Inequalities and the Social Context

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Inequalities and the Social Context

MARY JANE MOSSMAN

Dans ses décisions, L’Heureux-Dubé s’est montrée sensibilisée et sensible au contexte social dans lequel se trouvent bien ancrées les inégalités …¹

In thinking about my comments for this workshop, I was reminded of this assessment of Justice L’Heureux-Dubé, written by our late colleague Professor Marlène Caron in 1991. Marlène’s assessment appeared only a few years after Justice L’Heureux-Dubé was appointed to the Supreme Court of Canada, and just a few years before Marlène’s untimely death. It focused on the contributions of Justice L’Heureux-Dubé to family law jurisprudence in Quebec, when Justice L’Heureux-Dubé was a member of the Quebec Court of Appeal and at a time when courts in Quebec were engaged in interpreting revisions to the Civil Code. In this context, Marlène identified Justice L’Heureux-Dubé’s abiding concern for equality and the need to understand legal principles in a social context, goals to which Marlène was similarly committed as a legal scholar and law teacher.²

Thus, in reflecting on Justice L’Heureux-Dubé’s contributions to equality in relation to legal aid and family law, I want first to examine how her legal approach was “anchored in a social context of inequality” in the Supreme Court of Canada’s decision in New Brunswick v. G.(J.).³ In this case, the Court decided that state-funded counsel was required when an indigent mother faced the possibility that her children would be apprehended by the state. In addition to examining the reasoning in G., my comments sketch some of the current issues in Canada concerning unrepresented litigants, particularly in family law
matters, and the need for policy responses to these issues to be similarly “anchored in a social context” and informed by goals of substantive equality.

**New Brunswick v. G.**

In G., Justice L’Heureux-Dubé’s concurring decision focused on three Charter arguments: “security of the person” in section 7; “liberty” in section 7; and “equality” in section 15. In my view, her reasoning confirms Marlène Cano’s view that Justice L’Heureux-Dubé was committed to taking into account the social context in which legal facts are defined, and to achieving substantive equality in family law cases.

“**Security of the Person**”

The Supreme Court of Canada unanimously concluded that the trial judge in this case should have appointed state-funded legal counsel for an indigent mother in a child protection hearing, even though the New Brunswick legal aid program did not provide services for such proceedings. In doing so, the Court applied a test that included three elements: the seriousness of the interests at stake; the complexity of the proceedings; and the capacities of the appellant. Interpreting “security of the person” in section 7 as extending beyond the criminal law context, the Court held that it included interference with the psychological integrity of a parent resulting from potential removal of her children by the state. The Court agreed unanimously on this test to determine whether state-funded counsel is necessary to ensure a fair trial in child protection proceedings. Indeed, as I have argued elsewhere, the decision in G. defined a constitutional obligation for the judiciary to ensure a fair trial in civil, as well as criminal, cases.

However, the majority in G. concluded that such situations would not be frequent. By contrast, Justice L’Heureux-Dubé’s concurring reasons suggested that a trial judge should not apply the Court’s test on the assumption that such orders would be necessary only rarely. Like many legal practitioners who are regularly involved in child protection proceedings, Justice L’Heureux-Dubé understood that parents in such proceedings are often indigent or unacquainted with court processes, and sometimes disadvantaged by language, ethnicity, or illness; and they are often mothers. In acknowledging the reality of this context, Justice L’Heureux-Dubé’s conclusion that trial
judges need to take account of the important value of “meaningful participation” is particularly significant. For her, the idea of meaningful participation is recognition of a substantive right not to be excluded from participating in significant decisions affecting one’s life. As Jennifer Nedelsky has also argued, it is important for litigants to have

an opportunity to be heard by those deciding one’s fate, to participate in the decision at least to the point of telling one’s side of the story ... [in a] hearing [that is part of a] process of collective decision-making, rather than as passive, external objects of judgment. Inclusion in the process offers ... a sense of dignity, competence and power.¹⁰

“Liberty”

The majority decision did not address the section 7 “liberty” interest. However, the concurring reasons of Justice L’Heureux-Dubé confirmed the continuing vitality of an expanded view of the “liberty” interest, a view also adopted in the dissenting judgment of the New Brunswick Court of Appeal.¹¹ Such an expanded version of “liberty” arguably permits the reasoning in G to be extended to family law cases beyond child protection proceedings. As David Dyzenhaus argued in his work for the Ontario Legal Aid Review in 1997,¹² the unequal power relations between the state and a criminal accused, often used to justify priority for legal aid funding in criminal law matters, also provide a philosophical basis for extending a requirement for state-funded counsel to civil matters. The key factor is the existence of disparate power among litigants, not the source of the power differential: as Dyzenhaus argued, “What should matter is not the source of the power which worsens one’s situation of inequality before the law, but the fact that the situation has worsened.”¹³ Justice L’Heureux-Dubé’s reasons suggest that recognition of the real context of differential power relationships in court proceedings creates substantive rights in relation to an incipient litigant’s access to legal processes.

