

Gender Stereotyping and the Judiciary



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Session 5.

Gender stereotyping in sexual and reproductive health and rights (SRHR) cases

1. Sexual and reproductive health and rights (SRHR)
2. Role of judges in addressing wrongful stereotyping in SRHR cases
3. Unpacking stereotyping in SRHR cases: reproduction, family formation, consensual sexual conduct, and gender identity



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What are Sexual and Reproductive Health and Rights?

- Sexual and reproductive health and rights (SRHR) is related to multiple human rights and includes a series of freedoms and entitlements.
 - Rights to...
 - Freedoms from...
- Applies to everyone: women, men, girls, boys and those who identify with other identities
- Sexual and reproductive health and rights are critically influenced by **gender stereotypes**

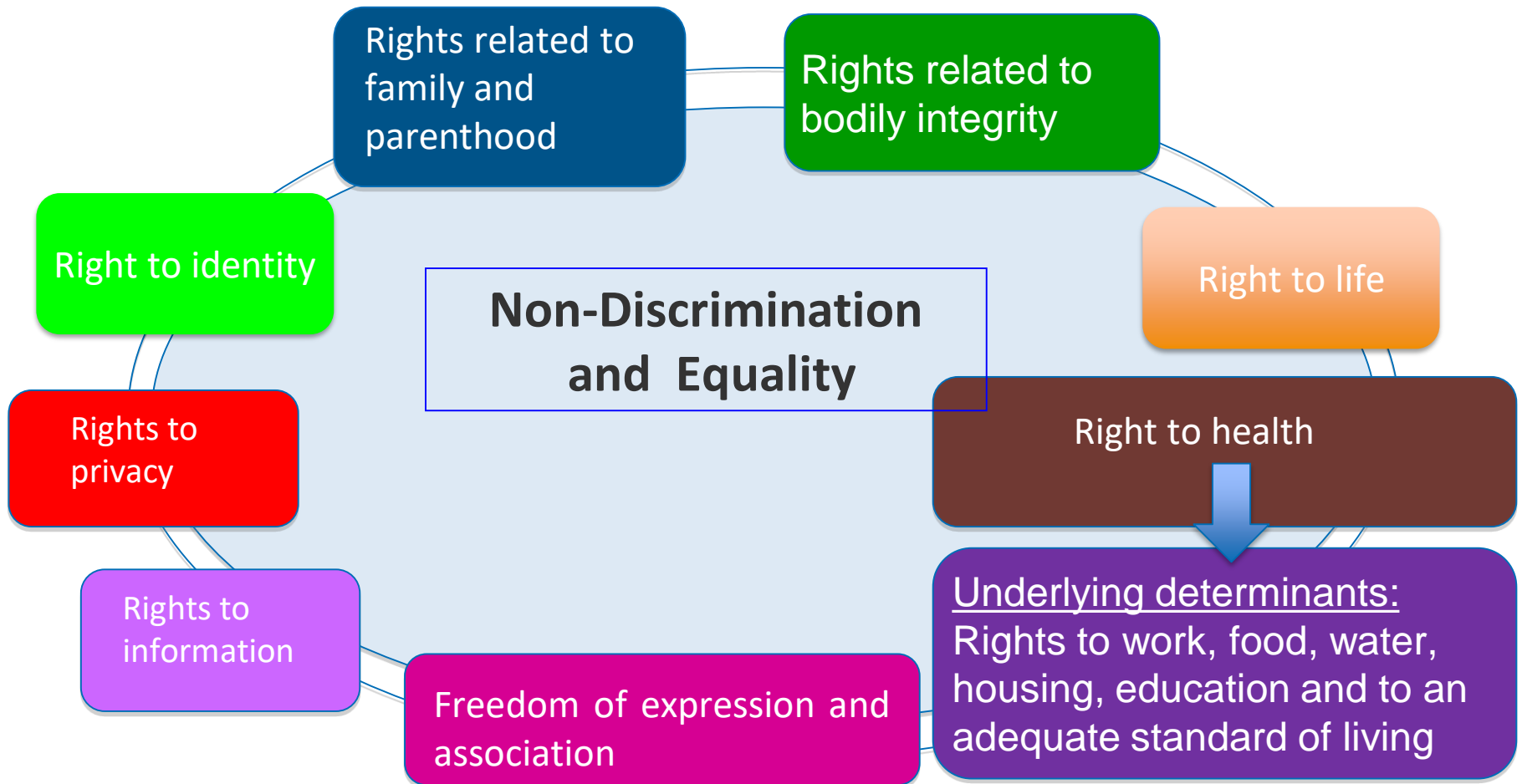
Key resources:

