

Eliminating judicial stereotyping

Equal access to justice for women in gender-based violence cases

Final paper

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Preface

The ability to access justice is a human right in itself and is also key to the realisation of all other human rights, including the rights to non-discrimination and equality.¹ Yet, many obstacles impede access to justice, including the cost of legal representation, corruption and lack of awareness of human rights. Women often face specific barriers in their efforts to seek justice based on their sex/gender. These barriers include male guardianship laws, fear of stigma and reprisals and cultural perceptions of men (and not women) as rights-bearers.² For women victims and survivors of gender-based violence, the barriers to justice are often even greater.³

Judicial stereotyping is a common and pernicious barrier to justice, particularly for women victims and survivors of violence.⁴ Such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry. This can have potentially wide-ranging consequences. It may, for instance, distort judges' perception of the facts, affect their vision of who is a 'victim', and influence their views about witness credibility.⁵ Ultimately, however, it compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice and the revictimization of complainants.⁶

Women victims and survivors 'should be able to rely on a [justice] system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions'.⁷ Eliminating judicial stereotyping is therefore a crucial step in ensuring equality and justice for victims and survivors. As the former Canadian Supreme Court Justice Claire L'Heureux-Dubé said,

[t]ogether, our overarching goal must be to ensure that substantive equality and impartiality are the predominant reality in our courts and in our communities, rather than a mythical ideal. The more we strive to reach this goal, the more myths and stereotypes will be eradicated from

¹ Committee on the Elimination of Discrimination against Women (**CEDAW Committee**), *Draft General Recommendation on Women's Access to Justice* (1 April 2014), para. 1.

² For an overview of the obstacles women often face when seeking justice, see: UN Women, *In Pursuit of Justice: 2011-2012 Progress of the World's Women* (2011).

³ See, e.g., Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Sexual Violence: Education and Health*, OEA/Ser.L/V/II. Doc. 65 (2011); Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA/Ser.L/V/II Doc. 63 (2011); Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II Doc. 68 (2007).

⁴ Navi Pillay, 'Equality and Justice in the Courtroom', *Huffington Post*, 3 March 2014.

⁵ See Sections 3.2 and 4 below.

⁶ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 95 (L'Heureux-Dubé J, concurring) (Canada, Supreme Court).

⁷ The Honourable Madame Justice Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87, 88.

the law, where they have no rightful place. With every success, we will be one step closer to attaining our goal of doing justice for all.⁸

The UN High Commissioner for Human Rights Navi Pillay agrees that eradicating stereotyping from our judicial systems must be a priority.

States should ... take measures to eliminate wrongful gender stereotyping in all aspects of the criminal justice system... Explicit action is required to ensure that government officials, especially those working in the justice system, do not deliver decisions based on harmful stereotypes and undermine the human rights of women and girls. Rather, officials should be identifying and challenging such negative beliefs, to help create environments that more fully respect the human rights of women and girls and build a culture of equality.

If we are serious about achieving gender equality... , we must devote more energy to dismantling prejudicial presumptions about women and men. We must stop perpetuating misguided ideas of what women should or should not be or do, based solely on the fact of being female. Instead, we must see them for who they are – unique human beings in all their diversity. This is the demand of equality, which is the foundation of human rights law.⁹

This paper – *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases* – is a tool to help eradicate judicial stereotyping. It seeks to raise awareness of, and encourage advocacy related to, judicial stereotyping in gender-based violence cases. The Office of the High Commissioner for Human Rights (**OHCHR**) hopes it will help to promote a dialogue on judicial stereotyping and contribute to improved justice outcomes for women victims and survivors of violence. The OHCHR also hopes that the paper will encourage states to monitor and evaluate the effectiveness of existing practices for addressing judicial stereotyping, including in gender-based violence cases.

⁸ Ibid, 102.

⁹ Pillay, *supra* note 4.

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1. Introduction

1.1 Background

In 2013, the Women’s Rights and Gender Section of the OHCHR commissioned a research report and policy paper on gender stereotyping. The research report examined how international human rights treaties and UN human rights mechanisms have addressed stereotyping.¹⁰ The policy paper identified strategies that the OHCHR might adopt to address stereotyping.¹¹ These strategies responded to the challenges the research report identified in addressing stereotyping within the UN human rights system. They include limited awareness of human rights obligations related to stereotyping and good practices in addressing stereotyping. The OHCHR commissioned this work to enable it to consider potential opportunities and challenges for future programming and coordination on stereotyping. It has subsequently taken action on several recommendations made in the policy paper. For instance:

- ◆ the OHCHR has included work on stereotyping in its 2014-2017 office Management Plan
- ◆ the High Commissioner for Human Rights has publicly committed the OHCHR to devote ‘considerable attention to providing more robust guidance’¹² on the issue of stereotyping
- ◆ the OHCHR is helping to facilitate a panel on stereotyping at the 2014 Human Rights Council annual full-day discussion on women’s human rights.

In addition, consistent with its focus on promoting access to justice for victims and survivors of gender-based violence, the OHCHR commissioned further research on the negative impact of judicial stereotyping in gender-based violence cases. This paper – *Eliminating Judicial Stereotyping* – outlines that research. It is based on a desk review of international human rights treaties and select laws, jurisprudence and scholarship that raise concerns about stereotyping in gender-based violence cases.¹³

¹⁰ Simone Cusack, *Gender Stereotyping as a Human Rights Violation: Research Report*, Prepared for the UN Office of the High Commissioner for Human Rights (2013), <http://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc> (viewed 24 May 2014).

¹¹ Simone Cusack, *Strategies for Addressing Gender Stereotyping: Policy Paper*, Prepared for the UN Office of the High Commissioner for Human Rights (2013).

¹² Pillay, *supra* note 4.

¹³ An effort has been made to include a diverse range of examples from around the world. However, not all regions are represented to the same degree due to different approaches to stereotyping. For example, bodies like the Committee on the Elimination of Discrimination against Women (**CEDAW Committee**) have addressed this issue with greater frequency and in more depth than other similar bodies. Other factors that affected the selection of examples include language barriers and time and space constraints.

1.2 Objectives and scope

Eliminating Judicial Stereotyping is an OHCHR tool that seeks to raise awareness of, and encourage advocacy related to, judicial stereotyping in gender-based violence cases. It aims to:

- ✦ identify **human rights obligations** related to judicial stereotyping and women's access to justice
- ✦ improve awareness of some of the **common stereotypes** about victims/survivors and perpetrators of gender-based violence
- ✦ highlight how judicial stereotyping **undermines justice** for victims/survivors
- ✦ identify **strategies for addressing judicial stereotyping** and **good practice examples** of their use in relation to gender-based violence.

This paper focuses predominantly on **judicial stereotyping**.¹⁴ The term 'judicial stereotyping' is used here to refer to the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (eg women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge stereotyping, for example by lower courts or parties to legal proceedings.

Judicial stereotyping

'Judicial stereotyping' is the practice of judges:

- ✦ ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group
- ✦ perpetuating harmful stereotypes through their failure to challenge stereotyping.

Judges are not the only actors in the justice system that stereotype. Law enforcement officials have, for example, been criticised for allowing stereotypes to influence investigations into reports of violence.¹⁵ Even so, stereotyping by

¹⁴ The paper does not consider the broader relationship between stereotyping and gender-based violence against women, such as how stereotyping facilitates or condones such violence. For an overview of this relationship, see CEDAW Committee, *General Recommendation No. 19*, UN Doc. A/47/38 at 1 (1993), paras. 11, 12, 21, 23, 24(e), 24(f), 24(t)(ii); Ramona Biholar, *Transforming Discriminatory Sex Roles and Gender Stereotyping: The Implementation of Article 5(a) CEDAW for the Realisation of Women's Right to be Free From Gender-based Violence in Jamaica* (Intersentia, 2013); Lisa Gormley, 'Gender Stereotyping in Cases of Rape and Violence against Women: Developments in Human Rights Jurisprudence' (2011) 16(3) *INTERIGHTS Bulletin* 140; Rebecca J. Cook, 'Lessons from the Cotton Field Case about Gender Justice' (2010) 104 *American Society of International Law Proceedings* 565; Rikki Holtmaat, 'Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention', in Carin Benninger-Budel (ed.), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff, 2009), 63.

¹⁵ See, e.g., *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6 (CEDAW); *Case of González et al. ('Cotton Field') v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), paras. 400-401 (Inter-American Court of Human Rights).

judges can have particularly pernicious effects, especially because their unique position of power means they can give stereotypes the full weight and authority of the law.¹⁶ To borrow the words of Justice Kriegler of the Constitutional Court of South Africa, judges can imbue stereotypes with legal authority and added legitimacy by virtue of the fact that they ‘put the stamp of approval of the ... state’ on them.¹⁷ This is in addition to any effect on the victim’s ability to access justice.

The particular focus of this paper is judicial stereotyping in cases of **gender-based violence against women**. ‘Gender-based violence against women’ is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.¹⁸

Gender-based violence against women

‘Gender-based violence against women’ refers to ‘violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.

Care has been taken to include examples of judicial stereotyping in cases concerning different forms of gender-based violence. Despite this, most examples concern stereotyping in sexual assault or domestic violence cases. This reflects the literature and jurisprudence on judicial stereotyping, which is substantially less developed in respect of other forms of gender-based violence.

Judicial stereotyping does not only affect women victims and survivors of violence. It can also undermine justice for male victims of violence¹⁹ and lead to miscarriages of justice in cases involving violence against people who identify as lesbian, gay, bisexual or transgender. For instance, stereotypes related to marriage and family relations may prevent a judge from recognising domestic violence in a lesbian or gay relationship, which may in turn mean that the judge denies a request for a protection order against such violence.²⁰ Stereotyping can

¹⁶ Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010), 36-37.

¹⁷ *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC), para. 85 (Kriegler J., dissenting) (South Africa, Constitutional Court).

¹⁸ CEDAW Committee, *General Recommendation No. 19*, *supra* note 14, para. 6.

¹⁹ Stereotyping can, for instance, affect disclosure of child sexual abuse by men and boys as well as their access to services. See, e.g., Gary Foster, Cameron Boyd & Patrick O’Leary, ‘Improving Policy and Practice Responses for Men Sexually Abused in Childhood’, *ACSSA Wrap*, No. 12 (Australian Institute of Family Studies, 2012), 5, 12, <http://www.aifs.gov.au/acssa/pubs/wrap/wrap12/w12.pdf> (viewed 24 May 2014); Denise A. Donnelly & Stacy Kenyon, “‘Honey, We Don’t Do Men’”: Gender Stereotypes and Provision of Services to Sexually Assaulted Males’ (1996) 11(3) *Journal of Interpersonal Violence* 441.

²⁰ See Section 4.2 below.

also affect women who pursue rights in areas other than violence (eg employment, reproductive health, family or civil law)²¹ as well as women accused of violence and other crimes.²² While these broader impacts of judicial stereotyping are also important, they fall largely outside the scope of this paper.

1.3 Outline

This paper consists of four substantive sections.