“Equality”

The majority judgment also did not address section 15. However, the concurring reasons of Justice L’Heureux-Dubé connected the section 7 rights of...
“security of the person” and “liberty” to the equality guarantee of section 15 of the Charter. For Justice L’Heureux-Dubé, section 7 rights must be “interpreted through the lens of sections 15 and 18.”\(^{13}\) Stressing the relevance of equality guarantees in the G. case, Justice L’Heureux-Dubé pointed out that child protection proceedings disproportionately affect single mothers, and that issues of fairness in child protection hearings are thus particularly important to “women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled.”\(^{14}\) Such arguments may also extend to other kinds of family law proceedings, particularly where there is an imbalance of power and resources among litigants, and to other civil proceedings where the failure to provide state-funded legal counsel to indigent persons may similarly serve to reinforce inequality before the law. In such situations, as Dyzenhaus argued, “the legal system is fostering (rather than constraining) the abuse of power and resources by the other party.”\(^{15}\)

Thus, as Patricia Hughes has suggested, access to the legal system may need to be understood as a systemic issue, one that fundamentally affects our existence as participating citizens of a democracy.\(^ {16}\) In this context, for both advocates and policy makers, the G. decision creates an opportunity for re-envisioning the content and form of legal aid services in ways that ensure that the Canadian legal system fundamentally reflects the goals of the Charter. Although all members of the Court accepted a need for fairness in proceedings, and recognized that this goal could require state-funded counsel for indigent litigants in some cases, Justice L’Heureux-Dubé’s concurring reasons expressly acknowledged the social context in family law matters, especially for women, and the need to envision both “liberty” and “equality” so as to recognize substantive rights to representation in pursuit of access to justice.

**Unrepresented Litigants: Equality and the Social Context**

Thus, the Court’s decision in G., and especially the reasoning in Justice L’Heureux-Dubé’s concurring reasons, have provided significant encouragement to advocates involved in access to justice issues, particularly in the context of challenges to legal aid cutbacks.\(^ {17}\) Yet, potential use of G. as a legal precedent in future challenges needs to be “anchored in the social context of inequality” in relation to issues of legal representation in Canadian courts.
Certainly, there have been widespread reports in the press about the dire situation of unrepresented litigants in criminal and family courts and in refugee determination hearings.\textsuperscript{18} Statistics about family law cases in Ontario have revealed a significant increase in unrepresented litigants in both the Unified Family Court and in the Family Division.\textsuperscript{19} Thus, as one judge commented in August 2002, the task for judges all too often seems to involve “bailing the Titanic with a teacup.”\textsuperscript{20} Increasingly, the unrepresented litigant has been identified as the source of new problems for jurisprudence and legal precedents, as well as for lawyers when the other party is not represented and for litigants who do not understand the court system or legal procedures. In this context, one response has been the creation of judicial protocols for dealing with unrepresented litigants and guides for lawyers who must engage in negotiation with an unrepresented litigant on the other side of a case.\textsuperscript{21}

Yet, while these problems are certainly all too real in practice, it may be important to examine the phenomenon of unrepresented litigants more closely, particularly in the family law context, and to assess the Court’s decision in G. “anchored in the social context of inequalities.” In an overview of unrepresented litigants in Nova Scotia, for example, Rollie Thompson identified three main categories: the “self-represented,” the “unrepresented,” and the “invisible.”\textsuperscript{22} According to Thompson, “self-represented” litigants include a large number of litigants who are “do-it-yourselfers” or “recreational litigants.” In addition, a smaller proportion of “self-represented” litigants are rather disaffected and vexatious, but not really dangerous, while a small minority are both dangerous and borderline in their capacity to deal with legal issues in a reasonable way.\textsuperscript{23} By contrast with the “self-represented” group, however, there are those who are “unrepresented” not as a result of choice, but rather because their eligibility has been eliminated by legal aid cutbacks; Thompson referred to these litigants as “LULAs” because they are litigants who are Left Unrepresented by Legal Aid.\textsuperscript{24}

