

*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) per Justice O'Connor  
(United States, Supreme Court): a case revisited under CEDAW.  
Anaïs Tobalagba JD Exchange student (3<sup>rd</sup> Year)

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**Abstract**

The American Supreme Court's *Mississippi University for Women v. Hogan* case (1982) has long been a leading reference on the issue of gender stereotyping and gender discrimination in education. This essay revisits the *Hogan* case under the light of the Convention on the Elimination of all forms of Discriminations Against Women (CEDAW) and tries to give an original and more global approach of the still existing gender bias regarding the access to schools and the societal role for which education institutions prepare students.

This analysis aims to be an illustration of the various tools and possibilities offered by the CEDAW to deal with gender discrimination in a more efficient way.

## Introduction

In the process of achieving gender equity and redefining the relation between males and females in public and private spheres, the *Mississippi University for Women v. Hogan* case (Hogan case) is concerned with one significant area in which it takes place which is education. It focuses on a particularly relevant gender issue: the discrimination, on the basis of sex, which biases the access to schools and, thus, the gender-stereotypical societal role for which education institutions prepare students<sup>1</sup>.

In 1982, the Supreme Court of the United States had to consider the situation of Joe Hogan, a skilled nurse employee, who was denied admission to the nursing baccalaureate offered by the State-supported, female exclusive Mississippi University for Women, solely because of his sex. In an important judgment, the Court denounced gender discrimination and challenged the underlying gender stereotype in the University's policy that nursing was a profession reserved for women.

In reading this case, questions arise as to how, if at all, it brings a new approach to gender stereotyping and sex discrimination in the field of education. If yes, how does this approach may or may not be efficient in dealing with these issues?

In commenting on the Hogan case, I will first expose the factual and procedural contexts in which the Court recognized the existence of gender stereotyping and discrimination in the Mississippi University for Women's policy (1). Secondly, I will study how the Court determined the existence of gender stereotyping in the Hogan case and how such stereotyping created a form of discrimination against women that was very likely to harm women (2). The third section will analyse how the context of the Hogan case provided all the

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<sup>1</sup> Grossman, Herbert and Suzanne, *Gender Issues in Education*, Allyn and Bacon, Needham Heights (Massachusetts), 1994, 207p., p.xi

necessary components to perpetuate a stereotype (3). In a fourth section, I will emphasize the way this case raises questions about gender equality in the sector of education (4). Eventually, I will focus on possible remedies for sex discrimination in education (5). I will conclude with a commentary on how the Court somewhat failed to entirely deal with the problem of gender stereotypes in education, but still managed to reach a decision that has significant resonance for present day situations.

## 1. The Factual and Procedural Backgrounds of the Hogan Case

### a) Facts and Procedure of the Case

The Mississippi University for Women (MUW), created in 1884, was the oldest State-supported all-female college in the United States. In 1971, MUW established a School of Nursing in Columbus, which offered both a four-year baccalaureate program and a graduate program in nursing.

In 1979, Joe Hogan, a registered male nurse employed in a Columbus medical center, applied for admission to the MUW nursing baccalaureate program in order to train to become a nurse-anaesthetist. Mississippi's two coeducational nursing schools were located more than 150 miles away from Hogan home base and to go to one of these schools, Hogan would have had to move his family and quit his job. Admitting that Mr. Hogan possessed the academic qualifications, the University nevertheless rejected his application solely on the basis of his sex<sup>2</sup>.

Hogan filled an action in the United States District Court for the Northern District of Mississippi, claiming that the school policy which accepted only female applicants in a State-

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<sup>2</sup> Shull, Mary Ellen, "Reinforcement of middle level review regarding gender classifications: *Mississippi University for Women v. Hogan*", *Pepperdine Law Review*, vol. 11, pp. 421-40, p.424, January 1984

supported university violated the equal protection clause of the fourteenth amendment of the US Constitution.

The District Court dismissed his claim, holding that the MUW's single-sex admission policy was related to the State's rational interest to provide the biggest range of educational opportunities for women and was consistent with the idea that single-sex education provided unique benefits for them.