- CESCR Committee General Comment 22 (2016)
- OHCHR Reflection Guide for the Judiciary on Applying a Rights-Based Approach to Sexual, Reproductive, Maternal Health and Under-5 Child Health (2017)



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What rights are necessary for the enjoyment of SRHR?



State's obligations concerning gender stereotyping on SRHR

- Wrongful gender stereotyping is a root cause of many violations of sexual and reproductive health and rights.
- States are obliged under international human rights law to address and dismantle gender stereotypes in cases concerning SRHR.
- The States obligations apply to all branches including the Judiciary.



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Critical role of the Judiciary in SRHR cases

- The judiciary has played a very important role in identifying and dismantling wrongful gender stereotyping on SRHR cases:
 - Upholding the right to sexual and reproductive health.
 - Hearing the voice of people who have been stigmatized and denied access based on their gender.
 - Challenging cultural and religious norms that denied these rights



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Categories of SRHR gender stereotypes

- Gender stereotypes on SRHR can be divided on the following categories:

1. Stereotypes related to reproduction

2. Stereotypes related to family formation

3. Stereotypes related to consensual sexual conduct

4. Stereotypes related to gender identity

1. 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.
- 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.

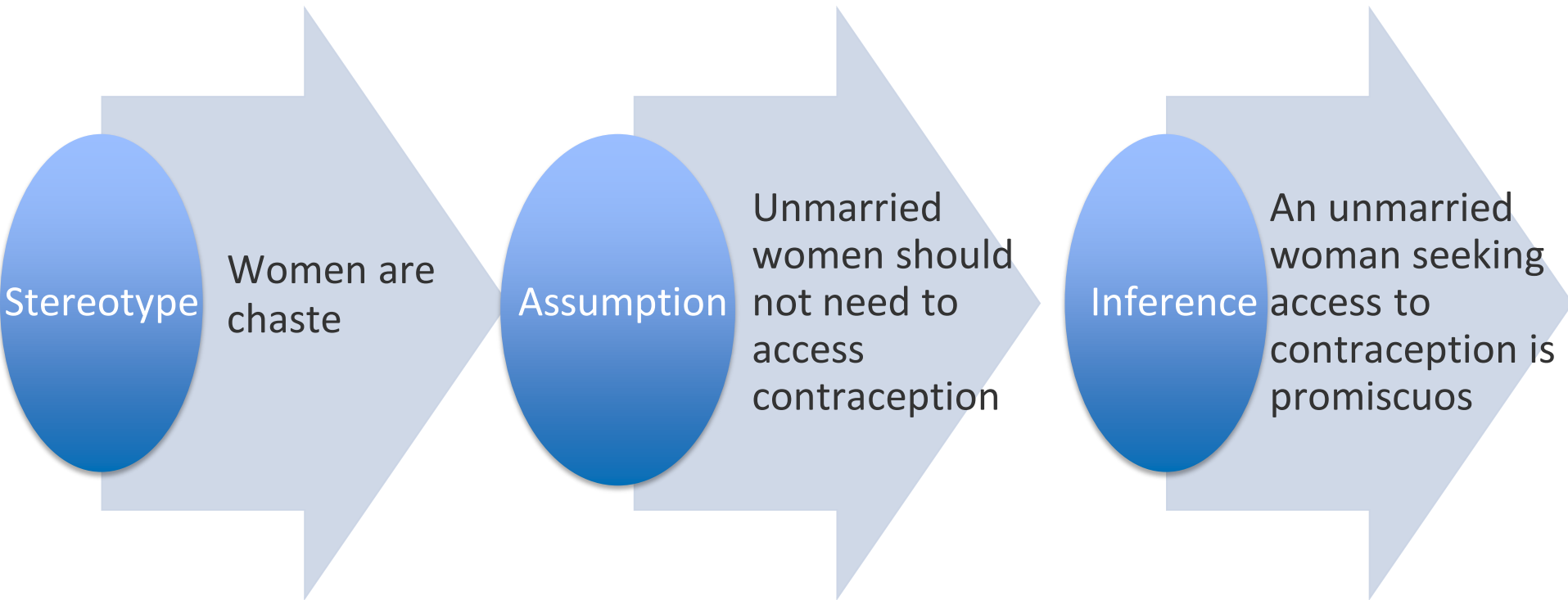


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Stereotypes related to reproduction

- These types of stereotypes may arise in cases concerning:
 - Contraception
 - Third party consent to sexual and reproductive health services
 - Termination of pregnancy
 - Pregnancy and childbirth

Stereotypes related to reproduction



Stereotypes related to reproduction

CEDAW Philippines Inquiry (2014) - Contraception

- De facto ban on modern contraception in public health services in Manila City, Philippines
- CEDAW Committee determined that the ban:

“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



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Stereotypes related to reproduction

