

**Background paper on the role of the judiciary in addressing the harmful gender stereotypes  
related to sexual and reproductive health and rights<sup>1</sup>**  
**A review of case law**

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<sup>1</sup> This background paper forms part of OHCHR’s series of papers on gender stereotyping. Appreciation is expressed to Christina Zampas and Johanna B. Fine for their research and preparations of earlier drafts.

## I. Introduction

### i. Background

This paper<sup>2</sup> analyzes how national and sub-national courts and international and regional judicial bodies<sup>3</sup> have challenged wrongful gender stereotyping in legislation, policies or cases by lower courts concerning select sexual and reproductive health and rights (SRHR) issues. It also analyses cases where these courts and bodies have instead engaged in wrongful stereotyping, resulting in violations of human rights. Relevant jurisprudence from international and regional quasi-judicial bodies and human rights mechanisms is also analyzed in the study. The paper finally seeks to identify strategies and make recommendations concerning the role of the judiciary in addressing wrongful stereotyping in such cases.

### ii. Understanding stereotypes, stereotyping, their links to human rights and the role of the judiciary

Gender stereotype is an overarching term that refers to a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively. Gender stereotypes are social and cultural constructions of men and women, due to their different physical, biological, cognitive, sexual and social functions. A **gender stereotype is harmful** when it limits an individual's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans. Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing).<sup>4</sup>

Gender stereotyping is the practice of ascribing attributes, characteristics or roles to individuals, based on their presumed membership in a social group of women or men, and is a significant challenge to the practical realization of human rights.<sup>5</sup> **Gender stereotyping is wrongful** when it results in a violation or violations of human rights and fundamental freedoms. The harm is caused by the *application* of a stereotypical belief to an individual (e.g., through laws and policies that embody a stereotype and result into a violation of human rights) in such a way as to negatively affect the recognition, exercise or enjoyment of their rights and freedoms.<sup>6</sup> In particular, in judicial processes, inferences may be drawn about individuals based on gender and other stereotypes (see Table 1). These inferences are often prejudicial in nature. Although gender stereotypes affect the enjoyment of sexual and reproductive health and rights by women, men, girls, boys and those who identify with other identities, denial and violations of these rights often disproportionately affect women and girls. This is due to deeply entrenched societal values pertaining to women's sexuality and patriarchal concepts of women's roles within the family to reproduction.

To clarify concepts, each subsection below contains a table with illustrative stereotypes and resulting inferences that have manifested in the judicial decisions related to SRHR referenced in

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<sup>2</sup> The paper is based on a desk review of select national, regional and international jurisprudence and related international and regional human rights norms and standards. The jurisdictions covered include national courts (high or constitutional courts), regional human rights courts, and UN and regional quasi-judicial bodies and human rights mechanisms that hear individual complaints. Some relevant collective complaint mechanisms are also covered. The review undertaken is not exhaustive and the cases presented are illustrative.

<sup>3</sup> Sometimes referred to collectively in this paper as 'the judiciary'.

<sup>4</sup> OHCHR, *Gender Stereotyping as a Human Rights Violation: Commissioned Report* (2013), 18.

<sup>5</sup> Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).

<sup>6</sup> OHCHR, *supra* note 4, 19.

the present study. These stereotypes and inferences often overlap and intersect. It is important to note that the listed stereotypes and inferences are examples and are not exhaustive.

**Table 1 - Example of stereotypes, group assumptions and inferences**

Stereotype	Women are emotionally volatile	Women are chaste	Women are primarily destined to be mothers	LGB persons are abnormal or deviant
<b>(Group) assumption</b>	Women are incapable of making rational decisions	Unmarried women should not need access to contraception	Women are more capable care-givers than men	People are in need of protection from LGB persons
<b>Inferences (about an individual)</b>	A woman should not be trusted to make responsible decisions about her own health but should be overseen by her husband, doctor or other authority figure	An unmarried woman seeking access to contraception is promiscuous	Custodial rights should be awarded preferentially to women.	Same-sex conduct should be prohibited

The term **judicial stereotyping** is used in the present report 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 (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes by not challenging stereotyping, for example by lower courts or parties to legal proceedings.<sup>7</sup>

In identifying and addressing stereotypes by lower courts and ensuring that legislation, norms and practices conform to human rights and constitutional guarantees – the judiciary can make a significant contribution to addressing the structural causes of the SRHR violations and make strides towards articulating the relevant State obligations and adopting appropriate, effective and meaningful remedies.<sup>8</sup>

In many of the cases analyzed below, where courts and quasi-judicial bodies have identified and addressed stereotyping related to SRHR, they have done so using medical, public health or other scientific evidence, including social science. They have also ensured that the voices and experiences of those most affected shape the legal or policy response to a particular issue. This is particularly important because one harmful impact of stereotyping is that it “*affects the credibility given to women’s [and other people’s] voices, arguments and testimonies, as parties and witnesses.*”

<sup>7</sup> See generally, OHCHR, *Eliminating Judicial Stereotyping, equal access to justice for women in gender-based violence cases* (2014).

<sup>8</sup> Eva Brems and Alexandra Timmer, *Stereotypes and Human Rights Law* (Intersentia, 2016), 48. National and international courts and quasi-judicial bodies have a critical role to play in safeguarding the enjoyment of SRHR, including through addressing and dismantling harmful gender stereotypes. SRHR, including concerning reproduction, family formation, sexual conduct and gender identity, is grounded in a constellation of human rights guarantees, including the rights to non-discrimination, life; health; freedom from torture and cruel, inhuman or degrading treatment; information, among others. See for instance, Committee on Economic, Social and Cultural Rights, *General Comment No. 22: on the Right to sexual and reproductive health (article 12)* UN Doc. E/C.12/GC/22 (2016), para. 5; OHCHR, Information series on sexual and reproductive health and rights, at <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx> (viewed on 1 August 2018).

*Such stereotyping can cause judges to misinterpret or misapply laws.*"<sup>9</sup> Courts and human rights bodies have recognized how stereotypes lead to stigma and discrimination and have applied general principles of dignity, equality and non-discrimination to address the impact of stereotyping.

While this report places an emphasis on cases where stereotyping has been addressed and human rights protected, examples are also provided of cases where judiciaries have engaged in wrongful stereotyping. Under these circumstances, judges and experts may issue decisions based on their own preconceived beliefs, rather than relevant facts, adopting rigid standards about what they perceive as appropriate behavior and penalizing individuals who do not conform to such stereotypes.<sup>10</sup>

The number of cases or issues brought before courts does not necessarily reflect the full range of discriminatory laws and practices - based on harmful gender stereotypes - that need to be addressed. The scope of this study only encompasses those cases where the attention to stereotypes and stereotyping is explicitly addressed by the court. Furthermore, cases that challenge the constitutionality of discriminatory laws based on stereotypes are usually issued by constitutional courts or international and regional bodies. This means that such cases have to make their way through lower courts and, in the case of international and regional bodies, domestic remedies have to be exhausted.<sup>11</sup> This often demands significant time and human and financial resources, which poses substantial barriers to access such courts and/or bodies, in particular for women, girls and others in marginalized situations, beyond the tremendous obstacles already being faced due to gender stereotypes in and of themselves.<sup>12</sup> Indeed, in some contexts the issues are so controversial, and even criminalized, that fear of exposure, stigmatization and harassment by bringing legal challenges prevents those affected from coming forward. In addition, due to the unwillingness of courts to address these issues, persons may lose faith in the justice system, discouraging them from filing complaints.

OHCHR's report, *Gender Stereotyping as a Human Rights Violation*, provides a detailed analysis of State obligations under various human rights treaties to work towards eliminating gender stereotyping, including by the judiciary.<sup>13</sup> States are required under international human rights law to combat stereotypes and eliminate stereotyping, including gender stereotyping by the judiciary. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) contain express obligations concerning stereotypes and stereotyping<sup>14</sup> and multiple human rights treaty bodies have identified such obligations through their interpretation of the right to non-discrimination and equality, as well as other human rights.<sup>15</sup> Regional human rights instruments also require States Parties to eliminate stereotyping, including stereotyping by judges.<sup>16</sup>

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<sup>9</sup> CEDAW Committee, *General Recommendation No. 33: on women's access to justice*, UN Doc. CEDAW/C/GC/33 (2015), para. 26.

<sup>10</sup> *Ibid.*

<sup>11</sup> See e.g., Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. A/RES/54/4 (entered into force 22 Dec. 2000), art. 4.1.

<sup>12</sup> CEDAW Committee, *supra* note 9, paras. 8, 17 (a), 36-37.

<sup>13</sup> OHCHR, *supra* note 4, 20-43.

<sup>14</sup> 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), Art. 5 (a) (CEDAW); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Art. 8.1 (b) (CRPD).

<sup>15</sup> See for instance, CEDAW Committee, *General Recommendation No. 33*, *supra* note 9, para. 8; Committee on the Rights of the Child (CRC Committee), *General Comment No. 20: on the implementation of the rights of the child during adolescence* (2016), para. 28; Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 3: on women and girls with disabilities* (2016): paras. 8, 17(e), 47.

<sup>16</sup> OHCHR, *supra* note 4.

These obligations apply to all branches of government, including the judicial branch, and their effect is that judges must<sup>17</sup>:

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

In addition, it should also be emphasized that judicial stereotyping may contravene the rights to equality before courts and tribunals and to a fair trial. The International Covenant on Civil and Political Rights (ICCPR) emphasizes that “*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”<sup>18</sup> There are no exceptions to this requirement and there must be a separation of powers between the judiciary and the executive or legislature with functions clearly distinguished.

## II. Gender stereotypes / stereotyping and sexual and reproductive health and rights

### i. Stereotypes related to reproduction

Women, as well as gender non-conforming individuals, have faced particularly pervasive and persistent obstacles in the exercise of their SRHR because of strong stereotypes about sexuality, pregnancy and motherhood.<sup>19</sup> These stereotypes are compounded by beliefs around other characteristics, such as age, HIV status, ethnicity, and disability to the detriment of specific groups of women. CEDAW has recognized that “*gender stereotypes may impact women’s capacity to make free and informed decisions and choices about their health care, sexuality and reproduction and, in turn, also impact on their autonomy to determine their own roles in society.*”<sup>20</sup>

**Table 2 - Common stereotypes related to reproduction and resulting inferences that undermine human rights**

Stereotype	Inference examples
<b>Women and adolescent girls are emotionally volatile and incapable of making rational</b>	➤ Access to sexual and reproductive health services requires the consent of a third party, such as from their husbands, parents or guardians

<sup>17</sup> 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.

<sup>18</sup> International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 1057 UNTC 407 (entered into force 23 March 1976), Article 14 (ICCPR); and 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; see also article 15(1) of CEDAW, article 12 of CPRD, and the Basic Principles on the Independence of the Judiciary (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. For a deeper analysis on the linkage to judicial stereotyping, see OHCHR, *supra* note 7.

<sup>19</sup> Rebecca J. Cook and Simone Cusack, *supra* note 5, 34.

<sup>20</sup> CEDAW Committee, Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/OP.8/PHL/1 (2014) para.42.

decisions about their sexual and reproductive lives	<ul style="list-style-type: none"> <li>➤ Doctors and other medical professions are justified in making decisions for women without their informed consent (“medical paternalism”)</li> <li>➤ Providing adolescents with confidential information and services about sexual and reproductive health will lead them to be irresponsible</li> </ul>
Trans people are abnormal, deviant or medically ill	<ul style="list-style-type: none"> <li>➤ Trans people should be sterilized to prevent them from reproducing</li> </ul>
Women’s natural role in society is to reproduce and be a mother	<ul style="list-style-type: none"> <li>➤ Women should carry a pregnancy to term at all costs, including if it is harmful to their health and life; they should prioritize protection of the fetus in all instances</li> <li>➤ Married women should not use contraception</li> </ul>
Women should be chaste	<ul style="list-style-type: none"> <li>➤ Unmarried women and adolescent girls should be denied access to contraception information and services to prevent their promiscuity</li> </ul>
Women living with HIV are promiscuous or drug users, and thus irresponsible	<ul style="list-style-type: none"> <li>➤ Women living with HIV should not raise families and thus, should be sterilized</li> </ul>
Women with disabilities are asexual, sexually inactive or oversexual, are incapable of understanding the responsibilities of being a parent, cannot provide independent consent to sexual and reproductive health services, and need to be protected	<ul style="list-style-type: none"> <li>➤ Women with disabilities should be sterilized, including to protect them from the repercussions of sexual violence</li> </ul>
Roma women are irresponsible and promiscuous, “fertile” and unable to make informed decisions about their reproduction	<ul style="list-style-type: none"> <li>➤ Roma women should be sterilized</li> </ul>
Women living in poverty are irresponsible and likely to abuse social services	<ul style="list-style-type: none"> <li>➤ Women living in poverty should be treated with suspicion by health service providers</li> </ul>

The notion that women and adolescent girls are unable to make rational decisions about their sexual and reproductive lives often underpin requirements that they seek **third-party consent**, such as from their husbands, parents or guardians, in order to access sexual and reproductive health services. These requirements have regularly been highlighted as violations of human rights, particularly as they often apply only to women, constituting a form of discrimination,<sup>21</sup> but also

<sup>21</sup> CEDAW Committee, *General Recommendation 24: on women’s health*, UN Doc. A/54/38/Rev.1, chap. I, para 11 (“It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”). The CEDAW Committee has consistently condemned requirements for spousal consent in order for women to access health services. Related to this, a series of judgments from the now-defunct European Commission of Human Rights, claims on the rights of men (fathers) in relation to fetuses when women sought to terminate their pregnancies (to require their consent) were rejected on the basis of women’s pregnancy-related privacy rights because a

because they are a barrier to accessing health services and thus infringe the right to health, particularly for women and adolescents.<sup>22</sup>

Courts and international human rights bodies have recognized that adolescents, especially adolescent girls, face compounded harmful stereotypes based on age suggesting that they are too immature and do not have the capacity to make responsible and informed decisions and therefore must be protected from engaging in sexual activity.<sup>23</sup> In this context, judicial bodies and human rights bodies have condemned blanket parental consent or notification requirements which do not consider the evolving capacity of the child to make decisions and thus deny adolescents the right to make autonomous and confidential choices regarding their health.<sup>24</sup>

The *Gillick* case involved a United Kingdom health and social security departmental circular advising doctors on the provision of contraception to minors. The circular stated that the prescription of contraception was a matter for the doctor's discretion and that it could be prescribed to those under 16 without parental consent. A mother with five daughters under the age of 16 sought a declaration that it would be unlawful for a doctor to prescribe contraceptives to girls under 16 without the knowledge or consent of the parent. The complainant argued, in part, that the confidential provision of contraceptives for a girl under 16 would encourage participation by the girl in sexual intercourse and this practice offends basic principles of morality and religion.