On appeal, the Fifth Circuit Court of Appeals reversed the District Court judgement with the argument that refusing admission to Hogan on the basis of his sex denied him equal protection rights guaranteed by the fourteenth amendment<sup>3</sup>.

The case came before the United States Supreme Court which had to answer the question whether a State statute that excluded males from enrolling in a State-supported professional nursing school violated the equal protection clause of the fourteen's amendment<sup>4</sup>.

b) *The Solution Provided by the Court*

The Court held that there was a violation of the fourteenth amendment. Writing for the majority, Justice O'Connor classified the MUW's enrolment policy as a specific example of gender-based discrimination. By attributing a compulsory preference to women based only on sex, and by denying men the right to obtain credits for a nursing baccalaureate, the University policy imposed upon Hogan a burden he would not have had were he female.

Moreover, Justice O'Connor added, to withstand the unconstitutionality of such discrimination, that any statute which classified individuals on the basis of their gender had to show an "exceedingly persuasive justification"<sup>5</sup> for the categorization. To do so, the

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<sup>3</sup> Auspitz, Lizbeth Ann, "Mississippi University for Women v. Hogan: Gender Discrimination - Establishing a Consistent Standard of Review", Ohio Northern University Law Review, vol. 10, pp. 159-70, p. 160, Winter 1983

<sup>4</sup> *Mississippi University for Women v. Hogan (Hogan Case)*, 458 U.S. 718 (1982) per Justice O'Connor (United States, Supreme Court), p 719

<sup>5</sup> *Ibid.* p731

petitioner had to show that the classification served "important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives"<sup>6</sup>. The State had claimed that its objective in excluding men was "educational affirmative action". Observing that the State had not shown that women lacked opportunities to obtain training or jobs in the field of nursing, the Court noted that the policy was not related to a compensatory purpose and didn't justify gender discrimination. The State's argument that the exclusion of men ensured better conditions of education for women was also rejected on the ground that men were allowed as auditors during the nursing classes. The State, then, had failed to show the existence of important objectives.

Going further, Justice O'Connor emphasized the idea that by contributing to the overrepresentation of women, the MUW's policy reinforced the stereotype of nursing as women's work, thus reducing the income of nurses<sup>7</sup>.

I will not focus my argumentation on the test used by the Court to deal with gender discrimination, which belongs to American Constitutional Law. Rather, I will focus on the fact that the analysis of the Court represents a step forward in the naming of stereotypes and in the definition of sex discrimination in the field of education. Nevertheless, I think that the judgment still fails to give a satisfying solution to gender discriminatory stereotyping.

I will study, then, how the Court did and could have raised the issue of gender stereotyping as a form of discrimination against women under the light of Convention on the Elimination of all forms of Discrimination Against Women

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<sup>6</sup> Ibid., p.718

<sup>7</sup> Hoffman, David, "Challenge to Single-Sex Schools under Equal Protection: *Mississippi University for Women v. Hogan*", Harvard Women's Law Journal, vol. 6, pp. 163-74, p. 166, Spring 1983

## 2. Stereotyping as Creation of a Form of Discrimination Against Women

Writing for the majority, Justice O'Connor perceived the existence of gender-role stereotypes (a) that were creating a form of discrimination against women but did not fully address (b) the issue of the harm created by such stereotypes.

- a) *In the Hogan Case, the Stereotype Against Women Creates a Perception About What is the Natural and Acceptable Role of women in Society.*

In their treatment of the situation, the judges indicate a will to analyse what they saw as a discrimination case consistently, regardless of the sex been discriminated against. Although Hogan, a man, was successful in his action, an examination of the case clearly reveals a **judicial preoccupation with the societal status of women**. Indeed, Justice O'Connor establishes that a female-only admission policy **perpetuates the stereotype of nursing as a typically woman's job**<sup>8</sup>. This point, combined with the one that the State could not proffer a legitimate governmental objective, constitute the two grounds that the Court uses to determine the existence of a discrimination.

