CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/96

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Appellant
THE MINISTER OF CORRECTIONAL SERVICES Second Appellant

versus

JOHN PHILLIP PETER HUGO Respondent

Heard on: 12 November 1996
Decided on: 18 April 1997

JUDGMENT

GOLDSTONE J:

[1] This matter comes before us on appeal against a judgment of Magid J in the Durban and Coast Local Division of the Supreme Court.[1] The applicant in the court below (now respondent) is a prisoner who, on 6 December, 1991, commenced serving an effective sentence of fifteen and a half years. Some nine years prior to his incarceration, the respondent married and a child was born of that marriage on 11 December 1982. The respondent's wife died in 1987.

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1 *Hugo v President of the Repubic of South Africa and Another* 1996 (4) SA 1012 (D).

[2] On 27 June 1994, acting pursuant to his powers under section 82(1)(k) of the interim Constitution,[2] the President (first appellant) and the two Executive Deputy Presidents signed a document styled Presidential Act No. 17 (the "Presidential Act"), in terms of which special remission of sentences was granted to certain categories of prisoners.[3] The category of direct relevance to these proceedings was "*all mothers in*

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2 Act 200 of 1993.

3 The Presidential Act provided, inter alia, the following:

> "In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to :
> - all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who has escaped and are still at large)
> - all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
> - all disabled prisoners in prison on 10 May 1994 certified as disabled by a district surgeon.

prison on 10 May 1994, with minor children under the age of twelve (12) years". It is common cause that the respondent would have qualified for remission, but for the fact that he was the father (and not the mother) of his son who was under the age of twelve years at the relevant date.

Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence :

- murder;
- culpable homicide;
- robbery with aggravating circumstances;
- assault with intent to do grievous bodily harm;
- child abuse;
- rape;
- any other crimes of a sexual nature; and
- trading in or cultivating dependance producing substances."

[3] In the application before Magid J, the respondent in an amended notice of motion[4] sought an order declaring the Presidential Act unconstitutional and directing the first appellant to correct it in accordance with the provisions of the interim Constitution. The respondent alleged that the Presidential Act was in violation of the provisions of section 8(1) and (2) of the interim Constitution in as much as it unfairly discriminated against him on the ground of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female.

[4] The application was upheld, the court finding that the Presidential Act discriminated against the respondent and his son on the ground of gender. This finding in turn raised the presumption of unfairness in section 8(4) of the interim Constitution, which presumption was found not to have been rebutted by the appellants.[5] The court ordered the first appellant to correct the Presidential Act in accordance with the provisions of the interim Constitution within six months from the date of its order.[6] It is the appeal from this decision, (leave having been granted in terms of Constitutional Court

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4 In the original Notice of Motion the respondent had initially sought an order for his release from imprisonment.

5 Supra n 1 at 1022D, 1023B.

6 Id at 1023F.

Rule 18) that forms the subject matter of this judgment. At the request of this Court, Mr M Pillemer appeared on behalf of the respondent. We are indebted to him for his assistance.

[5] This appeal requires us to consider the nature of the powers granted to the President by section 82(1)(k) of the interim Constitution.[7] Section 82(1) contains powers which historically are the non-statutory or prerogative powers which have traditionally inhered in the English monarch.[8] Similar powers have been and still are exercised (by heads of state or the executive in his or her name) in many countries, those in the

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7 Section 82(1) of the interim Constitution reads as follows:

> "(1) The President shall be competent to exercise and perform the following powers and functions, namely-
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> (a) to assent to, sign and promulgate Bills duly passed by Parliament;
> (b) in the event of a procedural shortcoming in the legislative process, to refer a Bill passed by Parliament back for further consideration by Parliament;
> (c) to convene meetings of the Cabinet;
> (d) to refer disputes of a constitutional nature between parties represented in Parliament or between organs of state at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution;
> (e) to confer honours;
> (f) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
> (g) to appoint commissions of enquiry;
> (h) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law;
> (i) to negotiate and sign international agreements;
> (j) to proclaim referenda and plebiscites in terms of this Constitution or an Act of Parliament; and
> (k) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures."

8 *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 at para 116, where the Court noted that "[t]he power of the South African Head of State to pardon was originally derived from royal prerogatives." See further Baxter *Administrative Law* (Juta, Cape Town 1984) 396; Per Schreiner JA in *Sachs v Donges NO* 1950 (2) SA 265 (A) at 306-307.

Commonwealth and many outside it.[9] In South Africa, prior to 1993, some, but not all, of those powers had been codified in earlier constitutions. Those that remained non-statutory were dealt with by reference to the exercise of the prerogative by the English monarch. The Republic of South Africa Constitution Act 32 of 1961 provided in section 7(4) that:

> "The State President shall ... as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative."

[6] In the Republic of South Africa Constitution Act 110 of 1983, it was provided in section 6(4) that:

> "The State President shall ... as head of the State have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative."

The 1983 Constitution made specific mention of some of the powers now contained in section 82 of the interim Constitution. These included, inter alia, the power to confer

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9 See Art 60(2) of the German Basic Law (Germany); US Constitution art II sec 2 cl 2 (USA); Art 13.6 Bunreacht Na hÉireann (Ireland); section 8 Republic of Singapore Independence Act (Singapore) referred to in Lee et al *Constitutional Law in Malaysia and Singapore* (Butterworths, Singapore 1991) 173. See further Sebba "The Pardoning Power - a World Survey" 1977 Vol 68 No 1 *The Journal of Criminal Law & Criminology* 83.

honours, pardon and reprieve offenders, and to enter into and ratify international treaties.[10]

[10] Section 6(3) of Act 110 of 1983.

[7] This process has now been completed in the interim Constitution. There is no express reference to prerogative powers and those powers of the President which originated from the royal prerogatives are to be found in section 82(1). This approach has also been followed in The Constitution of the Republic of South Africa, 1996.[11]

[8] Two conclusions can be drawn from the foregoing. First, the powers of the President which are contained in section 82(1) of the interim Constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of state. Second, there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1).

[9] It is in this context that we must consider the central submission of the respondent, namely, that the power of pardon or reprieve granted to the President in section 82(1)(k) is subject to the provisions of Chapter 3 of the interim Constitution and, in particular, the equality provisions contained in section 8. In order to consider this submission it is necessary first to determine whether, in the exercise of his or her section 82(1)(k) powers, the President is subject at all to the provisions of the interim Constitution.

[10] The starting point is the supremacy clause in the interim Constitution. It is

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11 Section 84(2).

provided in section 4 that:

> "(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
>
> (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

In terms of section 75 of the interim Constitution:

> "The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution."

And, section 76 provides simply that:

> "The President shall be the Head of State."

In section 81(1) and (2) the responsibilities of the President are set out as follows:

> "(1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of state defend and uphold the Constitution as the supreme law of the land.
>
> (2) The President shall with dignity provide executive leadership in the interest of national unity in accordance with this Constitution and the law of the Republic."

There then follow the provisions of section 82(1) which, as stated earlier, provide for the President's competence to perform powers which historically fell within the prerogative powers of the English monarch. These are powers which now flow directly from the interim Constitution itself. Unlike the other powers of the President, they do not derive their authority from, and they are not dependent upon, legislative enactment.

[11] There are only three branches of government viz. legislative, executive and judicial. The powers of the President, other than those set out in section 82(1), are without question executive powers.[12] The question is whether those referred to in section 82(1) fall within a different category. In my opinion they do not. Whether the President is exercising constitutional powers as head of the executive (ie the Cabinet) or as head of state, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government.

[12] Textual support for the view that the powers exercised by the President under section 82(1) are executive powers is to be found in the heading to and contents of section 83(1) and (2). It is there provided as follows:

> "83. **Confirmation of executive acts of President.-**

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12 Section 75.

(1) Decisions of the President taken in terms of section 82 shall be expressed in writing under his or her signature.

(2) Any instrument signed by the President in the exercise or performance of a power or function referred to in section 82(3) shall be countersigned by a Minister."

For the purpose of elucidating a provision in a statute our courts have referred to the headings of sections in a statute.[13] A similar position has been adopted in England[14] and Canada.[15] In the case of headings which are part of a constitution which was the product of negotiations conducted by the drafters thereof, and those headings are part of the

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13 Headings have, in certain circumstances, been used by our courts as an aid to interpret the sections of an Act which follow them, even though headings are not voted on or passed by Parliament. In *Chotabhai v Union Government and Another* 1911 AD 13 at 24 Lord de Villiers CJ, referring to an English decision, adopted the literal traditional viewpoint that "the headings of different portions of a Statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading." In *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431 Innes CJ, adopting a purposive approach, held that: "[w]e are. . . fully entitled to refer to [the heading] . . . for the elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process. . . . Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overriden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case." See also Solomon JA at 437. This position has recently been further endorsed by the Appellate Division in *Chidi v Minister of Justice* 1992 (4) SA 110 (A) at 115. See further *Bhagwan's v Swanepoel* 1963 (4) SA 42 (E) at 43D; Du Plessis *Interpretation of Statutes* (Butterworths, Durban 1986) 126-7.

14 In *Inglis v Robertson and Baker* [1898] AC 616 (HL) at 630 Lord Herschell (in regard to the Factors Act of 1889) stated: "These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them." Lord Upjohn in *Director of Public Prosecutions v Schildkamp* [1971] AC 1 (HL) at 28 with special reference to cross-headings stated: "When the court construing the statute is reading it through to understand it, it must read the cross-headings as well as the body of the statute and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of each case, and I do not think it is possible to lay down any rules."

15 In Canada it is accepted that headings are part of statutes and thus relevant to the construction thereof. Headings situate a provision within the general structure of the statute: indicating its framework, its anatomy and is a key to the interpretation of the sections ranged under it. See further Côte *The interpretation of legislation in Canada* (Editions Y Blais, Cowansville 1984). In *The Queen v Saskatchewan Wheat Pool* (1981) 117 DLR (3rd) 70 at 75 it was held that headings serve an interpretive purpose where there is ambiguity.

constitution as drafted, there is at least as much to be said for their relevance as a tool of interpretation as there is in the case of ordinary legislation.[16] It follows, in my opinion, that the heading of section 83 can be referred to as support for the conclusion that the powers of the President under section 82(1) are executive powers. The President, as an executive organ of state, by reason of the supremacy clause, is subject to the provisions of the interim Constitution.

[13] As far as Chapter 3 of the interim Constitution is concerned, it is provided in section 7(1) that:

> "This Chapter shall bind all legislative and executive organs of state at all levels of government."

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16 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 13-19. See also Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (Juta, Cape Town 1994) at 97.

Originating as they do from an executive organ of state, acts of the President, under section 82(1), are subject to the provisions of Chapter 3 of the interim Constitution. As a result, the exercise by the President of his powers under section 82(1) may be subject to review by courts of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers would be subject to review.[17] This conclusion is consistent with the approach of this Court in the first Constitutional Certification judgment,[18] where it was said that:

> "The power of the South African Head of State to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in NT 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT itself. It is that Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable." (footnote omitted)[19]

It is also mirrored in section 98(2)(a) and (b) of the interim Constitution which provides that the Constitutional Court has jurisdiction -

> "over all matters relating to the interpretation, protection and enforcement of the provisions of [the] Constitution, including -

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17 The general rule at common law was that the court may not review the manner in which the prerogative was exercised. See Carpenter *Prerogative powers - an anachronism*? Vol XXII CILSA 1989 at 192.