<p>Section 2 Access to justice for women</p>	<p>Section 2 provides a brief introduction to the international human rights framework as it relates to stereotyping and access to justice for victims and survivors of gender-based violence.</p>
<p>Section 3 Understanding stereotyping</p>	<p>Section 3 examines the concept of stereotypes and the practice of stereotyping. It highlights some of the stereotypes commonly found in gender-based violence cases and considers how judges have:</p> <ul style="list-style-type: none"> ◆ applied, enforced and perpetuated stereotypes ◆ debunked harmful stereotypes and challenged stereotyping.
<p>Section 4 How stereotyping undermines access to justice</p>	<p>Section 4 identifies how judicial stereotyping can undermine access to justice for victims and survivors. It explains how stereotyping can:</p> <ul style="list-style-type: none"> ◆ compromise the impartiality of judges' decisions ◆ influence judges' understanding of violent offences ◆ affect judges' views about witness credibility and legal capacity ◆ prevent perpetrators from being held legally accountable for violence ◆ impede victims' access to their legal rights and protections.
<p>Section 5 Strategies for eliminating stereotyping in gender-based</p>	<p>Section 5 identifies some strategies advocates might use to challenge judicial stereotyping in gender-based violence cases. It encourages advocates to:</p> <ul style="list-style-type: none"> ◆ highlight the harms of judicial stereotyping through evidence-based research ◆ advocate legal and policy reforms that prohibit judicial stereotyping

²¹ For good practice examples of challenging judicial stereotyping in cases concerning issues other than gender-based violence, see, e.g., *Case of Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs) (Inter-American Court of Human Rights); *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001) (Inter-American Commission on Human Rights).

²² Stereotyping can, for instance, influence the introduction of different crimes and whether or not women are charged with and convicted of criminal offences. See, e.g., Brenda L. Russell (ed.), *Perceptions of Female Offenders: How Stereotypes and Social Norms Affect Criminal Justice* (New York: Springer, 2013). States will often criminalise behaviour that falls foul of prescriptive stereotypes and, at the same, take punitive action against women who fail to conform, or only partly conform to those stereotypes. For example, gender stereotypes are often at play when rape survivors are convicted of adultery in cases where they have been unable to prove rape. See, e.g., 'Saudis: Rape Victim Deserved Flogging for Adultery', *USA Today*, 25 November 2007, http://usatoday30.usatoday.com/news/world/2007-11-25-saudi-arabia_N.htm (viewed 24 May 2014); Human Rights Council, *Communications Report of Special Procedures: Communications Sent, 1 December 2013 to 28 February 2014; Replies Received, 1 February to 30 April 2014*, UN Doc. A/HRC/26/21 (2014), 42, 46.

violence cases

- ✦ monitor and analyse judicial reasoning for evidence of stereotyping
- ✦ challenge judicial stereotyping through petitions and expert evidence
- ✦ highlight good practice examples of judges challenging stereotyping
- ✦ improve judicial capacity to address stereotyping.

It also highlights good practices examples of these strategies being used in practice.

2. Access to justice for women in gender-based violence cases

International human rights law guarantees victims and survivors of gender-based violence access to justice. Section 2 identifies some of the key human rights obligations related to justice for women victims and survivors of violence. It focuses mainly on the obligation of states to address judicial stereotyping, but also considers other key human rights, namely the rights to non-discrimination and equality, the rights to equality before courts and tribunals and to a fair trial and the right to an effective remedy.

2.1 State obligations to address judicial stereotyping

Two international human rights treaties contain express obligations on stereotyping. They are the:

- ✦ *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*²³
- ✦ *Convention on the Rights of Persons with Disabilities (CRPD)*.²⁴

Article 5(a) is CEDAW's key stereotyping provision.²⁵ It sets out CEDAW's crosscutting obligation to 'modify and transform gender stereotypes and eliminate wrongful gender stereotyping'.²⁶ Article 5(a) requires States Parties to take 'all appropriate measures' to 'modify the social and cultural patterns of conduct of men and women' in an effort to eliminate practices 'based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. Article 2(f) reinforces article 5(a) by requiring States Parties to take 'all appropriate measures' to 'modify or abolish ... laws, regulations, customs and practices which constitute discriminate against women'.

CEDAW requires States Parties to modify or transform harmful gender stereotypes and eliminate wrongful gender stereotyping

Article 2(f)

States Parties ... undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 5(a)

States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary

²³ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (**CEDAW**).

²⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (**CRPD**).

²⁵ See also CEDAW, preambular para. 14, art. 5(b), art. 10(c).

²⁶ *R.K.B. v. Turkey*, Communication No. 28/2010, UN Doc. CEDAW/C/51/D/28/2010 (2012), para. 8.8 (CEDAW).

and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

These obligations, like all contained in CEDAW, apply to all branches of government, including the judicial branch.²⁷ Their effect is that judges must:

- ✦ refrain from stereotyping (obligation to respect)
- ✦ ensure stereotyping does not infringe human rights (obligation to protect)
- ✦ ensure women can exercise and enjoy the right to be free from wrongful gender stereotyping (obligation to fulfil).

The obligations of States Parties to address stereotyping are not limited to the above provisions of CEDAW. Rather, the Committee on the Elimination of Discrimination against Women (**CEDAW Committee**) has recognised that there are implied obligations in each of CEDAW's substantive provisions, including article 15(1) on equality before the law (see section 2.2 below), to address gender stereotyping. It has also recognised that the obligations extend further still, to rights and freedoms not explicitly covered by CEDAW, but which are recognised under other treaties (eg the right to a fair trial) or customary international law and have an impact on the elimination of discrimination against women.²⁸

Gender-based violence is one area where the CEDAW Committee has taken significant strides toward elaborating the content and scope of States Parties' obligations to address stereotyping, including judicial stereotyping.²⁹ Its views in *V.K. v. Bulgaria* provide an example of the strides taken in this area.³⁰

V.K. denied a permanent protection order against domestic violence because of judicial stereotyping in Bulgarian courts

In *V.K. v. Bulgaria*, the CEDAW Committee determined that the refusal of the Plovdiv District and Regional Courts to issue V.K. a permanent protection order against her violent partner was based on 'stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence'. In holding the State Party accountable, it

²⁷ CEDAW Committee, *General Recommendation No. 28 on the Core Obligation of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28 (2010), para. 39.

²⁸ *Ibid*, para. 7.

²⁹ CEDAW Committee, *General Recommendation No. 19*, *supra* note 14, (1993), paras. 11, 21, 23, 24(t)(ii); *Isatou Jallow v. Bulgaria*, *supra* note 15; *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011) (CEDAW); *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (CEDAW); *Fatma Yildirim v. Austria*, Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (2007) (CEDAW); *Şahide Goekce v. Austria*, Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (2007) (CEDAW); *A.T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) (CEDAW); *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, UN Doc. CEDAW/C/2005/OP.8/MEXICO (2005).

³⁰ *V.K. v. Bulgaria*, *ibid*.

affirmed that States Parties are accountable for judicial stereotyping that violates CEDAW. In doing so, it stressed that ‘stereotyping affects women’s right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence’. In its recommendations, the Committee urged the State Party to provide mandatory training for judges on the *Law on Protection against Domestic Violence*, including ‘the definition of domestic violence and on gender stereotypes...’.

Article 8(1)(b) is the CRPD’s key provision on stereotyping. It is the first provision in an international human rights treaty to impose an express obligation to address compounded stereotypes. This is significant for women and girls with a disability whose experiences of violence and discrimination may differ from the experiences of men and other women due to the application or enforcement of compounded stereotypes.³¹

Article 8(1)(b) requires all branches of government, including the judicial branch, to adopt immediate, effective and appropriate measures to combat stereotypes of people with disabilities. Such measures include education and training initiatives, and policies and programmes, to combat stereotypes.³² Article 4(1)(b) strengthens article 8(1)(b) by requiring States Parties to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that discriminate against people with disabilities.³³ This includes laws, regulations, customs and practices that discriminate against people with disabilities on the basis of stereotypes.

The CRPD requires States Parties to combat stereotypes of people with disabilities

Article 4(1)(b)

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

Article 8(1)(b)

States Parties undertake to adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.

³¹ See Stephanie Ortoleva, ‘Women with Disabilities: The Forgotten Peace Builders’ (2010) 33 *Loyola of Los Angeles International & Comparative Law Review* 83, 91, 114; Kathleen Cornelsen, ‘Doubly Protected and Doubly Discriminated: The Paradox of Women with Disabilities After Conflict’ (2012) 19 *William & Mary Journal of Women and the Law* 105, 119-120.

³² CRPD, arts. 8(2)(a)-8(2)(d). See also CRPD Committee, *Concluding Observations: Tunisia*, UN Doc. CRPD/C/TUN/CO/1 (2011), para. 15(a); CRPD Committee, *Concluding Observations: Peru*, UN Doc. CRPD/C/PER/CO/1 (2012), para. 19.

³³ For an overview of articles 4(1)(b) and 8(1)(b) of the CRPD, see Cusack, *supra* note 10, 30-32.

Like with CEDAW, these provisions have the effect of requiring judges to: refrain from stereotyping (obligation to respect); ensure stereotyping does not infringe the human rights of people with disabilities (obligation to protect); and, ensure people with disabilities can exercise and enjoy their rights in practice free of harmful stereotypes (obligation to fulfil).

A third treaty, the *International Convention on the Elimination of All Forms of Racial Discrimination*, contains an obligation to address the related and sometimes overlapping concept of prejudice.³⁴ Whilst the treaty does not address stereotyping explicitly, the Committee on the Elimination of Racial Discrimination has addressed racial stereotyping through its jurisprudence.³⁵

Although the remaining international human rights treaties do not contain express provisions on stereotyping, many international human rights treaty bodies have implied such obligations through their interpretation of the rights to non-discrimination and equality as well as other human rights (see section 2.2. below). Moreover, while this paper focuses on the UN human rights system, it is important to acknowledge that several regional human rights treaties also require States Parties to address stereotyping, including stereotyping by judges. Relevantly, for this paper, many of those provisions deal explicitly with gender-based violence against women.

*Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*³⁶

Article 6(b)

The right of every woman to be free from violence includes, among others, the right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

Article 8(b)

The States Parties agree to undertake progressively specific measures, including programs to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.

³⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 7.

³⁵ See also Cusack, *supra* note 10, 38-39.

³⁶ See generally Gema Fernández Rodríguez de Liévana & Tania Sordo Ruz, 'Aproximación al Papel de los Estereotipos de Género en los Sistemas Interamericano y Europeo de Protección de Derechos Humanos' (forthcoming 2014); Tania Sordo Ruz, 'Los Estereotipos de Género Como Obstáculos para el Acceso de las Mujeres a la Justicia', *Primer Lugar Concurso de Ensayo Género y Justicia* (2011).

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

Article 12(1)

Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

Article 14(1)

Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 2(2)

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Article 4(2)(d)

States Parties shall take appropriate and effective measures to actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women.

Article 12(1)(b)

States Parties shall take all appropriate measures to eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination.

2.2 Other state obligations to ensure justice for victims and survivors

A number of other human rights and fundamental freedoms are also relevant to the ability of victims and survivors to access justice in cases of gender-based violence. They include the rights to:

- ◆ non-discrimination and equality
- ◆ equality before courts and tribunals and to a fair trial
- ◆ an effective remedy.

(a) Rights to non-discrimination and equality

Several international human rights treaties prohibit discrimination and inequality, including on the basis of sex and gender.³⁷ In addition to these general protections, CEDAW prohibits all forms of ‘discrimination against women’.³⁸ The CEDAW Committee has explained that this includes both gender-based violence against women³⁹ and wrongful stereotyping.⁴⁰ In fact, the Committee has recognised that stereotyping is a root cause and consequence of discrimination and identified its elimination as one of three central goals of CEDAW.⁴¹ Several other UN human rights mechanisms have also interpreted the rights to non-discrimination and equality to include those forms of discrimination and inequality rooted in stereotypes.⁴²

Stereotyping is a form of discrimination

The Committee on Economic, Social and Cultural Rights has recognised, for instance, that

- ✦ ‘the prohibited ground “sex” has evolved considerably to cover ... the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights’⁴³
- ✦ ‘[d]iscrimination on the basis of sex may be based on the differential treatment of women because of ... stereotypical assumptions...’⁴⁴
- ✦ ‘[g]ender-based assumptions and expectations, generally place women at a disadvantage with

³⁷ See, e.g., *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts. 2(1), 3, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976), arts. 2(2), 3.