This interpretation, which benefits women while appearantly benefiting the discriminated against man, is very convincing because it follows the same direction as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This text, according to Diane Otto in her article "*Lost in translation*"<sup>9</sup>, reinterprets rights in order to reconstitute its subject as a woman. For example, in the education sphere, as treated in this case, gender specific issues must be addressed, like eliminating the stereotypical gender-roles perceptions. This is the process done by the Court.

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<sup>8</sup> Hogan case, supra, p729

<sup>9</sup> Otto, Diane, "*Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law*", in Anne Orford, *International Law and its Others*, Cambridge University Press, pp. 318-356, p. 339, 2006

Secondly, in determining that the University policy perpetuated the stereotype of women as being the most competent for nursing, the Court takes a significant step to neutralize this age-old stereotype about women<sup>10</sup>. However, even if this step is important, the Court limits itself to the mere naming of the stereotype without examining in depth its inherent nature. I would like to go further than the Court to explain the kind of stereotype which is dealt with in the case.

In her comment, Justice O'Connor, without specifically referring to this qualification, treats the stereotype mainly as a descriptive one: nursing is a job for women. The analysis could go further by determining how this descriptive stereotype becomes a **prescriptive** one relating to the question of *why* should nursing be a women's work and not the work of men. Had the Court done this, it would have understood that rather than just perpetuating the stereotype of women nurses, the University policy also perpetuated the one that Michelle O'Sullivan calls "Mary"<sup>11</sup>, that is to say the stereotype of a nurturing woman whose ultimate goal is motherhood and caretaking.

The stereotype could then also be qualified as a **normative** one which Anthony Appiah defines as grounded in a social consensus about how an individual should behave in order to conform to their group<sup>12</sup>. Indeed, by perpetuating the stereotype of women nurses, the MUW places upon them the burden of being, in the facts, very caretaking so as to conform to the generalized idea of nurses. This is obviously the kind of operative gender stereotypes which impedes women equal access to education by limiting their role in society to housekeeping or

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<sup>10</sup> Hoban, Gerry E., "Constitutional law--the rejection of an otherwise qualified male applicant to a state-funded nursing college solely because of sex constitutes a violation of the equal protection clause of the fourteenth amendment. *Mississippi University for Women v. Hogan*", University of Baltimore Law Review, vol. 12, pp. 342-50, p.349, Winter 1983

<sup>11</sup> O'Sullivan, Michelle, "Stereotyping and the Male Identification: Keeping Women in their Place", Acta Juridica 185, reprinted in Christina Murray, ed., *Gender and the New South African Legal Order*, pp. 186-196, p.190, 1994

<sup>12</sup> Appiah, K. Anthony, "Stereotypes and the Shaping of Identity", California Law Review 88, Vol. 41, pp. 47-52, p. 48, 2000



to caretaking. As a result, it can be seen as a pretext to the closure of doors leading to more technical education such as sciences, mechanics, etc.

Then, the Court may have made more of an effort to examine in detail the stereotype in order to expose how the University policy had in reality much broader stereotypical effects than what Justice O'Connor's explanation accounted for.

Moreover, the Court did not account for the fundamental fact that the situation not only creates stereotypes against women but, conversely, the **stereotype of men as aggressive and not nurturing**, and therefore as inappropriate candidates for a nursing diploma. Justice O'Connor could have had a broader vision of the stereotypes engaged in the Hogan case because in failing to name the stereotyping of men, she tends to depict it as more legitimate than the one against women (i.e. it is not important enough to be named). In taking such a position, she failed to respect what Justice L'Heureux-Dubé calls "judicial impartiality"<sup>13</sup>.

According to Justice L'Heureux-Dubé, the role of the courts is to be impartial, i.e. to identify myths and stereotypes in an "open-minded fashion", without bias. To reach this aim, a judge has to get rid of his own idiosyncrasies, so as to change other peoples' perceptions and prevent the perpetuation of stereotypes. The Court could have taken in account such a mission and avoided a bias in the judgment, by naming *all* the stereotypes created, no matter the gender they concerned.