18 Supra n 8 at para 116.

19 Section 84(2)(j) of the first constitutional text (NT) before the Constitutional Court for certification provided for the power to pardon or reprieve offenders and remit fines, penalties or forfeitures. See section 84(2)(j) of the1996 Constitution for the corresponding provision.

> (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3; [and]
> (b) any dispute over the constitutionality of any executive or administrative act or conduct . . . of any organ of state;
> . . . ."

[14] The powers of the President under section 82(1) are expressed in wide and unqualified terms. Unlike most other presidential powers they can be exercised without the concurrence of the Cabinet. The President, in terms of section 82(1)(k), is subject only to a requirement that there be prior consultation with the Executive Deputy Presidents before the power is exercised.[20] The President is not, however, bound to follow the views of the Executive Deputy Presidents. As long as consultation has taken place his discretion is unfettered, in the sense that it is not expressly limited by the interim Constitution.

[15] In respect of most of the powers contained in section 82(1) it is not difficult to conceive of cases (extreme and unlikely as they may be) where some provision of the Bill of Rights might be contravened, and especially the equality provisions contained in section 8. One or another of the powers, for example, could be exercised, in a manner which excluded from consideration persons of a particular religion or ethnic group. As was stated by the Bavarian and Hessen Constitutional Courts,[21] the fact that the arbitrary

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20 Section 82(2)(e) read together with section 82(3) of the interim Constitution.

21 BayVerfGHE NF 18 140 (1965) at 147; HessStGH NJW 1974, 791 at 793.

exercise of the power to pardon may be a rarity is no ground for denying constitutional review.

[16] Thus far I have considered the issue before us with regard to the text of the interim Constitution. It is instructive also to have regard to developments in other relevant jurisdictions. Traditionally, the exercise of the prerogative powers of a monarch have not been subject to judicial scrutiny. However, over the past two or three decades there has been a movement, in certain circumstances, in favour of the recognition of such a review jurisdiction - and even in countries without a written constitution containing a bill of rights.

[17] In *Sachs v Donges NO*, Schreiner JA anticipated those developments. He said the following:[22]

> "Although in describing the category of prerogative powers the word "discretionary" is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute. It does not mean that the powers falling within the category form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done. There is no general rule that whatever has been done by the executive without statutory authority can be revoked by it at will. Each purported exercise of a prerogative power must be considered, when a case arises, on its own merits to see whether the power exists and whether the exercise is within the power; and this applies equally to the revocation of a previous act, done under a

22 Supra n 8 at 307.

prerogative power."[23]

[23] The South African cases in which the prerogative power of pardon or remission of sentence were considered, dealt with the right of an individual offender to due process in the consideration of its exercise. In *Smith v Minister of Justice and Another* 1991 (3) SA 336 (T), it was held that an offender has no legal right or expectation of being considered for pardon and that, by the same token, has no right to be heard before a decision is taken or to receive reasons after it has been refused. See also *Rapholo v State President and Others* 1993 (1) SA 680 (T), a case in which the court was considering a similar question with regard to amnesty. However, these decisions are not relevant to the objection raised in this appeal. The respondent is not claiming a common law review. He rests his case upon the alleged violation of the equality clause in the interim Constitution.

And, in Baxter[24] the following view is expressed:

> "The traditional view now shows signs of change. As the courts have developed more fully the principles by which discretionary powers may be reviewed, some judges have begun to regard some prerogative powers as an historical anachronism, as powers which might as easily have originated from statute, and as powers to which the normal principles of review should be applied by analogy. If this approach is accepted - and since the scope of review will always be affected by the question of justiciability - it is possible that the prerogative will gradually lose all its significance in administrative law." (footnote omitted).

[18] In England, where the prerogative powers were historically beyond the reach of the courts, the exercise of some prerogative powers has been subjected to judicial review. In 1984, in *Council of Civil Service Unions and Others v Minister for the Civil Service*,[25] a majority of the Law Lords held unambiguously that a decision-making power derived from a common law and not a statutory source is not "for that reason only" immune from judicial review; and that is so in respect of prerogative powers.[26] What determines whether the exercise of such a power is subject to the power of review is not its source but its subject-matter. After recognising the power of review, Lord Roskill stated:

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24 Supra n 8 at 392.

25 [1985] AC 374 (HL).

26 Per Lord Diplock at 410C-D, 411B-C; Per Lord Roskill at 417G-418B.

> "But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."[27]

Lord Scarman put it thus:

> "[I]f the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."[28]

In *R v Home Secretary, ex p Bentley*, Watkins LJ said the following:

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27 Id at 418A-C.

28 Id at 407B-C.

> "The *C.C.S.U.* [1985] A.C. 374 case made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.
>
> We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not.
>
> We do not think that we are precluded from reaching this conclusion by authority. Lord Roskill's passing reference to the prerogative of mercy in the *C.C.S.U.* case was obiter."[29]

That the reviewability of the exercise of prerogative power depends on the subject-matter was restated by the Privy Council in *Reckley v Minister of Public Safety and Immigration and Others NO (2),* where Lord Goff of Chieveley said that the *CCSU* case

> ". . . recognised that the exercise of a prerogative power was not ipso facto immune from judicial review; but it certainly did not go so far as to suggest that every exercise of such a power was amenable to that jurisdiction."[30]

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29 [1994] QB 349 (DC) at 363A-D.

30 [1996] 1 ALL ER 562 (PC) at 571.

[19] On the strength of these authorities it is safe to conclude that, in contemporary English law, the exercise of a prerogative power may be reviewed if, and to the extent that, the subject-matter thereof is amenable to judicial process.

[20] Other Commonwealth jurisdictions have adopted this English approach. In *Burt v Governor*-General, Cooke P said:

> "The prerogative of mercy is a prerogative power in the strictest sense of that term, for it is peculiar to the Crown and its exercise directly affects the rights of persons. On the other hand it would be inconsistent with the contemporary approach to say that, merely because it is a pure and strict prerogative power, its exercise or non-exercise must be immune from curial challenge. There is nothing heterodox in asserting, as counsel for the appellant do, that the rule of law requires that challenge shall be permitted in so far as issues arise of a kind with which the Courts are competent to deal."[31]

Burt's case established the reviewability of the exercise of a prerogative power on ordinary common law grounds.[32] Cooke P concluded, however, that cases such as that before him, in which a prisoner claimed he was entitled to a pardon on the grounds that he had been wrongly convicted, were subject to a fair practice in New Zealand and that the application for review should be dismissed. The approach of Cooke J in favour of reviewability of the executive power of pardon was statutorily confirmed in the New Zealand Bill of Rights Act, 1990, which controls the executive branch of government in

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31 [1992] 3 NZLR 672 (CA) at 678 lines 31-39.

32 Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, New Zealand

all its actions.[33]

1993) 588.

33 Id.

[21] In Australia the question was considered in *Minister for Arts Heritage and Environment and Others v Peko-Wallsend Ltd and Others*.[34] The issue was whether a decision of the Federal Cabinet in the exercise of a prerogative power could be reviewed by the courts. Bowen CJ said:

> "In my opinion, subject to the exclusion of non-justiciable matters, the courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative. The decision of the House of Lords in the *CCSU* case, *supra*, provides persuasive authority for this . . ."[35]

[22] The Canadian Courts have required that prerogative powers be exercised in conformity with the Charter of Rights and other constitutional norms and also subject to administrative law norms.[36]

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34 (1987) 75 ALR 218.

35 Id at 224 lines 6-11.

36 Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at para 1.8. See also *Operation Dismantle Inc. v The Queen* (1985) 13 CRR 287.

[23] What of non-Commonwealth countries? In Ireland the President is not answerable to the House of the Oireachtas (National Parliament) or to any court for the exercise of his or her powers and functions with regard to both formal and discretionary powers.[37] In *State (Walshe) v Murphy* Finlay P stated:

[37] Art 13.8.1 of the Irish Constitution. However this article cannot be raised in order to prevent judicial review of a function which, as Finley P stated in *State (Walshe) v Murphy* [1981] IR 275, "require[s] his [or her] intervention for its effectiveness in law, [but is] in fact the decision and act of the Executive."

> "The consequences of such a doctrine are alarming and appear to me to indicate its unsoundness as a proposition of constitutional law . . . . [It] would mean that the Executive would be in a position to act under the Constitution in respect of a number of matters contrary to the law and even contrary to the Constitution; and that, if such act required for its effectiveness the exercise of a function by the President, such illegal or unconstitutional conduct could not be reviewed by any court."[38]

[24] The US Constitution provides that the President

> " . . . shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[39]

This power of the President has been held by the Supreme Court to have as its origin the royal prerogative.[40] The nature of the power was considered by the Supreme Court as

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38 [1981] IR 275 at 283 as cited in Casey *Constitutional Law in Ireland* 2 ed (Sweet & Maxwell, London 1992) at 81.

39 US Constitution art II sec 2 cl 1. This includes the power to grant conditional pardons, commute sentences, remit fines and forfeitures and to grant amnesty by proclamation. See generally sections 10-13 in 59 *Am Jur* 2d at 12-15; Ammon L *Discretionary Justice: A legal and policy analysis on a governor's use of the clemency power in the cases of incarcerated battered women* 3 Journal of Law and Policy (1994) 1 at 28.

40 *Ex Parte Wells* 59 US (18 How) 307, 311 (1855).

early as 1833 in *United States v Wilson*.[41] Chief Justice Marshall, in an oft quoted passage, said:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

41 32 US (7 Pet) 150 (1833).

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate . . ."[42]

That definition of pardon as an act of grace was restated by the Supreme Court in 1915 in *Burdick v United States.*[43] However, in 1927, in *Biddle v Perovich*, Holmes J, speaking on behalf of a unanimous court, provided a more convincing basis for the exercise of the Presidential power than it being merely a private act of grace. He said:

> "A pardon in our days is not a private act of grace from an individual happening to possess power. *It is a part of the Constitutional scheme*. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[44] (My emphasis)

In more recent judgments, the United States Supreme Court has reinforced the notion that the President's power of pardon and reprieve, although derived from the Constitution,

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42 Id at 160.

43 236 US 79, 89 (1915). See also 59 *Am Jur* 2d sections 10-13, in particular n 29.

44 274 US 480, 486 (1927).

must be interpreted with regard to its English heritage. In *Schick v Reed*,[45] Burger CJ said:

[45] 419 US 256, 266 (1974).

> "A fair reading of the history of the English pardoning power, from which our Art. II, §2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution."[46]

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46 It should be noted that over the two centuries of United States Supreme Court jurisprudence there have been strong dissenting judgments holding that it was inappropriate to import into a constitutional state notions relating to the English monarch. See the dissent of McLean J in *Ex Parte Wells* supra n 40. In the passage at 321, his Republican fervour is apparent in his rhetorical question:

> "The President is the executive power in this country, as the Queen holds the executive authority in England. Are we to be instructed as to the extent of the executive power in this country, by looking into the exercise of the same power in England?"