The House of Lords recognized that a girl under 16 does not lack the power to give valid consent to contraceptive advice or treatment, merely on account of her age and observed,

*“[t]he truth may well be that the rights of parents and children in this sensitive area are better protected by the professional standards of the medical profession than by “a priori” legal lines of division between capacity and lack of capacity to consent since any such general dividing line is sure to produce in some cases injustice, hardship, and injury to health” ... [It held that] “the law [is] in line with social experience, which is that many girls are fully able to make sensible decisions about many matters before they reach the age of 16.”*<sup>25</sup>

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pregnant woman is “*the person primarily concerned by the pregnancy and its continuation or termination*”, see: *R.H. v. Norway*, Decision on Admissibility, Application No. 17004/90 (European Commission on Human Rights, 19 May 1992), para. 4; *Paton v. United Kingdom*, Application No. 8317/78 (13 May 1980) (European Commission on Human Rights); *R.H. v. Norway*, Decision on Admissibility, Application No. 17004/90 (European Commission on Human Rights, 19 May 1992); and generally, *Boso v. Italy*, Application No. 50490/99 (European Commission on Human Rights, September 2002).

<sup>22</sup> CEDAW Committee, *ibid.*, para 14; CRC Committee, *General Comment 4: on adolescent health and development*, UN Doc. CRC/GC/2003/4, paras 9, 11, 28; CESCR Committee, *General Comment 22, on the right to sexual and reproductive health*, UN Doc. E/C.12/GC/22, para 41.

<sup>23</sup> See section below on adolescent sexual activity

<sup>24</sup> For example, see Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/HRC/32/32 (2016), paras. 57, 59-60, 113; CESCR Committee, *General Comment No. 22, supra* note 22, para 30; CRC Committee, *General Comment No. 15: on the right of the child to the highest attainable standard of health*, UN Doc. CRC/C/GC/15 (2013), paras. 31, 56; *Gillick v. West Norfolk & Wisbeck Area Health Authority and another* [1986] 1 AC 112 (United Kingdom, House of Lords); *Christian Lawyers Association v. National Minister of Health and other*, Case No: 7728/2000, 2004 (10) BCLR 1086 (T) (South Africa, High Court, Transvaal Provincial Division).

<sup>25</sup> *Gillick v. West Norfolk & Wisbeck Area Health Authority and another* [1986] 1 AC 112 (England and Wales, House of Lords).

In a case brought before the High Court Transvaal Division in South Africa, *Christian Lawyers Association v National Minister of Health and Others*,<sup>26</sup> the applicants complained that the provisions of the abortion law which allow abortion for adolescents under 18 without ‘parental consent or control’ violated Constitutional rights to family and parental care, to be free from maltreatment, neglect and abuse, and to the best interests of the child. They argued that pregnant girls are unable to make an informed decision regarding terminating their pregnancy without parental consent or control as they are unable to “*appreciate the need for and value of parental care*” and to give consent, which serves their best interest.<sup>27</sup> The Court’s rejection of this argument was important in challenging stereotypes about adolescents’ decision-making capacity as inconsistent with their constitutional rights, including the rights to make decisions concerning reproduction and to control over one’s body.<sup>28</sup>

*“The argument that the provisions of the Act which are under attack are unconstitutional because they do not cater for the interest of the child is unsustainable. The legislative choice opted for in the Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities.”<sup>29</sup>*

In contrast, in the 2014 case of *Imbong v Ochoa*, the Filipino Supreme Court ruled that all minors must secure parental or guardian consent to access modern contraceptives. The Court declared unconstitutional sections of the reproductive health law that allowed access to contraception without parental consent, declaring these as “*anti-family*.” In asserting the right of parents to control their minor daughters, the case reinforced the stereotype of adolescent girls as incapable of rational decision-making.<sup>30</sup>

Laws criminalizing **abortion** or allowing abortion only in highly restricted circumstances have been highlighted by human rights bodies as constituting discrimination, and in violation of women’s rights to health and privacy.<sup>31</sup> Gender stereotypes about women underpin these laws, particularly notions that women are unable to make their own decisions about reproduction, and their need to be controlled. Additionally, these laws perpetuate and exacerbate the prescriptive, sex-role stereotype that essentializes women as mothers and instrumentalizes them as reproductive vessels by applying the force of the criminal law to those who do not wish to carry a pregnancy to

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<sup>26</sup> *Christian Lawyers Association v. National Minister of Health and other*, Case No: 7728/2000, 2004 (10) BCLR 1086 (T) (South Africa, High Court, Transvaal Provincial Division).

<sup>27</sup> *Ibid.*, 13.

<sup>28</sup> *Ibid.*, 27-28.

<sup>29</sup> *Ibid.*, 26, 56-57.

<sup>30</sup> The court noted that the law “*contains provisions which tend to wreck the family as a solid social institution. It bars the husband and/or the father from participating in the decision making process regarding their common future progeny. It likewise deprives the parents of their authority over their minor daughter simply because she is already a parent or had suffered a miscarriage.*” *James M. Imbong v. Hon. Paquito N. Ochoa, Jr.*, G.R. No. 204819 (2014) (Republic of the Philippines, Supreme Court).

<sup>31</sup> CESCR Committee, *General Comment No. 22*, *supra* note 22, para. 34; Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* (2014), 6. Note that international human rights bodies have characterized laws generally criminalizing abortion as discriminatory and a barrier to women’s access to health care and they have recommended that States remove all punitive provisions for women who have undergone abortion. They have also called on States to liberalize restrictive abortion laws and guarantee women and girls access to safe abortion services and quality post-abortion care and to respect the right of women to make autonomous decisions about their sexual and reproductive health, see again CESCR Committee, *General Comment No. 22*, para. 28; CEDAW Committee, *Concluding Observations on Peru*, UN Doc. CEDAW/C/PER/CO/7-8 (2014), para 36; CEDAW Committee, *Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review* (2014).



term.<sup>32</sup> Laws criminalizing abortion in all or many circumstances also fuel other harmful gender stereotypes, associating any woman who seeks or has received abortion services, or is suspected of having obtained an abortion, with criminal activity and stigmatizing them as “*bad girls*”.<sup>33</sup>

In the 2016 individual complaint before the Human Rights Committee concerning *Mellet v. Ireland*, the petitioner who was carrying a fetus with a fatal impairment was forced to travel abroad to access legal abortion services as a result of Ireland’s restrictive abortion law, under which abortion is permitted only in cases where the woman’s own life is endangered by continued pregnancy. The Human Rights Committee noted the petitioner’s claim that “[Ireland]’s criminalization of abortion subjected [the petitioner] to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination.”<sup>34</sup> Additionally, it found that the petitioner had experienced violations of her rights to freedom from cruel, human and degrading treatment, privacy and non-discrimination on grounds of socio-economic status.<sup>35</sup> Moreover, concurring opinions from several Committee members also found violations based on sex and gender discrimination.<sup>36</sup> One concurring opinion reasoned,

*“an alternative basis for a finding of gender discrimination – that Ireland’s legal regime is based on traditional stereotypes regarding the reproductive role of women, by placing the woman’s reproductive function above her physical and mental health and autonomy .... Indeed, the State’s laws appear to take such stereotypes to an extreme degree where, as here, the author’s pregnancy was nonviable and any claimed purpose of protecting a foetus could have no purchase. Requiring the author to carry a fatally impaired pregnancy to term only underscores the extent to which the State party has prioritized (whether intentionally or unintentionally) the reproductive role of women as mothers, and exposes its claimed justification in this context as a reductio ad absurdum. The Committee has recognized that “[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes” and has admonished States parties to ensure that such attitudes are not used to justify violations of women’s rights. In numerous prior cases, the Committee has invalidated as discriminatory both legislation and practices that reflected gendered stereotypes of women’s social and biological role ... Recognition that differential treatment of women based on gender stereotypes can give rise to gender discrimination is also in accord with the approach of other human rights bodies.”<sup>37</sup>*

The CEDAW Committee, in the individual complaint concerning *L.C. v. Peru*, found that Peru had violated the human rights of a pregnant minor who had been repeatedly sexually assaulted, become pregnant, and was denied legal abortion services. The petitioner had attempted to commit suicide by jumping from a building upon discovering that she was pregnant. However, health care providers delayed necessary spinal surgery to support her recovery due to her pregnancy. As a

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<sup>32</sup> Report of the UN Working Group on the issue of discrimination against women in law and in practice, UN Doc. A/HRC/32/44 (2016).

<sup>33</sup> *Espinoza González v. Peru*, Judgement of November 20, 2014 (Preliminary Objection, Merits, Reparations, and Costs), para. 272 (Inter-American Court of Human Rights).

<sup>34</sup> *Mellet v. Ireland*, Communication No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016), para 7.11 (Human Rights Committee). See also para. 3.19 in which the Committee also notes the extension of this stereotype that “*women should continue their pregnancies regardless of the circumstances, their needs and wishes*”. This finding was reaffirmed in a subsequent case brought before the Human Rights Committee against Ireland concerning the abortion law. *Whelan v. Ireland*, communication No. 2425/2014, UN Doc. CCPR/C/119/D/2425/2014 (2017), para 7.12. (Human Rights Committee).

<sup>35</sup> *Mellet v. Ireland*, *ibid.*, para. 7.11.

<sup>36</sup> *Ibid.*, Annex I, paras 3-5, Annex II, para. 16

<sup>37</sup> *Ibid.*, Annex II, paras 14-15.

result, the petitioner is paralyzed. Although Peruvian law generally criminalizes abortion, it is authorized in limited circumstances if the pregnancy poses a risk to the woman's health, and the petitioner made several requests to undergo an abortion on this basis. The hospital refused to provide her this service. The Committee noted that the decision of medical staff to delay necessary spinal surgery was based on a "*gender stereotype that understands the exercise of a woman's reproductive capacity as a duty rather than a right*" and "*considering her reproductive capacity of greater importance than her human rights*", in violation of her right to non-discrimination, including in the field of health care.<sup>38</sup>

At the regional level, in a series of cases against Poland, the European Court of Human Rights recognized violations of the women's right to private life, among other rights, because Poland had failed to establish an effective mechanism for women's views to be heard and considered in connection with the termination of pregnancy. Notably, the Court found that the petitioners' own decisions and views were not given proper respect in the *Case of Tysiac v. Poland*, where a woman's decision to terminate a pregnancy in order to protect her eyesight conflicted with the views of her doctor. As a result of the denial of abortion, the petitioner faced a serious risk of blindness. The Court found that "*[i]n the absence of any provision for a fair and independent review, given the vulnerability of women in such circumstances doctors would practically always be in a position to impose their views on access to termination, despite the paramount importance their decisions have for a woman's private life.*"<sup>39</sup>

Liiri Oja *et al.* observed that, "*by not identifying and articulating how the procedural obstacles are actually used as mechanisms to enforce and institutionalize ideological barriers to a life-saving service only needed by women, the Court fails to challenge the gender stereotypes underlying the narrative of normative motherhood.*"<sup>40</sup>

In a 2006 case, overturning Colombia's absolute ban on abortion, the Constitutional Court of Colombia relied on the CEDAW Convention to call "*for the elimination of all forms of gender discrimination that stereotype women into child-bearing service roles, inhibiting their ability to make free and informed decisions as to whether and when to found a family.*"<sup>41</sup> Specifically, the Court recognized that women cannot be "*treated as a reproductive instrument for the human race.*

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<sup>38</sup> *L.C. v. Peru*, Communication No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (25 November 2011), para 7.7 (CEDAW).

<sup>39</sup> *Case of Tysiac v. Poland*, Application no. 5410/03, Judgment of 20 March 2007, (European Court of Human Rights), para. 85. In subsequent decisions, it reiterated that "*in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered;*" and that "*[N]o proper respect had been shown for [the applicants'] own decisions and views.*" *P. & S. v. Poland*, Application no. 57375/08 (European Court of Human Rights, 30 October 2012), paras. 30, 58, 99; and *R. R. v. Poland*, Application no. 27617/04 (European Court of Human Rights, 26 May 2011), para. 191; "*Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case.*" *R. R. v. Poland*, Application no. 27617/04 (European Court of Human Rights, 26 May 2011) para 159.

<sup>40</sup> Liiri Oja & Alicia Ely Yamin, "*Woman' in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?*", *Columbia Journal of Gender and Law* 32(1) (2016), 76.

<sup>41</sup> *Women's Link Worldwide, 'C-355/2005: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia'* (2007), 9; Decision C-355-06, Judgement of 10 May 2006 (Colombia Constitutional Court), available at: <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm> (last viewed on 1 August 2018). See also the *Lakshmi Dhikta v. Nepal* case which concerned women's access to affordable abortion services and where the Court found "*if women's reproductive rights are not protected, they may be forced to become pregnant and to continue unwanted pregnancies in which case instead of being respected as rights holders they will be forced to bear the responsibility of human reproduction and transformed into mere instruments for that purpose*", *Lakshmi Dhikta v. Nepal*, Writ No. WO-0757 2067 (2007 AD) (Nepal, Supreme Court).

*The legislature must not impose the role of procreator on a woman against her will.*<sup>42</sup> It further challenged the stereotype that essentializes women as mothers and deprives them of agency in making decisions about their reproductive capacity in opining,

*“The right to be a mother, or in other words, the right to opt for motherhood as a “life choice,” is a decision of the utmost private nature for each woman. ... Therefore, the Constitution does not permit the state, the family, the employer or educational institutions to introduce any regulation or policy that infringes upon the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual.”*<sup>43</sup>

In contrast, in other cases, courts have relied on patriarchal beliefs about the role of women in the family and the stereotype of the women’s natural role in society to reproduce and be a mother. For example, in El Salvador where abortion is criminalized in all circumstances, “Manuela” (a pseudonym), a woman suffering from cancer (advanced Hodgkin’s lymphoma), was convicted of aggravated homicide and sentenced to 30 years in prison after suffering obstetric complications, which were misdiagnosed as attempted abortion.<sup>44</sup> During her trial, the judge referred to Manuela as “easy” because she had conceived outside of wedlock and noted that her “maternal instinct should have prevailed” and that “she should have protected the fetus.”<sup>45</sup>

Discriminatory and harmful stereotypes about sexuality and gender roles operate both to deny women access to contraception, as well as force certain women, and gender non-conforming individuals, to adhere to certain contraceptive methods, including involuntary sterilization.

The sexual stereotype that women should be chaste, and resulting inference that women, particularly unmarried women, who seek contraception are promiscuous, underlies policies and practices which obstruct women’s access to contraception. Additionally, sex and sex-role stereotypes that maintain that a woman’s primary purpose is to reproduce may cause health care providers to impede women’s access to contraception.<sup>46</sup> For certain groups of women and gender non-conforming individuals, harmful stereotypes influence judgments about their fitness or ability to be parents, and result in forced medical interventions in the form of long-acting contraceptive methods or involuntary sterilization. For instance, women with disabilities are stereotyped as incapable of parenting, trans persons are stereotyped as deviant, women living with HIV are stereotyped as irresponsible, and women from certain ethnic minorities or women living in poverty are stereotyped as both irresponsible and prone to abuse in public social services.