This point is all the more important since naming the stereotype against Hogan would have made the analysis of the Court even stronger. It would have been a mean to underline how such stereotypes against men have the effect, by a process of comparison, to strengthen the vision of women as caretaker and, in certain way, to legitimate it by suggesting that if men are unable to be nurturing, only women can take this role. I will illustrate my point with

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<sup>13</sup> L'Heureux-Dubé, Claire, "Beyond the Myths: Equality, Impartiality and Justice", Journal of Social Distress and the Homeless, No. 87, pp. 89-94; 99-102, p. 92, 2001

example of the Guatemala case of 2001. The Inter-American Commission on Human Rights was very precise in its denouncement of the stereotypes, embedded in the Guatemalan Civil Code, which refer to men as responsible for financially sustaining the home and representing the marital union, and in the way it underlined the effects such stereotypes could have upon women's situation: «*[These dispositions] establish a situation of de jure dependency for the wife and create an unsurmountable disequilibrium in the spousal authority in the marriage. [They] apply stereotyped notions of the role of women and men which create de facto discrimination against women in the family sphere*»<sup>14</sup>.

To summarize, Judges could have work more on the identification of stereotypes in order to establish more clearly how they constituted a form of discrimination which could harm women.

*b. Such Sex Stereotypes Create Discrimination Against Women*

The methodology used by Justice O'Connor to establish the existence of a discrimination in the MUW's admission rules is a **legal** one, based on references to statutes already invalidated by the Court on the ground of their patriarchal assumptions that gender could be a base of classification (such as, for instance, the *Craig v. Boren* case). Her conclusion is that a classification on the base of gender can be applicable if it is determined through reasoned analysis, for legitimate and important State's objective, with a substantial relationship between the purpose and the means, and not upon "traditional, often inaccurate, assumptions about the proper role of men and women"<sup>15</sup>. This method (which, in US law, is called intermediate testing) permitted her to determine that instead of compensating a work

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<sup>14</sup> Inter-American Commission on Human Rights, *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/00, OEA/Ser.L/V/II.111 Doc. 20 rev., p. 929, at paras. 1-4; 20-27; 31-54, para. 44, 2000

<sup>15</sup> Hogan case, *supra*, p.458

discrimination against women, which in the facts did not exist, the gender classification preventing access to men to the nursing school created a discrimination against Hogan.

This methodology fails to provide a satisfying understanding of the extent of stereotyping, discrimination and States obligations in the sector of education. The intermediate test lacks of precision. How do we determine a "legitimate" objective? What are the means that are considered "substantially related to the purpose"? Even in the case of such means, aren't they likely to create a harmful discrimination against some individuals? All these questions make me think that through its apparant reinforcement of the measures preventing a State to refer to stereotypes, the methodology used by the Court, gives this latter a lot of loopholes. A State may easily prove the legitimacy of its objectives and of the means used and, by doing so, justify discriminatory policies.

The Hogan case would have been more determined if it had been analysed under the CEDAW. **Article 5(a)** of the Convention imposes on the State the duty to intervene in the social relations and institutions in which negative stereotyped views about women are expressed or used. This article implies that by encouraging a university policy which privileged one gender on the other, the American State permitted the perpetuation of stereotypes against men and women and, as a result, breached its obligation under article 5(a). Then, the State's argument that such measures compensate a discrimination against women is invalid not only because, as the Court noted, in the nursing field women represente the great majority of students and employees, but also because it failed to banish gender stereotypes from social life.

The use of article 5(a) is all the more relevant since, as Rikki Holtmaat precises, it sets concrete standards as to the kind of activities a government should undertake<sup>16</sup>. Education is

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<sup>16</sup> Holtmaat, Rikki, *"Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination"*, The Hague: Reed Business Information, pp.76-78, p77, 2004

a part of these standards and is referred to by **article 10(a) CEDAW** which urges the States to take all measures to ensure the same conditions for career, access to studies and achievement of diploma in all types of training. Needless to say that in the present case this requirement was not respected and that the equal access to education was scorned - even if it was in favour of women - especially because Hogan was in the material impossibility to attend coeducational school and because men were accepted as auditors but not as students in the classes. The MUW policy, then, was clearly to refuse the nursing *diploma* to men only because on their sex and even if they could attend the classes.

