

Gender Bias in Judges' Decision-Making through the lenses of international human rights bodies

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Gender stereotypes

Stereotypes are generalized views or preconceived ideas, according to which individuals are categorized into particular gender groups, typically defined as “women” and “men” and are arbitrarily assigned characteristics and roles determined and limited by their sex

(Rebecca Cook & Simone Cusack,
Gender Stereotyping)

The role of judiciary



The judiciary is the branch of government which administers justice according to law.

Individuals look to the judiciary to uphold their rights and governments look to the courts to interpret laws.



Judges may be just as biased or even more biased than the general public in deciding court cases where traditional gender roles are challenged, even when they have the best possible intentions.



The significant expertise that judges possess doesn't inoculate them against decision-making biases. Therefore, more and more feminist scholars and lawyers have raised how much a judge's individual perspective matters in decision making

CEDAW

Convention on the Elimination of All Forms of Discrimination against Women

- Article 1 broadly defines discrimination against women to include the political, economic, social, cultural, civil or any other field.
- **Article 2**
- States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
 - (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women
- **Article 5**
- States Parties shall take all appropriate measures:
 - (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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

Rape cases



Karen Tayag Vertido v. The Philippines

- Karen Tayag Vertido, an employee of the Davao City Chamber of Commerce and Industry was raped by a former President of the Chamber, following an evening business meeting.
- The case languished in the trial court for 8 years. The accused was acquitted, the judge citing insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of rape. Judge based her decision to acquit on several 'guiding principles' derived from other rape cases and her unfavorable assessment of the author's testimony based, among other things, on the author's failure to take advantage of perceived opportunities to escape from the accused.

Decision (1)

- The decision had no basis in law or fact and 'was grounded in gender-based myths and misconceptions about rape and rape victims . . . without which the accused would have been convicted':
- **women should physically resist sexual assault at every opportunity**, which implies that failure to take advantage of perceived opportunities to escape from an alleged attacker is evidence that the woman was not raped
- **women are inherently untruthful and thus likely to fabricate allegations of rape**, which implies that rape allegations made by women should automatically be viewed with suspicion
- **older men lack sexual prowess**, which implies that an allegation of rape made against an older man must be unfounded because his age means he is not capable of committing rape
- **perpetrators of rape are strangers**, which implies that any sexual relations between persons who are 'more than nodding acquaintances' must have been consensual and, therefore, not rape

Decision (2)

- 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.
- *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 . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim.