IACHR – *I.V. v Bolivia* (2016)

In its first case concerning involuntary sterilization, the Court 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

- 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. The Court thus found a violation of the right to non-discrimination because she was a woman.



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Stereotypes related to reproduction

Decision C-355-06, Judgement of 10 May 2006 (Colombia Constitutional Court)

The Constitutional Court recognized that women cannot be:

“treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.”

(...)

“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.”



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Stereotypes related to reproduction

Christian Lawyers Association v. National Minister of Health and other – South Africa High Court Transvaal Division

- Court rejected argument that pregnant girls are unable to make an informed decision regarding abortion without parental consent or control as they are unable to “appreciate the need for and value of parental care” and to give consent:

“The legislative choice opted for in the Act serves the best interest of the pregnant girl child (...) 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.**”*



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Stereotypes related to reproduction

Imbong v. Hon. Paquito N. Ochoa, Jr., G.R. No. 204819 (2014) (Philippines, Supreme Court)

The court noted that the reproductive health 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.”*



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Stereotypes related to reproduction

Artavia Murillo et al v. Costa Rica – IACHR (2012)

- Court recognised that an IVF ban had a disproportionate impact on women, “owing to the existence of stereotypes and prejudices in society.’ It observed:

“the WHO has indicated that the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood”

Stressed that these, “**gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them**”

BUT (!)

Court subsequently relied on “motherhood” in determining violations of the right to private life. Specifically, it noted that, “**motherhood is an essential part of the free development of a woman’s personality.**”