In the second place, article 5(a), in combination to **article 2(f)**, implies that States have the duty to take all the appropriate measures to eliminate gender stereotypes in law and public policies. Again, in the Hogan case, the State failed respect this obligation. The MUW was a State-supported university, paid with public funds, which means that its policy was a public one. The State deliberately validated this stereotypical public policy and, as a result, breached article 5(a).

It is interesting to note that article 5(a) does not require a proof of discrimination to denounce a State failure to respect its obligations. It would nevertheless have been relevant to use it because even without establishing a discrimination, article 5(a) permits a deeper analysis than what the Court did, on the obligations and failures of the State in the education field.

The question of discrimination was fairly treated by the Court on the advantage of Hogan who was refused the access to the nursing school only on the basis of his sex. However, although Justice O'Connor denounces the stereotype of nursing as a women's job, it is very difficult to see in her analysis a link between this stereotype and the discrimination against *women* it implies.

Once again, CEDAW would have helped to enlarge the vision provided by the Court and would have helped not to limit it to discrimination against men. Indeed, **article 1 of the Convention**, which defines discrimination, addresses the problem of discrimination against women, rather than discrimination on the basis of sex. It provides «*the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women [...] of human rights and fundamental freedom...»*. We see that both direct and indirect discrimination are covered by this article. On the basis of this article, it is very easy to determine that in this case, there was direct discrimination against Hogan explicitly based on his sex, *and* also **indirect discrimination against women**: the apparently advantageous practices and policy of the MUW have the effect of excluding women from the enjoyment of opportunities such as higher salaries, etc. As Andrew Byrnes points out<sup>17</sup>, the definition focuses not only on the formal, *de jure* enjoyment by women of rights but on the *de facto* situation allowing women to enjoy these rights.

Consequently, using article 1 CEDAW helps us slide naturally to the question of the **harm** done by this discrimination to women. It leads us to wonder which are these opportunities of which women are deprived and how the University policy «*has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women [...] of human rights and fundamental freedom...»*.

c. *Discriminatory Stereotypes Have Harmful Effects Upon Women in the Educational Sector.*

I will focus on some of the harms done to women when the State policy refuses admission to men to a nursing school and perpetuates the stereotype of women nurses.

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<sup>17</sup> Byrnes, Andrew, “*The Convention on the Elimination of All Forms of Discrimination Against Women*”, in W. Benedek et al. ed., *Human Rights of Women: International Instruments and African Experiences*, London, New York, Zed Books, pp.119-133; 135-137; 138-9, 2002

The first one, the most material one, was noted in the case and is related to the idea that excluding men from the nursing sector depresses nurses wages and, consequently, denies women the opportunity to have important promotions. It also devalues the job, putting it to the rank of badly-paid occupations and, potentially, unpopular ones. It can't be denied that such views influence the nurses' image and inferiorizes them. For example one could say that if nurses accept to take care of others for a low salary it is because their primary vocation is that of caretaker. As Sophia Moreau writes in her article "*The Wrong of Unequal Treatment*"<sup>18</sup>: «Someone who has been denied a benefit on the basis of a stereotype has been publicly defined by another group's image of him".

The second harm was raised by Sophia Moreau. According to her, discrimination based upon stereotypical views **lessens one's autonomy and choices**, that is to say limits its power to direct his life in important ways and to shape its identity. In the Hogan case, such harm can be foreseen when we consider that offering privileged education to women in the nursing field is likely to create an attraction of women to that field and to influence the education choices they would have done were nursing a coeducational sector. Consequently it limits their career opportunities to the sphere of what are considered feminine occupations. It also has the effect to make these women conform to the stereotype of nurturing nurses and to attribute them personal characteristics that they don't necessarily hold.

All these points are the effects of the gender discrimination and the perpetuation of patriarchal views of women as caretakers and men as breadwinners which is implied in the MUW's admission policy.