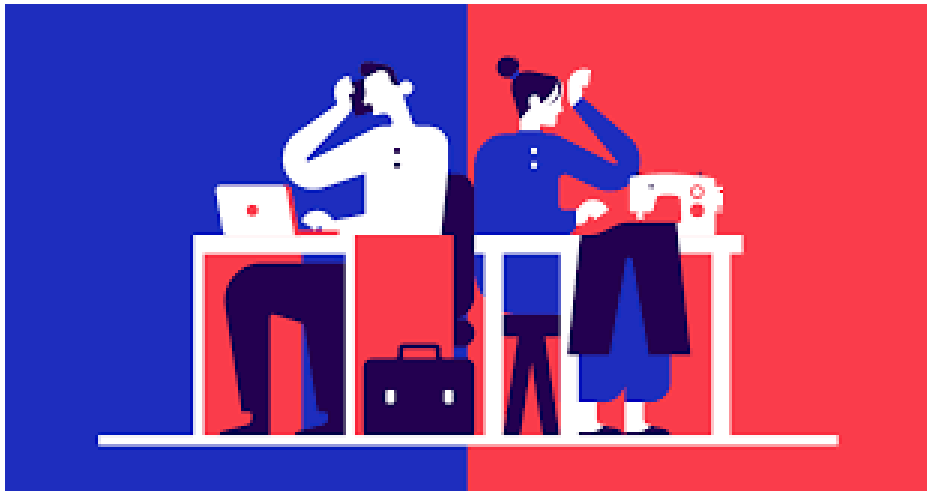
R.P.B. v. the Philippines

- The applicant argued that she was denied justice, as the trial court failed to assess the evidence and correctly apply the law, basing it on gender-based myths and stereotypes and failing to consider the rape in the context of her vulnerability as a deaf girl.
- The trial court relied on some common rape myths, such as:
 - 1) it is easy to accuse someone of rape, but it is difficult to prove it, and even more for the innocently accused person to disapprove it
 - 2) the testimony of the alleged victim must be scrutinized with particular caution
 - 3) evidence for the prosecution cannot rely on the weakness of the evidence given by the defense
- In addition, the victim's credibility was questioned, as she didn't react as expected by every woman of her strength



Labour law case

R K B v. Turkey



- R .K.B.'s employer accused her of having an affair with a male colleague and dismissed her from the position but did not dismiss the male colleague, and threatened to “spread rumours about her relationships with other men” to pressure her to sign a document, attesting that she had been paid all her benefits upon termination.
- She claimed that her employer, a hairdressing salon, had unfairly terminated her contract of employment based on gender stereotypes.

Decision

- The court proceedings were based on the *stereotyped perception of the gravity of extramarital affairs by women*, that extramarital relationships were acceptable for men and not for women and that only women had the duty to “refrain from even the slightest offence against morality”.
- Gender stereotypes are perpetuated through a variety of means and institutions including laws and legal systems and that they can be perpetuated by State actors in all branches and levels of government and by private actors.
- While lower instance court has clearly allowed its reasoning based on law and facts to be influenced by stereotypes, the higher court failed to address the gender aspect and has perpetuated gender stereotypes.

Cases concerning violence

González Carreño v. Spain

- Daughter of Ms. González Carreño was three years old, when she left her husband. Over number of years, she brought complaints against him to the Spanish legal system, seeking to protect her daughter from having to spend time with her father, as ordered by the courts. Following a judicial hearing on the matter, Ms. González Carreño's husband "approached her and told her that he was going [to] take away what mattered most to her". Later the same day, the police found the lifeless bodies of her daughter and her ex husband and concluded that he had shot his daughter and then committed suicide.



Decision

- The decision on a regime of unsupervised visits was adopted without a prior hearing of the author and her daughter, while the continued non-payment of child support by the father was not taken into account in that context. *All of these elements reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position.*
- The child custody and visitation decisions should be based on the best interests of the child, not on stereotypes, with domestic violence being a relevant consideration, and stressed that *stereotypes affected the right of women to an impartial judicial process and that the judiciary should not apply inflexible standards based on preconceived notions about what constituted domestic violence.*

V. K. v. Bulgaria

- The case concerned continued domestic violence case and the inactivity of domestic authorities to protect a wife, despite numerous calls and medical evidence of the abuse. V.K. and her daughter found protection and legal aid in a shelter. Consequently, her husband denied her contact with her son for two months and abused the staff intending to receive information on the location of his daughter.
- Bulgarian courts granted her an immediate but refused to give her a permanent protection order. In their view, she was not in a situation of an imminent threat to her life or health, or that of her children, because she was not exposed to violence in the month before she requested the order. However, immediately after the expiry of the order, she was harassed.



Decision

- Domestic courts relied on gender-based stereotypes, as they focused on the immediate physical threat, neglecting psychological suffering and economic violence, and applied a narrow legal definition of domestic violence by leaving out the history of severe domestic violence.
- The Committee underlined 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".

J. I. v. Finland

- J.I. Was in a violent relationship that intensified after their son was born. The violence included attempted suffocation, a bloody nose, being dragged by the hair, being thrown against a door and around the apartment and being humiliated. She remained in the relationship at that time as she wanted her child to have his father present in his life.
- She claimed that Finland does not consider domestic violence to be a real and serious threat. Its legislation and the practice of its public institutions, including the judicial system, do not recognize gender-based violence and its consequences.