The CEDAW Committee addressed grave and systemic human rights violations, caused in part by gender stereotypes, in connection with a *de facto* ban on modern contraception in Manila City, Philippines. In its inquiry report, the CEDAW Committee indicated that the *de facto* ban,

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<sup>42</sup> Women’s Link Worldwide, *ibid.*, 41, 36; *Decision C-355-06*, *ibid.*

<sup>43</sup> Women’s Link Worldwide, *ibid.*

<sup>44</sup> See, e.g., *Case No. 310-2013*, Decision of 28 May 2013 (El Salvador, Supreme Court of Justice, Constitutional Chamber); Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion* (2014), 13; Amnesty International, *On the Brink of Death*, *supra* note 31, 38.

<sup>45</sup> Center for Reproductive Rights, *ibid.*, pp 13, 59; Amnesty International, *On the Brink of Death*, *supra* note 31, p 38.

<sup>46</sup> International Federation of Gynecology and Obstetrics (FIGO), *Ethical Issues in Obstetrics and Gynecology: Harmful Stereotyping of Women in Health Care* (2011), page 29, para. 4.

*“reinforced gender stereotypes prejudicial to women, as they incorporated and conveyed stereotyped images of women’s primary role as child bearers and child rearers, thereby perpetuating discriminatory stereotypes already prevalent in the Filipino society. Such stereotypes further contributed to the belief that it was acceptable to deny women access to modern methods of contraception because of their natural role as mothers and had the effect of impairing the enjoyment by women of their rights under ... the Convention.”*<sup>47</sup>

Cases related to involuntary sterilization reveal compounded stereotypes about certain groups of women, such as Roma women, women living with HIV, women who use drugs, migrant women, women with disabilities, and poor women.<sup>48</sup> For instance, the Inter-American Court of Human Rights, in *I.V. v. Bolivia*, its first case concerning involuntary sterilization, found a violation of the right to be free from discrimination based on the underlying gender stereotypes which led to sterilization of the petitioner without her informed consent.<sup>49</sup> In 2000, I.V., a Peruvian migrant in Bolivia, went to a public hospital to deliver her child. During her caesarean section, I.V. was sterilized without her consent. She was only informed that doctors had performed a tubal ligation several days later. The Court observed that the process of informed decision-making operated under the harmful stereotype that I.V., as a woman, was unable to make such decisions responsibly, leading to *“an unjustified paternalistic medical intervention”* restricting her autonomy and freedom.<sup>50</sup> The Court thus found a violation of the right to non-discrimination because she was a woman.<sup>51</sup> It also recognized the particular vulnerability to forced sterilization facing certain women based on other characteristics, such as socioeconomic status, race, disability, or living with HIV.<sup>52</sup>

In a decision from the Supreme Court of Namibia in connection with the involuntary sterilization of three HIV-positive women, the Court implicitly recognized the role of compounded gender stereotypes in the failure to appropriately obtain informed consent. Stereotypes that women living with HIV are promiscuous or are drug users, and are thus, “irresponsible” lead to the inference that they are unable to be good parents. While the Court did not frame the facts of this case in terms of gender stereotyping, it explained the role of “medical paternalism” whereby doctors substitute their own stereotyped beliefs about certain women to bypass their right to informed consent, noting that,

*“There can be no place in this day and age for medical paternalism when it comes to the important moment of deciding whether or not to undergo a sterilisation procedure. The principles of individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law. These principles require that in deciding whether or not to undergo an elective procedure, the patient must have the final word.”*<sup>53</sup>

Harmful gender stereotypes about Roma women, depicted for instance as “fertile” and “promiscuous”,<sup>54</sup> also increase their vulnerability to involuntary sterilization. The European Court of Human Rights, in the case of *V.C. v. Slovakia*, noted that,

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<sup>47</sup> CEDAW Committee, *Philippines inquiry report*, *supra* note 20, para. 43.

<sup>48</sup> See generally, WHO, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (2014).

<sup>49</sup> *I.V. v. Bolivia*, Judgment 30 November 2016 (Inter American Court of Human Rights).

<sup>50</sup> *Ibid.*, para. 246.

<sup>51</sup> *Ibid.*, para. 249.

<sup>52</sup> *Ibid.*, paras. 247-248.

<sup>53</sup> *Government of the Republic of Namibia v. LM and Others*, Case No. SA 49/2012, [2014] NASC 19 (3 November 2014) (Namibia, Supreme Court), para. 106 and note also para. 105, “[s]he was, for example, described by one of the doctors as being ‘unreliable concerning her life care’ and that it was felt that she is ‘best helped if she never falls pregnant again.’”

<sup>54</sup> Working Group on Discrimination against Women, *supra* note 32, para. 57.

*“the reference in the record to the applicant’s ethnic origin without further details being given indicates ... a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed. Certainly, it does not suggest that special care was to be, or was in fact, exercised to ensure that the full and informed consent of such a patient was obtained before any sterilisation was contemplated, or that the patient was involved in the decision-making process to a degree permitting her interests to be effectively protected.”*<sup>55</sup>

The Court held that failing to secure the patients’ informed consent to sterilization amounted to a violation of their rights to private life and to freedom from inhuman or degrading treatment. As with the case from Namibia above, the court pointed to “medical paternalism” that resulted in the human rights violations, “[t]he way in which the hospital staff acted was paternalistic, since, in practice, the applicant was not offered any option but to agree to the procedure which the doctors considered appropriate...”<sup>56</sup>

Stereotypes around the sexuality of persons with disabilities, particularly women and girls but also men and boys, abound. They are often perceived as asexual, sexually inactive or ‘oversexual’, as well as unfit to be parents. Women with intellectual disabilities are often viewed as if they have no control, or should have no control over their sexual and reproductive choices; that they are not capable of consenting to sex.<sup>57</sup> This results in practices of forced sterilization or forced abortions, based on paternalistic justifications that it is “for their own good.”<sup>58</sup> These practices are often also conducted on a purported precautionary basis because of vulnerability to sexual abuse or avoiding the distress of having children removed from their care.<sup>59</sup>

Human rights norms and standards clearly protect the right of persons with disabilities to make decisions about their fertility and sexuality, and to be provided with the information and support to do so.<sup>60</sup> Some states, through their national civil (private) law, allow for full or partial guardianship, whereby guardians take decisions on behalf of persons with disabilities.<sup>61</sup> Some courts have started to challenge such laws under norms and standards set by the Convention on the Rights of Persons with Disabilities (CRPD), for example the Colombian Constitutional Court, in considering a constitutional case regarding a mother providing consent to a subdermal contraceptive implant, and later sterilization on behalf of an underage girl with intellectual disability,

*“[Ensuring the exercise of free and informed consent by the person concerned] requires demolishing prejudices against persons with disabilities, particularly against women and*

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<sup>55</sup> *V.C. v. Slovakia*, Application No. 18968/07, Judgment of 8 November 2011 (European Court of Human Rights), para. 151.

<sup>56</sup> *Ibid.*, para. 114; see also *N.B. v. Slovakia*, Application No. 29518/10, Judgment of 12 June 2012, (European Court of Human Rights).

<sup>57</sup> CRPD Committee, *General Comment No. 3*, *supra* note 15, para. 38; CRPD Committee, *General Comment No. 1: on Article 12: Equal recognition before the law*, UN Doc. CRPD/C/GC/1 (2014), para. 35.

<sup>58</sup> Interagency statement on involuntary sterilization, *supra* note 48, 5.

<sup>59</sup> *Ibid.*, 6, “sterilization does not protect against sexual abuse, and does not remove the obligation to provide protection from abuse ... Persons with disabilities should be given necessary support to look after children.”

<sup>60</sup> Convention on the Rights of Persons with Disabilities, Articles 23 and 25; CRPD Committee, *General Comment No. 3*, *supra* note 15, paras. 23, 44, 64(b); CRPD Committee, *General Comment No. 1*, *supra* note 57, para. 41. See also, The International Federation of Gynecology and Obstetrics (FIGO), *Female Contraceptive Sterilization* (2011) states that “Only women themselves can give ethically valid consent to their own sterilization. Family members including husbands, parents, legal guardians, medical practitioners and, for instance, government or other public officers, cannot consent on any woman’s or girl’s behalf.” para. 7, page 123.

<sup>61</sup> Interagency statement on involuntary sterilization, *supra* note 48, 6.

*girls. As expressed by this court, the main barrier to overcome is the persistent pattern of discrimination that, on the basis of stereotypes, challenge the capacity of the person concerned to self-determine themselves sexually and reproductively. The elimination of these stereotypes should lead to the elimination of any substituted provision of consent.”*<sup>62</sup>

The Court based its decision, in part, on the CRPD and the interpretation made by the Committee on the Rights of Persons with Disabilities of its article 12, which recognizes the right of women and girls to take decisions over their sexual and reproductive health and rights, the latter according to their evolving capacities.

*“[This Court] understands, consequently, that by ratifying the CRPD Colombia recognized the legal capacity of all persons with disabilities, on an equal basis with others, in all areas of their lives and that it implies eliminating all substituted decision making and to provide, instead, reasonable accommodation, support and safeguards to take their own decisions autonomously.”*<sup>63</sup>

In many countries, stereotypes about transgender people pathologize them as mentally ill, thereby suggesting that those who seek to change their gender are abnormal and in need of correction. These harmful gender stereotypes view this behavior as deviant, and in need of “normalization” because it contravenes heteronormative gender binaries and norms of procreation. This leads to the inference that trans persons disrupt the “natural” order of the family and underpins laws requiring them to undergo gender affirming surgeries or hormone treatments that result in sterilization in order to have their gender legally recognized or to undergo gender reassignment surgeries.<sup>64</sup>

Courts and international human rights bodies and experts have condemned these requirements and recognized that they violate the human rights of transgender people.<sup>65</sup> In a 2012 ruling, Sweden’s Administrative Court of Appeal found that the sterilization requirement was a violation of a person’s integrity and amounted to discrimination under the European Convention on Human Rights, noting that,

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<sup>62</sup> Decision T-573, para. 76, Judgement of 19 October 2016 (Colombia Constitutional Court).

<sup>63</sup> Ibid.

<sup>64</sup> Open Society Foundations, *License To Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People* (2014), 12. Stereotypes about gender roles within families have also been identified in cases pertaining to custody and adoption of children in the case of same-sex couples. For instance, in the 2012 case of *Atala Riffo and Daughters v. Chile*, the Inter-American Court found that the decision of the Supreme Court of Chile to deny a woman custody of her children, because her living with her same-sex partner relied on harmful stereotypes, noting, “the language used by the Supreme Court of Chile regarding the girls’ alleged need to grow up in a “normally structured family that is appreciated within its social environment,” and not in an “exceptional family”, reflects a limited, stereotyped perception of the concept of family, which has no basis in the Convention, since there is no specific model of family (the “traditional family”).” *Case of Atala Riffo and Daughters v. Chile*, Judgement of 24 February 2012 (Merits, Reparations and Costs) (Inter-American Court of Human Rights), para 145. Similarly, in a case allowing same-sex couples to adopt in South Africa, the Court acknowledged that the prohibition of adoption by same-sex couples “perpetuates the fiction or myth of family homogeneity based on the one mother/one father model ... [and] ignores developments that have taken place in the country, including the adoption of the Constitution.” *Du Toit and Another v. Minister of Welfare and Population Development and Others*, 2003 (2) SA 198 (CC), para. 28 (South Africa, Constitutional Court).

<sup>65</sup> See e.g., CESCR Committee, *General Comment No. 22*, supra note 22, para. 58; Dainius Pūras, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, supra note 24, para. 94; Juan Méndez, *Report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment*, UN Doc. A/HRC/22/53 (2013), para. 78; Council of Europe, Commissioner for Human Rights, *Human Rights and Gender Identity, Issue Paper*, COMDH/Issue Paper (2009), 2.

*“The reason given for the sterilisation requirement (...) is to eliminate the risk for the confusion in family relations which would arise if a transsexual person who has had their legal gender changed had children of their own.”*

But that,

*“Sterilisation involves a very intrusive and irreversible bodily intervention for the individual. To justify the sterilisation requirement solely by reason of “good order” in family relations is difficult to align with the nature of the intervention and the current values prevailing in today’s society.”<sup>66</sup>*

In Germany, a 2011 Federal Constitutional Court judgment overturned the requirement that transgender people prove permanent sterility.<sup>67</sup> It indicated that, *“it can no longer be assumed that existence of a sincerely and irrevocably felt transsexuality can be solely ascertained by the fact that the person concerned efforts by all means to correct his sexual organs and characteristics as an error of nature by means of sex transformation.”*<sup>68</sup> The Court then recognized that the requirement to *“undergo sex-adapting surgery leading to infertility ... impair[s] [the] right to sexual self-determination in an unacceptable manner.”*<sup>69</sup>

Finally, while little jurisprudence exists on this issue at the regional human rights and UN levels, in the 2015 European Court of Human Rights case of *YY v. Turkey*, the Court declared the requirement of infertility as a prerequisite to undergo gender reassignment surgery as incompatible with human rights. Although not explicitly recognized by the Court, this decision is important in challenging stereotypes and social norms about the desirability of the reproduction of trans persons, rather than medical evidence, which often underpin such requirements.<sup>70</sup>

Persistent gender stereotypes that depict women as vessels for reproduction and demean them as incompetent decision-makers have fueled laws, policies and practices that deprioritize the health needs of women who are pregnant, subject them to ill-treatment during **pregnancy, delivery and in the post-natal period** and deprive them of their ability to make informed choices in connection with childbirth and control over their bodies. Moreover, these stereotypes, which lead to discrimination, may compound with other stereotypes in connection with race, ethnicity or socio-economic status, to portray these groups of women as irresponsible or likely to abuse public services, resulting in further denials of access to quality care.

For example, the UN Committee on Economic, Social and Cultural Rights has recognized that people living in poverty may face, *“pervasive discrimination, stigmatization and negative*

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<sup>66</sup> *Case No. 1968-12*, Judgment of 19 December 2012, Title 03, Stockholm, Judgment of 19 December 2012 (Sweden, Administrative Court of Appeal).

<sup>67</sup> *Ms. L.I. Freifrau against decisions of the Berlin Court of Appeal, the Berlin Regional Court and the Schöneberg District Court*, Judgment of 11 January 2011, 1 BvR3295/07 (Germany, Federal Constitutional Court), para 66.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, para 55. Similarly, a 2013 decision from the Indian Supreme Court struck down the requirement of forced medical interventions in connection with legal gender recognition. It held that such requirement violated an individual’s dignity, freedom and self-determination. *National Legal Services Authority v. Union of India and others*, WP (Civil) No. 400 of 2012 with WP (Civil) No 604 of 2013, Decision of 15 April 2014 (India, Supreme Court).