Article 1 CEDAW is here very useful because its formulation, more than determining the cases in which women are discriminated, gives us no other choice than the one of considering

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<sup>18</sup> Moreau, Sophia, "*The Wrongs of Unequal Treatment*", University of Toronto Law Journal, No. 291, pp.297-302, p. 299, 2004

the harm done to women. This question, however, cannot be thought out of the context in which gender stereotyping is determined.

### 3. The Context in Which Hogan was Refused the Access to the Nursing School Contains all the Necessary Elements to Perpetuate a Stereotype.

In *Mississippi University for Women v. Hogan*, the Court established that «MUW's admission policy lends credibility to the old view that women, not men, should become nurses»<sup>19</sup> without explaining how, in the context in which Hogan was refused the access to the nursing school, all the conditions were gathered to promote such a stereotype. However, Glick and Fiske, in their article "*Sexism and Other 'Isms': Interdependence, Status and the Ambivalent Content of Stereotypes*"<sup>20</sup> tell us that to understand the deep nature of a stereotype we have to consider not only its content but also the situational, cultural and individual contexts in which it was created. This step is fundamental because a failure to analyse the context of a stereotype leads to a failure to see its constructive potential and its capacity to create yet more stereotypes than the already existing ones.

For instance, the Court could take into account that the **construction of gender in law is different in every culture** and that the fact the action takes place in a Western society influences the role which is attributed to men and women. The MUW's policy reflects the Western idea that, as Rebecca Cook writes, «...subordinate status is given to those who perform nurturing and supportive tasks in the domestic sphere [and] leadership roles in politics, religion and commerce are associated with masculinity»<sup>21</sup>. By refusing the admission to nursing school to men, the University indirectly takes the position that nursing, as a caretaking job, is not a

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<sup>19</sup> Hogan case, supra, p. 458

<sup>20</sup> Glick, Peter and Fiske, Susan T., "*Sexism and other 'Isms': Interdependence, Status, and the Ambivalent Content of Stereotypes*", in W.B. Swann, Jr., L.A. Gilbert and G. Langlois eds., *Sexism and Stereotypes in the Modern Society: The Gender Science of Taylor Spence*, Washington DC. : American Psychological Association, pp. 193-217, 1999

<sup>21</sup> Cook, J. Rebecca, "*State Responsibility for Violation of Women's Rights*", Harvard Human Rights law Journal 125, pp.130-134, 1994

reasonable job for American men and that they should apply only to specific supposedly gender-appropriate sectors of education.

The Court decision may have produced immediate benefits for a particular group of men, but it didn't recognize the historical social relation that formed the stereotype. Thus, the perpetuation of these stereotypes leaves very little space for the *transformation* of sex-role stereotyping in the American society.

To deal with this question, article 5(a) CEDAW helps us once again to determine the dangers of cultural hegemony<sup>22</sup>. This provision is very useful as it recognizes that gender is a social category and that the problem is one of gender social hierarchy rather than purely sexual differences. The major goal of this article is to eliminate all the traditional customs and practices, including the ones contained in religion or law, that have negative effects for the fulfillment of all women rights. Under article 5(a), it would have been possible for the Court to determine that the educational context in the Hogan case was likely to create stereotypes and that the State failed to make this context more stable by refusing to eliminate the patriarchal view promoted by its public education policy (the University was State-supported). The use of article 5(a) would thus, permit the possibility of a cultural transformation as well as more appropriate focus on the State's future responsibilities in that process. This leads us to consider how the Hogan case can be a starting point to think about equality in the field of education.

#### 4. The Case of Joe Hogan and the Research of Gender Equality in Education

In their decision, the majority judges voted in favour of **strict equality between men and women**. As Justice O'Connor noted, a similarly situated woman would not have been placed

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<sup>22</sup> Holtmaat Rikki, *supra*, p. 155



in the situation of choosing between foregoing school credit and traveling to another school<sup>23</sup>. The policy of denying the admission to men on the basis on their sex «*imposed upon Hogan a burden he would not bear were he female*»<sup>24</sup>. The position taken by the Court implies that in a same situation and with the same competences, men and women should have the exact same rights to access to education.