Some 118 years later, a similar dissenting and no less emotional protest came from Marshall J (joined by Douglas J and Brennan J) in *Schick v Reed* id at 276:

> "The English annals offer dubious support to the Court. The majority opinion recounts in copious detail the historical evolution of the pardon power in England. *Ante*, at 260-262. See also *Ex parte Wells, 18 How. 307, 309-313 (1856).* The references to English statutes and cases are no more than dictum; as the Court itself admonishes, "the [pardon] power flows from the Constitution alone." *Ante*, at 266. Accordingly, the primary resource for analyzing the scope of Art. II is our own republican system of government."

See, further, Kalt "Pardon Me?: The Constitutional Case Against Presidential Self-Pardons" (1996) 106 No 3 *Yale Law Journal* 779 at 803.

On that approach, in effect, the Supreme Court has adopted a somewhat deferential approach to the exercise by the President of the power of pardon and reprieve. However, notwithstanding that deference, the United States courts have tested that power in relation to the nature of conditions attached to a pardon,[47] and in relation to the extent to which the exercise of the power affects the vested rights of third parties.[48]

[25] The German courts have also approached the power of pardon and reprieve as a prerogative power originating at the commencement of the German monarchy and taken over into the Weimar Constitution. Whether that power can be reviewed under the present constitution by the Federal Constitutional Court was an issue which led to one of the few tied decisions of that court. In BVerfGE 25, 352 (1969) four of the justices were of the opinion that the Basic Law (Comprehensive Judicial Review of all Acts of Public Authority) did not apply to acts of mercy. They relied on the historical origin of the power of mercy which had always been regarded as an institution outside the legal order (and even contradictory of it). They held, too, that it constitutes an exception to the separation of powers between the executive and the judiciary. Its exercise, they concluded, cannot be subject to judicial review. The other four justices held that the historical tradition could not live within the framework of the Basic Law and that the

47 Supra n 45 at 266. See also *Hoffa v Saxbe* 378 F. Supp. 1221 (1974).

48 See *Knote v United States* 95 US (5 Otto) 149, 154 (1877).

arbitrary exercise of public power was not exempt from the basic requirements of the constitution.

[26] In Israel, which has a non-executive President, in a judgment which antedated the *CCSU* case, the following was stated by Berinson J:

> "The President is a creature of statute and his powers are defined by law. Like everyone else in this country, he enjoys no rights or privileges which are not accorded to him by the laws of the State and every official act of his which exceeds the limits of the law is null and void."[49]

[27] The foregoing discussion indicates that there has been a distinct movement in modern constitutional states, (and, I include, for this purpose, England) in favour of recognising at least some power of review of what are or were prerogative powers of the head of state.

[28] The approach of the English courts whereby the jurisdiction of the courts to review the exercise of prerogative powers depends upon the subject-matter of the power is one that is not open to us. The interim Constitution obliges us to test impugned action by any organ of state against the discipline of the interim Constitution and, in particular, the Bill of Rights. That is a fundamental incidence of the constitutional state which is envisaged in the Preamble to the interim Constitution, namely:

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49 *Matana v Attorney-General* 14 PD 970 at 977.

> "... a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;..."

In my view, it would be contrary to that promise if the exercise of presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights. However, it may well be that, because of the nature of a section 82(1) power or the manner in which is it is exercised, the provisions of the interim Constitution, and, in particular, the Bill of Rights, provide no ground for an effective review of a presidential exercise of such a power. The result, in a particular case, may be the same as that in England, but the manner in which that result is reached in terms of the interim Constitution is a different one. On the English approach the courts, in certain cases, depending on the subject-matter of the prerogative power exercised, would be deprived of jurisdiction. Under the interim Constitution the jurisdiction would be there in all cases in which the presidential powers under section 82(1) are exercised.

[29] The way is now open to consider the review in the instant case, that is the exercise by the President of his power of pardon and reprieve of prisoners under section 82(1)(k) of the interim Constitution. I would emphasize that we are not required to consider the question of the reviewability of other powers which may be exercised by the President under section 82(1). In cases where the President pardons or reprieves a single prisoner it

is difficult, (save in an unlikely situation where a course of conduct gives rise to an inference of unconstitutional conduct), to conceive of a case where a constitutional attack could be mounted against such an exercise of the presidential power. Even the provisions of section 8 of the interim Constitution - the equality clause - would have only limited application. No prisoner has the right to be pardoned, to be reprieved or to have a sentence remitted.[50] The interim Constitution places such matters within the power of the President. This does not mean that if a president were to abuse this power vested in him or her under section 82(1)(k) a court would be powerless, for it is implicit in the interim Constitution that the President will exercise that power in good faith. If, for instance, a president were to abuse his or her powers by acting in bad faith I can see no reason why a court should not intervene to correct such action and to declare it to be unconstitutional. For example, a decision to grant a pardon in consideration for a bribe, could no doubt be set aside by a court. So, too, if a president were to misconstrue his or her powers I can see no objection to a court correcting such an error, though it could not exercise the discretion itself. This is what happened in *R v Home Secretary, ex p Bentley*[51] but even then the court declined to issue a mandamus or a declaration. It simply invited the Home

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50 In *de Freitas v Benny* [1976] AC 239 (PC) at 247 Lord Diplock in an appeal from the Court of Appeal of Trinidad and Tobago stated:

> "Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

51 Supra n 29.

Secretary to consider the case again in the light of the decision that he had misconstrued his powers. As it was put by Wilson J in *Operation Dismantle Inc. v The Queen*:

> "[T]he courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power."[52]

In that case, the Canadian Supreme Court had been requested to review and set aside a decision by the Government to allow the testing of United States cruise missiles in Canada. Wilson J concluded that:

> "[I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."[53]

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52 Supra n 36 at 309.

53 Id at 310.

[30] In the present case we are asked to decide whether rights of male prisoners have been violated by the manner in which the President exercised his power to pardon or reprieve prisoners in the impugned part of the Presidential Act. Here the President did not exercise his power of pardon or reprieve in a single case. He exercised it "wholesale" as it were - in general terms. That is the only way in which such a power can be exercised in a case such as the instant one, where the head of state wishes to confer a benefit upon groups of prisoners to mark an important event in the life of the nation. The relevant date chosen in the Presidential Act was 10 May 1994, the date on which the President was inaugurated. For the first time in its history, South Africa had a head of state and a head of the executive chosen as the result of a democratic constitutional process, and representing the whole nation.

[31] Where the power of pardon or reprieve is used in general terms and there is an "amnesty" accorded to a category or categories of prisoners, discrimination is inherent. The line has to be drawn somewhere, and there will always be people on one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit. For instance there may be no meaningful difference between prisoners whose birthday was shortly before the cut off date identified by the President, and who were eighteen when the decision took effect, and those whose birthday was shortly after the cut off date and were under eighteen at the

effective date. Indeed, there might well have been prisoners in the first category who, if assessed individually, might have been considered to be more deserving of a remission of sentence than persons in the latter category.

[32] The respondent argued that the Presidential Act was in conflict with section 8 of the interim Constitution in that by releasing all mothers whose children were under the age of twelve, it discriminated against fathers of children of a similar age. Section 8 of the interim Constitution provides as follows:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) . . .
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[33] The respondent argues that in releasing mothers of small children but not fathers, the President discriminated on the grounds of sex. The advantage that was afforded mothers was not afforded to fathers of small children and that failure is sufficient to

establish discrimination within the context of section 8(2) of the interim Constitution. The Presidential Act, in fact, discriminates on a combined basis, sex coupled with parenthood of children below the age of twelve. Only women who are parents of such children were released: women without children were not. In *Brink v Kitshoff NO*[54] this Court held that it is sufficient if the discrimination is substantially based on one of the listed grounds in section 8(2). Accordingly, it is clear that the Presidential Act prima facie discriminates on one of the grounds listed in section 8(2). As such, section 8(4) requires us to presume that the discrimination is unfair, until the contrary is proved.

[34] The appellants rely on an affidavit of the President to which is attached a supporting affidavit of Ms Helen Starke, the National Director of the South African National Council for Child and Family Welfare. Those affidavits were filed in a similar application which came before the Transvaal Provincial Division of the Supreme Court in *Kruger and Another v Minister of Correctional Services and Others*.[55] In the present proceedings, the earlier affidavit of the President was attached to the affidavit of Colonel Du Plessis, who represented both appellants in the present matter. In error, the supporting affidavit of Ms Starke was omitted. Without any admission as to its admissibility, the appellant consented to the inclusion in the appeal record of the affidavit

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54 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 43.

55 1995 (2) SA 803 (T).

of Ms Starke.

[35] In the court a quo, the respondent submitted that the affidavit of the President, together with its attachments, constituted hearsay evidence and was inadmissible. Magid J found for the appellant on the basis that the affidavit was admissible and therefore did not have to decide the point. In this Court, counsel for the respondent wisely did not press the argument contained in his heads of argument objecting to the admissibility of the President's affidavit. It appears as part of the record of proceedings against the President in the Transvaal Provincial Division and is referred to and incorporated in his affidavit by an official duly authorised to represent the President in these proceedings. There is no question that the affidavit filed of record is that of the President and that it is the affidavit of Ms Starke that is now part of it. In my opinion their contents are properly before us and do not constitute hearsay evidence. Hence, it is not necessary to consider the alternative argument advanced by counsel for the appellants that, even if hearsay, the affidavit is admissible by reason of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act.[56]

[36] In his affidavit, the President stated that in regard to the special remission of all mothers of minor children, he

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[56] Act 45 of 1988.

"was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. Having spent many years in prison myself, I am well aware of the hardship which flows from incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner.

7 Account was taken of the special role I believe that mothers play in the care and nurturing of younger children. In this regard I refer to the affidavit of HELEN STARKE . . . respectfully draw attention to the fact that the well-being of young children has been of particular concern to me and was an important factor in identifying two of the three categories in the Presidential Act.

. . . .

9 I have had an on-going concern about the general plight of young children in South Africa. There have been many occasions upon which I have expressed this concern publicly."

In her affidavit, Ms Starke stated in relation to the special remission of mothers of minor children:

"4 In my opinion, the identification of this special category for remission of sentence is rationally and reasonably explicable as being in the best interests of the children concerned. It is generally accepted that children bond with their mothers at a very early age and that mothers are the primary nurturers and care givers of young children.

. . .

5 Although it could be argued that fathers play a more significant role in the lives of older children, the primary bonding with the mother and the role of mothers as the primary nurturers and care givers extends well into childhood.

6 The reasons for this are partly historical and the role of the socialisation of women who are socialised to fulfil the role of primary nurturers and care givers of

> children, especially pre-adolescent children and are perceived by society as such (sic).
>
> . . . .
>
> 8 In my experience, there are only a minority of fathers who are actively involved in nurturing and caring for their children, particularly their pre-adolescent children. There are, of course, exceptions to this generalisation, but the de facto situation in South Africa today is that mothers are the major custodians and the primary nurturers and care givers of our nation's children."

[37] The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon the evidence of Ms Starke that mothers are, generally speaking, primarily responsible for the care of small children in our society. Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement, of course, is a generalisation. There will, doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be *fair* to discriminate between women and men on that basis.