<sup>70</sup> The Court held that the principle of respect for the applicant’s physical integrity precluded any obligation to undergo sterilization, *Y.Y. v. Turkey*, Application No. 14793/08, Judgment of 10 March 2015 (European Court of Human Rights).

*stereotyping which can lead to the refusal of, or unequal access to, the same quality of ... health care as others.*"<sup>71</sup>

In a recent decision from the High Court of Kenya in Nairobi, the Court implicitly recognized the bias of health care providers towards two petitioners, who were held in detention in a Maternity Hospital, refused treatment and subjected to ill treatment because of their inability to pay their medical bills, "*on account of their status as poor, socially and economically marginalized women*"<sup>72</sup>. Importantly, the Court referenced the affidavit of one of the doctors at the hospital, in which he "*speaks of managing "stubborn" and "rogue mothers," [as] a clear indication of the attitude that the hospital had towards its patients.*"<sup>73</sup> The Court further elaborated that "[t]he experience of the petitioners ...demonstrated the disdain that those charged with the provisions of the services held towards the poor women."<sup>74</sup> These stereotypes contributed to the verbal abuse the patients experienced and the "deplorable" conditions under which they were held during the period of detention and their denial of medical care.<sup>75</sup>

Additionally, in a 2010 case, the High Court of Delhi recognized the denial of access to maternal health care that poor women experience as a result of harmful stereotypes that depict them as irresponsible and prone to take advantage of the health care system. In this case, Shanti Devi, a migrant woman, was repeatedly denied the medical care, rations and financial support to which she was entitled under various government schemes, which resulted in her humiliation, suffering, and ultimately, death.<sup>76</sup> The Court noted that,

*"An argument was advanced ... by drawing an analogy with the allotment of alternate accommodation to a slum dweller, that there is an apprehension that the benefit under the scheme would be "misused". This Court finds this apprehension to be misplaced. Given the status of the facilities available in Government hospitals and primary health centers across the country, it is very unlikely that any person who can otherwise afford health care is going to "misuse" these facilities. On the other hand, when it comes to the question of public health, no woman, more so a pregnant woman should be denied on any rational basis facility of treatment at any stage irrespective of her social and economic background. There cannot be a situation where a pregnant woman who is in need of care and assistance is turned away from a Government health facility only on the ground that she has not been able to demonstrate her [below the poverty line] status or her "eligibility"."*<sup>77</sup>

Health care providers have also deprived women of the ability to determine the course of their treatment during childbirth, undermining their autonomy. In this context, women have been subjected to unnecessary and invasive procedures and denied choices about different ways of giving birth.<sup>78</sup> This is underpinned by gender stereotypes about women's inability to make rational decisions, combined with "medical paternalism". Additionally, in this context, health care

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<sup>71</sup> CESCR Committee, *General Comment 20: on non-discrimination in economic, social and cultural rights*, UN Doc E/C.12/GC/20, (2009), para. 35.

<sup>72</sup> *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others*, [2015], Petition No. 562 of 2012, para. 198 (High Court of Kenya at Nairobi (Constitutional and Human Rights Division)).

<sup>73</sup> *Ibid.*, para. 130.

<sup>74</sup> *Ibid.*, para. 187.

<sup>75</sup> *Ibid.*, para. 130.

<sup>76</sup> *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, W.P.(C) 8853/2008 and *Jaitun v. Maternity Home, MCD, Jangpura & Others*, W.P. No. 10700/2009 (High Court of Delhi, 2010).

<sup>77</sup> *Ibid.*, para. 48.

<sup>78</sup> For example, see Citizen, Democracy and Accountability, *Women – Mothers – Bodies: Women's Human Rights in Obstetric Care in Healthcare Facilities in Slovakia* (2015), 189; See also, Amnesty International, *She is not a criminal: the impact of Ireland's Abortion Law* (2015), 47.



providers often do not seek women's informed consent to such interventions, substituting their beliefs about the best course of treatment for those of the women.<sup>79</sup>

Courts and human rights bodies and experts are increasingly starting to address the unnecessary and involuntary childbirth procedures, as a human rights concern.<sup>80</sup> They have called on states to respect women's choice to home deliveries and appropriately regulate birthing facilities, as a matter of ensuring women's autonomy, privacy, and human dignity.<sup>81</sup> In the 2010 case of *Ternovsky v. Hungary*, the European Court of Human Rights recognized that Hungary's lack of comprehensive and effective regulation of home birth, which exposed health care professionals who performed home births to the risk of prosecution, amounted to a violation of the right to private life because it effectively denied the applicant the opportunity to give birth at home.<sup>82</sup> Although not explicitly recognizing stereotypes, the decision by the Court is nonetheless important in challenging stereotypes about women's rationality, and the subsequent inference that they are unable to appreciate the risks in connection with their health care choices, in holding that the woman "is entitled to a legal and institutional environment that enables her choice."<sup>83</sup>

In contrast, the 2015 decision from the Court in the case of *Dubská and Krejzová v. the Czech Republic*, ruled that legislation prohibiting health professionals to assist with home birth did not amount to a violation of the right to private life.<sup>84</sup> As such, the Court implicitly accepted assumptions that privileged the opinions of medical staff over the choices of women, reinforcing prevalent stereotypes in this context.<sup>85</sup> The dissenting opinion noted that the wishes and needs of the woman were not the basis for such regulation, and implicitly recognized the detrimental impact of the majority's ruling by noting that, "[w]hile only relatively few mothers might prefer to give birth at home, I have no reason to doubt that for these women this is a very important matter of personal choice."<sup>86</sup> This case has been referred to the Grand Chamber and is pending.<sup>87</sup>

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<sup>79</sup> Liiri Oja & Alicia Ely Yamin, *supra* note 40, 77.

<sup>80</sup> Bulgarian Helsinki Committee, *Gross Violations against Pregnant Women in Bulgaria*, available at: <http://www.bghelsinki.org/en/news/press/single/gross-rights-violations-against-pregnant-women-bulgaria/> (viewed on 1 August 2018); *Case of Dubská and Krejzová v. the Czech Republic*, Applications nos. 28859/11 and 28473/12, Judgment of 11 December 2014, (European Court of Human Rights), para. 56; *Concluding Observations: Czech Republic*, UN Doc. CEDAW/C/CZE/5 (2010) para. 37; Working Group on Discrimination against Women, *supra* note 32, para. 106.

<sup>81</sup> Working Group on discrimination against women, *ibid.*, para. 106(g).

<sup>82</sup> *Case of Ternovszky v. Hungary*, Application no. 67545/09, Judgment of 14 March 2011 (European Court of Human Rights), para. 26. The Court noted that it "conclude[s] that the matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness. Prospective mothers cannot therefore be considered as freely benefiting from such assistance, since a permanent threat is being posed to health professionals inclined to assist home births by virtue of [a decree "sanction[ing] health professionals who carry out activities within their qualifications in a manner which is incompatible with the law or their licence."

<sup>83</sup> *Ibid.*, para. 24.

<sup>84</sup> *Case of Dubská and Krejzová v. the Czech Republic*, Applications nos. 28859/11 and 28473/12, Judgment of 11 December 2014 (European Court of Human Rights). Although the Court recognized the reports of extensive mistreatment and abuse that women in Czech health facilities experience, including "patronizing behaviour on the part of hospital staff", para. 32, which suggest that they are incapable of making autonomous choices; noted human rights norms and standards calling on the Czech Republic to "consider taking steps to make midwife-assisted childbirth outside hospitals a safe and affordable option for women", para 56; acknowledged that "the majority of the research studies presented to it do not suggest that there is an increased risk for home births compared to births in hospital," para 96, and affirmed that the inability to be assisted by midwives during home birth was an interference with the petitioners' right to private life, it ultimately found that this did not amount to a violation of the right to private life, para 101.

<sup>85</sup> Liiri Oja & Alicia Ely Yamin, *supra* note 40, 78, 80.

<sup>86</sup> *Case of Dubská and Krejzová v. the Czech Republic*, *supra* note 84 (Lemmens, dissenting), para. 4.

<sup>87</sup> *Ibid.*, the case was referred to the Grand Chamber on 1 June 2015, para. 36.

In a 2012 case of *Artavia Murillo et al v. Costa Rica*, the Inter-American Court of Human Rights held that Costa Rica’s ban on in vitro fertilization (IVF) amounted to violations of the rights to privacy, to found a family and to equal protection of the law. The Court extensively recognized that the IVF ban could affect both men and women, but had a disproportionate impact on women, “owing to the existence of stereotypes and prejudices in society.” Defining femininity by motherhood,<sup>88</sup> it recognized the sex-role stereotypes that contribute to this disproportionate impact in observing that “the WHO has indicated that, while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood.”<sup>89</sup> While the Court stressed that these, “gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them,”<sup>90</sup> it recognized them and defined them “in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber’s judgment.”<sup>91</sup> Yet, while the Court refuted the incompatibility of gender stereotypes with the principles of international human rights law, it subsequently relied on “motherhood” in determining violations of the right to private life. Specifically, the Court noted that, “motherhood is an essential part of the free development of a woman’s personality.”<sup>92</sup>

## ii. Stereotypes related to roles within the family, marriage and family relations

Stereotypes related to fixed roles for different individuals in the family are common. Many courts around the world and international human rights bodies have expressed concern regarding “the persistence of deep-rooted and negative patriarchal stereotypes regarding the roles of women and men in the family and in society at large.”<sup>93</sup> International mechanisms have also emphasized that there are various forms of family, depending on cultural, religious, and other contexts.<sup>94</sup> They have also indicated that these and other stereotypes related to marriage and family relations can result in violations of human rights, including the right to non-discrimination and equality between women and men.

**Table 3 - Common stereotypes related family formation and resulting inferences that undermine human rights**

Stereotype	Inference example
<b>Women and adolescent girls are incapable of making rational, informed and independent decisions, and they are in need of protection</b>	➤ Girls should marry someone of their parents’ choosing

<sup>88</sup> *Artavia Murillo et al. v. Costa Rica*, Case No. 12,361, Judgment 28 November 2012 (Inter American Court of Human Rights) para. 294; See also Ciara O’Connell, *Women’s Reproductive Rights and Reparations: Lessons from the Inter-American System of Human Rights*, Inter-American Human Rights Network Workshop, University of Ghent, 30 January 2016, 18.

<sup>89</sup> *Artavia Murillo et al. v. Costa Rica*, *ibid.* para. 296.

<sup>90</sup> *Ibid.*, para. 302.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, para. 143.

<sup>93</sup> Human Rights Committee, *Concluding Observations: Sierra Leone*, UN Doc CCPR/C/SLE/CO/1 (17 April 2014), para. 10; Human Rights Committee, *Concluding Observations: Cape Verde*, UN Doc. CCPR/C/CPV/CO/1 (23 April 2012), para. 8; Human Rights Committee, *Concluding Observations: Kuwait*, UN Doc. CCPR/C/KWT/CO/2 (18 November 2011), para. 8; Human Rights Committee, *Concluding Observations: Armenia*, UN Doc. CCPR/C/ARM/CO/2 (31 August 2012), para. 7; CESCR Committee, *Concluding Observations: Equatorial Guinea*, UN Doc. E/C.12/GNQ/CO/1 (13 December 2012), para. 15; CESCR Committee, *Concluding Observations: Mauritania*, UN Doc. E/C.12/MRT/CO/1 (10 December 2012), para. 10.

<sup>94</sup> See e.g., Working Group on Discrimination against Women in law and in practice, A/HRC/29/40, para. 23; CEDAW *General Recommendation No. 29 on economic consequences of marriage, family relations and their dissolution*, CEDAW/C/GC/29 (2013), paras. 16-24.

	<ul style="list-style-type: none"> <li>➤ Women depend on men for their financial security</li> </ul>
<b>Women are the property of their husbands</b>	<ul style="list-style-type: none"> <li>➤ Women should be sexually available to their husbands, and rape within marriage is not possible</li> <li>➤ Women's and girls' virginity before marriage is highly valued, and thus their sexuality should be controlled</li> </ul>
<b>Girls mature faster than boys</b>	<ul style="list-style-type: none"> <li>➤ Disparate ages for entering into marriage are justified</li> </ul>
<b>Men are irresponsible, promiscuous and incapable of emotionally connecting to their children and taking on caring roles</b>	<ul style="list-style-type: none"> <li>➤ Marriage will protect women from irresponsible and promiscuous men, which will bind them to their family</li> <li>➤ Men should not be given custody of their children or be single parents</li> </ul>

Gender stereotypes have operated to force individuals, particularly girls, into **marriage** without their consent, in violation of their rights.<sup>95</sup> Stereotypical views about women's roles and sexuality contribute to the persistence of child marriage, reinforcing patriarchal systems of control over girls' bodies and lives and entrenching their subordination. Such stereotypes include notions that women and girls are in need of protection from men who are considered promiscuous and irresponsible; that women are dependent on men for their financial security; and that women are the property of men, which justifies control of their sexuality and the primary value placed on their virginity.<sup>96</sup> These stereotypes underlie the pressure on women and girls to get married in many contexts. Additionally, a persistent stereotype that states have used to justify child marriage is that girls are more mature than boys and therefore ready to marry before 18, the usual age of majority.<sup>97</sup>

These stereotypes operate to strip women and girls of agency and to reinforce a view of women and girls as commodities.<sup>98</sup> Such stereotypes are often enshrined in law in the form of legislation

<sup>95</sup> CEDAW Committee and Committee on the Rights of the Child, *Joint General Recommendation No. 31 and No. 18 on harmful practices*, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014), para. 20.

<sup>96</sup> OHCHR, *Preventing and eliminating child, early and forced marriage*, A/HRC/26/22 (2014), paras. 17-20; Center for Reproductive Rights, *Child Marriage in South Asia: International and Constitutional Legal Standards for Promoting Accountability and Change* (2013), 16. Similar stereotypes about both men and women have been relied upon in cases pertaining to same-sex unions. For instance, an analysis of court decisions in the United States denying the right to marry to same-sex couples, demonstrate the reliance of courts on sex-role stereotypes in upholding different sex-marriage requirements, "on the grounds that men and women, simply by virtue of their gender, provide distinct role models for children; that men and women play "opposite" or "complementary" roles within marriage; and that marriage is essential to protect vulnerable women from irresponsible men who, absent the bonds of marriage, would abandon their children." Deborah A. Widiss, Elizabeth Rosenblatt, Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, (2007) 30 *Harvard Journal of Law & Gender*, 463. The High Commissioner for Human Rights has emphasized that States should "provide legal recognition to same-sex couples and their children and ensure that same-sex couples are not discriminated against compared to different-sex couples in similar situations, including with regard to benefits, pensions, taxation and inheritance." OHCHR, *Living Free and Equal* (2016), p. 75.