Although this position goes in the right direction, it seems to me that it is restricted to the requirement of a formalistic sameness of treatment for similarly situated people, that is to say to the requirement of formal equality and gender neutrality. This solution adopted by the Court, even if vital at a first stage, is insufficient. Some of the difficulties it can bear were explained by Sandra Fredman in her article "*Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*"<sup>25</sup>. For her, three points must be raised. First, a limitation to formal equality would mean that men and women have to be treated equally well but also equally bad. Secondly, a strictly equal treatment can be found in extending an advantage to the unprivileged one but also by removing a benefit from the privileged group. Finally, formal equality would imply that any gender specific treatment is to be prohibited as discriminatory. For example, if the Court requires strict equality for men and women in the nursing field, it would declare discriminatory a measure favouring women in the sector of mathematics where they are, however, underrepresented.

The question of equality in that case could be analysed with regard to CEDAW. The Convention's concept of equality is, under **article 4(a)** not only *de jure* equality but also *de facto* one, i.e. practical and visible equality. The Committee on the Elimination of Discrimination against Women analysed it this way: «*In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which*

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<sup>23</sup> Shull, Mary Ellen, *supra*, p 437

<sup>24</sup> Hogan case, *supra*, p.724

<sup>25</sup> Fredman, Sandra, "*Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*", in I. Boerefijn et. al. ed., *Temporary Special Measures*, Intersentia, Antwerpen, pp.111-118, p. 112, 2003

*the Committee interprets as substantive equality»<sup>26</sup>. This entails that the CEDAW recommends **substantive equality** which is not gender neutral but takes gender in account to appropriately re-structure societies on a non male-defined basis. This kind of equality also requires positive measures to bring about change. In the sector of education it can take the form, for instance, of a modification of gender stereotypes in textbooks, etc.*

By the way, it is useful to consider the CEDAW notion of substantive equality to deal with the Hogan case to ensure that MUW, more than changing its admission policy, took measures to institute equality between men and women with consideration for the particular needs of each gender. It could then *facilitate* men's admission to the nursing school so as to achieve certain parity in a sector where women are overrepresented.

Thinking of a social transformation makes us consider the possible remedies against discriminatory stereotyping in the education field.

## **5. What Can be the Means and Remedies Against Such Form of Discriminatory Stereotyping in the Sector of Education?**

Some remedies can be found in the CEDAW (a) whereas others deal with a particular relationship between education institutions and students (b)

### *a) The Remedies Recommended by the CEDAW*

It is striking that in this decision, the Court recognizes the discriminatory character of the State's policy but shows reluctance to propose remedies against it. This position reveals a general hesitancy of tribunals to interfere with the means because they think the State is in a better position to do it. However, as Mary Jane Mossman highlights, judicial decisions have

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<sup>26</sup> CEDAW, General Recommendation 25, Temporary Special Measures (Thirtieth Session), U.N.Doc., CEDAW/C/2004/I/WP.1? Rev.1, 30 January 2004

the potential to permit a transformation regarding stereotypical and discriminatory policies<sup>27</sup> by offering (explicitly or implicitly) guiding lines to political decision makers.

The first step to find remedies in the present case would be to look at it through the lens of the CEDAW. As we saw before, article 5(a) emphasises States' duties to avoid the perpetuation of gender stereotypes and discrimination in legal, political and social life. As the Hogan case refers to a State-supported institution, the main remedy would be a **State policy aiming at eradicating discrimination** based upon stereotypical views and at promoting gender equality. Similarly, in the particular sector of education, article 10 of the Convention urges State parties to address gender-specific issues like eliminating stereotypical gender representations from educational material (10(c)) or implementing the same conditions for access to studies and for the achievement of diplomas, with the same quality teaching staff (10(a) and (b)). In the present case, art 10(c) is particularly relevant because it encourages *coeducation* as a remedy to achieve gender equality: this underlines that the MUW's female-only nursing school holds a real discriminatory potential, contrary to the CEDAW's recommendations.

