

## EQUALITY IN AN UNEQUAL WORLD

Dianne Hubbard, Legal Assistance Centre, 1997

*The Constitutional Court of South Africa recently decided a case involving sex discrimination against men -- President of the Republic of South Africa v Hugo. The differing opinions of the justices deal with the thorny question of how to apply legal equality in a society where men and women are still unequal.*

In June 1994, South African President Nelson Mandela pardoned certain categories of prisoners who had not committed very serious crimes. One category was mothers with minor children under the age of 12. A male prisoner with a son who was under the age of 12 at the time challenged the pardon in court on the grounds that it was unfair sex discrimination.

In terms of the South African Constitution, no one may be unfairly discriminated against on the basis of sex. The Constitutional Court decided that the sex discrimination in the Presidential pardon was not unfair. The different treatment of mothers and fathers was justifiable because it reflected the unequal roles which men and women actually play in child-rearing.

### *Discrimination is not always unfair*

Discrimination on the basis of sex was clearly present. An advantage had been given to mothers of small children which was not given to fathers of small children. The harder question was whether or not the discrimination was "fair".

The President justified the distinction on the grounds that mothers play a special role in the care and nurturing of young children. Only a minority of South African fathers are actively involved in childcare. Because of this social fact, the President felt that the release of mothers would best serve the interests of the children involved.

Justice Goldstone, who gave the court's judgement, noted that there are certainly cases where fathers bear more childcare responsibilities than mothers. There are also cases where the primary care-giver is neither the mother or the father, but rather an extended family member. But mothers *generally* bear an unequal burden of child-rearing, which requires great sacrifice:

*"For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. The generalisation upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared."*

So the discrimination was based on a genuine social fact, but did that make it fair? According to Justice Goldstone, it is necessary to look at the practical

considerations involved in the discriminatory act, as well as the impact of the discrimination.

The President wanted to issue a pardon to show mercy to prisoners. But he could not pardon any category of prisoner lightly. He had to show respect for the decisions of the judicial system, and he had to take into account public fears that releasing prisoners might lead to an increase in crime. Since male prisoners outnumber female prisoners almost fiftyfold in South Africa, releasing the fathers of young children as well as the mothers would have meant the release of a very large number of prisoners. This might have produced a public outcry. And because fathers play a lesser role in child-rearing, the release of male prisoners would not have contributed as significantly to the President's goal of serving the interests of children. In other words, the costs of such a move would have outweighed the gains.

Looking at the impact of the discrimination, Justice Goldstone pointed out that the President's pardon did not restrict the rights of any fathers permanently. It merely deprived them of a blanket form of early release. It did not stop any of them from applying to the President for an individual pardon on the basis of their own special circumstances. The President's pardon may have denied them an advantage given to mothers, but it did not fundamentally impair their right to dignity or their sense of equal worth. So there was discrimination, but it was not unfair.

Two opinions written by women on the court came to the same conclusion as Justice Goldstone, that the sex discrimination in the Presidential pardon was Constitutionally acceptable.

Justice Mokgoro felt that society must move away from gender stereotyping which has prevented women from "forging identities for themselves independent of their roles as wives and mothers". She was concerned that such stereotypes may deny fathers the opportunity to participate in child rearing, to the detriment of both the fathers and their children. But she still felt that the Presidential pardon was justified on practical grounds.

The sheer numbers of male prisoners would have made it politically impossible to provide a blanket pardon for all fathers and mothers. A case-by-case inquiry into the question of who was the primary caregiver in each case would have been far too time-consuming. And fathers were still eligible to apply for pardons on an individual basis. In practical terms, "the issue was whether some children with parents in prison be united with the parent, or no children be united with their parents". So the pardon was discriminatory, but it was justifiable as a way to help the children involved.

Justice O'Regan also rooted her opinion in social realities. She agreed that the discrimination was not unfair, even though it was based on a gender stereotype, because that stereotype is a social fact.

*"In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case."*

The impact of the discrimination was that there was an advantage to some mothers who are part of a group which generally shoulders a disproportionate share of

child care. On the other hand, no fathers were substantially or permanently harmed. And so Justice O'Regan concluded that the different treatment of mothers and fathers was not unfair.