<sup>97</sup> *Mudzuru v. Minister of Justice*, Const. Application No. 79/14, Judgment No. CCZ 12/2015 (2016) (Zimbabwe, Constitutional Court); *Case No. 541-2006*, Decision of 29 November 2007 (Guatemala, Constitutional Court).

<sup>98</sup> Center for Reproductive Rights, *Child Marriage in South Asia*, *supra* note 96, 16.

that permits marriage before the age of 18, or authorizes a lower ages of marriage for girls.<sup>99</sup> Even in countries in which statutory law bans child marriage, in states with plural legal systems, customary, religious or traditional laws may permit this practice.<sup>100</sup>

Human rights experts and bodies have discussed the role that these stereotypes play in the practice of child marriage, and have recognized this practice as a human rights violation.<sup>101</sup> Notably, they have rejected the justification for child marriage on the basis of the stereotyped notion that “*girls mature faster and are more likely to handle family life at an earlier age than boys*,”<sup>102</sup> explaining that such provisions, “*assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial.*”<sup>103</sup>

In a 2016 case challenging Zimbabwe’s Marriage Act, which authorized girls to marry at the age of 16 with parental, guardian, or judicial consent, whilst boys needed to attain the age of 18, the Court recognized the link between disparate legal ages of marriage for girls and boys and the prevalence of child marriage.<sup>104</sup> The Court found that this act, “*and any law, custom and practice which authorises child marriage is unconstitutional.*”<sup>105</sup> The Court recognized and debunked the stereotypical notions on which the law was based, indicating that, “*the respondents sought to justify marriage under ... the Marriage Act on the ground that a girl physiologically, psychologically and emotionally matures earlier than a boy. The contention is without scientific evidence to support it.*”<sup>106</sup>

Additionally, it invoked human rights principles in debunking this stereotype by elaborating that,

*“It is regrettable that the respondents failed to appreciate that the rationale they advanced in support of the difference in the treatment of girls and boys formalised by the impugned legislation, is the old stereotypical notion that females were destined solely for the home and the rearing of children of the family and that only the males were destined for the market place and the world of ideas ... The contention by the respondents is contrary to the fundamental values of human dignity, gender equality, social justice and freedom which the people of Zimbabwe have committed themselves to uphold and promote through legislation governing the interests of children.”*<sup>107</sup>

Moreover, the Court addressed and refuted another stereotype invoked by the government, that

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<sup>99</sup> *Sapana Pradhan Malla and Others v. Office of Prime Minister and Others*, Special Writ No. 98 of the Year 2062 (2005) (Nepal, Supreme Court Special Bench).

<sup>100</sup> CEDAW Committee and Committee on the Rights of the Child, *supra* note 95, para. 43 (“*In States parties with plural legal systems, even where laws explicitly prohibit harmful practices, prohibition may not be enforced effectively because the existence of customary, traditional or religious laws may actually support those practices.*”).

<sup>101</sup> See, e.g., CESCR Committee, *Concluding Observations: Sri Lanka*, UN Doc. E/C.12/LKA/CO/2-4 (2010), para. 15; CESCR Committee, *Concluding Observations: Chad*, UN Doc. E/C.12/TCD/CO/3 (2009), para. 19; CESCR Committee, *Concluding Observations: Colombia*, UN Doc. E/C.12/COL/CO/5 (2010), para. 18; CESCR Committee, *Concluding Observations: India*: UN Doc. E/C.12/IND/CO/5 (2008), paras. 13, 33; Juan Méndez, *Report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment*, UN Doc. A/HRC/31/57 (2016), para. 58. Article 21(2) of the African Charter on the Rights and Welfare of the Child requires states to prohibit child marriage. Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa also prescribes that the age of marriage is 18.

<sup>102</sup> Human Rights Committee, *Concluding Observations: Cameroon*, UN Doc. CCPR/C/CMR/CO/4 (2010), para. 9.

<sup>103</sup> CEDAW Committee, *General Recommendation No. 21*, UN Doc. A/49/38 at 1 (1994), para. 38.

<sup>104</sup> *Mudzuru v. Minister of Justice*, *supra* note 97.

<sup>105</sup> *Ibid.*, 54.

<sup>106</sup> *Ibid.*, 51.

<sup>107</sup> *Ibid.*, 52.

“men would impregnate girls and not bear the responsibility of having to marry them,” in the absence of a law or custom permitting child marriage.<sup>108</sup> The Court refuted such justifications in ruling that “the circumstance of a girl getting pregnant does not disentitle her from the enjoyment of all the rights of a child enshrined in ... the Constitution.”<sup>109</sup> Moreover, it explicitly disentangled the fact of pregnancy from marriage, and caretaking responsibilities for children from marriage in elaborating that,

*“A girl does not become an adult and therefore eligible for marriage because she has become pregnant ... The effect of the protection under .... the Constitution, is that a girl remains a child regardless of her pregnancy status until she attains the age of 18 years. Whilst she is a child all the fundamental rights of a child protect her from being subjected to any form of marriage.*

*There is a difference between making a man take responsibility for the pregnancy of a girl and the maintenance of the baby once it is born and compelling a girl child to get married because she got pregnant. ... It would, in fact, be a form of abuse of a girl child to compel her to be married because she got pregnant. That in any case cannot happen without a contravention of ... the Constitution. What is clear is that pregnancy can no longer be an excuse for child marriage.”<sup>110</sup>*

In a similar case, the Supreme Court of Nepal in 2006 ordered the amendment of the Marriage Registration Act to ensure consistency and uniformity in age by also relying on scientific evidence to challenge the stereotype that women mature earlier than men,

*“The respondents have failed to give any justification or rational ground for the variance manifest in the legal provision prescribing 22 years for men and 18 years for women. Although the Ministry of Law and Justice had contended ... that the age variance was based on the assumption that women used to become mature earlier than men. However, there was no solid ground to prove that assumption and, therefore, the said assumption could not be deemed as being scientific in itself.”<sup>111</sup>*

In contrast to these decisions, in 2006, Guatemala’s Constitutional Court ruled that the difference in the minimum age of marriage between men (age 16) and women (age 14), with authorization from a parent, guardian or judge, placed men and women on equal footing with respect to their capability to perform the acts and purposes of marriage and was thus not discriminatory.<sup>112</sup>

Stereotypes surrounding gender roles within the family also can influence judicial decisions in the context of **custody of children**. Judges may substitute their perceptions about the need to preserve traditional family structures for consideration of the best interests of the child. For example, sex-role stereotypes that depict women as mothers and care-givers, and fathers as non-nurturing and incapable of caring for children may influence the judiciary, preferencing the award of parental rights to women.

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid., 53.

<sup>111</sup> *Sapana Pradhan Malla and Others v. Office of Prime Minister and Others, Supreme Court of Tibet, 2006*, Special Writ No. 98 of the Year 2062 (2005 A.D) (Supreme Court of Nepal), 42.

<sup>112</sup> *Case No. 541-2006*, Decision of 29 November 2007 (Guatemala, Constitutional Court).

The Inter-American Court of Human Rights has played an important role in identifying judicial stereotypes in this context and has called on states to combat such stereotypes.<sup>113</sup> In the 2012 Inter-American Court of Human Rights case of *Forneron and daughter v. Argentina*,<sup>114</sup> in which the biological mother of a child gave the child up for adoption despite appeals submitted by the biological father to exercise care and custody of the child, the Court found that rejection of the father's claims were based on gender stereotypes about the ability of a man to care for a child. In finding violations of the right to protection of the family, among others rights, it noted,

*"...the determination of the best interests of the child must be made based on an evaluation of the specific conduct of the parents and its negative impact on the well-being and development of the child, if applicable, or on the real and proved, not speculative or imaginary, harm or risk to the well-being of the child. Thus, speculations, presumptions, stereotypes, generalized considerations on the personal characteristics of the parents, or cultural preferences regarding traditional concepts of the family are inadmissible."*<sup>115</sup>

Moreover, the Court found that the lower court's reasons for denying custody to the father, including the purported absence of love between the child's parents, the absence of a "*formal relationship for more than 12 months*" between them, the "*supposed indifference or passivity towards the pregnant woman ... cannot constitute grounds for the judicial authority in question to deny paternity.*"<sup>116</sup> It elaborated that,

*"...these assertions correspond to preconceived ideas about the roles of a man and a woman with regard to certain reproductive processes or functions in relation to a future maternity and paternity. These notions are based on stereotypes indicating the need for eventual ties of affection or a supposed mutual desire to form a family, the presumed importance of the "formality" of the relationship, and the role of the father during pregnancy, who should provide care and attention to the pregnant woman, because if these assumptions do not exist, a lack of capacity or aptness of the father will be presumed as regards his role in relation to the child, or even that the father was not interested in providing care and well-being to the child."*<sup>117</sup>

It additionally recognized that,

*"[t]he considerations of the first instance judge also reveal a preconceived idea of what it is to be a single parent, because Mr. Fornerón's capacity and possibility of fulfilling the role of father was questioned and conditioned to the existence of a wife. The single status of Mr. Fornerón, compared by one of the judges to "the absence of biological family," used as grounds for legally depriving him of performing his role as a father, constitutes the denial of a basic right based on stereotypes about the capacity, qualities or attributes*

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<sup>113</sup> See also at the regional level, *Case of E.B. v. France* (Application no. 43546/02), Final Judgment of 22 January 2008 (European Court of Human Rights, Grand Chamber), para. 96, in which the Court implicitly recognized that stereotypes about sexual orientation and marital status, which maintain that lesbian women cannot be good mothers, significantly contributed to the denial of a woman's application for child custody. See also, Rebecca J. Cook and Simone Cusack, *supra* note 5, 31.

<sup>114</sup> *Case of Fornerón and Daughter v. Argentina*, Judgment of 27 April 2012 (Merits, Reparations and Costs) (Inter-American Court of Human Rights).

<sup>115</sup> *Ibid.*, para. 50.

<sup>116</sup> *Ibid.*, para. 93.

<sup>117</sup> *Ibid.*, para. 94.

required to exercise single parenthood, without considering the specific characteristics and circumstances of the father who wishes, alone, to fulfill his role as a father.”<sup>118</sup>

### iii. Stereotypes related to consensual sexual conduct

Stereotypes in the context of consensual sexual conduct are integrally linked with stereotypes related to traditional family structures, sexuality, reproduction and procreation. Stereotypes that dictate what are acceptable sexual partnerships and acceptable types of sexual conduct can lead to discrimination and inadequate legal protection of rights. These stereotypes privilege male sexuality over female sexuality, sex within marriage over sex outside of marriage, and heterosexuality over homosexuality, stigmatizing consensual sexual relationships and conduct that fall outside these norms.<sup>119</sup>

**Table 4 - Common stereotypes related to consensual sexual conduct and resulting inferences that undermine human rights**

Stereotype	Inference example
<b>Sex must have a procreative function</b>	➤ Sexual activity without the purpose of procreation should be punished
<b>Women are primarily destined to be wives and mothers</b>	➤ Women are the property of their husbands and should be sexually available only to their husbands  ➤ Sexual activity by women outside marriage or committed relationships, or without the purpose of procreation, such as adultery or sexwork, should be punished
<b>Women and adolescent girls are weak, vulnerable and fragile, incapable of making rational decisions</b>	➤ Age of consent laws for girls should be higher than for boys
<b>Women and adolescent girls should be chaste, modest and sexually passive</b>	➤ Women sexworkers are immoral, reckless and untrustworthy
<b>Men’s and adolescent boys sexual urges are biological and uncontrollable</b>	➤ Men should be excused for sexual activity outside marriage or punished less severely than women  ➤ Men’s violence is unavoidable  ➤ Age of consent laws for girls should be higher than for boys
<b>Adolescents are not rational decision makers and do not have the capacity to make decisions about their sexual activity</b>	➤ Rules are needed to prohibit consensual sexual conduct between adolescents

<sup>118</sup> Ibid., para. 96.

<sup>119</sup> Rebecca J. Cook and Simone Cusack, *supra* note 5, 27.

<b>Gay men are promiscuous, perverse, sexual predators, and inherently criminal</b>	<ul style="list-style-type: none"> <li>➤ Children are in need of protection from gay men</li> <li>➤ All men are in need of protection from gay men</li> <li>➤ Gay men have a universal sexual desire for all men</li> </ul>
<b>Same-sex conduct is abnormal, perverse or deviant</b>	<ul style="list-style-type: none"> <li>➤ Same-sex conduct should be prohibited</li> </ul>

In many contexts, **sex outside marriage** is punished, often focused solely on the sexual conduct of the woman involved. Grounded in the sexual stereotype that women ought to be sexually chaste and that they are the sexual property of their husbands, adultery laws evoke numerous human rights concerns. Frequently, these laws are explicitly discriminatory, expressly targeting women and/or providing different punishments for women and men. Other adultery laws are gender neutral, but de facto discrimination remains as the laws are disproportionately enforced against women and girls.<sup>120</sup> In some countries, the crime is severely punished, oftentimes by courts, and may even result in sentences of death by stoning.<sup>121</sup> Overall, these laws tend to interrogate women's behaviour while obscuring or justifying that of their male counterparts, based on sex stereotypes that men's strong sexual urges are biological and uncontrollable.<sup>122</sup>

Courts have found such adultery laws unconstitutional and in violation of international human rights.<sup>123</sup> The Constitutional Court of Uganda, in a decision from 2007, held that the Ugandan Penal Code provision criminalizing adultery violated the rights to equality, dignity and protection from inhuman treatment, implicitly debunking the sexual stereotypes underpinning the law.<sup>124</sup> The law made it an offence for a married woman to have sex with any man whether married or not, but the same law exonerated a married man's conduct if he has sex with an unmarried woman. The Court rejected the State's arguments that the law fostered the sanctity of marriage, was in the public interest, and that dropping the law would encourage immorality and promiscuity, and determined that the law was inconsistent with the constitution.<sup>125</sup>

Persons engaging in sex work, particularly women, are often stereotyped as immoral, reckless, risky and irresponsible, running counter to the sex role stereotype that women should be sexually passive, chaste and modest, and should only have sex within marriage. This stereotype can be

<sup>120</sup> Working Group on Discrimination against Women, *supra* note 32, paras. 76-77; *Background information on the statement issued by the Working Group on Discrimination against Women to repeal laws criminalizing adultery* (2012), [www.ohchr.org/Documents/Issues/Women/WG/BackgroundNoteAdultery2.doc](http://www.ohchr.org/Documents/Issues/Women/WG/BackgroundNoteAdultery2.doc) (viewed 20 October 2018).

<sup>121</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/35/23 (2017), paras. 42, 101(a), 105.