[38] For all that it is a privilege and the source of enormous human satisfaction and

pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. 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.[57] The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.[58] 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.[59] 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

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57 As one woman put it in Barrett et al *Vukani Makhosikazi: South African Women Speak* (CIIR, London 1985) at 135: "Keeping a family, a home and a job going leaves most African women exhausted to the point of death."

58 One small study in the Cape Peninsula, for example, found a default rate of 85,5% in the payment of child support maintenance. See Burman and Berger "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa" (1988) 4 *SAJHR* 194 and 334 at 340.

59 See *Beijing Conference Report: 1994 Country Report on the Status of South African Women* at para 4.2.2.

responsibilities for child rearing are more equally shared.

[39] The fact, therefore, that the generalisation upon which the appellants rely is true, does not answer the question of whether the discrimination concerned is fair. Indeed, it will often be unfair for discrimination to be based on that particular generalisation. Women's responsibilities in the home for housekeeping and child rearing have historically been given as reasons for excluding them from other spheres of life. In a case note concerning *Incorporated Law Society v Wookey*,[60] which denied women the right to be admitted as attorneys, a commentator wrote:

> "A revolt against nature is involved in any proposal to allow women to enter into the legal profession. This idea is incompatible with the ideas and duties of Motherhood."[61]

To use the generalisation that women bear a greater proportion of the burdens of child rearing for justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them would clearly, therefore, be unfair.

[40] That, however, has not happened in this case. The President has afforded an opportunity to mothers, on the basis of the generalisation, that he has not afforded to

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60 1912 AD 623.

61 De Villiers "Women and the Legal Profession" (1918) 35 *SALJ* 289 at 290 as cited in Murray and Kaganas "Law and Women's Rights in South Africa: An Overview" (1994) *Acta Juridica* 1. See also Sachs and Wilson *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson, Oxford 1978).

fathers. In my view, the fact that the individuals who were discriminated against by a particular action, such as the one under consideration, were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair.

[41] The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada*[62] L'Heureux-Dubé J analysed the purpose of section 15 of the Canadian Charter (which entrenches the right to equality) as follows:

> "This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society: *Big M Drug Mart Ltd* [(1985) 13 CRR 64] at p.97 . . . (*per* Dickson J. (as he then was)). More than any other right in the *Charter*, s. 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that

62 (1995) 29 CRR (2d) 79 at 104-5.

> treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."
> (See also the judgment of McLachlin J in *Miron v Trudel* (1995) 29 CRR (2d) 189 at 205.)

It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that the impact of the discrimination on the people who were discriminated against was not unfair. In section 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.[63]

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63 It is the logical corollary of the principle that "like should be treated like", that treating unlike alike may be as unequal as treating like unlike. See the discussion in Kentridge "Equality" in Chaskalson et al *Constitutional Law of South Africa* (Juta & Co Ltd, Kenwyn 1996) at para 14.2.

[42] According to the affidavits filed, the President intended by the special remission of the prison sentences of mothers to further the best interests of children. There is no doubt of his good faith. However, the fact that the President, in good faith, did not intend to discriminate unfairly and had in mind the benefit of children is not sufficient, to establish that the impact of the discrimination upon fathers was not unfair.

[43] To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.

[44] The power to pardon duly convicted prisoners in terms of which the President acted is conferred upon him by the interim Constitution. The power of pardon is one which is recognised in many democratic countries.[64] In terms of the interim Constitution, the power is not subject to cabinet concurrence or to legislative control, but is conferred upon the President directly by the interim Constitution. Although the historical roots of the pardoning power may lie in the royal prerogative, it is clearly a power which the drafters of the interim Constitution considered appropriate within a constitutional democracy. To repeat the words of Holmes J:

64 Supra para 5. See Sebba, supra n 9.

> "When [a pardon is] granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[65]

The pardoning power in the interim Constitution serves a similar function. It is not a private act of grace in the sense that the pardoning power in a monarchy may be. It is a recognition in the interim Constitution that a power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon.

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65 Supra para 24.

[45] There are at least two situations in which the power to pardon may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences and second, it may be used to confer mercy upon individuals or groups of convicted prisoners when the President thinks it will be in the public benefit for that to happen.[66] In the first situation, it has been recognised in many courts that it can play an important role in enhancing justice within a legal system. As Cooke P said in *Burt v Governor-General*:

> "[I]t must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchial right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes."[67]

The pardoning power in the interim Constitution should provide such a safeguard.

[46] In addition, however, it will also provide an opportunity to the President to release groups of convicted prisoners where he or she considers it desirable in the public interest.

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66 See for a full discussion Kobil "The Quality of Mercy Strained: Wresting the Pardoning Power from the King" (1991) 69 *Texas Law Review* 569.

67 Supra n 31 at 681 lines 50-53.

This is such a case. Here the pardon was not to an individual to correct a miscarriage of justice, but to a group to confer an advantage upon them as an act of mercy at a time of great historical significance. In exercising the power, the President considered carefully the implications of the remission he proposed. In particular, he took into account the interests of the public and the administration of justice. As he stated in his affidavit:

> "5. The decision to grant special remission of the remainder of their sentences to the categories mentioned in the Presidential Act was not lightly taken. The power to grant special remission is, in my opinion, a grave one which requires careful consideration of many competing interests. In particular:
>
> 5.1 I believe that it is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentence is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute.
>
> 5.2 I believe further that it is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. I am conscious of the fact that the level of crime is a matter of concern to the public at large and that there may well be anxiety about the release of persons who have not completed their sentences."

The considerations mentioned here would well nigh have made it impossible for the President to release all fathers who were in prison as well as mothers. Male prisoners outnumber female prisoners almost fiftyfold.[68] A release of all fathers would have meant

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68 The daily average prison population in 1994 was 108066 males and 2867 females. The female prison

that a very large number of men prisoners would have gained their release. As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers. In addition, the release of a large number of male prisoners in the current circumstances where crime has reached alarming levels would almost certainly have led to considerable public outcry. In the circumstances it must be accepted that it would have been very difficult, if not impossible, for the President to have released fathers on the same basis as mothers. Were he obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all.

[47] In this case, two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage: an early release from prison; and fathers have been denied that advantage. The President released three groups of prisoners as an act of mercy. The three groups - disabled prisoners, young people and mothers of young children - are all groups who are particularly vulnerable in our society, and in the case particularly of the disabled and mothers of young children, groups who have been the victims of discrimination in the past. The release of mothers will in many cases have been of real benefit to children which was the primary purpose of their release.

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population was thus 2,58% of the total prison population. (Report of the Department of Correctional Services.)

The impact of the remission on those prisoners was to give them an advantage. As mentioned, the occasion the President chose for this act of mercy was 10 May 1994, the date of his inauguration as the first democratically elected President of this country. It is true that fathers of young children in prison were not afforded early release from prison. But although that does, without doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement. Furthermore, the Presidential Act does not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. In his affidavit, the President made clear that fathers of young children could still apply in the ordinary way for remission of their sentences in the light of their particular circumstances. The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers, was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair. The respondent, therefore, has no justified complaint under section 8(2) of the interim Constitution.

[48] Magid J came to the conclusion that the President did not discharge the burden of

proving that the discrimination was not unfair. In effect, he came to that conclusion on the basis that the axe wielded by the President was too blunt. His criticism was that:

> "The President did not suggest that he drew a distinction between mothers of children in normal families both of whose parents are alive and "single parent" families. So children whose mothers were imprisoned but who were being cared for by their fathers (and possibly other close members of their families) were preferred to children who might have been left without any care at all by the incarceration of their "single parent" fathers."[69]

However, in my opinion, for reasons which have already been set out above, if the President decides to approach the issue of pardon or reprieve not in individual cases, but by reference to a category of offender, then it may be well nigh impossible to do so other than by the "blunt axe" method. In the legislative or administrative context other methods would usually be available and over or under inclusive classifications would be less likely to be held fair. I do not agree with Magid J, therefore, that on this account the President failed to discharge the burden placed upon him by the provisions of section 8(4) of the interim Constitution to establish that the discrimination was not unfair.

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69 Supra n 1 at 1023A.

[49] In *Kruger and Another v Minister of Correctional Services and Others*,[70] a similar case to the present one, Van Schalkwyk J dismissed the application. He did so, broadly speaking, on the basis that the President, in making the order, did so in the exercise of a prerogative power, and that in the absence of mala fides, the courts were powerless to intervene. The learned Judge erred, in my opinion, in not finding that in the exercise of his or her powers, the president under the interim Constitution is obliged to adhere to all of the terms of that Constitution including the provisions of the Bill of Rights. He also failed to recognise that in the approach he adopted the President, in his order, created a category of prisoners which had the effect of discriminating against another category of prisoners.

[50] On the basis on which this judgment proceeds it is unnecessary to consider, as does Mokgoro J, whether the Presidential Act constituted a " law of general application" for the purposes of s 33(1) of the interim Constitution, and I would prefer to express no view in that regard.

[51] It remains to consider the dissenting judgment of Didcott J. It is based upon the approach adopted by this Court in *JT Publishing (Pty) Ltd v Minister of Safety and Security and Others*.[71] In that case this Court considered the circumstances in which

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70 Supra n 55.

71 1996 (12) BCLR 1599 (CC).

courts should grant declaratory orders in constitutional cases. Didcott J referred to the fact that declaratory orders are discretionary and went on to say:

> "A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."[72]

Didcott J concluded that there was no reason why this Court should not adhere to a rule that "sounds so sensible". He stated further:

> "We should no doubt regard it, like most general rules, as one that is subject in special circumstances to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication."[73]

But the circumstances of the *JT Publishing* case differ *toto caelo* from those now before us. That was a case where the relief asked for on appeal was to declare legislation invalid and to place Parliament on terms to amend it. By the time judgment was delivered in this Court, the Act was about to be repealed and replaced. The question before the Court therefore had absolutely no relevance to the future and in the face of its imminent repeal the applicants could not have been granted any effective relief, not even a declaratory order. As stated by Didcott J who delivered the unanimous opinion of the Court:

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72 Id at para 15.

73 Id at para 15.

> "Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under their rapidly waning authority."[74]

The same cannot be said in this case. Here the Court is being asked to hold on the constitutionality of presidential powers exercised under section 82(1)(k). These constitutional powers, in their exercise by the President, could have benefited the applicant. The President, conceivably could have decided to include fathers with children under the age of twelve years. Had it been unconstitutional to exclude such fathers, the applicant would at the least have been entitled to a declaratory order in the terms suggested in the judgment of Kriegler J. It follows that the decision in the *JT Publishing* case is distinguishable.

[52] In the result, however, it has been established that the President has exercised his discretion fairly and in a manner that was consistent with the interim Constitution. The court a quo therefore should have dismissed the application.

[53] The appeal is allowed and the order of the court a quo, save as to costs, is set aside

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74 Id at para 16.

and replaced by an order in the following terms:

> The provisions of the Presidential Act No. 17 of 27 June, 1994 relating to the remission of sentences of mothers in prison on 10 May, 1994, with children under the age of twelve years, are declared to be not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993.

