of the case was strikingly under-discussed in the judgments themselves.
[25] *Sinnott* (n 4) 711.
[26] Jeff King, 'The Future of Social Rights: Social Rights as Capstone', in Katherine Young (ed), *The Future of Economic and Social Rights* (CUP 2019), 289-323.

allocation decisions and give sharp-elbowed litigants an unfair advantage.[27] Furthermore, it is widely acknowledged that legislation will usually be a more effective mechanism for achieving social progress than litigation – a point made by Hardiman J in both judgments.

The reservations expressed by the majorities in both *TD* and *Sinnott* about freewheeling judicial knight-errantry are thus not easy to dismiss. There is some wisdom in their instinctive disapproval of courts rushing to fill gaps left by executive inertia, and their preference for declaratory orders over other forms of relief – especially in situations as in *TD* where the relief sought is relatively wide-ranging, and the rights alleged to be violated are somewhat lacking in definition. There is no guarantee that such interventions will necessarily lead to better outcomes, and a real risk that they might distort incremental legislative reform measures as and when they are introduced.[28]

However, the majority in both judgments over-egged the pudding. Instead of just focusing on these procedural issues, the Court also used *TD* and *Sinnott* as opportunities to affirm the traditional model of separation of powers. And the passage of time has arguably been less favourable to this element of the judgment.

Re-reading both judgments again, it is striking how eager the majority were to draw categorical distinctions between the roles of the different branches of the state. Several judges in the majority, in particular Murphy and Hardiman JJ, went beyond what was strictly necessary to decide the two cases and cast doubt more generally over the legitimacy of judicial intervention in the sphere of positive state provision, in particular when issues of socio-economic resource allocation and 'policy implementation' were at issue. At times, this area of state activity comes close to being conceptualised as a judicial 'no go' zone – with for example the threshold for the grant of mandamus relief being set at 'absolutely exceptional circumstances', and several judges in both *TD* and *Sinnott* giving a narrow reading to the scope of Art. 42.4 and other constitutional rights which seem to open up limited exceptions to the basic separation of powers norm.[29]

This approach is problematic, as has been highlighted by case-law developments over the last two decades. First of all, as Conor O'Mahony notes in his contribution to this collection of papers, it is difficult to reconcile with both the text of *Bunreacht na hÉireann* and other established elements of the Court's case-law.[30] Provisions like Art. 42.4 clearly envisage the state as having positive obligations to provide particular forms of social provision to particular groups in need, as confirmed ironically in both *TD* and *Sinnott* – and the courts are not precluded from enforcing this obligation, unlike the case with the Directive Principles set out in Art. 45. In other areas of case-law, the Supreme Court has also been prepared to recognise that the scope of legally enforceable constitutional rights can extend into areas of socio-economic policy.[31] Indeed, it is difficult to see how judicial protection of the Art. 40.1 right to equality could not but blur the categorical lines the majority try to draw in *TD* and *Sinnott* – if the case-law in this area were ever to evolve out of its current embryonic stage.[32]

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[27] Octavio Ferraz, 'Harming the Poor Through Social Rights Litigation' (2011) 89 Texas L. Rev. 1643-1668.

[28] See the provisions of the Education of Persons with Special Educational Needs Act 2004, which were introduced partially in response to the outcome of *Sinnott*.

[29] See Murphy J's judgment in *Sinnott*, where he was reluctant to accept that the state was subject to a positive obligation to provide primary education to children over the age of 12.

[30] Conor O'Mahony, 'I Would Do Anything For Rights – But I Won't Do That' 2022 6(3) Irish Judicial Studies Journal 29.

[31] See *N.H.V. v Minister for Justice & Equality* [2017] I.E.S.C. 35.