³⁸ CEDAW, art. 1 (defining ‘discrimination against women’ as ‘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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’).

³⁹ CEDAW, art. 1; CEDAW Committee, *General Recommendation No. 19*, *supra* note 14, paras. 1, 6. See generally Christine Chinkin, ‘Violence Against Women’, in Marsha A. Freeman, Christine Chinkin & Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012), 443.

⁴⁰ CEDAW, arts. 1, 2(f), 5. See also *R.K.B. v. Turkey*, *supra* note 26, para. 8.8; CEDAW, *General Recommendation No. 28*, *supra* note 27, para. 5, 22; CEDAW Committee, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc. A/59/38 (2004), para. 7.

⁴¹ *R.K.B. v. Turkey*, *ibid*; CEDAW, *General Recommendation No. 28*, *ibid*; CEDAW Committee, *General Recommendation No. 25*, *ibid*.

⁴² Cusack, *supra* note 10, 20-43.

⁴³ CESCR, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, UN Doc. E/C.12/GC/20 (2009), para. 20.

⁴⁴ CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2005/4 (2005), para. 11.

respect to substantive enjoyment of rights'.⁴⁵

To comply with the rights to non-discrimination and equality, members of the judiciary must base their decisions on law and relevant facts in evidence, rather than stereotypes.

Judicial stereotyping in Chile violates the rights to non-discrimination and equality

In *Atala Riffo and Daughters v. Chile*, a child custody matter, the Inter-American Court of Human Rights recognised that judicial stereotyping is a form of discrimination and inequality. In doing so, it noted

that although the Judgment of the Supreme Court and the provisional custody ruling sought to protect the best interests of the girls ... , it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the Supreme Court of Justice and the Juvenile Court of Villarrica did not prove in this specific case that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest.... On the contrary they used abstract, stereotyped, and/or discriminatory arguments to justify their decisions ... , for which reason said decisions constitute discriminatory treatment against Ms. Atala'.⁴⁶

(b) Rights to equality before courts and tribunals and to a fair trial

International human rights law guarantees the rights to equality before courts and tribunals and to a fair trial. For example:

- ✦ article 14 of the *International Covenant on Civil and Political Rights (ICCPR)* provides that '[a]ll persons shall be equal before the courts and tribunals' and 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'
- ✦ article 15(1) of CEDAW requires States Parties to 'accord to women equality with men before the law'⁴⁷
- ✦ article 12 of the CRPD guarantees persons with disabilities equal recognition before the law and article 13 guarantees 'effective access to justice for persons with disabilities on an equal basis with others'.

These guarantees aim to ensure the proper administration and enforcement of justice at all stages of legal proceedings and by all courts and tribunals. To comply with these guarantees, it is crucial that members of the judiciary decide gender-

⁴⁵ Ibid, para. 14.

⁴⁶ *Case of Atala Riffo and Daughters v. Chile*, supra note 21, para. 146.

⁴⁷ See also CEDAW, art. 2(c) (requiring States Parties '[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination').

based cases impartially and without discriminating against those involved in the proceedings, including on the basis of gender stereotypes.⁴⁸

Stereotyping affects women's right to a fair and just trial and judges must not apply stereotypes to victims or survivors of violence

In *Karen Tayag Vertido v. The Philippines*, the CEDAW Committee stressed that

stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.⁴⁹

Violence proceedings must be fair and impartial and free of stereotypes

In *R.P.B. v. The Philippines*, the CEDAW Committee affirmed that stereotyping affects women's right to a fair trial and urged the State Party to

Ensure that all criminal proceedings involving rape and other sexual offences are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and disability;

Provide adequate and regular training on the Convention, the Optional Protocol thereto and the Committee's general recommendations, in particular general recommendations Nos. 18 and 19, to the judiciary and legal professionals so to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.⁵⁰

Judges' decisions must be impartial and not influenced by stereotypes or other biases

In its *General Comment No. 32* on article 14 of the ICCPR, the Human Rights Committee noted that there are two aspects to the requirement of impartiality.

First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.⁵¹

⁴⁸ Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32 (2007), paras. 2, 7-9, 21, 25, 65.

⁴⁹ *Karen Tayag Vertido v. The Philippines*, *supra* note 29, para. 8.4. See also *R.P.B. v. The Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014), para. 8.8 (CEDAW); *V.K. v. Bulgaria*, para. *supra* note 29, para. 9.11.

⁵⁰ *R.P.B. v. The Philippines*, *ibid*, paras. 9(b)(iii), 9(b)(iv).

⁵¹ Human Rights Committee, *General Comment No. 32*, *supra* note 48, para. 21.

(c) Right to an effective remedy

The right to an effective remedy is guaranteed under several international human rights treaties. For example:

- ✦ article 2(3) of the ICCPR provides that ‘any person whose rights or freedoms as herein recognized are violated shall have an effective remedy’ and the Human Rights Committee has said that ‘this provision needs to be respected whenever any guarantee of article 14 has been violated’⁵²
- ✦ articles 2(b) and 2(c) of CEDAW contain an implied obligation to provide effective remedies to women whose human rights have been violated.⁵³

The CEDAW Committee has explained that States Parties must ‘provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged’.⁵⁴ It has further explained that States Parties must ‘ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate’.⁵⁵

The right to an effective remedy applies to violations of all human rights. For example, in cases of gender-based violence, the CEDAW Committee has urged States Parties to provide

- ✦ ‘[e]ffective complaints procedures and remedies, including compensation’
- ✦ ‘[c]riminal penalties where necessary and civil remedies in case of domestic violence’
- ✦ ‘[e]ffective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence’.⁵⁶

Violence cases must be decided fairly, impartially and quickly

In *R.P.B. v. The Philippines*, the CEDAW Committee explained that,

for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner. It further recall[ed] its general recommendation No. 18, where it observed that ‘disabled women are considered as a

⁵² Ibid, para. 58. See also Human Rights Committee, *General Comment No. 28: Equality of Rights between Men and Women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 11; Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 14-17, 19-20.

⁵³ *R.P.B. v. The Philippines*, *supra* note 49, para. 8.3; *Karen Tayag Vertido v. The Philippines*, *supra* note 29, para. 8.3; CEDAW Committee, *General Recommendation No. 28*, *supra* note 27, paras. 32, 34.

⁵⁴ CEDAW Committee, *General Recommendation No. 28*, *ibid*, para. 32.

⁵⁵ Ibid, para. 34.

⁵⁶ CEDAW Committee, *General Recommendation No. 19*, *supra* note 14, paras. 24(i), 24(r)(i), 24(t)(i).

vulnerable group', 'who suffer from a double discrimination linked to their special living conditions'. In this context, the Committee emphasize[d] that it is crucial to ensure that women with disabilities enjoy effective protection against sex and gender-based discrimination by States parties and have access to effective remedies.⁵⁷

Although the Committee has made a number of structural recommendations to address judicial stereotyping, it has not yet provided guidance on the nature or types of remedies States Parties should provide to individuals affected by this harmful practice.

⁵⁷ *R.P.B. v. The Philippines*, *supra* note 49, para. 8.3 [citations omitted]. See also *Karen Tayag Vertido v. The Philippines*, *supra* note 29, para. 8.3.

3. Understanding stereotyping

Understanding stereotyping and how judges stereotype in gender-based violence cases is key to addressing this particular barrier to justice. Section 3 examines the concept of stereotypes and the practice of stereotyping. It highlights some of the stereotypes commonly found in gender-based violence cases and explains how many judges who have presided over such cases have applied, enforced and perpetuated those stereotypes. It also highlights how some judges have debunked harmful stereotypes and challenged stereotyping.

1. What is a stereotype and what is stereotyping? What are some of the common stereotypes found in gender-based violence cases?
2. How do judges apply, enforce and perpetuate stereotypes? How can judges debunk harmful stereotypes, and challenge stereotyping, that violate human rights?

3.1 Stereotypes and stereotyping in gender-based violence cases

A stereotype is ‘a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group...’.⁵⁸

Stereotype

A ‘stereotype’ is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group.

At its core, a stereotype is a preconceived belief that causes its holder to presume that all members of the subject group do or should possess particular attributes or characteristics, or perform certain roles.⁵⁹ Understood in this way, a stereotype can be categorised into three separate elements:

- ◆ a preconceived **belief** formed before full knowledge or evidence is available
- ◆ about the **attributes, characteristics or roles** (eg nurturing, breadwinner)
- ◆ of a social **group** or **subgroup** (eg lesbians, girl child, men).

The term ‘stereotyping’ refers to the practice of applying a stereotypical belief to an individual member of the subject group. It occurs when a person ascribes ‘to an individual specific attributes, characteristics, or roles by reason only of her or his membership in a particular group’.⁶⁰

⁵⁸ Cook & Cusack, *supra* note 16, 9.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 12.

Stereotyping

‘Stereotyping’ is the practice of ascribing to an individual specific attributes, characteristics, or roles by reason only of her or his membership in a particular group.

Stereotyping excludes any individualised consideration of, or investigation into, a person’s actual circumstances and their needs or abilities. So, when a judge engages in stereotyping, he or she reaches a view about an individual based on preconceived beliefs about a particular social group and not relevant facts or actual enquiry related to that individual or the circumstances of their case.

Judges regularly rely upon *gender* stereotypes in gender-based violence cases. These are generalised views or preconceptions about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women.⁶¹ When a judge ascribes to a man or woman specific attributes, characteristics or roles based on his or her membership in the group of men or women, the judge is engaging in ‘gender stereotyping’.⁶²

Gender stereotype/stereotyping

A ‘gender stereotype’ is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women. ‘Gender stereotyping’ is the practice of ascribing to an individual man or woman specific attributes, characteristics or roles by reason only of her or his membership in the social group of men or women.

Gender stereotypes (and, hence, gender stereotyping) come in varied and overlapping forms, all of which can be found in gender-based violence cases.

Sex stereotype	A generalised view or preconception about the physical, including biological, emotional and cognitive attributes or characteristics that are or should be possessed by women and men. ⁶³	Eg women are inherently untruthful
Sexual stereotype	A generalised view or preconception about the sexual characteristics or behaviours that women and men are believed or expected to possess. ⁶⁴ It typically reinforces heterosexuality/dominant male sexuality.	Eg women are/should be sexually passive
Sex-role stereotype	A generalised view or preconception about the roles that women and men do or are expected to perform,	Eg men are/should be heads of households

⁶¹ Ibid, 20. See also Gabriella Knaul, *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/66/289 (2011), para. 19.

⁶² Cook and Cusack, *supra* note 16, 20; *Case of González et al. (“Cotton Field”) v. Mexico*, *supra* note 15, para. 401.

⁶³ Cook and Cusack, *ibid*, 25.

⁶⁴ *Ibid*, 27.

	and the types of behaviours to which they are expected to conform. ⁶⁵ It typically assigns the sexes distinct, but mutually reinforcing, roles or behaviours.	
Compounded stereotype	A generalised view or preconception about groups that result from the ascription of attributes, characteristics or roles based on one or more traits . ⁶⁶	Eg Asian women are sexually submissive

Gender and other forms of stereotyping lead to inferences being drawn about individuals. These inferences are often prejudicial in nature. In cases concerning gender-based violence, they regularly undermine the claims of the victim/survivor and simultaneously support the defences advanced by the alleged perpetrator.