Chaskalson P, Mahomed DP, Ackermann, Langa, Madala, and Sachs JJ concur in the judgment of Goldstone J.

DIDCOTT J:

[54] This case is covered and governed, I believe, by that part of our recent decision in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*[1] where we held that constitutional questions fell within the field of the judicial discretion which controlled the grant of declaratory orders, and laid down as a general policy the rule that the discretion ought not to be exercised in favour of answering any such question once it was or had become, in the circumstances of the case, "merely abstract, academic or

[1] 1996 (12) BCLR 1599 (CC).

hypothetical".[2]

[2] Para 15 at 1608D-F.

[55] The issue put to us in that litigation, an issue questioning the constitutionality of some statutory provisions which catered for censorship, had ceased to be a live one by the time when we decided the matter owing to the repeal in the meantime of the legislation containing them and its replacement by a substantially different scheme. No good purpose could have been served at that stage by our granting the declaration of invalidity which was sought. The question itself had become "wholly academic", as the judgment described it,[3] "exciting no interest but an historical one". And neither of the applicants for the declaration stood any longer to gain the slightest benefit or advantage from it.[4] No wrong done to either on the strength of the impugned provisions could still be righted. The danger had passed that anything which needed to be stopped might occur under their authority. Nor did any room remain for the consequential order requested in the event of the declaration, an order directing Parliament to rectify the defects thus found, since those were on the scrapheap already, together with the provisions themselves. The applicants, who asserted a devotion to freedom of expression felt in the interests of their commercial activities, would no doubt have liked nevertheless to obtain the declaration in case it turned out to be useful in some future attack launched by them

3 Para 17 at 1609H.

4 Para 16 at 1609G.

on the fresh legislation. But that consideration did not even enter the reckoning.

[56] Here we see a comparable state of affairs, where events have likewise overtaken the issue raised. Unlike the legislation assailed in the earlier case, the presidential decree challenged in this one has not been repealed but still stands formally. That is a difference more apparent, however, than real. The decree was neither intended nor designed to continue operating indefinitely, or indeed for a moment longer than the limited time needed to give effect to the releases from prison for which it provided. It dealt with those once and for all, in short, having no residual force. Its energy had already been exhausted when the proceedings in the Court below were heard and decided. The decree was signed and issued some sixteen months before the first occasion and almost twenty months prior to the second one. It is scarcely speculative to assume that all the releases had been accomplished within those periods. To suggest otherwise would surely be fanciful. Nor is it conceivable that the mothers released from gaol will have to return there if we confirm Magid J's declaration of invalidity, even on the supposition that they can lawfully be rearrested then.

[57] That leaves the fathers who remain in prison. The respondent did not purport to litigate in the interests of their group or to take up the cudgels for any father but himself. His own release from custody was what he wanted. Yet the order for that which he claimed initially, but abandoned later, was never on the cards. No Court could have

granted it without usurping a power entrusted solely to the first appellant and substituting its own discretion for his. The only personal advantage that the respondent might then have hoped to gain was an order requiring the first appellant to reconsider the decision taken by him on the remission of sentences, an order in other words with much the same effect as that of the consequential one granted by Magid J. The advantage was, however, illusory. For an apparently insuperable obstacle confronted the respondent. His son was not younger than twelve years when the litigation started in the Court below. The boy had reached that age already and, by the time of Magid J's judgment, his age was thirteen years. So a revised decision favouring fathers as well as mothers would not have resulted in the respondent's release from gaol unless it had been altered elsewhere too, by providing either for its retrospective operation from the date of the original decision or for an increase in the age of the children to whom it referred that was sufficient to cover his case. There is no reason to believe in the likelihood of such an alteration when the age specified in the decree had never been called into question. Indeed, that sounds most unlikely once account is taken of the store which was set all along by the interests of children younger than twelve years but no older. The upshot is that, like the applicants in the *J T Publishing* case, the respondent in this matter could derive no apparent benefit or advantage from the declaration which he sought and obtained in the Court below. The issue raised by him had also become by then "wholly academic, . . . exciting no interest but an historical one".

[58] Nor is a ruling on that issue required from us for the future guidance of anybody. The decree was a unique measure, taken to celebrate the inauguration of our first democratically elected President. Its repetition on any similarly auspicious occasion which may arise some day seems improbable, in the same form at any rate. It is certainly less likely than censorship to be repeated. And, should that nevertheless happen, any defects recurring then will in all probability provoke objections which can be considered and met when they arise.

[59] Factual differences between the present case and the one of *J T Publishing* can easily be found. None of them is significant or material, however, in my opinion. In principle, as I see them, the two matters are indistinguishable from each other.

[60] I have not overlooked the qualification to the rule dealing with declaratory orders which the *J T Publishing* judgment expressed when it added:[5]

> "We should no doubt regard it, like most general rules, as one that is subject in special circumstances to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication."

But no such factor occurs to me now. The doors of the Courts, it is often said, should always be kept open to those with constitutional complaints. That does not mean,

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5 Para 15 at 1608G-1609A.

however, that the Courts are compelled to investigate every such complaint, no matter how pointless or inappropriate it may be in the circumstances to do so. Nor does it matter for the purposes of the rule that the issue on which a decision is sought happens to be one of constitutional importance. That is invariably the case. But the cart must not be put before the horse.

[61] I accordingly decline to enter, let alone take either side in, the debate that is being conducted within our ranks about the validity of the differentiation between fathers and mothers which marked the decree. I do so from no pusillanimous reluctance to become entangled in the controversy, but because of my conviction that we are bound by the discipline of the *J T Publishing* judgment not to embark on the enquiry and to hold that Magid J should likewise have abstained from doing so.

[62] For the reasons given by me, and for those alone, I concur in the part of the order proposed by Goldstone J that will allow the appeal and set aside both the declaration of invalidity and the consequential correction which Magid J ordered. I dissent, on the other hand, from the proposal to substitute a declaration of validity for the one of invalidity.

KRIEGLER J:

[63] This is a very hard case indeed.[1] For that reason this dissent essays reluctantly, the more so because the lucidity of my colleague Goldstone J's judgment on behalf of the majority - and its commendable conclusion - render their view so attractive. They hold that: (a) a presidential pardon granted under the clemency powers afforded by s 82(1)(k) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution", its provisions being referred to without further identification) is subject to judicial review for its consistency with the requirements of the Bill of Rights;[2] (b) Presidential Act 17 of 1994 ("the Act"), which conferred clemency on 440 mothers of young children, passes such scrutiny; and therefore, (c) the court below erred in granting an order for its correction.

[64] My dissent is narrowly based as I agree with conclusions (a) and (c). Nonetheless my disagreement with conclusion (b), and with the reasoning underpinning it, is profound and emphatic. In my view the pardon, although issued in good faith, for ostensibly rational reasons and manifestly to the advantage of some members of a traditionally disadvantaged class, is (i) inconsistent with the prohibition against gender or sex discrimination contained in s 8(2); (ii) has not been shown to be fair; and (iii) is therefore

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1 I call it a hard case because, by anyone's lights, it seems mean spirited in the extreme to scrutinise closely the validity of an act of clemency by the newly inaugurated President aimed at enabling a few hundred women prisoners, sentenced for less reprehensible crimes, to care for their young children.

2 In the course of arriving at that conclusion Goldstone J, in paragraph 49, overrules the judgment of Van Schalkwyk J in *Kruger and Another v Minister of Correctional Services and Others* 1995 (2) SA 803 (T). From what I say in paragraph 65 below it should be clear that I wholeheartedly agree that the decision in *Kruger's* case understated the scope of judicial review under the Constitution.

invalid. I nevertheless agree that the appeal should succeed and that the order granted in the court below must be set aside and replaced by another. In what follows I hope to explain the route that brings me to that destination.

[65] With regard to the finding of judicial reviewability of the exercise by the President of his s 82(1)(k) powers I have little to add to the analysis by my colleague Goldstone J in paragraphs 5 to 29 of his judgment. Although I would prefer not to characterise the relevant power as executive, administrative or presidential/prerogative, it does not really matter. Nor does it make any difference whether the power is rightly seen as a residual element of the royal prerogative, or as falling in a special category of discretionary powers of the head of state exercisable otherwise than on the advice of the cabinet, or as executive/administrative acts by the head of the executive branch of government. On a fair reading of ss 4, 75, 76 and 81 (especially subsection (1)) in the context of the Constitution as a whole, the exercise by the President of the s 82(1)(k) powers is governed by the prohibition against discrimination contained in s 8(2). I therefore do not think one has to categorise those powers as "executive", thus bringing them within the ambit of s 7(1), in order to subject them to Chapter 3 review.[3] Ultimately the President,

[3] Nor, incidentally, does it make any difference, in my opinion, whether one asks whether the President's actions under s 82(1)(k) are reviewable "at common law" or under s 8. If the President acts in a manner inconsistent with the Constitution, eg without reference to the Executive Deputy Presidents or in conflict with the obligation not to discriminate unfairly, he/she both exceeds the relevant powers, bringing the ultra vires doctrine into play, and also

as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands.

[66] With regard to the second question, namely the constitutional validity of the Act, I can also be relatively brief. That is because my dissent does not relate so much to the principles involved, nor to the proper approach to a constitutional challenge based on alleged unfair discrimination. On the contrary, I endorse the general observations in the majority judgment regarding gender discrimination. I also acknowledge that this is not only a hard case but an awkward one for the development of our equality jurisprudence, one in which its application to reality is slippery. My dissent is confined to the latter exercise. In the result my conclusion is that the President not only transgressed the provisions of s 8(2) in distinguishing between classes of parents on the basis of their gender (on which the majority seem to agree with me) but also that the presumption of unfairness attaching to that distinction has not been rebutted. That is the point at which our paths diverge.

[67] The facts appear from the judgment of my colleague Goldstone J; I need highlight only those that are pertinent to my particular approach. On 30 June 1995 the respondent commenced motion proceedings in the Durban and Coast Local Division of the Supreme

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triggers the nullification provision of s 4(1).

Court expressly aimed at procuring his release from prison. He attacked the constitutionality of the Act as being in violation of his rights under ss 8(1) and (2) and asked for a corresponding declaratory order under s 7(4)(a) coupled with a mandatory order for his release. Ultimately he sought only the declaratory order and a direction that the Act be corrected "in accordance with the provisions of the Constitution". The court granted the order as prayed, save that the President was given six months in which to effect the correction.

[68] There was no factual dispute raised on the papers and the case was determined on the basis of the averments made in the affidavits filed on behalf of the President.[4] In exercising the clemency power vested in him by s 82(1)(k), the President decided to do so, not on the basis of an evaluation of the merits of specific cases, but by generic classification. One of the generic lines he drew to distinguish between those upon whom the gift of clemency was to be bestowed and those not, was admittedly sex/gender based. Female parents of sub-twelve year old children were to go free but male parents not.

[69] The President decided to grant the special remission to particular categories of prisoners only after "careful consideration of many competing interests". In particular the President stated in his affidavit:

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[4] I agree with Goldstone J, in paragraph 35 of the majority judgment, that the affidavits of the President and Ms Starke are properly before us.