Decision

- *“ Often, judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women’s voices, arguments, and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women’s rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the re-victimization of complainants.”*
- General recommendation No 33 (2015) on women’s access to justice, para. 26-27

S.F.M. v Spain

- This case concerns obstetric violence - a specific type of violence that happens during the medical practice during the childbirth process.
- The applicant claimed to experience a long childbirth process and her behavior was characterized as a submissive, obedient woman without the capacity to discern what was best for her due to gender stereotypes.
- Despite all the evidence, the administrative and judicial authorities gave credence only to the hospital reports, taking at the same time the view that her psychological harm was only a matter of mere perception.
- She claimed that these stereotypes distorted the judge's discernment and resulted in a decision based on preconceived beliefs and myths, not recognizing obstetric violence, as a particular form of violence.



Decision

The pathologization of the labor experienced by the applicant was based on **gender stereotypes regarding sexuality, maternity, and childbirth, which were perpetuated in the administrative and judicial proceedings.**

Domestic judicial authorities did not perform any profound analyses of the evidence presented by the applicant. This inactivity resulted from discriminatory notions that the doctor is to decide whether or not to perform an episiotomy.

ECtHR

K onstantin Markin v. R ussia

- Father of four worked in the Army as a radio operator for intelligence. He divorced when his third child was born, and the children stayed with him.
- He sought maternity leave for a period of 3 years, which was not approved because such a long length belongs to women employed in the military.
- See also *Gruba and Others v. R ussia*



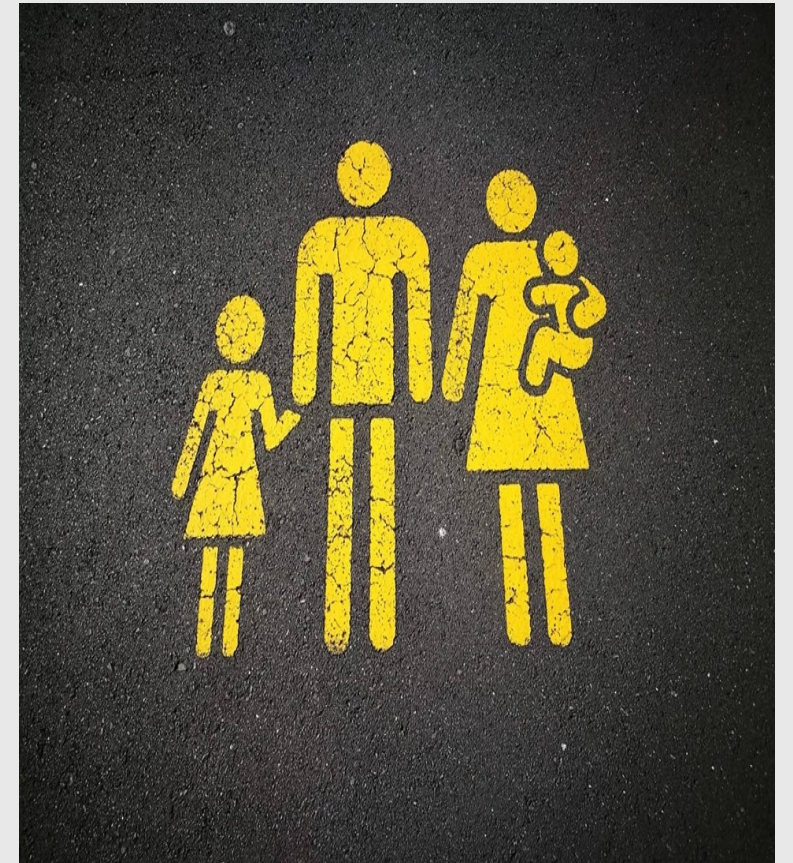
Judgment(G C)

In particular, references to traditions, general assumptions, or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.