Stereotype	Men have/should have strong libidos	Women with mental disabilities are hypersexual	Women are/should be housewives/ caregivers
(Group) assumption	Men will/should regularly initiate sexual activities	Women with mental disabilities are sexually voracious and indiscriminate in their choice of sexual partners	Women are heterosexual and their paramount duty is to fulfil the roles of wife and mother/caregiver
Inferences (about an individual)	A man is unable to control his hormonal urges and can't be held responsible for his own sexual 'misconduct', especially if 'provoked' (eg by a woman's clothing or behaviour).	A woman with a mental disability could not have been assaulted because she must have consented to sex or she may require more corroborating evidence than in cases involving a woman without such a disability.	It is 'permissible' for a man to use violence to control a woman who is not heterosexual or does not perform these roles (eg lesbians, bisexual women, women who pursues roles other than or in addition to the roles identified).

A single stereotype can lead to multiple inferences, some or all of which a judge may infer in a particular case.

Stereotype	Women should be chaste	Women should dress and behave modestly	Men are/should be heads of households
(Group) assumption	Women should abstain from extramarital sex	Women should dress and behave to avoid impropriety and indecency, especially to avoid sexual attention	Men hold ultimate power in interpersonal and family relations and women are subordinate in those same relations
Inferences	Possible inferences	Possible inferences	Possible inferences

⁶⁵ Ibid, 28.

⁶⁶ Ibid, 29.

<p>(about an individual)</p>	<p>include:</p> <ul style="list-style-type: none"> ◆ an unchaste woman has a propensity to consent to sex and must have consented ◆ a woman who has had prior sexual relations is a less credible witness ◆ an unchaste woman 'deserved' raped and is not 'worthy' of criminal justice system intervention ◆ violence is justified to curtail sexual promiscuity or regain sexual control. 	<p>include that:</p> <ul style="list-style-type: none"> ◆ an immodest woman 'provoked' sexual assault and must accept blame ◆ an immodest woman is a less credible witness. 	<p>include that:</p> <ul style="list-style-type: none"> ◆ a man may use violence to discipline his wife if she does not obey him ◆ a man may use violence or the threat of violence to maintain power in marriage and family relations ◆ the wishes and desires of a (violent) man should be prioritised over those of his wife and their children, including in legal proceedings (eg child custody proceedings).
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3.2 How judges apply, enforce and perpetuate stereotypes

There are many different means of perpetuating stereotypes related to gender-based violence. They include literature, music, pornography, the media, legal systems, education systems and religious and cultural practices.

History demonstrates that judges have also played a significant role in perpetuating stereotypes, particularly in the area of gender-based violence. It has been said, for instance, that it was discretion in trial judges that saturated sexual assault laws with gender stereotypes.⁶⁷

Judges saturated sexual assault laws with gender stereotypes

'The common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law "enshrined" prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her "morality" or "character".'⁶⁸

Judges may engage in stereotyping in one of two ways. Judges may apply, enforce and perpetuate stereotypes in their decision-making by substituting stereotypes for law and facts in evidence. Alternatively, they may facilitate the perpetuation of stereotypes by failing to challenge stereotyping, for example by lower courts or the parties to legal proceedings.

⁶⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 708-709 (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court).

⁶⁸ *Ibid*, 665.

The impact of judicial stereotyping is wide-ranging. For example, it might:

- ◆ distort judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial
- ◆ affect judges' vision of who is a victim of gender-based violence
- ◆ influence judges' perceptions of the culpability of persons accused of gender-based violence
- ◆ influence judges' views about the credibility of witnesses
- ◆ lead judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges' attach to certain evidence
- ◆ influence the directions that judges give to juries
- ◆ cause judges to misinterpret or misapply laws
- ◆ shape the ultimate legal result.

For further information about some of these impacts, see section 4 below.

3.3 How judges debunk stereotypes and challenge stereotyping

Just as judges can play a significant role in perpetuating stereotypes, they can also play a significant role in ridding the justice system of those same stereotypes. It has been said, for instance, '[t]he criminal justice system can play a major role in the process of replacing "mythical" views of sexual assault, and the social definitions of sexual assault based on these myths, with views based on fact and the results of empirical studies that are relevant to the legal definitions of sexual assault'.⁶⁹

Judge challenges as irrelevant and prejudicial evidence based on gender stereotypes

'Evidence of prior acts of prostitution or allegations of prostitution are properly excluded by the provision. In my opinion, this evidence is never relevant and, besides its irrelevance, is hugely prejudicial. I vehemently disagree with the assertion of the appellant ... that 'a prostitute is generally more willing to consent to sexual intercourse and is less credible as a witness because of that mode of life' ... Nor do I particularly understand the phenomenon whereby many complainants in sexual assault cases are asked if they are prostitutes'.⁷⁰

Judges have a responsibility to uphold the fairness and integrity of the justice system by ensuring that gender-based violence trials 'are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype'.⁷¹ This means that they must base their decisions on law and facts in evidence and not

⁶⁹ Lucinda Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea' (1987) 2 *Canadian Journal of Women and the Law* 233, 258 n 43.

⁷⁰ *R. v. Seaboyer*, *supra* note 67, 690.

⁷¹ *Ibid*, 699.

engage in gender stereotyping. It also means that they must debunk stereotypes in gender-based violence cases and challenge the stereotypical reasoning of other judges and other actors in the legal system. At a minimum, this requires judges to

- ◆ identify gender stereotyping
- ◆ name and challenge operative gender stereotypes
- ◆ expose the harms of those stereotypes and their application in gender-based violence cases
- ◆ identify how the application, enforcement or perpetuation of stereotypes discriminates against women or otherwise violates their rights.

For examples, please see section 5.5 below.

4. How stereotyping undermines access to justice

When judges stereotype or fail to challenge stereotyping, they can undermine justice for victims and survivors of gender-based violence. Section 4 examines some of the ways that judicial stereotyping can frustrate the efforts of victims and survivors to obtain justice for violence.

1.	Stereotyping can compromise the impartiality of judges' decisions
2.	Stereotyping can influence judges' understanding of the nature of the criminal offence
3.	Stereotyping can affect judges' views about witness credibility and legal capacity
4.	Stereotyping can stop judges holding offenders legally accountable
5.	Stereotyping can impede access to legal rights and protections

Judicial stereotyping can sometimes have multiple repercussions in a single case. For example, stereotyping might compromise the impartiality of a judge's decision and affect his or her views about witness credibility or the culpability of the accused person.

4.1 Stereotyping can compromise the impartiality of judges' decisions

Judges must reach impartial decisions based on law and relevant facts in evidence. Impartiality can, however, be compromised when judges disregard law and facts in favour of stereotypes. This is because judicial outcomes based on generalised views or preconceptions do not take a person's actual needs, abilities or circumstances into account and, therefore, distort the truth.⁷²

Stereotypes are a form of bias and close judges' minds to the truth

'By definition, myths and stereotypes divorce the law from contemporary knowledge because they have more to do with fiction and generalization than with reality. They are irrational, nonscientific narratives used by human beings to explain what they do not fully understand... They are, therefore, incompatible with the truth-seeking function of the legal system. ...

Myths and stereotypes are a form of bias because they impair the individual judge's ability to assess the facts in a particular case in an open-minded fashion. In fact, judging based on myths and stereotypes is entirely incompatible with keeping an open mind, because myths and stereotypes are based on irrational predisposition and generalization, rather than fact. They close one's mind to both truth and reality...'.⁷³

⁷² Sophia R. Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Journal* 291, 298, 299; Cook and Cusack, *supra* note 16, 11, 61.

⁷³ L'Heureux-Dubé, *supra* note 7, 89, 92 [citations omitted].

Impartiality compromised when Bolivian courts disregarded law and facts in favour of myths and stereotypes in a rape case

In 1996, Jose Carlos Aguilar Orellana was convicted of breaking and entering into M.Z.'s apartment and raping her. However, the Bolivian Court of Appeals overturned his conviction, a decision the Supreme Court upheld in 2000.

M.Z. subsequently submitted a petition to the Inter-American Commission on Human Rights in which she claimed that the acquittal violated her human rights. In June 2002, after the case was declared admissible,⁷⁴ Equality Now submitted an expert brief to the Commission on stereotyping. Among other things, it stressed the obligation of judges to base their decisions on relevant facts in evidence and not stereotypes.

[T]he substantive guarantees of equality ensure that judges trying or reviewing cases are unbiased by sex-based prejudices, that the law's application is free of sex-based preconceptions, and that decisions are not predicated on mistaken notions derived from an individual's group membership. The procedural guarantees of due process converge in requiring that judicial determinations be based on facts in evidence and be free of partiality. Taken together, these rights go to the core of human rights and to the integrity of the legal system in enforcing them. They guarantee that domestic judicial outcomes are predicated not on preconceptions and prejudices or mythic stereotypes but on evidenced realities.⁷⁵

The brief argued that stereotyping compromised the impartiality of the Bolivian Court of Appeals. It explained, for instance, that the Court noted photographs of the rape scene, but

it only state[d] that ... underwear can be seen in them, failing to mention the fact that the woman's underwear was torn, blood and hair were visibly present, and the room was in a general state of disarray. The Court entirely elided the evidence provided by the doctors on violence and trauma... Through the omissions, the Court ... reconfigured the events as not violent and left open the possibility that MZ wished them to have occurred. As so distorted in classic mythic terms, the Court's presentation of the facts substitute an image of sex for the reality of the rape that was found by the trial judge.

The Court of Appeals also came to the conclusion, highly problematic given the facts as found, that the victim did not make any attempt to fight the rape, despite her size and strength. The ... Court ... determined that MZ was tall and robust, while the accused was thin and of medium height. Amidst this confusion, the Court ... misquote[d] a witness, citing as his testimony that MZ was tall, and in a hand to hand fight, it 'would have been impossible for him [the accused] to overpower her'. In fact, the witness Rene Mauricio Guzman said that in his opinion, in a hand to hand struggle, MZ 'would not be easily overpowered'...

Whatever weight should be given to Mr. Guzman's opinion ... , not easy is not the same as impossible. The implication that since, given her strength, the victim could have fought off the attacker if she had wanted to, serves to insinuate that, since she failed to fight him off, she must have wanted the events to occur. This ... is in turn an expression of the rape myth that women want forced sex. The Court's misrepresentation of the witness' statement is evidence of, and can be explained by, judicial disregard for fact in favor of myth.⁷⁶

⁷⁴ *M.Z. v. Bolivia*, Case 12.350, Report No. 73/01 (admissibility), 10 October 2001 (Inter-American Commission on Human Rights).

⁷⁵ Equality Now (Catharine A. MacKinnon & Jessica Neuwirth), *Amicus Curiae* Brief, Case 12.350, 26 June 2002, 6-7.

⁷⁶ *Ibid*, 12-13 [citations omitted].

4.2 Stereotyping can influence judges' understanding of violent offences

Judicial stereotyping can influence judges' understanding of different offences related to gender-based violence and their perception of whether or not a criminal offence has occurred. For example, Amnesty International has claimed that, in some countries, 'police, prosecutors, and judges apply prevailing stereotypes to conclude that a sex worker (or an unmarried woman) could not possibly have been raped'.⁷⁷ In a further example, scholars have considered how stereotyping by judges and other legal professionals affects perceptions of domestic violence in same sex relationships.