<sup>122</sup> These stereotypes of men and women interplay with the result being that the force of the criminal law mostly falls on women. See *Joint Statement by the United Nations Working Group on discrimination against women in law and in practice* (18 October 2012),

<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E> (viewed 20 October 2018); Working Group on Discrimination against Women, *supra* note 120; Committee against Torture, *Concluding Observations: Yemen*, UN Doc. CAT/C/YEM/CO/2/Rev.1 (2010), para. 24.

<sup>123</sup> *Case No. 936/95*, Decision of 7 March 1996 (Guatemala, Constitutional Court), striking down the Penal Code's punishment of marital infidelity or adultery on the basis both of the Constitution's equality guarantees and human rights treaties including the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>124</sup> *Law Advocacy for Women in Uganda v. Attorney General of Uganda*, Decision of 5 April 2007, Constitutional Court of Uganda, Constitutional Petitions Nos. 13/05 /& 05/06 (2007).

<sup>125</sup> *Ibid.*



further compounded by one's migrant status, gender identity, race or ethnicity.<sup>126</sup> As with adultery, the sex stereotype of men having uncontrollable sexual urges, which lead to sexual stereotypes of men as inherently violent, are also evident in cases relating to sex work. Around the globe, sex workers and people profiled as sex workers are among the most marginalized population groups, facing human rights violations including rape, kidnappings, beatings, murder, arbitrary arrest and detention, forced labor, denial of due process, threats, and extortion, and theft of safe sex materials. These violations are often committed with impunity by both State and non-State actors.<sup>127</sup>

For instance, in 2016 a decision by the Constitutional Court of South Korea noted that “sex trade” “*spreads a decadent, hedonistic culture, which eventually destroys society's overall sound customs and morality in respect to sex.*”<sup>128</sup> This language can reinforce stereotypes about sex-workers. In a case before a High Court in India, the judge reasoned that sex workers are not entitled to the same privacy rights as other individuals, relying on stereotypes about women's sexual activity as primarily destined for marriage and motherhood. He explained that: “*By making her sexual services available for hire to strangers in the market-place, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. It would be undoubtedly correct that this does not strip her of her right to be treated with dignity as a human being and to be respected as a person. But, it does place the prostitute or sex worker far away from the inner sanctum of protected privacy rights.*”<sup>129</sup>

A dissenting opinion in another case in South Africa concerning the criminalization of prostitution identified and countered the stereotype of men as having uncontrollable sexual urges. The judges noted that as prostitutes were overwhelmingly women, “*the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is in itself in conflict with the principle of gender equality*”<sup>130</sup> and that “[i]n terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do.”<sup>131</sup>

At the time of writing, same-sex sexual conduct is criminalized in 72 countries and is punishable by death in eight countries.<sup>132</sup> Jurisprudence around the globe has recognized that criminalization

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<sup>126</sup> See e.g., *Case of B.S. v. Spain*, Application No. 47159708, 24 July 2012 (European Court of Human Rights) (finding Spain violated the rights of an African sex worker working in Spain by not taking into account “the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute”); Amnesty International, *The Human Cost of ‘Crushing’ the Market, Criminalization of Sex Work in Norway* (2016), 87; *Petition for Constitutional Review of the Act on the Punishment of Intermediating in Sex Trade and Associated Acts Article 21 Paragraph 1*, Decision number: 2013 헌가 2 (2013HeonGa2) (2016) (South Korea, Constitutional Court).

<sup>127</sup> Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *Fordham L. J.* 3, 1178, 1180, 1181 (2011); Human Rights Watch, *Off The Streets: Arbitrary Detention And Other Abuses Against Sex Workers In Cambodia* (2010); Human Rights Watch, “Swept Away:” *Abuses Against Sex Workers In China*, 2, 14, 30, 31 (2013); Make The Road New York, *Transgressive Policing: Police Abuse Of Communities Of Color In Jackson Heights*, 4, 5, 12, 13 (2012); Sex Workers Advocacy Network in Central and Eastern Europe and Central Asia, *Arrest the Violence: Human Rights Abuses Against Sex Workers in Central and Eastern Europe and Central Asia*, 11-12, 19-36 (2009).

<sup>128</sup> *Petition for Constitutional Review of the Act on the Punishment of Intermediating in Sex Trade and Associated Acts Article 21 Paragraph 1* Decision number: 2013 헌가 2 (2013HeonGa2) (2016) (South Korea, Constitutional Court).

<sup>129</sup> *Sahyog Mahila Mandal and Anr. Vs. State of Gujarat and Ors*, 18 March 2004, (2004) 2 GLR 1764, para 10.1

<sup>130</sup> *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) (O’Regan and Sachs dissenting), para. 60.

<sup>131</sup> *Ibid.*, para. 64.

<sup>132</sup> *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc. A/HRC/38/43 (2018), paras. 50-51; The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia, A World Survey of Laws: criminalization, protection and recognition* (May 2017).

of **same-sex sexual conduct** between consenting adults violates principles of dignity and the rights to privacy, to liberty and security, and to be free from discrimination, amongst other rights.<sup>133</sup> These courts and human rights bodies have also recognized that the criminalization of same-sex conduct legitimizes prejudice and exposes people to hate crimes, police abuse, torture and family violence, and harms physical and mental health, including hampering efforts to eliminate HIV/AIDS.<sup>134</sup>

Harmful stereotypes underpin laws and policies that criminalize same-sex conduct. These stereotypes are wide in scope and often include the same stereotypes and inferences underlying discriminatory laws and judicial pronouncements governing procreation, marriage and other forms of consensual sexual conduct. These stereotypes label people who engage in same-sex conduct as abnormal, or deviant.<sup>135</sup> Sex role stereotypes that reinforce gender differentiated roles between men and women also contribute to the stigmatization of same-sex sexual conduct by prescribing a natural order of gender relations. Many other harmful stereotypes arise out of the stigma and fear resulting from the clash with this “natural order”, including that gay men are sexually promiscuous, perverse, that they corrupt children, and the stereotype that gay men have some type of universal sexual desire for *all* men.<sup>136</sup>

In *Naz Foundation v. Govt. of NCT of Delhi*, a Delhi High Court found that sexual orientation is included in the prohibited grounds of discrimination and that a 19<sup>th</sup> century colonial era law criminalizing consensual same-sex sexual activity between adults is unconstitutional. In coming to this conclusion, the Court observed:

*“The purpose underlying the fundamental right against sex discrimination is to prevent behavior that treats people differently for reason of not being in conformity concerning*

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<sup>133</sup> OHCHR, *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law* (2012), 30; *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994) (UN Human Rights Committee); *Dudgeon v UK*, Application No. 7525/76, Judgement of 22 October 1981 (European Court of Human Rights); *Norris v. Ireland*, Application No. 10581/83, Judgment of 26 October 1988 (European Court of Human Rights); *Modinos v. Cyprus*, Application No. 15070/89, Judgment of 22 April 1993 (European Court of Human Rights).

<sup>134</sup> OHCHR, *Born Free and Equal*, *ibid.*, 22, 33. For example, in some countries where same-sex sexual conduct is criminalized, men accused of being gay are forced to undergo forced, invasive and degrading procedures, such as anal exams, in order to absolve them of this “crime.” See *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994) (UN Human Rights Committee); *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi); UNAIDS, *The Gap Report* (2014), 207-208.

<sup>135</sup> See e.g. *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi); *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, Decision of 9 October 1998 (6) BCLR 726 (South Africa, Constitutional Court). Courts have also identified this stereotype in connection with cases about same-sex marriage. For instance, in 2006, the South African Supreme Court identified this stereotype and its incompatibility with principles of self-determination and equality in noting that “*The exclusion of same-sex couples from the benefits and responsibilities of marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples ...*” *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), paras. 71-72 (South Africa, Constitutional Court).

<sup>136</sup> Please note that although most of the case law on same-sex sexual conduct described in the present study concerns sexual conduct between consenting men, this does not preclude the occurrence of judicial stereotyping in cases concerning consensual sexual conduct between women or between those who identify with other identities. As mentioned above the present study did not intend to be exhaustive.

*“normal” or “natural” gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgements and generalization about the conduct of either sex.”*<sup>137</sup>

The Court further reasoned that the law was rooted in harmful stereotypes of gay and lesbian people being deviant and perverse, and that it underscored the resulting stigma and prejudice associated with stereotypes which view a whole group of people as criminal:

*“When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalized and turned on itself.”*<sup>138</sup>

In summarizing its decision, the Delhi High Court stressed the importance of upholding the values of equality, tolerance and inclusiveness in society, and not ostracizing persons based on stereotypes:

*“If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.”*<sup>139</sup>

In 1998, the Constitutional Court of South Africa, in finding laws criminalizing same-sex sexual conduct to be unconstitutional, held that even when such laws are not enforced, they promote negative stereotypical attitudes, such as gay men are inherently criminal, which then stigmatizes them and leads to discriminatory conduct in all areas of life, not just in sexual intimacy:

*“Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as ‘unapprehended felons’, thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.”*<sup>140</sup>

And a concurring opinion by Judge Sachs,

*“The selection of issues for investigation must not be selected and treated on the basis of stereotypes and prejudice.”*<sup>141</sup>

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<sup>137</sup> *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi), para. 99. Although this decision was later overturned, the language of the lower court decision is retained here as an example of the judiciary addressing gender stereotypes in this context, see Supreme Court of India (2013), Civil Appellate Jurisdiction, Civil Appeal No. 10972 OF 2013 (Arising out of SLP (C) No. 15436 of 2009), Judgment of 11 December 2013.

<sup>138</sup> *Ibid.*, para. 94.

<sup>139</sup> *Ibid.*, para. 130.

<sup>140</sup> *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, Decision of 9 October 1998 (6) BCLR 726 (South Africa, Constitutional Court), para 23. See also *Norris v. Ireland*, Application No. 10581/83, Judgment of 26 October 1988 (European Court of Human Rights), para. 21, “[o]ne of the effects of the criminal sanction against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals, leading on occasion to depression and the serious consequences which can follow...” (reference to proceedings before the Irish High Court).

<sup>141</sup> *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, *ibid.*, para. 133.

A number of states have passed laws in recent years prohibiting “public promotion of homosexuality” or “homosexual propaganda”, which are discriminatory restrictions on freedom of expression, association and peaceful assembly, including the freedom to seek, receive and impart information and ideas.<sup>142</sup> In other states, restrictions on information are not provided for in by legislation, but exist in practice. These laws and practices restrict information, often evidence-based, about sexual and reproductive health issues and censor discussions of homosexuality in and outside the classroom.<sup>143</sup> Such laws and practices end up perpetuating harmful stereotypes such as that the only normal sexual conduct is heterosexual and that same-sex conduct is mentally and physically harmful.<sup>144</sup> This in turn fuels stigma, motivates further discriminatory laws and policies, and can lead to hate crimes and other attacks against LGBTI people.<sup>145</sup>

The European Committee on Social Rights addressed this issue in a collective complaint against Croatia in 2009. The Committee challenged the State’s failure to institute a mandatory, comprehensive sexuality education program in schools and found the content of existing curricula on the subject<sup>146</sup> to be discriminatory and subjective because it reinforced harmful stereotypes concerning same-sex sexual orientation.<sup>147</sup> The Committee particularly emphasized that the State has a positive obligation to ensure that state-approved sex education is not used as a tool for reinforcing “*demeaning stereotypes and perpetuating forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation.*”<sup>148</sup> It also found that information in Croatian educational materials referring to same-sex conduct as abnormal sexual development and the cause of ‘irregularities in family relations’, as well as characterizing homosexuals as promiscuous and responsible for the spread of AIDS, as “*manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted*” and “*stigmatize homosexuals and are based on negative, distorted, reprehensible and degrading stereotypes... such statements serve to attack human dignity and have no place in sexual and reproductive health education... .*”<sup>149</sup>

Serious barriers continue to exist with respect to enjoyment of SRHR by adolescents, including lack of access to information and services, or conditioning access on the authorization of a parent

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<sup>142</sup> OHCHR, *Living Free & Equal - What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people* (2016), 88-89, 122; United Nations Human Rights Committee, Communication No. 1932/2010, *Irina Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010 (2012).

<sup>143</sup> OHCHR, *Born Free and Equal*, *supra* note 133, 56; Article 19, *Traditional values? Attempts to Censor Sexuality: Homosexual Propaganda Bans, Freedom of Expression and Equality* (2013).

<sup>144</sup> Anand Grover, *Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/66/254 (2011), para. 59.

<sup>145</sup> OHCHR, *Born Free and Equal*, *supra* note 135 and OHCHR, *Living Free and Equal*, *supra* note 142, 55-59.

<sup>146</sup> *Interights v. Croatia*, Decision of 30 March 2009, Complaint No. 45/2007 (European Committee of Social Rights), paras. 45-48. The Committee held that the right to health obligates states to ensure sexual and reproductive health education “*throughout the entire period of schooling*” as part of the mandatory school curriculum. The Committee stated that this curriculum must provide objective, scientifically based and non-discriminatory sex education without “*censoring, withholding or intentionally misrepresenting information.*” It added that sex education must not only address the biological functions of sexuality but also its social and cultural aspects. The Committee specifically noted that sex education must be aimed at “*developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behavior.*”

<sup>147</sup> *Ibid.*, para. 64, 66. The discrimination was found in relation with Art.11 (2) of the European Social Charter (revised) (the right to protection of health).

<sup>148</sup> *Ibid.*, para. 61.

<sup>149</sup> *Ibid.*, para. 60.

or guardian.<sup>150</sup> Human rights bodies have regularly pointed out how denial of access to sexual and reproductive health information and services has a serious impact not only on the right to health of adolescents, but also on their enjoyment of multiple other rights including related to bodily integrity and education. These human rights concerns are integrally related to legal frameworks which take inadequate account of the principle of “evolving capacities of the child” and supporting young people to make informed decisions about their sexual lives. Undergirding these laws are gender and age-based stereotypes which assert that adolescents do not have the capacity and judgment to make choices about their sexual activity. These stereotypes are often reflected in age of consent laws, which prohibit adolescents from engaging in a broad range of consensual sexual conduct between themselves.

These laws can also take a more protectionist approach towards adolescent girls -- where they prescribe higher ages of consent for girls than boys. Underlying these approaches are stereotypical notions of proper sexual conduct by girls, or sexual stereotypes, that girls should be chaste and virgins, with their sexuality reserved for committed relationships and marriage. These stereotypes play out in relation to the sex and sex role stereotypes of boys as virile and aggressive and unable to control their sexual urges. Moreover, the stereotype maintains that adolescent girls are particularly vulnerable because they are emotionally weak.