Significantly, Thompson’s research suggested that the majority of “self-represented” litigants were men, while the majority of “unrepresented” litigants were women. Moreover, since about 70 per cent of family law legal aid clients in Nova Scotia were women, cuts to civil legal aid fell disproportionately on women. Indeed, as Thompson pointed out, it is likely that some women simply abandoned their claims in the face of legal aid cutbacks, becoming part of the category of “invisible” litigants, those for whom a lack of access to repre-
sentation resulted in a lack of substantive legal rights. Thus, the use of legal principles concerning state-funded representation in family law matters pursuant to the decision in G. clearly requires careful attention to the social context of inequality among different categories of “unrepresented” litigants.

In such a context, future applications of the test adopted unanimously by the Supreme Court of Canada in G. need to take account of these issues. While “the seriousness of the interests at stake” and “the complexity of the proceedings” may well extend to family law matters beyond child protection, the application of the test of “capacity of the appellant” requires careful analysis. In the first place, it seems to require the applicant to demonstrate incapacity, another context in which legal strategies may require rather demeaning assertions about the powerlessness and victimization of women. More significantly, in the context of gendered power relations within the family, the application of this branch of the test should not be based on assumptions that women and men stand in positions of equality in their need for representation. At the same time, there are undoubtedly some cases where men, as well as women, can demonstrate a need for state-funded legal representation in family law matters: the problem is to define an approach that takes into account the social context of substantive, not just formal, equality.

One possible approach was identified by Diana Majury in her analysis of the doctrine of unconscionability in relation to domestic contracts. As she suggested, courts could better take account of inherent gender inequality in the family bargaining context by presuming that such bargains are unequal, thus shifting the onus of demonstrating that an individual contract was in fact fair to the party asserting it (usually the male partner). Such an approach assumes a social context of inequality, but preserves the possibility of demonstrating equality in particular circumstances, while ensuring that the party who wants to assert that the bargain was equal has legal responsibility for proving the claim. In the context of access to state-funded representation in family law matters, the social context of inequality may similarly require a presumption that an indigent woman does not have sufficient capacity to represent herself effectively, with the onus on the state to demonstrate the contrary; by contrast, no such presumption would need to apply to indigent men, although they would be entitled to prove their incapacity in the particular circumstances of individual cases.
As is evident, however, a legal presumption of women’s incapacity to provide their own representation both reflects the social context of gendered inequality and also tends to reinforce it. Such a dilemma frequently results from efforts to promote substantive, rather than formal, equality goals: principles that attempt to take account of circumstances of substantive gendered inequality frequently result in the appearance of formal inequality, at the same time that they also reinforce the inequalities that we wish to overcome. This problem is both the promise and the problem of taking account of the social context of inequality. In such a context, we must exercise great care in constructing legal challenges after G. to further goals of access to justice in family law. In anchoring our legal principles in the social context of equality, the fundamental goal must be justice for all individuals in family relationships.

Endnotes


4 In the Supreme Court of Canada, supra note 3, the majority judgment was written by Chief Justice Lamer (with Justices Gonthier, Cory, McLachlin, Major, and Binnie concurring). Both Justices Gonthier and McLachlin joined in Justice L’Heureux-Dubé’s concurring judgment.

5 S.C.C. decision, supra note 3 at para. 75.

7 S.C.C. decision, supra note 3 at paras. 112–25.
8 Ibid., at para. 125.
10 N.B.C.A. decision, supra note 3, Bastarache and Ryan J.J.A.
13 S.C.C. decision, supra note 3 at para. 115.
14 Ibid. at para. 114.
17 See the papers collected in Making the Case, supra note 6.
20. David Gambrill, “LAO Sends in Staff Lawyers to Cover Cases” (2002) 13:30 Law Times 1 at 5; the quotation was attributed to Superior Court Justice Paul Cosgrove in relation to courts in Brockville, Perth, and Cornwall.


23. Thompson, “Practising Lawyer’s Field Guide,” supra note 22 at 532–33. According to Thompson, these are “lawyer wannabes,” those who want to act as their own lawyers.

24. Ibid. at 531–32.

25. Ibid. at 531. As Thompson noted, some of these clients may have legal representation at the outset, but lose counsel at some point for financial reasons.

26. For example, see Anne Bottomley and Joanne Conaghan, eds., Feminist Theory and Legal Strategy (Oxford and Cambridge: Basil and Blackwell Ltd., 1993).