Judicial stereotyping may affect judges' perceptions of whether there is domestic violence in same sex relationships

'There is some evidence that the sex of the perpetrator and victim and the couple's sexual orientation influence criminal justice system responses to domestic violence. For example, police are less likely to arrest perpetrators or to enforce protective orders in cases that do not involve male-against-female violence.... Police are reportedly less likely to intervene in domestic violence cases that involve gay or lesbian couples, perhaps due to sexual prejudice ... or gender-role stereotypes that women cannot be abusers and men cannot be abused.... If law enforcement officers hold these attitudes, we can expect that witnesses, health care workers, attorneys, judges, and juries do as well. To the extent that members of the criminal justice system perceive non-prototypical domestic violence as less problematic or worthy of intervention than domestic violence perpetrated by heterosexual men against their wives or girlfriends, many victims, including those in gay and lesbian relationships, may not receive equal protection under the law'.⁷⁸

4.3 Stereotyping can affect judges' views about witness credibility and legal capacity

There is a long history of judges questioning the credibility of witnesses and their evidence on the basis of stereotypes.⁷⁹ Stereotyping has typically influenced judges' views about the credibility of witnesses and their evidence in two ways.

- ✦ First, stereotyping has often contributed to judges forming a negative view about the credibility of women victims and survivors.
- ✦ Second, stereotyping can lead judges to form a favourable view of the credibility of men accused of gender-based violence.

⁷⁷ Amnesty International (Tania Baldwin-Pask), *Submission to the Committee on the Elimination of Discrimination against Women on its General Discussion on Access to Justice*, TIGO IOR 40/2013.008, 30 January 2013, 6.

⁷⁸ Sheila M. Seelau & Eric P. Seelau, 'Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence' (2005) 20(6) *Journal of Family Violence* 363, 364 [citations omitted].

⁷⁹ See, e.g., Kathy Mack, 'B. v. R.: Negative Stereotypes and Women's Credibility' (1994) 2(2) *Feminist Legal Studies* 183.

Stereotyping contributes to judges forming a negative view of the credibility of women victims and survivors of gender-based violence

'The archetype of the ideal sexual assault victim ... functions to disqualify many complainants' accounts of their sexual assault experiences. To this extent, the "ideal victim" myth often works to undermine the credibility of those women who are seen to deviate too far from stereotypical notions of "authentic" victims, and from what are assumed to be "reasonable" victim responses. Credibility assessments remain absolutely pivotal in sexual assault trials. These assessments of credibility remain deeply influenced by myths and stereotypes surrounding "ideal", "real", or "genuine" victims of sexual assault. ...

"Bad" victims—those women whose lives, backgrounds, and characteristics depart from the narrow confines of "ideal victims" in sexual assault cases—are the women whose accounts are subject to the most scrutiny, whose credibility is most attacked, and who are seen to be less deserving of the law's protection. This, in turn, is inextricably tied with the pervasiveness of victim-blaming, the idea that women are, and should be, responsible for navigating their own safety, for managing men's sexual attention and aggression, and also for accurately assessing and avoiding risk. ... Racialized and marginalized women, who are less valued and less credible in a society characterized by racism, are, by definition, less readily identified as "ideal victims" and more easily stigmatized as "bad" or "undeserving" victims (if their victim claims are heard at all).⁸⁰

Judicial stereotyping influenced views about the credibility of the victim and the accused in a rape case

In *Karen Tayag Vertido v. The Philippines*,⁸¹ a majority of the CEDAW Committee concluded that Judge Hofileña-Europa evaluated Ms Vertido's behaviour against stereotypes and formed a negative view of her credibility, as she had not responded according to how a rational and 'ideal' victim was expected to respond in a rape situation. It explained:

the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The ... judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee note[d] that the Court did not apply the principle that 'the failure of the victim to try and escape does not negate the existence of rape' and instead expected a certain behaviour from the author, who was perceived by the court as not being 'a timid woman who could easily be cowed'. It is clear ... that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation ...

The majority also concluded that the trial decision contained 'several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim'. It continued, noting

with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that

⁸⁰ Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22(2) *Canadian Journal of Women and the Law* 397, 398, 409-410.

⁸¹ *Karen Tayag Vertido v. The Philippines*, *supra* note 29.

the author and the accused knew each other, constitute a further example of ‘gender- based myths and misconceptions’.

Some women, including women with mental disabilities,⁸² may be denied access to justice because of stereotyping that leads judges to conclude they are not competent or credible witnesses.

Judicial stereotyping leads to adverse findings about the capacity and credibility of women with mental disabilities in gender-based violence cases

‘Not only are women with disabilities excluded as witnesses because they may have difficulty communicating with the police, but stereotypes about women with disabilities operate to exclude or discount their testimony. The sexual nature of certain crimes and the general failure [of] society to see people with disabilities as sexual beings may result in judges and juries discounting the witnesses’ testimony in sexual assault cases. This tendency to essentially “infantilize” women with mental disabilities contributes to discounting their testimony. On the other hand, society may view some women with mental disabilities as hypersexual and lacking self-control, leading to the disregard of their complaints.

Law enforcement and legal agencies may see women with disabilities ... as lacking credibility. Some judges may require more corroborating evidence of an assault in cases involving women with disabilities than in other cases, and evidence about prior mental health treatment may be used to discredit their testimony. ... Overly paternalistic attitudes towards women with disabilities may cause various players in the judicial system to view them as too fragile to withstand the rigors of examination. Exclusion is particularly problematic in gender-based violence and sexual assault cases, where testimony of parties and credibility of witnesses are exceptionally important, placing them at even greater risk, because perpetrators may be more likely to attack women with disabilities because they know that their complaints may be taken less seriously. If prior complaints have been dismissed women with disabilities are less likely to report abuse in the future, perpetuating the violence’.⁸³

4.4 Stereotyping can stop judges holding offenders legally accountable

There are countless examples of accused persons being acquitted of gender-based violence crimes on the basis of stereotypes, rather than law or relevant facts in evidence. Oftentimes, stereotyping leads judges to blame the victim/survivor, and not the accused, for violent acts, especially in cases where the victim/survivor does not fit the ‘ideal victim’ archetype.

⁸² See generally Janine Benedet & Isabel Grant, ‘More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth’ (2013) 25(1) *Canadian Journal of Women and the Law* 31; Janine Benedet & Isabel Grant, ‘Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues’ (2007) 52 *McGill Law Journal* 515; Janine Benedet & Isabel Grant, ‘Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief’ (2007) 52 *McGill Law Journal* 243.

⁸³ Women Enabled, *Submission to the Committee on the Elimination of Discrimination against Women on its General Discussion on Access to Justice*, 1 February 2013, 4-5 [citations omitted]. See also International Disability Alliance, *Submission to the Committee on the Elimination of Discrimination against Women on its General Discussion on Access to Justice*, 18 February 2013, 2 [citations omitted]; Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/67/227 (2012), para. 41

Victims and survivors often have to fit the ‘ideal victim’ archetype before judges will hold offenders legally accountable

‘The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e., who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained’.⁸⁴

Stereotyping caused judge to shift responsibility for sexual assault to the victim

‘The stereotypical reasoning of the lower courts in the *Ewanchuk* case ... burdened women by shifting responsibility for sexual assault to them. ... Justice L’Heureux-Dubé singled out the comment of Justice McClung of the Alberta Court of Appeal regarding how “In a less litigious age going too far in the boyfriend’s car was better dealt with on site—a well chosen expletive, a slap in the face or, if necessary, a well-directed knee”. She explained that this comment rested on the sexual stereotype that women should physically resist sexual assault, and that, according to this stereotype, “it is not the perpetrator’s responsibility to ascertain consent ... but the women’s not only to express an unequivocal ‘no’, but also to fight her way out of such a situation”. Since the complainant had not physically resisted *Ewanchuk*’s sexual advances, Justice McClung found a reasonable belief that she may have implicitly consented to sexual relations. In making this finding, Justice McClung denied female sexual agency and privileged male sexuality. Moreover, he harmed the complainant by holding that she may have been responsible for the assault. Yet, as Justice L’Heureux-Dubé insightfully pointed out, the enforcement of this sexual stereotype obscured the real reason that the complainant did not physically resist *Ewanchuk*’s sexual advances: her fear of aggravated sexual assault’.⁸⁵

4.5 Stereotyping can impede access to legal rights and protections

Judicial stereotyping can impede the ability of women to access legal protections against gender-based violence. This includes where women seek protection orders against violent perpetrators to ensure their physical and mental integrity. In such cases, women may not only be denied justice, but may also be at risk of further acts of violence. Judicial stereotyping can also undermine the ability of women to exercise and enforce other rights guaranteed by law. An example is where women seek custody or supervised visits of their children to protect themselves and their children against violent perpetrators. When judges make determinations about the care and custody of children based on stereotypes, rather than facts in evidence about the occurrence of or potential for violence, they risk prioritising the rights of perpetrators over the rights and safety of women and children.

Violent perpetrator murdered daughter after Spanish court granted unsupervised visits

In 1999, after more than 20 years of domestic violence, Ángela González Carreño left Felipe Rascón. She sought the assistance of Spanish authorities on multiple occasions to ensure the safety of herself and her daughter Andrea. This included a request that

⁸⁴ *R v. Seaboyer*, *supra* note 67, 650.

⁸⁵ Cook & Cusack, *supra* note 16, 62-63.

domestic courts specify that Rascón could only have supervised visits with Andrea. In April 2003, during an unsupervised visit, Rascón murdered his six-year-old daughter and then committed suicide.

In 2011, Ángela submitted a communication to the CEDAW Committee.⁸⁶ She claimed that Spanish courts had engaged in stereotyping when making determinations about visitations rights to Andrea. For example, she claimed that the authorities ‘gave credence to the stereotype that any father, even an abusive one, should enjoy visiting rights without effectively pondering the rights of the minor’. She continued:

Stereotyping and prejudice ... played a fundamental role in the attitude of the courts and other authorities that favored the right of the batterer to periodic visits with his daughter, despite the ongoing violence he exercised over her and the author and without consideration to his failure to comply with his legal obligations, such as the payment of child support... National courts based their decisions on the prejudice that it is always best to allow for visitation rights even when there are indications, or it is proven, that the parent is violent and abusive. Concretely, the courts were influenced by the stereotyped notion that children are always better off if they are raised by both a father and a mother. The courts also took for granted that being in relation with a violent father is better than not being in contact with him...

To support the communication, Ángela’s legal representatives invited several experts to submit briefs to the CEDAW Committee. One brief focused on stereotyping, including how it can undermine access to justice for victims.⁸⁷ In addressing the role of judicial stereotyping in child custody decisions where one parent is violent, the brief noted that

stereotypes related to the so-called ‘inherent’ and ‘natural’ differences between women and men are sometimes relied upon in support of the claim that women and men make unique contributions to childrearing. The inference intended to be drawn from such stereotypes is that the involvement of both parents in the care and custody of a child is important to his or her overall development and well-being. Stereotypes about the roles of women and men within marriage and family relations may also be relied upon at times, including the stereotype that men are heads of households, which implies that their wishes and desires should be prioritised over those of women and their children. When such stereotypes are relied upon in determinations concerning the care and custody of children where there has been a history of domestic violence, there is a risk that the rights of the perpetrator will be prioritised over the rights to life and physical and mental integrity of the female victim/survivor and the best interests of her child.

The CEDAW Committee has not yet reached a decision in this case.

⁸⁶ *Ángela González Carreño v. Spain*, Communication No. 47/2012, filed 20 September 2012.

⁸⁷ Simone Cusack, *Ángela González Carreño v. Spain*: CEDAW Communication No. 47/2012, *Amicus curiae* brief submitted to the Committee on the Elimination of Discrimination against Women (2014).

5. Strategies for eliminating stereotyping in gender-based violence cases

Addressing judicial stereotyping in gender-based violence cases is crucial to ensuring justice for women. Human rights advocates can play a crucial role in preventing and challenging such stereotyping. Section 5 identifies strategies that advocates might use and highlights how they have been applied in practice.