International and national courts have reviewed challenges to such laws and the reasonableness and effectiveness of their purported aims: protecting children from abuse, delaying sexual debut, preventing teenage pregnancies and/or sexually transmitted infections or even preventing the purported harms of homosexuality. While laws and courts rightfully seek to address the high prevalence of sexual abuse against children,<sup>151</sup> courts have found that discriminatory age of consent laws and criminalizing consenting conduct between adolescents are often based on harmful stereotypes, and as such do not reach their purported aim of protection, instead potentially being harmful to their health and development.

The Constitutional Court of South Africa in 2013 held that the justifications of criminal sanctions for children below the age of 16 for consensual sexual conduct - to deter early sexual intimacy and combat the health risks associated therewith – are based on harmful stereotypes concerning proper conduct of adolescents and their inability to make healthy decisions about their sexual activity.<sup>152</sup> The Court found that this led to a misguided protectionist approach that is not based on scientific evidence, but to the contrary, is actually harmful to healthy sexual development of adolescents and “constitute(s) a deep encroachment on the rights to human dignity and privacy, as well as the best-interests [of the child] principle.”<sup>153</sup> The Court continued, “it strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, and yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.”<sup>154</sup>

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<sup>150</sup> Committee on the Rights of the Child, *General Comment No. 20*, *supra* note 15; OHCHR, *Information series on sexual and reproductive health and rights*, *supra* note 8, on “Adolescents”.

<sup>151</sup> UNICEF, *Hidden in Plain Sight: A statistical analysis of violence against children* (2014).

<sup>152</sup> *Teddy Bear Clinic for Abused Children and RAPCAN v. Minister of Justice and Constitutional Development and the National Director of Public Prosecutions*, Case CCT/12/13, [2013] ZACC 35 (South Africa, Constitutional Court), para 3. The Court made clear that this case was not about whether children should or should not engage in sexual conduct and not about whether Parliament can set a minimum age for consensual sexual conduct.

<sup>153</sup> *Ibid.*, para. 82.

<sup>154</sup> *Ibid.*, para. 79.

The Court rejected the state's justifications that the law intends to protect and promote the quality of life of adolescents<sup>155</sup> and held that,

*“It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one’s consensual sexual choices are not respected by society but are criminalised, one’s innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact have a severe impact on the social lives and dignity of those targeted...There can be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents...therefore, the stigma attached to adolescents by the impugned provisions is manifest.”*<sup>156</sup>

In some jurisdictions, different ages of consent for homosexual and heterosexual relationships are codified in the law. Human rights bodies have pointed out that differing ages of consent are incompatible with human rights obligations; constituting discrimination on the basis of sexual orientation.<sup>157</sup> Such laws can expose adolescents engaging in same-sex conduct to increased risks of punishment, as well as contributing to increased stigma and prejudice against lesbian, gay and bisexual people more generally. Stereotypes driving such laws include that persons engaged in same-sex conduct are abnormal and are dangerous predators, and the inference that adolescents, being at a particularly vulnerable time in their development, must be protected against such conduct. Some of these laws explicitly focus on male same-sex sexual activity, ignoring female same-sex activity. The focus on male activity, as opposed to female activity, reflects the importance placed on preserving stereotypical notions of masculinity.

The Austrian penal code, later found by the European Court of Human Rights to be in violation of the European Convention on Human Rights and subsequently amended, had higher ages of consent for adolescent sexual conduct with adult men, than adolescent females did with either adult men or women. The Austrian Constitutional Court found the law to be compatible with the principle of equality. It justified this differentiation based on “*expert opinions*“ which supported stereotypical assumptions about homosexual conduct suggesting that such behavior inhibits the normal sexual development of young men.<sup>158</sup>

*“The criminal provision which has been challenged is included in the group of acts considered unlawful in order to protect - to an extent thought to be unavoidable - a young, maturing person from developing sexually in the wrong way. (‘Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ...’ Pallin in*

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<sup>155</sup> Ibid., para 53.

<sup>156</sup> Ibid., paras. 55. Note: the case does not concern imposing criminal liability on an adult for engaging in consensual conduct with an adolescent (paras. 107 and 113).

<sup>157</sup> Committee on the Rights of the Child, *Concluding observations on Chile*, CRC/C/CHL/CO/3, para. 29; *Isle of Man, United Kingdom*, CRC/C/15/Add.134, para. 22; *Austria* CCPR/C/79/Add.103, para. 13. See also OHCHR, *Born Free and Equal*, supra note 133, 32.

<sup>158</sup> *S.L. v. Austria*, Application no. 45330/99, Judgment of 9 January 2003 (European Court of Human Rights), para.17. The Austrian Constitutional Court found the law compatible with principle of equality because, according to “*authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males’ ... This conclusion was also based on their [the legislature’s] views of morality...we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible ...*”

*Foregger/Nowakowski* (publishers), Vienna commentary to the Criminal Code, 1980, para. 1 on Article 209 ...).”<sup>159</sup>

The European Court of Human Rights in *S.L. v. Austria*, held,

*“To the extent that Article 209 of the [Austrian] Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour”*<sup>160</sup>

The **stereotype of women as primarily destined to be mothers and care-givers** was a central concern in the 2017 case of the European Court of Human Rights, *Carvalho Pinto de Sousa Morais v. Portugal*. The petitioner in this case suffered injuries as a result of medical negligence, including difficulties in having sexual relations. A lower administrative court awarded her damages for these injuries and while this judgment was upheld on appeal on the merits, the Supreme Administrative Court reduced the damages based on several justifications, including *“that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age.”*<sup>161</sup>

The European Court of Human Rights declared this decision to be a violation of the right to non-discrimination, taken in conjunction with the right to privacy. Concluding that the petitioner’s **age and sex** were decisive factors in the decision of the Portuguese court to reduce the damages, the European Court observed: *“The question at issue here is ... the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people.”*<sup>162</sup>

#### iv. Stereotypes related to gender identity

Societal understanding of gender identity has generally fallen within the binaries of male and female. These understandings are based on sex stereotypes of binary physical and biological differences between males and females at birth, and related sex role stereotypes concerning reproduction and family relations. These stereotypes maintain that anyone falling outside the heteronormative binary, whether they are intersex persons, transgender persons or persons engaging in same-sex activity regardless of their gender identity, are outside the ‘natural order’ and are deviant, abnormal and thus, in need of correction.

**Table 5 - Common stereotypes related to gender identity and resulting inferences that undermine human rights**

Stereotype	Inference example

<sup>159</sup> Ibid., para. 17.

<sup>160</sup> Ibid., para. 44.

<sup>161</sup> *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, 25 July 2017 (European Court of Human Rights), para. 16

<sup>162</sup> Ibid. para 52.

## Trans persons are abnormal, perverts or deviant

➤ The gender identity of trans people should not be officially recognized

➤ Changing legal gender identity should be contingent on psychological examinations and medical interventions, including sterilization

A growing number of countries allow for change in one's legal gender on official documents<sup>163</sup> and a few have recently passed laws to allow modification of documentation based solely on self-identification, not requiring any medical interventions or psychological examinations.<sup>164</sup> Most countries, however, do not allow any such changes in documentation, while others only allow legal gender recognition contingent on the fulfillment of invasive requirements, such as sterilization.<sup>165</sup>

Human rights bodies and courts have recognized that denial of legal gender recognition and coercive practices to bring one's identity or sex in line with stereotypes which promote binary biological norms violate the human rights of transgender people and intersex persons.<sup>166</sup> Official documents that reflect one's gender identity are integral to the development of one's personality, and to self-determination, dignity and freedom.<sup>167</sup> They are also crucial when travelling, in the context of employment, housing, health care, and social benefits, and in marriage.<sup>168</sup>

The Supreme Court of Nepal, in *Pant v. Nepal*,<sup>169</sup> in finding that legal gender recognition of a third gender should not be based on any medical (or other) criteria, but rather on self-identification, observed,<sup>170</sup>

*“an old notion considers the people of a third sex other than the men and women as rare and that the people of third sex are sexual perverts. Such old notions have no value if one holds the view that welfare states, dedicated to the human rights should protect the right to life of every citizen.<sup>171</sup> (...) It cannot be said that only because of their behavior, activities and conduct guided by their self-feeling as well as their cross dress other than one imposed by the society according to their gender identity, will pollute the society. This is so, as an individual does not change his own natural identity merely to imitate other people. The medical science has already proved that this is a natural behavior rather than a psychiatric problem. Now, therefore, it is not desirable to cling to the old belief by ignoring the conclusion drawn by science and medicine. Any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view. The fundamental rights of an individual should not be restricted on any*

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<sup>163</sup> Human Rights Watch, *Rights in Transition, Making Legal Recognition for Transgender People a Global Priority* (2016), <https://www.hrw.org/world-report/2016/rights-in-transition> (viewed on 20 October 2016).

<sup>164</sup> *Ibid.*

<sup>165</sup> For more on involuntary sterilization and transgender people, please see section on contraception above.

<sup>166</sup> Besides the section on contraception above, see, e.g., Dainius Pūras, *Special Rapporteur on the right to health*, *supra* note 24, para. 94; Juan Méndez, *Special Rapporteur on torture and other cruel, inhuman and degrading treatment*, *supra* note 101, para. 49; Human Rights Watch, *supra* note 163; Amnesty International, *The State Decides Who I am, Lack of Legal Gender Recognition for Transgender People in Europe* (2014).

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Pant v. Nepal*, Writ No. 917 of the year 2064 BS (2007 AD) (Supreme Court of Nepal).

<sup>170</sup> *Ibid.*, 28.

<sup>171</sup> *Ibid.*, 276.



*grounds such as religion, culture, customs, values and the like.*”<sup>172</sup>

A 2014 Indian Supreme Court judgment holding that transgender persons have a right to legal recognition relied on the Constitutional guarantees of non-discrimination, equality and freedom of expression, and recognized that binary stereotypes permeate society, noting that failure to protect transgender persons “...lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”<sup>173</sup> The Court also provided a history of transgender persons in India who went from being revered in Indian mythology and scriptures to being criminalized under British colonial rule. In uncovering traditions that were more open and tolerant before they were attacked by colonial laws, the Court dispelled stereotypes of transgender persons as being abhorrent to the binary biological and social norms of men and women.

### **III. Strategies for strengthening the role of the judiciary in eliminating stereotyping**

As has been demonstrated throughout this report, several gender stereotypes that can obstruct the full enjoyment of human rights revolve around sex, sex role, and sexual characteristics of men and women. By explicitly identifying, challenging, and awarding effective remedies to address stereotyping, as further discussed below, courts have and can have a critically important transformative impact in promoting equality throughout society.

As recognized by the CEDAW Committee,

*“stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants ... Women 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. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.”*<sup>174</sup>

Addressing judicial stereotyping and strengthening the role of judiciary in dismantling stereotypes is critical to ensuring everyone’s human rights are protected without discrimination, especially women and their enjoyment of sexual and reproductive health and rights. Human rights advocates can play an important role in preventing and challenging wrongful stereotyping, and in ensuring that the judiciary recognizes and addresses the harmful gender stereotypes at play and award appropriate gender-sensitive reparations. This section will draw and expand on the strategies identified in the previous report on this issue, entitled “*Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases*”.

These strategies, “*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.*”<sup>175</sup> Since many of the same stereotypes that underlie SRHR violations also threaten individual’s rights in other areas, it is crucial that advocates pursue these strategies in all areas of their work.

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<sup>172</sup> Ibid., 281.

<sup>173</sup> It also recognized that constitutional protection cannot be restricted to binary genders of male or female, *National Legal Services Authority v Union of India and Others*, Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013 (15 April 2014) (Supreme Court of India), para. 1.

<sup>174</sup> CEDAW Committee, *General Recommendation 33*, *supra* note 9, paras. 26, 28.

<sup>175</sup> Simone Cusack, *supra* note 7, 29.

### **i. Legal, policy and regulatory/guidance reforms**

Laws and policies at the national-level help to guarantee that judicial as well as other State actors comply with the State's international human rights obligations and may also give individuals legal standing and a direct cause of action in order to ensure accountability. In line with their obligation to ensure full respect for the right to equality before courts and to a fair trial, including by a competent, independent and impartial tribunal, State actors, including the judiciary, should give due consideration to whether the reform or creation of specific law, policy, regulatory/guidance frameworks is needed to ensure national protections against judicial stereotyping. Such laws, policies and regulations/guidance may incorporate various types of protections against stereotyping, such as:

- General protections, which protect against all types of stereotyping (including gender stereotyping by judges) given that few laws address judicial stereotyping specifically,
- Subject matter protections that seek to guard against stereotyping in particular areas (such as sexual and reproductive health),
- Group-based protections, which defend against stereotyping of specific populations (such as women or transgender people), and/or,
- Situational protections, which protect against stereotyping in specific situations.

For example, the Canadian Judicial Council's Ethical Principles for Judges, which provides guidance for federally appointed judges, seeks to protect against stereotyping in general, and includes a range of values and principles, including impartiality, that judges should adhere to in the performance of their duties. With respect to stereotyping, the principles indicate that,

*“Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived. Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.”*<sup>176</sup>

With respect to group-based protections, human rights instruments, such as the CEDAW and the CRPD Conventions, protect specific groups, in this case, women and persons with disabilities, and include specific provisions to guard against stereotyping of them. Many countries throughout the world have ratified these treaties. By doing so, they have committed to eliminate stereotyping against women and persons with disabilities. Moreover, national laws and policies provide group-based protections. For example, Malta's Gender Identity, Gender Expression and Sex Characteristics Act<sup>177</sup> protects the rights of trans and intersex persons. This Act accords a right to the recognition of one's gender identity, bodily integrity and physical autonomy; permits gender reassignment based on a person's self-determination; notes that rights, relationships and obligations arising out of marriage shall not be affected by a change in gender identity; and prohibits the requirement of surgical procedures or other medical treatments in connection with gender reassignment. While the legislation does not explicitly reference stereotypes, it implicitly dispels stereotypes that pathologize trans persons, depict them as abnormal, and question their ability to parent and make decisions about their lives.

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<sup>176</sup> Canadian Judicial Council, *Ethical Principles for Judges* (1998), 24.

<sup>177</sup> Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (Malta).

An example of situational protections against stereotyping is Argentina's Law of Humanized Childbirth.<sup>178</sup> Although the law does not explicitly address judicial stereotyping, it establishes the rights of women who receive maternal health care during labor and childbirth in health facilities. Notably, it underscores the importance of women's participation in the decision-making process in connection with childbirth, rather than viewing them as objects of care.<sup>179</sup> It guarantees them the right to be informed about possible medical interventions and to choose among the alternatives, as well as the rights to respectful treatment and individualized medical care that guarantees a woman's privacy and respects her cultural customs.<sup>180</sup> As such, these guarantees debunk stereotypes about the inability of women to make rational decisions and depict them as reproductive vessels.