### *Unfair perpetuation of gender stereotypes*

Justice Kriegler disagreed. In his opinion, the fact that women actually bear a disproportionate burden of child-rearing does not make a distinction drawn on this basis a fair one. "True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality." The view of women as the primary care-givers for children relegates women to a "subservient" and "inferior" role which is part of the old system of patriarchy rejected by the new Constitution.

In the view of Justice Kriegler, it is wrong to rely on generalisations about gender roles, no matter how true, because equal dignity and respect mean protecting the choices of every individual. Relying on the generalisation that women are the primary caregivers may hamper the efforts of those men who want to break out of the stereotypical mould and become more involved with their children.

According to Justice Kriegler, the Presidential pardon resulted in the release of 440 women from prison, but it acted to the detriment of all South African women "who must continue to labour under the social view that their place is in the home". It also encouraged men "to accept that they can have only a secondary/surrogate role in the care of their children". The pardon reinforced existing "gender scripts".

Justice Kriegler summed it up like this: "*Mothers are no longer the "natural" or "primary" minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism or privilege may maintain. Constitutionally the starting point is that parents are parents.*"

### *Equal treatment versus equal results*

This question of how to promote equality in an unequal world is a vexed one. One statement in Justice O'Regan's opinion goes to the heart of the problem: "*Although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality*". In other words, the vision of total equality under the law must somehow be reconciled with unequal social reality. Otherwise, theories about equality may simply protect the status quo.

The debate among the members of South Africa's Constitutional Court reflects a debate going on around the world. When does the advancement of equality in an unequal world require that men and women be treated differently? Here are a few examples:

- Affirmative action for women arises from the idea that it is not sufficient simply to treat men and women equally in a society where they have not benefited from equal opportunities in the past. For example, this is the rationale behind Namibia's requirement that party lists for local elections include a specified number of women.

- In the United States, a 1991 court case acknowledged that what constitutes sexual harassment at the workplace may differ, depending on whether the victim is a man or a woman. A "sex-blind" test of harassment may ignore the experiences of

women in a world where women live under a heavier burden of fear of violent sexual assault. This means that sexual overtures which seem trivial to a man may place a woman in real fear for her safety.

- In some countries, unmarried fathers have the right to participate in decisions about their child's adoption only if they have actually established a parental relationship with the child, while the unmarried mother's right over the child is automatic.

- Divorce law in the United States has been criticised for disadvantaging women through attempts at equal treatment. For example, "equal" division of property fails to recognise the typical situation in which the wife both works outside the home *and* does the lion's share of household and childcare duties. "Equal" division of property can also mean that divorced women get saddled with half of the family debt, even though they tend to have lower incomes and often have no real say in decisions about family finances. "Equality" has also produced a trend towards joint custody, which usually means that the ex-husband and the ex-wife have equal power over the children, while the ex-wife actually takes responsibility for far more of the day-to-day work of childcare.

Treating people differently on the basis of their sex can be dangerous. Women have been discriminated against for centuries by laws and policies which were designed to "protect" them. A law which takes account of the unequal realities must also try to move towards the ideal of sexual equality.

In a book called *The Illusion of Equality*, US law professor Martha Fineman suggests that we need to recognise two kinds of equality. "Rule equality" means applying gender-blind rules to every situation, regardless of the social differences and inequalities involved. "Result equality" means tailoring the rules to fit the factual situation, so that the *result* is that men and women are placed in a comparable position.

One can argue that the Presidential pardon in the Hugo case achieved "result equality". Mothers, the parents most likely to be involved in the care of small children, received a blanket release, while the small minority of fathers who were willing to play the role of primary caretaker had the option of applying for a release on an individual basis. This was probably a fairly efficient approach to the goal of reuniting the children of prisoners with a parent who would assume responsibility for their daily care. On the other hand, one of the judges believed that the more worrying result was the reinforcement of gender stereotypes.

The arguments boils down to a question of fact versus symbol. *What would you have decided?*