1.	Highlight the harms of judicial stereotyping through evidence-based research
2.	Advocate legal and policy reforms that prohibit judicial stereotyping
3.	Monitor and analyse judicial reasoning for evidence of stereotyping
4.	Challenge judicial stereotyping through petitions and expert evidence
5.	Highlight good practice examples of judges challenging stereotyping
6.	Improve judicial capacity to address stereotyping

The strategies identified aim to ensure appropriate legal and policy frameworks are in place to prevent and address judicial stereotyping. They also aim to ensure that: judicial stereotyping is identified; operative stereotypes are named; the harms of judicial stereotyping are understood; and judges comply with their human rights obligations in practice. Since many of the same stereotypes that facilitate and condone gender-based violence undermine women’s rights in other areas, it is crucial that advocates pursue these strategies in all areas of their work.

5.1 Highlight the harms of judicial stereotyping through evidence-based research

A key contribution that advocates can make is to raise awareness of the harms of judicial stereotyping through evidence-based research. Such research might highlight the prevalence, nature and harms of stereotyping in violence cases or, for example, in those cases decided by a particular court or judge.

Resource for Penang judiciary highlights the harms of stereotyping in sexual assault cases

In 2007, the Women’s Centre for Change published a background paper for the Penang Judiciary, entitled *Seeking a Better Judicial Process for Sexual Crimes*.⁸⁸ A key aim of the paper was to ‘gauge the extent to which myths and stereotypes about victims of sexual crime influence the conduct, outcome and sentencing of trials concerning sexual crime, and the media reporting thereof’.

⁸⁸ Women’s Centre for Change (WCC) Penang, *Seeking a Better Judicial Process for Sexual Crimes: Background Paper for Dialogue with Penang Judiciary* (2007).

To this end, researchers analysed the records of 439 sexual crime cases and articles from 3 Malaysian newspapers from 2000 to 2004. The research showed that most of the defences relied on by accused persons referred ‘to established myths and stereotypes about female behaviour, including what is acceptable sexual norms’. In presenting the findings, the paper urged the judiciary to take note of these myths and stereotypes when hearing sexual crime cases.

In assessing the merits of a sexual crime case, it is very important that those involved, including judges and magistrates, do not impose their own opinions of appropriate gender behaviour on victims of sexual crime. Although we recognise that the credibility of the sexual crime victim/complainant as a witness is critical, as is true in any other type of criminal trial, we are concerned that certain ideas and stereotypes about women’s behaviour often come into play in sexual crime trials. Any such bias against the complainants would inevitably impact upon the chances of a conviction. ... We argue that tackling these myths and stereotypes, and tackling this culture of scepticism, where the story of the woman is doubted from the beginning, are key to better conviction rates, better justice and recovery.

The paper identified how the myths and stereotypes influenced judicial opinions on a range of topics, including corroboration, witness credibility, false and late reporting and consent. For instance, in relation to consent, it explained:

In our sample, [consent] was raised as a defence not just in rape cases but [also] in a range of sexual assault trials. ... In 39 of the 52 cases where there is a record of cross-examination, consent was explicitly raised as a defence and in 32 cases, the ‘behaviour’ of the victim implying consent was relied upon, for example, by reference to the choice of the victim being with a particular person, at a particular location, and/or at a particular time.

The paper also sought to debunk myths and stereotypes. For instance, it challenged myths and stereotypes related to late reporting by discussing research that identified various reasons why people may not report, or delay reporting, sexual crimes. Reasons identified include stigma, fear of retaliation and fear of being blamed for the crime.

UN Special Rapporteur highlights the negative impact of stereotyping on the criminal justice system

In 2011, the UN Special Rapporteur on the independence of judges and lawyers discussed the negative impact of stereotyping on the criminal justice system.⁸⁹ Among other things, her report recognised that judicial stereotyping is widespread in this system and undermines access to justice and equality for women. She also highlighted how stereotyping harms women within the system. As part of that discussion, she explained:

Procedures and rules of evidence in the criminal justice system are often infiltrated by strong gender stereotypes which can result in engagement in gender-biased behaviour by court officials and discrimination against women by the criminal system in general. Gender stereotypes particularly affect procedures in rape and violence against women cases.

In many States, provisions on rape and sexual assault in criminal codes are based on gender stereotypes and prejudices which result in the discriminatory treatment of victims, who are disproportionately female. Hence, high levels of attrition plague the prosecution of rape and sexual violence cases throughout the world, resulting in a significant problem of impunity.

The UN Special Rapporteur also stressed the importance of judges being able to

⁸⁹ Knaul, *supra* note 61.

challenge gender stereotyping.

Judges must be in a position to challenge gender stereotyping and discrimination when they encounter it in the form of wrongful charging of suspects, charges being brought without any supporting evidence of wrongdoing and merely on the basis of hearsay, or mischarging of a particular form of conduct (like charging abortion as infanticide). Judges must also be willing to challenge stereotyping and discrimination by not detracting from women’s testimony or discounting their credibility, which applies whether women are the accused or victims. ...

Challenging gender stereotyping further means challenging common assumptions: about male perpetrators — such as, for instance, their entitlement to control women in various ways and their supposed inability to control their own sexual urges; about male victims, for example, their ability, in cases of male rape, to have defended themselves; and about women as perpetrators of crimes of violence against men. Similar sensitivity is required when dealing with gender norms and expectations regarding lesbian, gay, bisexual and — particularly — transgender victims and perpetrators.

5.2 Advocate legal and policy reforms

National laws and policies help to ensure that judges and other state actors comply with their international obligations related to stereotyping. They may also give victims a direct legal cause of action to hold judges accountable.⁹⁰ Advocates should consider whether reform is needed to strengthen national protections against judicial and other stereotyping. Such reforms might incorporate different types of protections against stereotyping, for instance general protections, subject matter or group specific protections and/or situational protections.

General protections	Protect against all stereotyping (eg gender and racial stereotyping), including by judges	Eg <i>Bangalore Principles of Judicial Conduct</i>
Subject matter protections	Protect against stereotyping in particular areas, for example stereotyping related to gender-based violence	Eg <i>General Law on Women’s Access to a Life Free of Violence</i> (Mexico)
Group-based protections	Protect against stereotyping of specific groups, such as women or people with disability	Eg CEDAW, CRPD
Situational protections	Protect against stereotyping in specific situations, such as rules of evidence that seek to prevent stereotyping in sexual assault cases	Eg Rules of Procedure and Evidence of the International Tribunals for Rwanda and the former Yugoslavia

Bangalore Principles of Judicial Conduct

The *Bangalore Principles of Judicial Conduct* identify a range of values and principles, including impartiality, that judges should adhere to in the performance of their duties. The Principles provide, *inter alia*, that a judge shall:

⁹⁰ Other causes of action may still be available to challenge judicial stereotyping in the absence of explicit protections against stereotyping (e.g., appealing a decision based on an error of law or fact).

- ◆ perform his or her judicial duties without favour, bias or prejudice
- ◆ not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue
- ◆ not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds
- ◆ require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.⁹¹

Mexico's General Law on Women's Access to a Life Free of Violence prohibits stereotyping

Mexico's *General Law on Women's Access to a Life Free of Violence* has several provisions on stereotyping. Although they do not deal explicitly with judicial stereotyping, they illustrate how one state has used national law to address stereotyping. The law requires:

- ◆ states and municipalities to provide free education to perpetrators to eliminate stereotypes about male supremacy and macho patterns that facilitate violence
- ◆ the Mexican Government to provide education about gender-based violence that is free of stereotypes and recognises the risk women face in an unequal society
- ◆ the *Comprehensive Program to Prevent, Treat, Punish and Eradicate Violence against Women* to provide for education programs to prevent, treat and eradicate stereotyped behaviour that facilitates and condones violence against women
- ◆ the federation to ensure the media do not promote stereotyped gender images
- ◆ the Public Education Ministry to eliminate stereotypes from education programs and incorporate content into those programs to modify behaviour based on the idea that one of the sexes is superior or inferior or on sex-role stereotypes.⁹²

The law also guarantees victims of violence the right to be valued and educated free of stereotypes and practices based on the concepts of inferiority or subordination.⁹³

Rules of evidence help to prevent stereotyping in sexual assault cases decided by the International Tribunals for Rwanda and the former Yugoslavia

Included in the Rules of Procedure and Evidence of the International Tribunals for Rwanda and the former Yugoslavia are requirements that may help to prevent stereotyping in sexual assault cases. With some differences, Rule 96 of the respective

⁹¹ *Bangalore Principles of Judicial Conduct*, UN Doc. E/CN.4/2003/65, annex, values 2(2), 2(4), 5(2), 5(5).

⁹² *General Law on Women's Access to a Life Free of Violence* of 2007 (Mexico), arts. 8(II), 17(I), 38(II), 41(XVIII), 45(VII), 45(XII).

⁹³ *Ibid*, art. 52(VII).

tribunals provides that in sexual assault cases:

- ✦ the victim’s testimony does not need to be corroborated
- ✦ consent is not permitted as a defense if the victim
 - ✦ was subjected to or threatened with or has had reasons to fear violence, duress, detention or psychological oppression
 - ✦ reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear
- ✦ before evidence of the victim’s consent is admitted, the accused must satisfy the Trial Chamber *in camera* that the evidence is relevant and credible
- ✦ the victim’s prior sexual conduct shall not be admitted in evidence or as defence.⁹⁴

Laws in Lesotho and South Africa prohibit adverse findings about a victim’s credibility based on delays in reporting sexual assault

Section 20 of Lesotho’s *Sexual Offences Act 2003* provides that ‘[i]n criminal proceedings at which an accused is charged with an offence of a sexual nature, the court shall not draw any adverse inference only from the length of the delay between the commission of the sexual act and the laying of a complaint’.

Section 59 of South Africa’s *Criminal Law Sexual Offences and Related Matters Amendment Act 2007* similarly provides that ‘[i]n criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof’.

5.3 Monitor and analyse judicial reasoning

Human rights advocates should be vigilant in ensuring that stereotypes do not impede access to justice for victims/survivors of gender-based violence. This means scrutinising judicial reasoning to ensure judges are complying with their obligation to reach decisions based on law and fact and not stereotypes. There are a number of key questions that advocates need to consider when monitoring and analysing judicial reasoning for evidence of stereotyping.

- | | |
|----|---|
| 1. | Did the judge engage in stereotyping or fail to challenge stereotyping by lower courts? |
| 2. | What are the operative stereotypes? |
| 3. | How was the victim/survivor harmed as a result of judicial stereotyping? |

⁹⁴ International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (2013), r 96; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, *Rules of Procedure and Evidence*, IT/32/Rev.49 (2013), r 96.

Stereotyping present in rape cases decided by Croatia's Zagreb County Court

One study analysed 29 rape and attempted rape cases decided by Croatia's Zagreb County Court between 1 January 2008 and 30 June 2012.⁹⁵ All of the judges accepted that the sexual acts took place against the women's will. However, they still found that, legally, they had not been raped. The study aimed to identify the extent, nature and impact of judicial stereotyping in those cases. Among other things, it found that:

- ✦ many judges had relied on stereotypes and based their reasoning on whether the women responded in line with what was expected of 'ideal victims'
- ✦ the judges questioned the evidence of women whose response was inconsistent with that of 'ideal victims', such as where physical resistance was absent or deemed inadequate
- ✦ the reliance upon stereotypes was a key factor in judges' decisions to acquit.

The study concluded that

the dominant conceptualisation of rape in the practice of this Court is in line with the 'real rape' myth which is based on, and supports, the norm of possessive heterosexuality according to which women enjoy being sexually possessed. Thus, the dominant view is that force has to be so intense as to 'prevent completely the victim from deciding' and that resistance has to be serious and continuous, while submission due to fear is often equalised with consent.