[32] In this respect, the conclusion by the majority in *Sinnott* that the plaintiff's mother's rights were not engaged by the state neglect of her son's basic educational needs now seems obviously wrong: her situation would now

All this suggests that it was questionable for the majority in *TD* and *Sinnott* to adopt a concept of separation of powers based on categorical, broad-bush distinctions between the appropriate spheres of judicial, executive and legislative activity. Indeed, the Court's approach has caused subsequent confusion and uncertainty. For example, in its recent decision in *Burke v Minister for Education*, the Supreme Court had to clarify and add shades of nuance to Hardiman J's suggestion that judges should only be prepared to review executive policy implementation in exceptional circumstances.[33]

Furthermore, the Court in *TD* and *Sinnott* was so keen to affirm the traditional model of separation of powers that the claims of the plaintiffs get somewhat lost in the mix. There is no sustained discussion in either judgment as to whether the shocking history of state neglect in both cases might warrant the courts intervening in areas where they would normally not tread. There is also little or no recognition of the extent or gravity of the rights violations at issue, or the ongoing nature of the damage being potentially inflicted on the plaintiffs as the litigation proceeds.[34] The majority in both cases gesture towards the important role that courts play in vindicating constitutional rights, citing judgments like *State (Quinn v Ryan)*.[35] However, there is no real acknowledgement that the Irish courts have in the past crossed traditional separation of powers boundary lines in reviewing executive compliance with constitutional rights and principles – which of course begs the question why a similar approach was not adopted in *TD* and *Sinnott*.

From the perspective of hindsight, this failure to engage seriously with the rights concerns at issue particularly stands out, as well as the neglect of the disability and gender equality dimension to both cases. It highlights what Keith Ewing has described as the problem of the 'unbalanced constitution': the way particular types of rights claims – usually egalitarian or redistributionist in nature – are often side-lined within separation of powers frameworks.[36] Furthermore, much of the argumentative scaffolding erected by the majority to justify its conclusions lacks relevance to the particular situation of the plaintiffs in both cases. For example, Hardiman J in the extract from his *Sinnott* judgment quoted above waxes lyrical about the importance of the political process – but the primary plaintiffs in both *TD* and *Sinnott* are classic examples of individuals whose needs and perspectives are easily lost within the churn of democratic debate. Indeed, given the extent to which both judgments push back against the rights centrism of the late 1990s legal *Zeitgeist*, it is striking how little they engage with some of the arguments generally put forward to justify its focus on judicial remedies as a means of compensating for political blind-spots.

None of this is to suggest there is nothing of value in the majority's position. The same concerns that justify judicial caution at the procedural level of remedies are also relevant to wider debates – and Hardiman J's attack on the depoliticising tendencies of much of the 1990s *Zeitgeist* is on point. However, the broad brush with which the majority paint, and the unconvincing way in which they fit the doctrinal and normative flux of Irish constitutional law within a rigid separation of powers frame, is less than convincing. Both judgments might have been improved if the Supreme Court had been more delineating on the rare

form the basis of an indirect sex discrimination claim, as well as a claim for discrimination based on caring association with a disabled person.

[33] *Burke* (n 6).

[34] I am grateful to Professor Gerry Whyte for this point.

[35] O'Dálaigh CJ's judgment in *Quinn* (n 16) was extensively cited in both cases, by both judges in the majority and Denham CJ dissenting.

[36] Keith Ewing, 'The Unbalanced Constitution', in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001), 103–118.

circumstances when supervisory relief might be appropriate, and less concerned with rhetorical push back against what it considered to be questionable legal fashions.

Conclusion

Some of the Supreme Court's reasoning in *TD* (and *Sinnott*) holds up to this day – in particular, the majority's view that it is *prima facie* undesirable for courts to assume too active a role in supervising the detailed implementation of state policy. But, in general, the Court adopted an unduly broad-brush, rigid and artificially constrained approach to separation of powers. As such, it is time to rethink the precedential value of *TD* coupled with *Sinnott*, and to cast a somewhat sceptical eye on the majority's rush to repudiate the fashionable cutting edge of the late 1990s legal *Zeitgeist*. They were perhaps too quick to throw the baby out with the bathwater – and too slow to engage constructively with some of the fresh thinking about separation of powers that emerged from that era.