The different treatment of servicemen and servicewomen as regards entitlement to parental leave is clearly not intended to correct the disadvantaged position of women in society or “factual inequalities” between men and women ...The Court agrees with the applicant and the third party that such difference **has the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.**

Carvalho Pinto v. Portugal

- The applicant, who had been diagnosed with a gynecological disease, brought a civil action against a hospital for clinical negligence following an operation for her condition. The Administrative Court ruled in her favour and awarded her compensation. On appeal, the Supreme Administrative Court upheld the first-instance judgment but reduced the amount of damages.
- The Supreme Administrative Court had confirmed the findings of the first-instance court but considered that the applicant's physical and mental pain had been aggravated by the operation, rather than considering that it had resulted exclusively from the injury during surgery. It relied on the fact that the applicant was "*already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age*" and the fact that she "*probably only needed to take care of her husband*", considering the age of her children.



Judgment (1)

- The question at issue was not considerations of age or sex as such, but rather *the assumption that sexuality was not as important for a fifty-year old woman and mother of two children as for someone of a younger age*. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfillment of women as people.
- The wording of the Supreme Administrative Court's judgment could not be regarded as an unfortunate turn of phrase. *The applicant's age and sex appeared to have been decisive factors in the final decision, introducing a difference in treatment based on those grounds*.

Judgment (2)

- The Court noted the contrast between the applicant's case and the approach that had been taken by the Supreme Court of Justice in previous judgments in which two male patients aged 55 and 59 respectively had alleged medical malpractice. In those judgments, the Supreme Court of Justice found that *the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock"*.
- In the Court's view, those considerations show the prejudices prevailing amongst the judiciary in Portugal.

Jurđić v. Croatia

- The applicant is a woman who underwent in vitro fertilization. She concluded a contract with a new company after 14 years of work with another employer, and 10 days after she received information that the treatment had been successful and that she is pregnant.
- As her pregnancy was of high risk, she took a sick leave. However, when she requested payment of salary compensation, her health insurance status was rejected, claiming that when she concluded a contract, she was medically unfit for employment due to in vitro treatment, and it declared her employment as fictitious.
- The applicant challenged this decision before domestic bodies, including Constitutional Court, that dismissed her complaint as unfounded.



Judgment

- She had been discriminated on the ground of sex.
- The Croatian authorities did not explain how her contract was fraudulent when she didn't know that in vitro fertilization was successful. Moreover, it seems that domestic authorities are of opinion that a woman is obliged to report her plans about possible pregnancy while concluding a contract.
- The ECtHR was very concerned with the **wording** used in decisions of domestic authorities, which are an example of gender stereotyping, and expressed an opinion that they "**present a serious obstacle to the achievement of real substantive gender equality, which, as already stated, is one of the major goals in the member states of the Council of Europe.**"

Rape cases

- M.C. v. Bulgaria - focus on "direct" proof of rape".
- Y. v. Slovenia - the victim was cross-examined and felt a distressing experience because the judge did not ensure respect for the applicant's integrity
- J.L. v. Italy - the secondary victimization to be the breach of positive duty of the State. An essential part of the judgment is that the State has a positive duty to protect the victim's image of gender-based violence and her privacy. This properly limits judges in their expression in the judgments:

„Judges need to avoid reproducing sexist stereotypes in court decisions, minimizing gender-based violence, and exposing women to secondary victimization by using guilt-inducing and moralistic language that is likely to lead to victim's distrust in justice“





Stereotypes:



1. compromise the impartiality of judges' decision



2. influence judge's understanding of violent offences



3. affect judges' views about witness credibility



4. lead to impunity



5. refrain victims from seeking protection

**How
stereotypes
undermines
access to
justice?**

Strategies for eliminating stereotyping in judgments

Improve

judicial capacity by development of training and continuing legal education programs that have an aim to break stereotypes and established myths about female/male behavior

Monitor and analyze

judicial reasoning

Challenge

judicial stereotyping and emphasize its harms

Highlight

good practice examples

Thank you for your attention!