> "5.1 I believe that it is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentence is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute.
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> 5.2 I believe further that it is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. I am conscious of the fact that the level of crime is a matter of concern to the public at large and that there may well be anxiety about the release of persons who have not completed their sentences.
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> 5.3 In granting the special remission to the various categories of prisoners mentioned in the Presidential Act, it was important to have regard to the role of the law enforcement agencies who are responsible for combating crime and the effect which the grant of remission may have on their work."

[70] The President "was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided." He took account "of the special role" he believes "that mothers play in the care and nurturing of younger children" and annexed an affidavit by the National Director of the South African National Council for Child and Family Welfare, who expressed the view that identification of mothers of children under the age of twelve years for remission of sentence was "rationally and reasonably explicable as being in the best interests of the children concerned." She added that "the primary bonding with the mother and the role of mothers as the primary nurturers and care givers extends well into childhood. The reasons for this are partly historical and the role of the socialisation of women who are

socialised to fulfil the role of primary nurturers and care givers of children, especially pre-adolescent children and are perceived by society as such."

[71] The President also makes plain that he acted "[a]fter taking into account the many competing and sometimes irreconcilable interests . . . honestly, in good faith and after careful deliberation." He adds that "[t]he exercise of the power of pardon or remission, is by its very nature, highly complex . . . that it would be unfortunate if unnecessary restraints were placed upon the exercise of such power because this may inhibit its exercise. It is an area in which difficult choices have to be made . . . ." Nevertheless the affidavit invites correction if it be found that the President erred in the exercise of the power in question.

[72] Accepting without hesitation or qualification that the President acted in the manner and spirit - and for the commendable motives - he describes, I believe that in determining whether or not the presumed unfairness of the Act which automatically flows from the breach of the prohibition against discrimination contained in s 8(2) has been adequately rebutted, one cannot ascribe to the President the weighing of factors he himself does not mention. Thus, in my view, it is not open to us to make our own enquiries about the prison population and then to conclude that "a very large number of men prisoners would have gained their release".[5] We have not been told and have no data to found an opinion

[5] As the majority judgment does in paragraph 46.

as to how many men would or could have qualified for release if the Act had treated the sexes equally. There is even less room for a finding that the numbers would have caused public disquiet. The President said nothing of the kind on the papers; no argument to such effect was advanced on his behalf at the hearing and counsel were not asked by the Court to address the subject. It is, of course, wholly illogical to rely on current perceptions of the level of crime in drawing inferences about reaction in mid-1994 had substantially more prisoners qualified for release. We also do not know anything about the administrative bother that may or may not have been involved in weighing the family circumstances of individual prisoners, or of applying some other method of advancing the cause of young children deprived of parental care without drawing the distinction simply along the gender line. Nor does it behove us hypothetically to second guess the President as to what he would or would not have decided had he been advised that the distinction along sex/gender lines was constitutionally suspect.

[73] A point that should also be stressed is that the question is not whether we find that the objective of the Act was praiseworthy or its likely effect beneficial to some. Both are common cause on the papers. The crisp question is whether the Act, regardless of its impressive provenance and charitable appearance, complies with the demands of s 8(2). The criteria are prescribed by the Constitution; so too their application to a given piece of legislation or a specific executive act. The immediate focus is on s 8(2), read with and fortified by s 8(4); but the wider context is also important. Discrimination founded on

gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2); in ss 119 and 120, especially 119(3), providing for the creation of a Commission on Gender Equality; and the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mind set and statutory drafting style (sanctified by s 6(a) of the Interpretation Act No 33 of 1957) which used the masculine gender only.

[74] The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.

[75] The importance of equality is demonstrated by the Constitution's insistence that discrimination on a specified s 8(2) basis be presumed unfair until the contrary is established. The insistence on such rebuttal is not new to this Court. A burden of

"justification" was placed on the President by s 8(4) read with s 8(2). The latter states that

> "[n]o person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

Section 8(4) then continues,

> "[*p*]*rima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

Although s 8(2) expressly makes the possible grounds for discrimination open ended, both provisions give special treatment to the listed grounds of distinction. In the context of s 8(2) they render a distinction couched in their terms automatically questionable, and s 8(4) reinforces this by presuming that discrimination on a listed ground is unfair. Discrimination on the basis of a s 8(2) category must be regarded as unfair unless and until a persuasive rebuttal is established to vindicate it. For it is conduct that, on the face of it, is out of step with the fundamental values of our new constitutional order. This is particularly the case where discrimination on the basis of race, sex or gender is concerned. Although the Constitution does not establish levels of scrutiny in the manner of the American Constitution, it is nevertheless worth noting that race and sex/gender are

given special mention in the Preamble[6] and head the list of s 8(2) categories. The drafters of the Constitution could hardly have established a presumption of unfairness in s 8(4) only to have the burden of rebuttal under the section discharged with relative ease.

[76] Therefore, in terms of s 8(4), read both textually and contextually, unless and "until the contrary is established", a distinction drawn on the basis of gender or sex, such as the one here, must be found to be unfair. If no rebuttal is apparent, that is the end of the matter - the presumption of unfairness, which entails unconstitutionality under s 8(2), stands.[7] Where some rebuttal is proffered, one must examine it to see whether it indeed

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6 The first paragraph of the Preamble expresses the need to

> ". . . create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is *equality between men and women and people of all races* so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . . ." (emphasis added)

7 My colleague Mokgoro J has concluded that although the Act is in conflict with s 8, it is a "law of general application" within the meaning of s 33(1) and is saved by its provisions. I cannot agree with the second of those propositions and the third therefore does not arise. The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make "law", nor can it be said to be "of

"establishes" (ie proves) the fairness of the distinction.

[77] What kinds of facts are likely to discharge the burden of rebuttal imposed on the President by s 8(4)? I would make three observations here. First, the fact that discrimination is unintended or in good faith does not render it fair. Once the subject action or legislation is found to create adverse effects on a discriminatory basis, there is no further requirement, eg of bad faith or malice. My second observation is that the "rebutting" factors can seldom, if ever, in themselves be discriminatory or otherwise objectionable. True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster. Third, factors that would or could justify interference with the right to equality in a section 33(1) analysis, are to be distinguished from those relevant to

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general application". The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.

the enquiry under section 8(4). The one is concerned with justification, possibly notwithstanding unfairness; the other is concerned with fairness and with nothing else. I turn from these general comments to the case at hand.

[78] In my respectful view, the majority errs on all three counts. First, my colleagues base their finding of fairness in part on the good faith of the President. Second, the Act is upheld despite the fact that it relies on a generalisation regarding parental roles which is the result of disadvantage and discrimination. Third, in invoking factors such as public reactions to the release of many prisoners and administrative efficiency, the majority applies a section 33(1) analysis at the point of looking for a rebuttal of unfairness.

[79] In attempting to discharge their burden under s 8(4), the appellants rely on the two affidavits I have mentioned. With regard to the discrimination between the parents of young children, their effect is limited. The emphasis, as I've indicated above, is the President's concern for children, coupled with his belief that mothers have, and are generally perceived to have, a special role in the care and nurturing of younger children. The second affidavit is directed to the latter and purports to provide empirical confirmation for the President's belief. No other purpose or rationale is provided for the decision to accord the benefit of liberty to mothers and not to fathers.

[80] One can accept for the sake of argument that the President's belief is empirically

confirmed. The question then is whether the fact that in South Africa mothers are the primary care givers can establish fairness under s 8(4). In this regard I agree with the majority judgment that the fact that women generally "bear an unequal share of the burden of child rearing" cannot render it ordinarily "fair to discriminate between women and men on that basis". What I cannot endorse, is the majority's conclusion that although the discrimination inherent in the Act was based on that very stereotyping,[8] it is nevertheless vindicated. In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind.[9] Indeed I find it startling that the appellants could have placed this fact before the Court in order to establish that their conduct does not constitute unfair discrimination. I would have thought that this is precisely the kind of motive that the respondent might have attempted to divine in the appellant's conduct in order to

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8 The word "stereotype" appears to have its ordinary meaning in the judgments of the United States Supreme Court. One possible definition, in *Mississippi University for Women v Hogan* 458 US 718, 725 (1982), is "fixed notions concerning the roles and abilities of males and females". The Canadian Supreme Court is slightly clearer on the meaning of "stereotype". The enumerated and analogous grounds set out in the Charter's s 15(1) serve as indicators of discrimination because "distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics." *Miron v Trudel* (1995) 29 CRR (2d) 189 at 200.

9 So this court argued in *Brink v Kitschoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42.

condemn it. It hardly has justificatory power. One of the ways in which one accords equal dignity and respect to persons[10] is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.

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10 See the telling passage in the judgment in *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5 quoted in paragraph 41 of the majority judgment.

[81] Is it relevant that an inherently objectionable generalisation has been used in this case for the benefit of a particular group of women prisoners? The majority judgment regards this as an important - if not a decisive - factor in its reasoning.[11] My first response is a narrow one. It is merely to say that the President has nowhere mentioned that it was his purpose to benefit women generally or the released mothers in particular. There is no suggestion of compensation for wrongs of the past or an attempt to make good for past discrimination against *women*. On the contrary, the whole thrust of the President's affidavit, and the raison d'etre for the main supporting affidavit, is the interest of *children*. The third category of prisoners released under the Act was not women in their own right but solely in their capacity as perceived child minders.

[82] For the purposes of my next response I am prepared to accept without deciding, that in very narrow circumstances a generalisation - although reflecting a discriminatory reality - could be vindicated if its ultimate implications were equalising.[12] But I would suggest that at least two criteria would have to be satisfied for this to be the case. First, there would have to be a strong indication that the advantages flowing from the

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11 See paragraph 47.

12 The United States Supreme Court allows generalisations to justify sex-based distinctions in very narrow circumstances. See *Schlesinger v Ballard* 419 US 498 (1975) and *Califano v Webster* 430 US 313 (1977). For an important judgment where such a generalisation fails, see *Mississippi University for Women v Hogan* 458 US 718 (1982).

perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages. Second, the context would have to be one in which discriminatory benefits were apposite.

[83] I illustrate what I mean by examining how these criteria are to be applied in the instant case. In terms of the first criterion, the benefits in this case are to a small group of women - the 440 released from prison - and the detriment is to all South African women who must continue to labour under the social view that their place is in the home. In addition, men must continue to accept that they can have only a secondary/surrogate role in the care of their children. The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women qua women in the President's conduct, merely a favour to perceived child minders. On the other hand there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the workplace and other sources of opportunity. There is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts. I cannot agree that because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major societal disadvantages.

[84] The second criterion, it will be recalled, requires some connection between the discriminatory action and the advantage to the previously disadvantaged. On that basis the limited and parochial benefits flowing from the Act are dubious. From the fact that women have suffered discrimination *generally*, it cannot be argued that they deserve compensatory benefits in *any* context. I suggest that the relevant context in this case is a penal one, for the effect of the Presidential Act is felt by prisoners. It has not been suggested that women have suffered systematic discrimination in a penal context.[13] The point here is that there is an advantage unrelated to any compensable past disadvantage.

[13] Indeed, having regard to my personal observations over some 45 years, I would have regarded allegations to that effect with some scepticism.