*b) Towards Another Form of Education*

In the education field, it is possible to find remedies without using the CEDAW. As stereotypical categorization is typical of the human mind<sup>28</sup> and, as suggests Anthony Appiah<sup>29</sup>, as it can have positive effects in helping an individual to define his social identity, I don't assert that these remedies can completely eliminate stereotypical views. However I believe students can be taught to recognize categorization and to avoid making negative

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<sup>27</sup> Mossman, Mary Jane, "Feminism and Legal Method: The Difference it Makes", Australian Journal of Law and Society, Vol. 3, pp. 32-46, p. 44, 1986

<sup>28</sup> American Psychological Association, "In the Supreme Court of the United States: Price Waterhouse v. Ann B. Hopkins. Amicus Curiae Brief for the American Psychological Association", American Psychologist, Vol.46, pp.1061-1070, p. 1068, 1991

<sup>29</sup> Appiah, Anthony, supra, pp. 51-2

judgements a natural consequence of such classification. In doing so, the possibility to transform stereotypical thinking into discriminatory action would be reduced.

To reach this goal, three variables can be considered. The first one would be to **eliminate the educators and education's policy-makers stereotypical perceptions and behaviour**. By accepting and maintaining a discriminatory University policy, the direction and education staffs of the nursing school possibly communicate stereotypical models to their students. For example, in a classroom where men are auditors and women are seeking a nursing degree, the message likely to be heard by the students may be "their natural dispositions make women more worthy to deserve a nursing degree". In order to prevent the survival of these views, education staff should examine their own behaviour for potential gender bias and correct any that they may discover.

Secondly, a means to limit gender discrimination in education would be to **correct students' stereotypical beliefs about gender roles**, courses and careers. For instance, the MUW could provide to students, regardless of their sex, information about various sectors of education (nursing as well as mechanics) in which they could enrol and encourage them to consider non-traditional careers and occupations. Or, the University could insert in the nursing program more "technical" or "scientific" classes, even if not in direct relation with nursing so as to open students to different perspectives. Again, opening the nursing school and diploma to men would be a way to recruit non-traditional students into courses that are viewed in a stereotypical way.

Eventually, the **stereotypical relationships between students should be eliminated**<sup>30</sup>. To help make this happen, the MUW should encourage students to form mixed-gender groups, which would be easier in coeducational classes, rather than facilitating, by the creation of female-only classes, groups limited to one sex. This could be a way for students to know

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<sup>30</sup>Grossman, Herbert and Suzanne, supra, p. 182-3

better members of the other gender, to understand and accept their similarities and differences and, consequently, to realize that most of the stereotypical views they could have are false or inadequate. These are some ideas that the Court could have considered when dealing with the MUW question.

## Conclusion

The *Mississippi University for Women v. Hogan* case marks a further step in the consideration of gender inequality in the sector of education. By naming and denouncing the existing stereotypes in a University policy, it raises questions about the responsibility of States and education institutions in the propagation of stereotypical and discriminatory views and creates a starting point to think about their expected roles to remedy such situation.

However, although the case was decided in 1982, it still holds significant resonance nowadays as such judgment could still be necessary in many parts of the globe. It shows us that since this date, politicians, teachers and judges didn't do enough yet to limit gender discrimination in education.

Countless girls still endure schooling designed to depreciate them and to fit them for domestic roles. Katarina Tomasevski gives us the outstanding example of girls' education in Afghanistan<sup>31</sup>: «Education of girls pertains to the ministry of religion and boys' education to the ministry of education. As likely as not, girls are taught about their lesser worth [...]. Boys are, in the meantime, probably taught about their superiority showing that education is capacious enough to accommodate rights and wrongs». She also emphasizes that in many countries, school textbooks keep women at home and men out in the public making history.

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<sup>31</sup> Tomasevski, katarina, *Human Rights in Education as Prerequisite for Human Rights Education*, Novum Grafiska AB., Gothenburg, pp. 33-35, 2001

The real use of Human Rights texts (such as the CEDAW) by States along with the implication of teachers in communicating non-stereotypical views and the efforts of judges in naming and sentencing stereotypical discrimination, as the Court did in the Hogan case, would help make schools much more than sites that reproduce social inequalities. Instead they could help produce institutions where students, whatever their sex, could think beyond the ideological limits laid out for them.

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