Relatedly, in 2009, Argentina adopted a law to prevent, sanction and eradicate violence against women, which includes subject matter protections against stereotyping in the area of gender-based violence.<sup>181</sup> Notably, this law also explicitly includes obstetric violence as a form of violence against women, thereby incorporating the situational protections referenced above to prevent obstetric violence and combat the stereotypes that perpetuate the mistreatment and dehumanization of women in this context. Venezuela and Mexico have similarly developed situational protections in the form of specific legislation on childbirth to ensure women's decision-making autonomy in this context<sup>182</sup>, dispelling gender stereotypes. They have also incorporated obstetric violence into legislation regulating violence against women, which provides broader subject matter protections.<sup>183</sup>

## ii. Identify and highlight good practices

Relevant stakeholders should highlight good practice examples of addressing judicial stereotyping, particularly in SRHR cases. Good practice examples of addressing judicial stereotyping might include:

- laws and policies that prohibit and sanction judicial stereotyping,
- rules of evidence and procedure that limit opportunities for stereotyping,
- judgments that challenge judicial stereotyping by lower courts,
- transformative remedies that tackle harmful stereotypes,
- resources and trainings that build judicial capacity to address stereotyping.

These examples provide critical guidance on debunking stereotypes and give judges an important external perspective that can help them identify and overcome stereotypes. This paper highlights many good practice examples of addressing judicial stereotyping in SRHR cases.

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<sup>178</sup> Law of Humanized Childbirth of 2004 (Argentina).

<sup>179</sup> Ibid.; Carlos Alejandro Herrera Vacaflor, *Obstetric Violence in Argentina: A Study on the Legal Effects of Medical Guidelines and Statutory Obligations for Improving the Quality of Maternal Health*, thesis for the degree of Master of Laws (LL.M.), Graduate Department of the Faculty of Law University of Toronto (2015), 36, [https://tspace.library.utoronto.ca/bitstream/1807/70430/1/Herrera\\_Vacaflor\\_Carlos\\_A\\_201511\\_LLM\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/70430/1/Herrera_Vacaflor_Carlos_A_201511_LLM_thesis.pdf) (viewed on 20 October 2016).

<sup>180</sup> Law of Humanized Childbirth of 2004 (Argentina).

<sup>181</sup> Law for Comprehensive Protection to Prevent, Punish and Eradicate Domestic Violence Against Women of 2009 (Argentina).

<sup>182</sup> Official Standards for Comprehensive Sexual and Reproductive Health Care of 2003 (Venezuela); Women assistance during pregnancy, childbirth and puerperium of 2008 Law (Federal District of Mexico).

<sup>183</sup> General Law on the Right of Women to a Life Free from Violence of 2007 (Venezuela); Women's Law of the State of Durango a Life Without Violence of 2007 (Mexico); Law of the State of Veracruz de Igancio de la Llave on Women's Access to a Life Free of Violence of 2008 (Mexico); Law for the State of Guanajuato on Women's Access to a Life Free of Violence of 2010 (Mexico); Law in the State of Chiapas on Women's Access to a Life Free of Violence of 2009 (Mexico).

Another important aspect of identifying good practice judgments that challenge judicial stereotyping is highlighting decisions in which courts have awarded gender-sensitive remedies, or reparations, to combat stereotypes. The Committee on Economic, Social and Cultural Rights has recognized that states must “ensure that all individuals have access to justice and to a meaningful and effective remedy in instances where the right to sexual and reproductive health is violated.”<sup>184</sup> Moreover, it has called on states to implement “measures to overcome long-standing discrimination and entrenched stereotypes against certain groups and to eradicate conditions that perpetuate discrimination.”<sup>185</sup> By awarding gender-sensitive reparations, including measures of non-repetition, Courts can play a crucial role in combating prevalent stereotypes and the structural gender discrimination that these stereotypes perpetuate, and in ensuring progress towards a society that guarantees gender equality.<sup>186</sup> Notably, by naming, understanding, and acknowledging and redressing the harmful impact of gender stereotypes, Courts can turn unacknowledged harmful experience into legally cognizable wrongs that require redress, and can play a transformative role in ensuring women’s decision-making capacity is upheld and respected, and that they can participate in society as full, autonomous subjects.<sup>187</sup> Specifically, the Inter-American Court has recognized this role, noting that,

*“[t]he Court emphasizes that some discriminatory acts analyzed in the previous chapters relate to the perpetuation of stereotypes that are associated with the structural and historical discrimination suffered by sexual minorities ... particularly in matters concerning access to justice and the application of domestic law. Therefore, some reparations must have a **transformative purpose**, in order to produce both a restorative and corrective effect and promote structural changes, dismantling certain stereotypes and practices that perpetuate discrimination against LGBT groups ....”* (emphasis added).<sup>188</sup>

Notably, in the case of *Atala Riffo and Daughters v. Chile*, referenced above, the Inter-American Court of Human Rights awarded reparations intended to combat the prevalence of gender stereotyping by public officials and the judiciary at all levels. It observed that,

*“the Court orders the State to continue implementing continuous educational programs and training courses in: i) human rights, sexual orientation, and non-discrimination; ii) protection of the rights of LGBTI community; and iii) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia. The courses must be directed at public officials at the regional and national levels, and particularly at judicial officials of all areas and levels of the judicial branch.”*<sup>189</sup>

### **iii. Monitor and analyze judicial reasoning**

The judiciary and other key stakeholders should ensure that stereotypes do not impede access to justice for victims of SRHR violations. Where judges do - on the one hand - apply, enforce, or perpetuate stereotypes, and - on the other hand - call out and dismantle stereotypes in cases involving sexual and reproductive health and rights, this is usually done through an analysis of legislation, because it is frequently the legislation’s compatibility with rights that the court is being asked to address. Yet, even when courts find laws that codify gender stereotypes in violation of

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<sup>184</sup> CESCR Committee, *supra* note 22, para. 64.

<sup>185</sup> *Ibid.*, para. 36.

<sup>186</sup> Ciara O’Connell, *supra* note 88.

<sup>187</sup> Liiri Oja & Alicia Ely Yamin, *supra* note 40, 63-65.

<sup>188</sup> *Case of Atala Riffo and Daughters v. Chile*, *supra* note 64, para. 267.

<sup>189</sup> *Ibid.*, para. 271.

constitutional or human rights protections, they do not always identify, name and dismantle the gender stereotypes underpinning such laws, or acknowledge and redress the specific harms these cause. In those rare cases where they do name and address the harmful stereotype, most fail to address the intersectionality and compounded stereotypes experienced by subgroups of persons.

Judicial reasoning should therefore be scrutinized to ensure judges are competent, independent and impartial, in line with international human rights law, and in this light comply with their obligation to reach decisions on the basis of law and fact and not stereotypes. For example, in several decisions mentioned above, judges disregarded scientific evidence and issued rulings on the basis of their stereotypical perceptions or beliefs. Below is a list of key questions that advocates need to consider when monitoring and analyzing 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/stereotypes invoked?
3. How was the individual harmed as a result of judicial stereotyping?
4. Did the judge award remedies to debunk the stereotypes?

Notably, even decisions that uphold the rights of victims can perpetuate stereotypes if judges do not address and debunk stereotypes. In contrast, if judges consciously identify and challenge stereotypes, they can dismantle harmful narratives about women, men and others and build an alternative construction of their identity in which women are in control of their own lives and can determine what happens to their bodies.<sup>190</sup>

As such, studies or other analyses of a range of cases can be developed that would identify the extent, nature, and impact of judicial stereotyping in connection with specific issues, such as SRHR, to raise awareness about the harms of judicial stereotyping and make recommendations for combatting such stereotyping, including through law and policy reform for example.<sup>191</sup>

#### **iv. Challenge judicial stereotyping in cases**

Human rights advocates, lawyers and other stakeholders also have an important role to play in challenging judicial decisions in which gender stereotypes impair the ability of judges to fairly and impartially assess the facts and distorts the truth-finding process. As such, judicial stereotyping in SRHR cases can be challenged by assisting individuals 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.

Several of the examples discussed above demonstrate the success of appealing decisions involving stereotypes to higher national courts and submitting petitions or communications to regional or international human rights bodies. In many of these cases, these higher courts and regional and international human rights bodies and mechanisms have addressed, debunked and dismantled the

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<sup>190</sup> Liiri Oja & Alicia Ely Yamin, *supra* note 40, pp. 65, 95.

<sup>191</sup> See Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned*, *supra* note 44, p. 67, in which it, among other measures, encourages the Supreme Court of Justice to “[p]rovide guidelines and trainings in order to ensure that judicial officials guarantee the right to due process, avoid prejudices and gender stereotypes, and respect procedural guarantees without exception in cases of women prosecuted for abortion-related crimes” and encourages the National Judicial Council to, “[d]evelop training programs for public officials—including judges, prosecutors, and public defenders—on human rights and sexual and reproductive rights.”

operative stereotypes and recognized their impact on the human rights violations suffered by the petitioners. Additionally, as discussed above in the case of *Artavia Murillo et al v. Costa Rica*, the expert testimony about the role of stereotyping in connection with Costa Rica’s ban on IVF provided compelling evidence for the Inter-American Court, which it relied on it in ruling that “gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them.”<sup>192</sup>

#### v. Build judicial capacity

Education, training, and guidance are integral to building capacity and competency of judges to identify harmful gender stereotypes and address wrongful gender stereotyping, as well as to ensure judicial decision-making is not adversely affected. In order to urgently address gender-based stereotypes, the UN Special Rapporteur on the independence of judges and lawyers has recognized that,

*“training on gender equality and women’s rights, ..., in particular the Convention on the Elimination of All Forms of Discrimination against Women, should be set up and made compulsory for judges, prosecutors and lawyers. The study of gender equality, women’s rights and relevant international standards should also form an integral part of the legal education.”*<sup>193</sup>

Additionally, education that occurs in law school will be important in eliminating gender stereotyping in the judiciary.<sup>194</sup>

Education, training and guidance may come in many forms, including seminars, written resources, such as bench books and judicial protocols, and incorporating content on combatting gender stereotyping into law school and judicial training curricula. Such education, training and guidance should assist judges to achieve best practice in decisions concerning sexual and reproductive health and rights. At a minimum, this will require information to help judges:

- reach decisions based on facts and the law and not on stereotypes,
- give due weight to the credibility, voices and testimonies of women and marginalized groups,
- 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 to access justice,
- identify, debunk and dismantle harmful stereotypes and wrongful stereotyping related to sexuality and reproduction,
- apply international instruments related to human rights, such as the CEDAW Convention and the ICCPR,
- award effective, gender-sensitive remedies.

For instance, in Mexico, the Gender Equality Unit of the National Supreme Court of Justice in 2013 published a protocol, entitled *Judicial Decision-Making with a Gender Perspective* (Translated into English in 2014), which recognized that stereotypes permeate the work of courts and adjudicators.

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<sup>192</sup> *Case of Artavia Murillo et al. v. Costa Rica*, *supra* note 88, para 302.

<sup>193</sup> Gabriella Knaut, *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/HRC/29/26/Add.1 (2015), para. 115.

<sup>194</sup> CEDAW Committee, *General Recommendation No. 33*, *supra* note 9, para. 29 (a).

It also included a dedicated chapter on stereotyping which provides concrete guidance on how judges can identify stereotypes and avoid stereotyping in their legal reasoning, including in cases related to sexual and reproductive rights.<sup>195</sup> The Gender Equality Unit is monitoring the protocol's implementation and, to this end, has asked judges to provide copies of decisions applying the protocol.

Human rights advocates can play an important role in building judicial capacity to address stereotyping. This might include working with key bodies, such as judicial training institutes, that provide education and training to judges. It could also include holding discussions with judiciaries, conducting education, training and awareness-raising programs for the legal profession and disseminating resources on stereotyping, including best practice summaries.<sup>196</sup>

#### **vi. Advocate for diversity within the judiciary**

Human rights advocates can also advocate for diversity within the judiciary in order to ensure that it represents the pluralistic society and communities it serves.<sup>197</sup> According to the UN Special Rapporteur on the independence of judges and lawyers, ensuring diversity among the judiciary by encouraging representation of women and other underrepresented groups like ethnic, racial or sexual minorities would bring, “*different perspectives or approaches to adjudication, while fighting against gender stereotypes ... ensure a more balanced and impartial perspective on matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly,*”<sup>198</sup> and “*improve public trust and confidence in its credibility, legitimacy and impartiality.*”<sup>199</sup>

Good practices include recruiting a diverse applicant pool by ensuring that the judicial seat is widely advertised and all candidates are welcome to apply; ensuring diverse hiring committees for these positions, and training those on such committees to be effective recruiters; being clear that recruiting diverse candidates is an important aspect of the hiring process; recruiting graduates from a broad range of law schools that attract diverse candidates; and ensuring transparency and consistency in the application and interview process so that all applicants are treated in a similar way. Other measures include appointing a diversity compliance officer or ombudsman that can hold states accountable for achieving meaningful diversity on the judicial bench by monitoring diversity levels and improving outreach efforts, among other measures. Additionally, states should improve record keeping on judicial applicants, particularly in connect with the gender composition of the applicant pool so that progress on issues of diversity can be tracked.<sup>200</sup>

## **Conclusion**

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<sup>195</sup> Gender Equality Unit, National Supreme Court of Justice, Mexico, *Judicial Decision-Making with a Gender Perspective: A Protocol. Making Equal Rights Real* (2014), 48-56, available at: <https://www.buscatdh.bidh.org.mx/Protocolos/JudicialDecisionMakingwithaGenderPerspectiveAProtocolMakingEqualRightsReal.pdf> (viewed on 12 September 2017).

<sup>196</sup> See for example, UN Women, *Promoting Women's Human Rights Compliant Justice Delivery: Regional Workshop for Judicial Training Institutions in South East Asia* (2015), 5.

<sup>197</sup> Gabriella Knaul, *Special rapporteur on the independence of judges and lawyers*, UN Doc. A/66/289 (2011), para. 26

<sup>198</sup> *Ibid.*, para. 27.

<sup>199</sup> *Ibid.*, para. 26; See also, for example, Brennan Center for Justice, *Improving Judicial Diversity* (March 2010), 1, 11, 36-42, which documents the underrepresentation of women and minorities in State appellate benches in the US, recognizes that implicit biases and stereotypes contribute to the gender and racial disparities that persist on the bench even though commissions that nominate judges may be open to all applicants, and offers a series of recommendations and best practices for encouraging diversity.

<sup>200</sup> Brennan Center for Justice, *Improving Judicial Diversity*, *ibid.*, 36-42.

As has been demonstrated throughout this report, misperceptions and beliefs about the sex, sex role and sexual characteristics of men and women obstruct the full enjoyment of SRHR, operating to marginalize and exclude gender non-conforming individuals and to subordinate and control women and girls. As such, by explicitly identifying, debunking, and awarding effective remedies to address stereotypes, courts have and can have a critically important transformative impact in catalyzing the elimination of gender stereotypes and ensuring equality throughout society.