[85] I must emphasise that I am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair.[14] There is no question that gender or sex discrimination can be shown to be fair. All I am contending is that the evidence must be persuasive. In cases such as these the United States Supreme Court requires "exceedingly persuasive justification"[15] - a rigorous test in the context of their equality provision, which makes no express mention of discrimination and contains no deemed unfairness. We should do no less. In the present case the presumption of unfairness has not been disturbed. The justification that has been tendered is manifestly inadequate. There is no warrant to strain to uphold the presidential action in question. Clearly the Act was issued in good faith, after mature reflection, after consideration of the multifarious pros and cons, and for manifestly laudable humanitarian motives. None of those factors, however, cuts any ice. On the contrary, the President's *ipse dixit* establishes that the decision was founded on what has come to be known as gender stereotyping. And the Constitution enjoins all organs of state - here the President - to be careful not to perpetuate the distinctions of the past based on gender type-casting. In effect the Act put the stamp of approval of the head of state on a perception of parental roles that has been proscribed. Mothers are no longer the "natural" or "primary" minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism

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14 I reiterate that it is in not necessary to express any view in this case on the possible interaction between rebuttal of a presumption of unfairness under s 8(4) and justification under s 33(1).

15 See *United States v Virginia* 1996 US LEXIS 4259 at *28 (Supreme Court of the United States June 26, 1996) (citing *Mississippi University for Women v Hogan* 458 US 718, 724 (1982)).

or privilege may maintain. Constitutionally the starting point is that parents are parents.

[86] **I accept that my finding that the President has discriminated unfairly may not answer legitimate concerns that my conclusion may be seen as discouraging benefits directed at persons within historically disadvantaged classes. A clear disclaimer is salutary. I am not suggesting that the executive or legislature should never recognize gender or sex distinctions. Gender/sex based distinctions can, and on occasion should, be made. The caveat is simply that such distinctions must be shown not to discriminate unfairly under the Constitution - or they must be justifiable under section 33(1). Neither the legislature nor executive need feel hamstrung by my finding in this case.**

[87] That leaves only the question of the appropriate order to be made. It can be answered quite simply. I have come to the same conclusion on the reviewability and constitutionality of the Act as did the learned judge in the court below. Nevertheless, even on that finding, the order was overbroad. There was nothing wrong with those parts of the Act that were not tainted by gender or sex discrimination, eg the release of certain prisoners younger than 18 years of age. The Act is constitutionally objectionable only to the extent that it discriminated on the basis of gender/sex between male and female prisoners who, as at 10 May 1994, had children under the age of twelve years. In my view the learned judge should also not have put the President on terms to rectify the Act.

Once there was no longer any prayer for the respondent's release and there was no prayer relating to the women who had (long since) been released,[16] rectification of the order would have served no useful purpose. On the other hand, the Act *had* constituted a breach of section 8(2) and a declaratory order to that effect under section 7(4)(a) and (b)(i) was therefore appropriate, even though it entailed no direct or discernible consequential relief for the respondent. A breach of the Constitution had occurred and a judicial declaration to that effect was appropriate. Costs were not awarded in the court below and were not mentioned before us. No more need be said on the topic.

[88] In the result I would order as follows:

1. The appeal is upheld;
2. The order in the court below is set aside and in its stead it is declared that Presidential Act 17 issued on 17 June 1994 constituted a breach of section 8(2) of the Constitution of the Republic of South Africa, No 200 of 1993, to the extent that it discriminated between male and female prisoners who, on 10 May 1994, had children under the age of twelve years.

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16 The order was granted on 16 February 1996, some thirty months after the Act had been issued.

MOKGORO J:

[89] I have read the judgments of my colleagues, and I concur in the order proposed by Goldstone J. I agree that Presidential Act No. 17 of 1994 ("the Presidential Act") is reviewable by this Court, for the reasons given by him. I differ with my colleagues, however, with respect to the precise legal route taken in arriving at the order. I hold that the Presidential Act constitutes "unfair discrimination" contrary to section 8(2) of the interim Constitution ("the Constitution"), but that the unfair discrimination is justified under section 33(1) of the Constitution.

[90] Section 8 of the Constitution provides as follows:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) . . .
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that

subsection, until the contrary is established."

[91] The facts in this case have been set out in full in the judgment of Goldstone J. In brief, women prisoners with children under the age of 12 were granted remission of their sentences by the President, whereas their male counterparts were not. By reason of section 8(4) of the Constitution, such discrimination is presumed to be unfair discrimination, "until the contrary is established". In my view, that presumption has not been rebutted in this case.

[92] I agree with Goldstone J that the prohibition against unfair discrimination is of crucial importance in our constitutional scheme:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[1]

I further agree with the test proposed by him as to whether discrimination is "unfair":

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1 Para 41.

"To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[2]

[2] Para 43.

I disagree, however, on the application of these principles to the facts of this case. I have no doubt that the President acted in good faith, and I am sure much deliberation went into the Presidential Act.[3] The President stated that he took particular account of the need to maintain the integrity of the judicial system and the administration of justice.[4] He also considered the concerns of the public about the release of convicted prisoners.[5] The release of mothers of young children was motivated primarily by a concern for children.[6] No fathers were released, despite an acknowledgment by the government that "a minority of fathers . . . are actively involved in nurturing and caring for their children".[7] In my view, denying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men's aptitude at child rearing, is an infringement upon their equality and dignity.[8] The Presidential Act does not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers.

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3 See affidavit of Nelson Mandela at para 5. I agree with my colleagues that the affidavits of the President and Ms Starke are admissible.

4 Id.

5 Id.

6 Id at para 6.

7 See affidavit of Ms Starke at paras 5 and 8.

8 *Egan v Canada* (1995) 29 CRR 79 at 104-5.

[93] Section 8 of our Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children. As recognized by this Court in *Fraser v Children's Court, Pretoria North and Others*,[9] fathers have a meaningful contribution to make in child rearing, and I am concerned that this Court may be perceived as retreating from the valuable principles laid down in that case. It is important that those principles be adhered to, so that they may

9 1997 (2) BCLR 153 (CC).

begin to benefit all mothers, fathers and their children.[10]

[10] I am optimistic that changes can occur even in traditional African societies, where gender roles are particularly entrenched. There is an inherent flexibility in African customs and traditions, potentially making them responsive to changes in lifestyles. To date, however, that flexibility has been counterbalanced by the conservatism of customary law. The Constitution, however, prompts us to take an affirmative responsibility in correcting this skewed parental role division.

[94] I am unpersuaded by the emphasis in the majority judgment on the vulnerable position of mothers of young children in South Africa. While such mothers may generally be disadvantaged in society, there is no evidence that they are disadvantaged in the penal system in particular. I do not insist that there be a rigid link between the nature of disadvantage suffered by a group, and measures taken to alleviate that disadvantage. There should, however, be *some* correlation between the two. That correlation does not appear to exist here.[11] I therefore hold the Presidential Act to be unfair discrimination, which falls to be justified in accordance with section 33(1) of the Constitution.

[95] Section 33(1) provides in relevant part:

> "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
> (a) shall be permissible only to the extent that it is -
> (i) reasonable; and
> (ii) justifiable in an open and democratic society based upon freedom and equality; and
> (b) shall not negate the essential content of the right in question[.]"

[11] I do not think, for example, that the President could have released only black mothers even though, on the whole, they are a more vulnerable group than white mothers.

[96] A precondition to the applicability of section 33(1) is that the limitation of a right occur "by law of general application". Although the Presidential Act is not conventional legislation, in my view, it satisfies that precondition. The phrase "by law of general application" has not been interpreted in detail by this Court, but a broad view was taken of "law" by Kentridge AJ in *Du Plessis and Others v De Klerk and Another*.[12] In holding that the words "all law in force" in section 7(2) of the Constitution encapsulate common law as well as statute law, in part because the broad term "reg" is used in the Afrikaans text, Kentridge AJ noted:

> "The term 'reg' is used in other parts of chapter 3 as the equivalent of 'law', for example in s 8 ('equality before the law') and s 33(1) ('law of general application'). Express references to the common law in such sections as s 33(2) and s 35(3) reinforce the conclusion that the law referred to in s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law. Nor can I find any warrant in the language alone for distinguishing between the common law of delict, contract, or any other branch of private law, on the one hand, and public common law, such as the general principles of administrative law, the law relating to acts of State or to State privilege, on the other."[13]

Kriegler J added that

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12 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

13 Id at para 44 (internal footnote omitted).

"s 33(1) . . . draws no distinction between different categories of law of general application . . . . [I]t is irrelevant whether such rule is statutory, regulatory, horizontal or vertical, and it matters not whether it is founded on the XII Tables of Roman law, a Placaet of Holland or a tribal custom."[14]

[14] Id at para 136.

[97] Section 2 of the Interpretation Act 33 of 1957 ("the Interpretation Act"), defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law", and presumptively applies to the interpretation of every such "law. . . in force" and of "all by-laws, rules, regulations or orders made under the authority of any such law".[15] Delegated legislation must be published:

> "When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister . . . , such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*."[16]

The Interpretation Act does not specifically address the prerogative powers possessed by the President under prior constitutions.

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15 Section 1 of the Interpretation Act.

16 Section 16 of the Interpretation Act.

[98] Guidance as to the meaning and purpose of "law of general application" can also be obtained from decisions of the European Court of Human Rights and the Canadian Supreme Court, both of which have considered the phrase "prescribed by law" in the context of limitation of rights. The judgment of the European Court of Human Rights in *The Sunday Times v The United Kingdom*[17] concerned an injunction issued in accordance with the common law of contempt, which infringed a newspaper's freedom of speech. Article 10 of the European Convention of Human Rights provides, so far as is material:

> "2. [Freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law* and are necessary in a democratic society . . . ." (Emphasis added).

[99] In that case, the question arose whether a common law limitation fell within the term "prescribed by law", so as to be a permissible limitation on the right to freedom of expression.[18] The court ruled as follows:

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the

17 (1979) 2 EHRR 245.

18 Id at paras 46-53.

circumstances, the consequences which a given action may entail."[19]

On the facts, the court held that the common law rule fulfilled the requirements of both accessibility and precision.[20]

[100] The views of the Canadian Supreme Court are also of assistance. Like the South African Constitution, the Canadian Charter of Rights and Freedoms (the "Canadian Charter") contains a general limitations clause, which provides that:

19 Id at para 49.

20 Id at para 53.

> "The Canadian Charter . . . guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society." (Emphasis added).[21]

That Court has consistently held rules emanating from statute, regulation and common law to be "prescribed by law".[22] The Canadian Supreme Court is divided, however, on whether rules emanating from directives or guidelines, issued by government departments or agencies but falling outside the category of officially published delegated legislation, are "prescribed by law".[23]

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21 Section 1, Canadian Charter.

22 See for example *R v Therens* (1985) 18 DLR (4th) 655 at 680; see generally Hogg *Constitutional Law of Canada* 3 ed Vol 2 (Carswell, Ontario 1992), at 35-12.