Based on the findings above (and of an analysis of Croatia's Criminal Code), the study proposed a new model of rape law for Croatia that is based on 'communicative sexuality' and respect for women's sexual autonomy and integrity. To minimise the potential for further judicial stereotyping, it recommended amending the Criminal Code to include a number directions, including that a victim's previous sexual encounters with an accused do not constitute consent.

Stereotyping present in gender-based violence cases decided by Argentinian courts

In 2010, Argentina's Defensoría General de la Nación published *Discriminación de Género en Las Decisiones Judiciales: Justicia Penal y Violencia de Género*.⁹⁶ Through a selection of cases, the report analysed the extent to which Argentinian courts had applied international human rights obligations related to gender-based violence against women. Chapter 5 of the report:

- ✦ highlighted examples of judicial stereotyping in gender-based violence cases
- ✦ named the stereotypes and prejudices upon which judges had relied (ie 'mujer honesta', 'mujer mendaz', 'mujer instrumental', 'mujer co-responsable', 'mujer fabuladora')
- ✦ identified how judicial stereotyping resulted in discrimination and the denial of

⁹⁵ Ivana Radačić, 'Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice' (2014) 22(1) *Feminist Legal Studies* 67.

⁹⁶ Raquel Asensio et al., *Discriminación de Género en Las Decisiones Judiciales: Justicia Penal y Violencia de Género* (Buenos Aires: Defensoría General de la Nación, 2010), <http://www.artemisanoticias.com.ar/images/FotosNotas/inv%20defensoria11-10%5B1%5D.pdf> (viewed 24 May 2014).

justice.

Advocates need to be aware that even decisions that uphold the rights of victims/survivors can perpetuate stereotypes if stereotyping is left unaddressed by judges or other decision-makers.

Human Rights Committee could have strengthened its views by holding the Argentine Republic accountable for judicial stereotyping

L.N.P. v. Argentine Republic concerned the acquittal of several accused of gang raping a 15-year-old girl.⁹⁷ The Human Rights Committee found that the decision of the trial court that lack of consent had not been proved was based on discriminatory and offensive criteria designed to cast doubt on the girl's morality.

The court that heard the case also invoked discriminatory and offensive criteria, such as 'the presence of long-standing defloration' of the author to conclude that a lack of consent to the sexual act had not been demonstrated. The author further maintains that all the witnesses were asked whether she was a prostitute. The Committee considers that all the above statements, which have not been contested by the State party, reflect discriminatory treatment by the police, health and judicial authorities aimed at casting doubt on the morality of the victim. The Committee observes, in particular, that the judgement of the Criminal Chamber of Presidencia Roque Sáenz Peña bases its analysis of the case on the sexual life of the author and whether or not she was a 'prostitute'. The Chamber also takes the author's loss of virginity as the main factor in determining whether she consented or not to the sexual act.

The Committee ultimately held the State Party accountable under the ICCPR, including for violating the right to non-discrimination. Yet, it did not explicitly acknowledge the role of stereotyping in the court's decision to acquit. This is significant because it meant that the Committee did not articulate the obligations under the ICCPR to refrain from judicial stereotyping or hold the State Party accountable for this particular rights violation. It is also significant because it meant that the stereotypes were not challenged, leaving other rape survivors vulnerable to stereotyping by the Argentinian judiciary. Moreover, the failure to address stereotyping is inconsistent with the Committee's own *General Comment No. 28*, which recognised that States Parties must ensure that stereotyping does not affect legal rights and protections, including in respect of rape.

5.4 Challenge judicial stereotyping

Courtrooms are supposed to be places where human rights are upheld, where decisions are fair and impartial and not compromised by judges' stereotypical views and other biases. So when stereotyping closes judges' minds to truth, when it impairs their ability to assess the facts and distorts the truth-finding process, judicial decisions must be challenged. And in this there is an important role to be played by human rights advocates.

As concerned members of society, ... we have an obligation to ensure that all aspects of our legal system transcend myths and stereotypes to achieve true impartiality, equality, and

⁹⁷ *L.N.P. v. Argentine Republic*, Communication No. 1610/2007, UN Doc. CCPR/C/102/D/1610/2007 (2011) (HRC).

ultimately, justice. Substantive equality, as well as an informed and impartial judiciary, should remain at the top of our list of priorities.⁹⁸

Human rights advocates can challenge judicial stereotyping in gender-based violence cases by assisting victims/survivors to:

- ✦ appeal decisions involving stereotyping to higher national courts
- ✦ submit petitions or communications to regional or international human rights bodies alleging human rights violations based on judicial stereotyping
- ✦ identify experts to give evidence about judicial stereotyping on their behalf.

Rape survivor submitted a communication to the CEDAW Committee challenging a trial judge's decision to acquit an accused of rape

In 2007, Karen Tayag Vertido (with the assistance of legal counsel) submitted a communication to the CEDAW Committee.⁹⁹ A key claim was that the trial judge's decision to acquit the accused of raping her was discriminatory because it was based on stereotypes and myths related to rape.

Ms Vertido:

- ✦ identified stereotypes in the reasoning of the trial judge that require women to respond to rape in a particular way
- ✦ analysed how the trial judge's reliance on the stereotypes denied her justice, including by undermining her credibility because her behaviour differed from that expected of an 'ideal victim'
- ✦ drew the Committee's attention to the widespread practice of judicial stereotyping in the Philippines, which she claimed placed rape victims at a legal disadvantage and reduced their chances of obtaining justice.

Among other things, Ms Vertido asked the Committee to recommend that the Philippines investigate and review the trial judge's decision and adopt measures to eliminate judicial stereotyping.

A majority of the Committee held the Philippines accountable under CEDAW for the stereotyping of the trial judge.¹⁰⁰ The majority's views are significant, as they:

- ✦ named the myths and stereotypes applied and perpetuated by the trial judge
- ✦ affirmed that judicial stereotyping violates the rights to non-discrimination and a fair trial and that States Parties are responsible under CEDAW for such stereotyping

⁹⁸ L'Heureux-Dubé, *supra* note 7, 101.

⁹⁹ Karen T. Vertido, Communication against the Philippines, Submitted to the Committee on the Elimination of Discrimination against Women, 29 November 2007.

¹⁰⁰ *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (CEDAW). See also Karen Tayag Vertido, 'General Discussions Elaborating a Draft General Recommendation on Women and Access to Justice' (Speech delivered at the Committee on the Elimination of Discrimination against Women, 54th session, General Discussion on Access to Justice, Geneva, 2013); Simone Cusack & Alexandra S.H. Timmer, 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v The Philippines*' (2011) 11(2) *Human Rights Law Review* 329.

- ◆ clarified that “the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general”¹⁰¹
- ◆ urged the State Party to ensure “that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions”.¹⁰²

Expert evidence can help dispel stereotypes in domestic violence cases

‘Expert evidence on the psychological effect of battering on wives and common law partners must ... be both relevant and necessary in the context of the present case. ...

Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership of his wife and his “right” to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick “no thicker than his thumb”. ...

The woman’s duty was to serve her husband and to stay in the marriage at all costs “till death do us part” and to accept as her due any “punishment” that was meted out for failing to please her husband. ...

However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it. ...

The Court concludes ... that the battering relationship is “subject to a large group of myths and stereotypes”. As such, it is “beyond the ken of the average juror and thus is suitable for explanation through expert testimony”. I share that view’.¹⁰³

Expert evidence on how stereotyping led to the acquittal of a man accused of rape

In 1996, Jose Carlos Aguilar Orellana was convicted of breaking and entering into M.Z.’s apartment and raping her. However, the Bolivian Court of Appeals overturned his conviction, a decision that was upheld in 2000 by the Supreme Court. It will be recalled from section 4.1 that, in June 2002, Equality Now submitted an expert brief on stereotyping to the Inter-American Commission on Human Rights in support of M.Z.’s claim. In that brief, they:

- ◆ noted that the trial court determined that the evidence supported M.Z.’s claim that she had been raped
- ◆ claimed that the decision of the appellate courts to overturn the rape conviction was based not on Bolivian law or the facts, as determined by the trial court, but on stereotypes and myths

On sex-stereotyped and rape-mythic rather than valid legal and factual grounds, the

¹⁰¹ *Karen Tayag Vertido v. The Philippines*, *ibid*, para. 8.4.

¹⁰² *Ibid*, para. 8.9(b).

¹⁰³ *R. v. Lavallee* [1990] 1 S.C.R. 852, 871-873 (Wilson J) (Canada, Supreme Court).

Court of Appeals reversed the trial court ruling that MZ was raped and the Supreme Court confirmed this reversal. The Bolivian Court of Appeals and the Supreme Court subordinated legal reasoning and evidence to gender bias. Their sex-discriminatory decision-making rendered the promise and guarantee of an effective remedy for violence against women illusory. The Court of Appeals did not even cite and then refute or discredit much of the evidence that supported MZ that the trial court accepted. It simply ignored that evidence, relying instead on rape myths as the basis for the outcome. The Supreme Court of Bolivia did the same.¹⁰⁴

- ✦ identified a range of stereotypes and myths relied on by the appellate courts and explained how they influenced their reasoning

Further to the question of resistance, the Court of Appeals was suspicious that neighbors did not hear any sounds of conflict. At the same time, that Court chose to ignore reports by MZ that her life was threatened and that when she tried to scream, her attacker attempted to choke her, and her credible explanation that this was the reason she did not make more noise. In a clear double standard, the Court of Appeals, while marking MZ's physique, also failed to note the accused's former military and athletic training, as the lower court did, which provided him a highly relevant physical advantage. The Court in these respects relied upon standards for assessment of the credibility of a rape victim that bear no relation to the well-known terror and silencing of the victim that are typical in rape cases, and were amply recounted by MZ from the moment she came into contact with the authorities, and were in evidence at trial. Instead, they subliminally rely on the rape myth that women who really want to resist a rape, can and do.¹⁰⁵

- ✦ recalled that judicial stereotyping violates human rights, including the rights to non-discrimination and equal protection of the law.¹⁰⁶

In March 2008, the parties entered into a friendly settlement agreement in which Bolivia recognised its human rights responsibilities toward M.Z. In particular, it acknowledged her right to live free from violence and its due diligence obligation to prevent, investigate, prosecute and punish gender-based violence. Bolivia also agreed to implement measures, including judicial training, to prevent similar violations in the future.¹⁰⁷

5.5 Highlight good practice examples

Whenever possible, human rights advocates should highlight good practice examples of efforts to address judicial stereotyping, including in gender-based violence cases. Such examples provide important guidance on debunking stereotypes and give judges an important external perspective that can help them move beyond stereotypes.

Good practice examples of addressing judicial stereotyping might include:

- ✦ laws and policies that prohibit and sanction judicial stereotyping

¹⁰⁴ Equality Now, *supra* note 75, 18.

¹⁰⁵ *Ibid*, 14 [citations omitted].

¹⁰⁶ See section 4.1.

¹⁰⁷ Inter-American Commission on Human Rights, 'IACHR Concludes Working Visit to Bolivia', Press Release No. 40/09, 26 June 2009.

- ✦ rules of evidence and procedure that limit opportunities for stereotyping
- ✦ judgments that challenge judicial stereotyping by lower courts
- ✦ resources and training that build judicial capacity to address stereotyping.

This paper highlights many good practice examples of addressing judicial stereotyping in gender-based violence cases. Several examples are also highlighted below.