23 See Hogg, id at 35-12 at n 54.

[101] The decision in *Committee for Commonwealth of Canada v Canada*[24] illustrates that division. The case concerned internal government directives alleged to infringe freedom of speech. Lamer CJC considered that the limitations clause could not apply because the directives were not "law".[25] He explained that the government's internal directives and policies differ from statutes and regulations in that they are not generally published, and therefore are unknown to the public.[26] Lamer CJC added that the directives were binding only on government officials, and could be cancelled at will.[27] The views of Lamer CJC echo the following concerns of Wilson J in *McKinney v University of Guelph*:[28]

> "[The limitations clause] serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective."

McLachlin J, on the other hand, took a much broader view of the meaning of "law" in *Committee for Commonwealth v Canada.* She considered that the "prescribed by law"

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24 (1991) 77 DLR (4th) 385.

25 Id at 401.

26 Id.

27 Id.

28 (1991) 76 DLR (4th) 545 at 604

requirement was to eliminate from the limitations clause purview conduct which is purely arbitrary. She cautioned that:

> "From a practical point of view, it would be wrong to limit the application of [the limitations clause] to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under [the limitations clause]. In my view, such a technical approach does not accord with the spirit of the Charter and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary."[29]

[102] It can be seen then that several concerns underlie the interpretation of "prescribed by law". The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals.[30] In my view, those rule of law concerns are adequately

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29 Supra n 24 at 461.

30 It should be noted that those concerns also underlie the theoretical distinction between "legislative" and "non-legislative" acts in administrative law. See Baxter *Administrative Law* (Juta, Cape Town 1984) at 349-51.

met by the Presidential Act.[31] The remaining question about the Presidential Act concerns its origin as executive rule making rather than as legislation, which I shall now address.

[31] I note that the Presidential Act was not published in the Gazette, as is generally required for delegated legislation. I agree with McLachlin J in *Committee for Commonwealth of Canada v Canada*, however, that formal publication requirements are not dispositive for the purposes of section 33(1). As regards the "general application" requirement, I consider the Presidential Act is distinguishable from the impugned legislation in *Matinkinca and Another v Council of State, Ciskei and Another* (1994) (1) BCLR 17 (Ck). It was held in that case (at 41) that a decree indemnifying Ciskei security forces and demonstrators for the Bisho Stadium massacre was not a law of general application. That decree applied as a retroactive release to the security forces and demonstrators involved in one specific incident. By contrast, the Presidential Act applies to all prisoners in South Africa, whenever they were convicted and wherever they were held.

[103] The origin of the Presidential Act in executive rule making rather than in a formal legislative process is not fatal to the application of section 33(1). As noted by Wilson J, supra, there are safeguards attaching to the legislative process, because legislation is the subject of a detailed and rigorous procedure, upon which many people have an opportunity to comment and vote. However, there are numerous instances of delegated legislation drafted by the executive, which legislation would undoubtedly be accepted as "law".[32] The difference between the Presidential Act, and standard instances of executive rule making, in the form of delegated legislation, is the absence of a parent statute in the former case. In standard cases of executive rule making therefore, at least the parent statute has undergone the rigours of the legislative process. That difference cannot in my view justify different treatment for the Presidential Act, which represents an exercise of public power derived directly from the Constitution. The legitimacy which attaches to delegated legislation by reason of the parent statute must attach with equal force to rules representing a direct exercise of power granted by the Constitution. The Constitution, after all, was a vigorously negotiated document.

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32 See generally Baxter, supra n 30 at ch 9.

[104] I consider it undesirable to take a technical approach to the interpretation of "law of general application". As noted by McLachlin J, supra, a technical approach unduly reduces the types of rules and conduct which can justify limitations. That exclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3, and when such rights are regarded as breached. In other words, courts which wish to uphold action or rules as justified, but are unable to do so because of a narrow definition of "law of general application", may strain the interpretation of other sections of the Constitution in order to find the conduct did not infringe the right in question.[33] Further, the "law of general application" requirement is merely a precondition to the applicability of section 33(1). If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself. To conclude, the Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals. In my view, that is sufficient to fall within "law of general application" for the purposes of section 33(1).

[105] I shall now turn to the other requirements of section 33(1), namely whether the limitation is reasonable and justifiable in an open and democratic society. The President has explained in his affidavit that the reason for releasing mothers was a concern for the plight of children.

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[33] See Woolman in Chaskalson et al *Constitutional Law of South Africa* (Juta & Co Ltd, Kenwyn 1996) at 12-19, n 1.

> "6. With regard to the grant of special remission to all mothers with minor dependent children under the age of 12 years, I was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. Having spent many years in prison myself, I am well aware of the hardship which flows from incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner.
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> . . . .
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> 8. Shortly before the signing of the Presidential Act I stated the following in a speech . . . :
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> 'Our policies must turn into reality the principle that every child deserves to have a decent home and be brought up in the loving care of a family. The terrible legacy of street children has to be attended to with urgency. A collective effort has to be launched by the government, civil society and the private sector to ensure that every child is looked after, has sufficient nutrition and health care.'"

There can be no doubt that the aim of ensuring young children are looked after is legitimate.[34] The real controversy arises as to whether the Act is a proportionate response in light of the unfair discrimination suffered by fathers.

[106] Despite my reservations at its gender stereotyping, I conclude that the Presidential Act is justified. First, although fathers have not benefitted from the group pardon, they

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[34] This Court has affirmed the importance of children's rights. In *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC), we declared unconstitutional section 294 of the Criminal Procedure Act 51 of 1977 which authorised whipping for juveniles.

are still entitled to apply for remission on an individual basis. Second, I agree with Goldstone J that politically, it would have been virtually impossible to release all men and women with children under twelve, because of the sheer numbers involved. Further, there would have been great administrative inconvenience in engaging in a case-by-case evaluation for each mother and father as to whether they were the primary care giver for their child. Thus the basic question put to us is whether only the women should have been released, or no one released. In other words, the issue was whether some children with parents in prison be united with their parent, or no children be united with their parents. I consider the aim of easing the plight of South African children to be extremely important, and that every possible opportunity should be taken to further that aim. The temporary denial of parenthood to fathers is therefore justifiable with reference to the interests of the children whose mothers were released. Accordingly, I hold the Presidential Act to be justified in accordance with the requirements of section 33(1).

O'REGAN J:

[107] I have had the opportunity of reading the judgments of Goldstone J and Kriegler J. I concur fully in the judgment of Goldstone J. I have nothing to add to his analysis of the reviewability of the President's power to pardon prisoners in terms of section 82(1)(k) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim

Constitution"). However, I wish to add a few remarks concerning the question of whether the President discriminated unfairly when he exercised this power to remit the sentences of mothers of young children but not fathers of young children.

[108] The Respondent's argument was that in releasing mothers, but not fathers, the President discriminated on the grounds of sex. There can be no doubt that in not affording fathers the opportunity of a special remission of sentence, the President did discriminate against fathers on the basis of their sex. Section 8 of the interim Constitution provides:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) . . .
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

The denial of an opportunity such as a special remission of sentence is sufficient in my view to constitute discrimination as contemplated by section 8(2). Having produced

prima facie proof of discrimination on the grounds of sex, the Respondent argued (relying on section 8(4) of the interim Constitution) that that was sufficient proof of unfair discrimination in breach of section 8(2) unless the contrary was established.

[109] According to his affidavit, the President released mothers of young children because he was concerned for the welfare of children. In his view, mothers play a "special role . . . in the care and nurturing of young children". Both Goldstone J and Kriegler J have observed that the reason given by the President for the release of mothers was based on a stereotype or generalisation concerning the special role that mothers play in our society in relation to the care and rearing of children. Although the evidence upon which the President based his assertion was perfunctory, I, like Goldstone J and Kriegler J, see no reason to doubt that as a matter of fact in South African society, mothers not only bear a considerably greater proportion of the burdens of child rearing than fathers, but also that mothers, as a general rule, do have a special role in relation to the nurturing and care of children. There are, of course, some fathers who share fully in the responsibilities of child rearing.

[110] The responsibility borne by mothers for the care of children is a major cause of inequality in our society. Being responsible for the rearing of children is a great privilege, but also a great strain. Many women rear children single-handedly with no help, financial or otherwise, from the fathers of the children. The need to support

children financially is one of the reasons for women seeking work outside the home. However the responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.

[111] Kriegler J finds that the President's reliance on the generalisation constituted unfair discrimination, even though the discrimination was directed against fathers not mothers. He holds that only when two strict requirements are met will reliance upon such a generalisation constitute fair discrimination: where it is strongly indicated that the advantages conferred by reliance upon the generalisation outweigh the disadvantages and secondly where there is a connection between the discriminatory action and the advantage to the previously disadvantaged (at para 82). In my view, his approach is too restrictive. Even where discrimination in a particular case arises from reliance upon a stereotype or generalisation, the focus of the section 8(2) determination must remain whether the impact of the discrimination was unfair.

[112] To determine whether the discrimination is unfair it is necessary to recognise that 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. There are at least two factors relevant to the

determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of section 33 of the interim Constitution.

[113] 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. With respect, therefore, I cannot agree with Kriegler J that it is a "profound and troubling" disadvantage for women when the

President says that mothers play a special role in nurturing children. The profound disadvantage lies not in the President's statement, but in the social fact of the role played by mothers in child rearing and, more particularly, in the inequality which results from it. Putting an end to that inequality is a major challenge for our society. There can be no doubt that where reliance upon the generalisation results in greater disadvantages for mothers, it would almost without question constitute unfair discrimination. On the other hand, were we to establish the rigid rule proposed by Kriegler J that reliance upon that generalisation even to afford some advantage to mothers would, except in very narrow circumstances, be unfair, we may well make the task of achieving the equality desired by the Constitution more difficult. On the facts of this case, I conclude that the President's reliance upon the fact of women's greater share of child rearing responsibilities in order to afford an advantage to some women has not caused any significant harm to other women.

[114] The harmful impact of the discrimination in this case was not experienced by mothers, but by fathers. However in my view, that impact was far from severe. Fathers were denied an opportunity of special remission of sentence. There is no doubt that an early release from jail is beneficial. But in assessing the impact of the discrimination, it must be remembered that their imprisonment resulted, not from the President's act in denying them remission, but from their having been convicted of criminal offences. In addition, they still have the right to apply for special remission of sentence in the light of

their own circumstances. The effect of the discriminatory act was, therefore, in my view not to cause substantial harm. That harm would have been far more significant in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood.

[115] In considering the factors relevant to a determination of unfairness, it appears that the discrimination in this case caused no significant harm to mothers and no severe harm to the interests of fathers. A further relevant factor in this case is the nature of the presidential power. In that regard, I have nothing to add to the analysis contained in the judgment of Goldstone J (at paras 44-46). That power, when exercised to confer a pardon upon groups, is resistant to individualised application. It may well have been impossible for the President to exercise it in this case in a more individualised way. In the light of all these factors, therefore, I come to the conclusion that the discrimination caused by the President remitting the sentences of mothers of young children but not the sentences of fathers of young children was not unfair.

Chaskalson P, Mahomed DP, Ackermann, Goldstone, Langa, Madala, and Sachs JJ concur in the judgment of O'Regan J.

For the appellants:	GJ Marcus and AG Jeffrey instructed by the State Attorney (Kwazulu-Natal)
For the respondent:	Mr M Pillemer instructed by Shepstone & Wylie