Canadian judge identifies and challenges judicial stereotyping in a sexual assault case

R v. Ewanchuk concerned the sexual assault of a 17 year-old girl by Steve Brian Ewanchuk. The trial judge acquitted Ewanchuk based on the defence of ‘implied consent’. He did this even though he found the girl was a credible witness who gave reliable evidence she had been assaulted. The Alberta Court of Appeal upheld the acquittal. However, it was later overturned by the Supreme Court of Canada, which held that ‘implied consent’ is not a defence to sexual assault under Canadian law.¹⁰⁸

In a concurring opinion, Justice Claire L’Heureux-Dubé determined that the lower courts had engaged in stereotyping and that this had led to the acquittal of Ewanchuk. She explained that the case was ‘not about consent, since none was given. It [was] about myths and stereotypes’. She went on to say that

it is difficult to understand how the question of implied consent even arose. Although the trial judge found the complainant credible, and accepted her evidence that she said ‘no’ on three occasions and was afraid, the trial judge nevertheless did not take ‘no’ to mean that the complainant did not consent. Rather, he concluded that she implicitly consented and that the Crown had failed to prove lack of consent. This was a fundamental error.

The fundamental error, Justice L’Heureux-Dubé concluded, derived not from the findings of fact, but from myths and prescriptive sexual stereotypes. According to her Honour, McClung J.A. of the Court of Appeal compounded this error. She explained:

[H]e stated ... that ‘it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines’. He noted ... that ‘she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple’.

Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying ‘no’, she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of ‘good’ moral character. ‘Inviting’ sexual assault, according to those myths, lessens the guilt of the accused...

Justice L’Heureux-Dubé continued:

The expressions used by McClung J.A. to describe the accused’s sexual assault, such as ‘clumsy

¹⁰⁸ *R v. Ewanchuk*, *supra* note 6.

passes' ... or 'would hardly raise Ewanchuk's stature in the pantheon of chivalric behaviour' ..., are plainly inappropriate in that context as they minimize the importance of the accused's conduct and the reality of sexual aggression against women.

McClung J.A. also concluded that 'the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal' ... having found earlier that 'every advance he made to her stopped when she spoke against it' and that '[t]here was no evidence of an assault or even its threat' ... According to this analysis, a man would be free from criminal responsibility for having non-consensual sexual activity whenever he cannot control his hormonal urges. Furthermore, the fact that the accused ignored the complainant's verbal objections to any sexual activity and persisted in escalated sexual contact, grinding his pelvis against hers repeatedly, is more evidence than needed to determine that there was an assault.

Finally, McClung J.A. made this point: 'In a less litigious age going too far in the boyfriend's car was better dealt with on site -- a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee' ... According to this stereotype, women should use physical force, not resort to courts to 'deal with' sexual assaults and it is not the perpetrator's responsibility to ascertain consent, ... but the women's not only to express an unequivocal 'no', but also to fight her way out of such a situation.

Justice L'Heureux-Dubé concluded her opinion by explaining that judges must base their decisions on law and fact and not on myths and stereotypes.

Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

Kenyan Court of Appeal challenged the stereotype that women are untruthful and therefore likely to fabricate allegations of sexual assault

In *Mukungu v. Republic*, the Kenyan Court of Appeal determined that the requirement for corroboration in cases concerning sexual offences against women and girls was unconstitutional. In doing so, it noted that

[t]he need for corroboration in sexual offences appears to be based on what the Superior Court restated in *Maina v Republic* [1970] EA 370. There the Court said:

... as pointed out by the Court of Appeal in *Henry and Manning v Republic* 53 criminal appeal rep 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case.

It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences testimony of women and girls should be treated differently. ...

The Constitution has no provision authorising any discriminatory treatment of witnesses particularly with regard to matters of credibility. It is noteworthy that even the Evidence Act (Chapter 80) Laws of Kenya, has no provision on the issue of corroboration of the testimony of adult women and girls. ...

For the foregoing reasons we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.¹⁰⁹

CEDAW Committee explained the obligation to refrain from stereotyping in rape cases

R.P.B. v. The Philippines concerned the rape in 2006 of R.P.B., a 17-year-old girl who is both deaf and mute.¹¹⁰ In 2011, the Regional Trial Court of Pasig City acquitted J, her neighbour, of the rape. R.P.B. later submitted a communication to the CEDAW Committee. In it, she claimed that the trial court discriminated against her, as it based the acquittal on stereotypes and myths and ignored evidence that explained her behaviour, including her disability and J's physical strength. In particular, she noted that the stereotypes and myths imposed peculiar evidentiary burdens on, and undermined the credibility of, women rape victims. 'Those who satisfy the stereotypes,' she said, 'are considered credible, while the others are met with suspicion and disbelief, leading to the acquittal of the accused.'

In its views, the Committee concluded that the Philippines violated CEDAW when the trial court engaged in stereotyping, resulting in 'material and moral damage and prejudice.' After explaining how the trial court's reliance on stereotypes led to the acquittal, the Committee outlined the obligations of States Parties concerning judicial stereotyping. According to its expert view:

- ✦ article 2(f) of CEDAW requires States Parties to take appropriate measures to modify or abolish discriminatory customs and practices
- ✦ States Parties are responsible for judicial decisions that violate CEDAW, including those based on stereotypes and myths
- ✦ 'there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct'
- ✦ 'stereotyping affects women's right to a fair and just trial and ... the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim'.

The Committee also made a number of recommendations on stereotyping, including that the Philippines

- ✦ ensure all rape and sexual offences proceedings are conducted fairly and impartially and free from prejudices and stereotypes
- ✦ provide regular training for judges so that court proceedings and decisions are not

¹⁰⁹ *Mukungu v. Republic*, [2003] 2 EA 482, paras. 11-14 (Kwach, Bosire & O'Kubasu JJA) [citations omitted] (Kenya, Court of Appeal).

¹¹⁰ *R.P.B. v. The Philippines*, *supra* note 49.

affected by stereotypes and gender bias.

Indian Supreme Court challenged the stereotype that women should be chaste and the implication that an unchaste woman has a propensity to consent, and must have consented, to sex

‘The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl “of loose morals” or “such type of a girl”. ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded! ... Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone had everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court’.¹¹¹

5.6 Improve judicial capacity

Education and training is key to building capacity to address judicial stereotyping and ensuring decision-making is not adversely affected by harmful stereotypes. For instance, the UN Special Rapporteur on the independence of judges and lawyers has recognised that ‘development of training and continuing legal education programmes ... is the cornerstone for developing the capacity of the judiciary to challenge gender stereotypes within and outside the criminal judicial system...’.¹¹²

Education and training may come in many forms, including seminars and written resources (eg bench books). Whatever the form, they should assist judges to achieve best practice in decisions on gender-based violence. At a minimum, this will require information to help judges:

- ✦ reach decisions based on law and fact and not on stereotypes
- ✦ identify stereotyping and operative stereotypes, for example in the reasoning of lower courts or in the arguments advanced by counsel
- ✦ understand the harms caused by stereotypes and stereotyping, including how they undermine the ability of victims/survivors to access justice
- ✦ debunk stereotypes related to gender-based violence.

¹¹¹ *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393; 1996 SCC (2) 384 (Anand J) (India, Supreme Court).

¹¹² Knaul, *supra* note 61, 2. See also *R.P.B. v. the Philippines*, *supra* note 49, para. 9(b)(iv); *R.K.B. v. Turkey*, *supra* note 26, para. 8.10(b)(iii); *Jessica Lenahan (Gonzales) et al. v. United States of America*, Case 12.626, Report No. 80/11, 21 July 2011, para. 215(6) (Inter-American Commission on Human Rights); *V.K. v. Bulgaria*, *supra* note 29, para. 9.16(b)(iv).

Judges must debunk myths and stereotypes and expose and eradicate their ideological and cultural foundations

'[E]ven the notoriously cautious courts are beginning to recognize that it is imperative that all jurists go beyond myths and stereotypes in order to ensure that justice is done – we need to “debunk” these myths. Debunking is more than simply being able to recognize myths and stereotypes. It is about exposing the ideological and cultural foundations of the myths and stereotypes prevalent in each culture and eradicating these fictions from the reasoning of all those who interpret our general culture, and, in particular, those in positions of power who contribute to their reinforcement'.¹¹³

Human rights advocates can play an important role in building judicial capacity to address stereotyping. This might include working with key bodies (eg judicial colleges) that provide education and training to judges. It might also include conducting their own education and training programmes for the legal profession and disseminating their own resources on stereotyping, including good practice approaches.¹¹⁴

Training and resources for the National Supreme Court of Justice in Mexico help to limit judicial stereotyping

The Gender Equality Unit of the National Supreme Court of Justice in Mexico conducted a seminar on gender stereotyping, which was attended by members of the Mexican judiciary as well as academics and women's human rights defenders. The seminar examined how

- ◆ stereotypes had hindered women's access to justice in several cases
- ◆ judges could have challenged those stereotypes through their legal reasoning.

In 2013, the Gender Equality Unit published a protocol, entitled *Judicial Decision-Making with a Gender Perspective*. Translated into English in 2014,¹¹⁵ it acknowledges that

stereotypes permeate the work of courts and adjudicators. Stereotypes can cause personnel to expect certain types of behavior from certain people involved in a case; they can cause us to believe that 'neutral' norms are non-discriminatory; and they can even influence the language that we use. But when stereotypes infiltrate judicial decision-making, this is at odds with one of the law's purposes – to redress instances of disproportionate distribution and exercise of power. Judicial decisions are how those with legal power respond to asymmetrical power dynamics. As such, judges have the potential to make those power asymmetries visible, and to reverse the effects of stereotype-based power structures that cause exclusion and marginalization.

The protocol's chapter on stereotyping provides concrete guidance on how judges can

¹¹³ L'Heureux-Dubé, *supra* note 7, 91.

¹¹⁴ See, e.g., International Commission of Jurists, *Sexual Violence against Women: Eradicating Gender Stereotypes in Laws and Practice. Distilling the Issues & Pointing to Comparative Good Practices* (forthcoming 2014).

¹¹⁵ Gender Equality Unit, National Supreme Court of Justice, Mexico, *Judicial Decision-Making with a Gender Perspective: A Protocol. Making Equal Rights Real* (2014), http://www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_article=1987 (viewed 24 May 2014).

identify stereotypes and avoid stereotyping in their legal reasoning. It also identifies examples of judicial stereotyping and outlines the human rights obligations imposed on judges to address stereotyping. The Unit is monitoring the protocol's implementation and, to this end, has asked judges to provide copies of decisions applying the protocol.

Building on the protocol, in 2014, the National Supreme Court of Justice in Mexico issued a binding decision – *Tesis Aislada XCIX/2014* (10^a)¹¹⁶ – that:

- ◆ recognises women's rights to live free of violence and discrimination and to equal access to justice
- ◆ requires judges to incorporate a gender perspective into their decision-making, including by challenging gender stereotypes in laws.

U.K. bench book provides important guidance on judicial stereotyping

In 2013, the U.K. Judicial College published its *Equal Treatment Bench Book*, which includes guidance for judges on gender and other forms of stereotyping.¹¹⁷ Among other things, the bench book:

- ◆ recognises that stereotypes can disadvantage women and lead to unlawful discrimination against them
- ◆ identifies common stereotypes about women and men
- ◆ affirms that judges should not make stereotypical assumptions about women and men, even though certain assumptions may be true about many or event most women or men
- ◆ provides important data and information that help debunk stereotypes and myths related to gender-based against women, such as reasons why women may not leave violent partners or do not report gender-based violence immediately.

¹¹⁶ *Tesis Aislada XCIX/2014* (10^a), *Acceso a La Justicia en Condiciones de Igualdad. Todos Los Organos Jurisdiccionales del País Deben Impartir Justicia con Perspectiva de Género*, http://www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_article=1957 (viewed 24 May 2014).

¹¹⁷ Judicial College (U.K.), *Equal Treatment Bench Book* (2013), http://www.judiciary.gov.uk/Resources/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf (viewed 24 May 2014).