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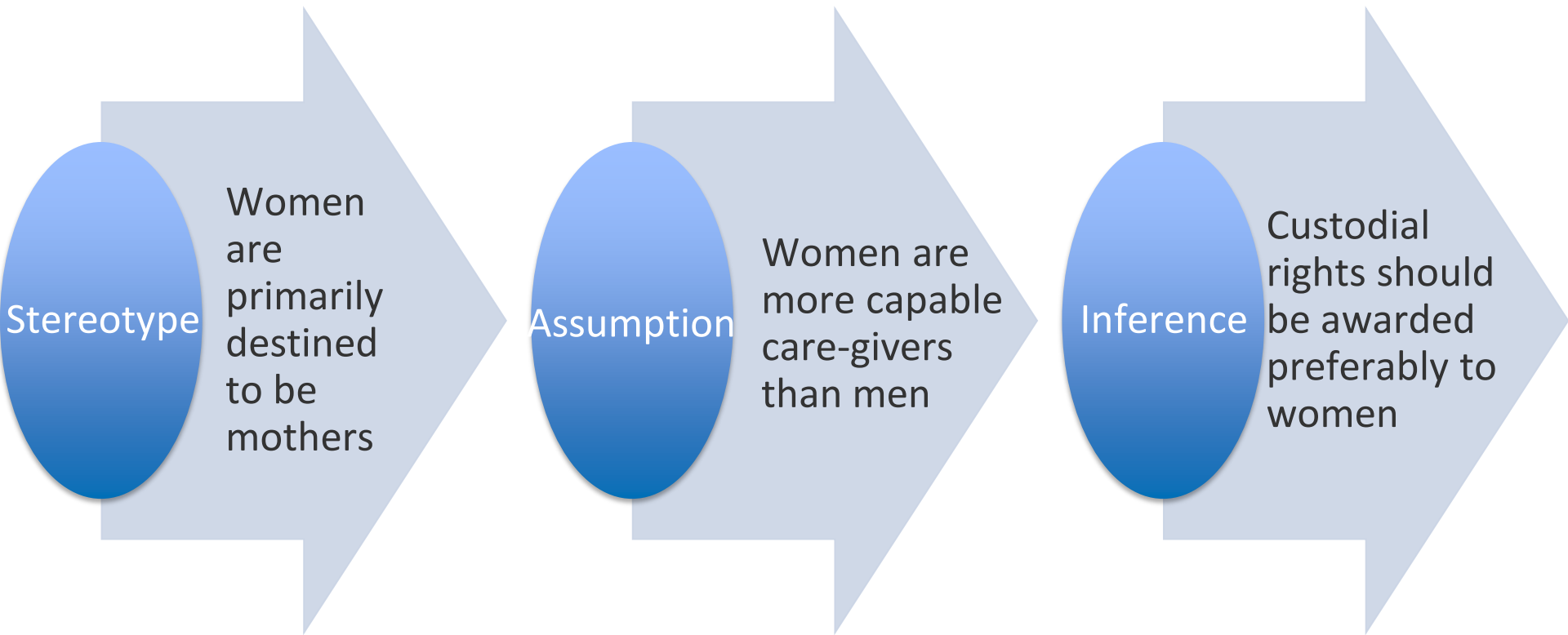
2. Stereotypes related to family formation

- 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.”*

Stereotypes related to family formation

- These types of stereotypes may arise in cases concerning:
 - Marriage and Divorce
 - Custody

Stereotypes related to family formation



Stereotypes related to family formation

Sapana Pradhan Malla and Others v, Office of Prime Minister and Others, Supreme Court of Nepal, 2006

- Ordered amendment to Marriage Registration Act, noting:

“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.”*



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Example of international case-law

IACHR - Fornerón and Daughter v. Argentina (2012)

On determining the best interests of the child:

“speculations, presumptions, stereotypes, generalized considerations on the personal characteristics of the parents, or cultural preferences regarding traditional concepts of the family are inadmissible.”

The Court also observed:

“supposed indifference or passivity towards the pregnant woman ... cannot constitute grounds for the judicial authority in question to deny paternity.”

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.”



3. 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.

Stereotypes related to consensual sexual conduct

- These types of stereotypes may arise in cases concerning:
 - Sex outside of marriage
 - Same-sex conduct
 - Adolescent sexual conduct

Stereotype

Women are emotionally volatile

Assumption

Women are incapable of making rational decisions

Inferences

A woman can't make a rational decision about their own SRHR

Stereotypes related to consensual sexual conduct

Decision of the Delhi High Court in the case of *Naz Foundation v. Govt. of NCT of Delhi*

- Court declared of law criminalizing consensual same-sex sexual activity as unconstitutional and 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 “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.”



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Stereotypes related to consensual sexual conduct

Petition for Constitutional Review of the Act on the Punishment of Intermediating in Sex Trade and Associated Acts – South Korea Constitutional Court

- in 2016, the Constitutional Court of South Korea upheld a law criminalizing sex work,

“regardless of whether the sex trade is voluntary or not.”

- It noted that the “sex trade”,

“spreads a decadent, hedonistic culture, which eventually destroys society’s overall sound customs and morality in respect to sex.”



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Law Advocacy for Women in Uganda v. Attorney General of Uganda (2007) – Constitutional Court

- Ugandan Penal Code provision criminalizing adultery was found to violate the rights to equality, dignity and protection from inhuman treatment, implicitly debunking the sexual stereotypes underpinning the law.
- 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, as unconstitutional.



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Stereotypes related to consensual sexual conduct

S.L. vs Austria (2003) - ECtHR

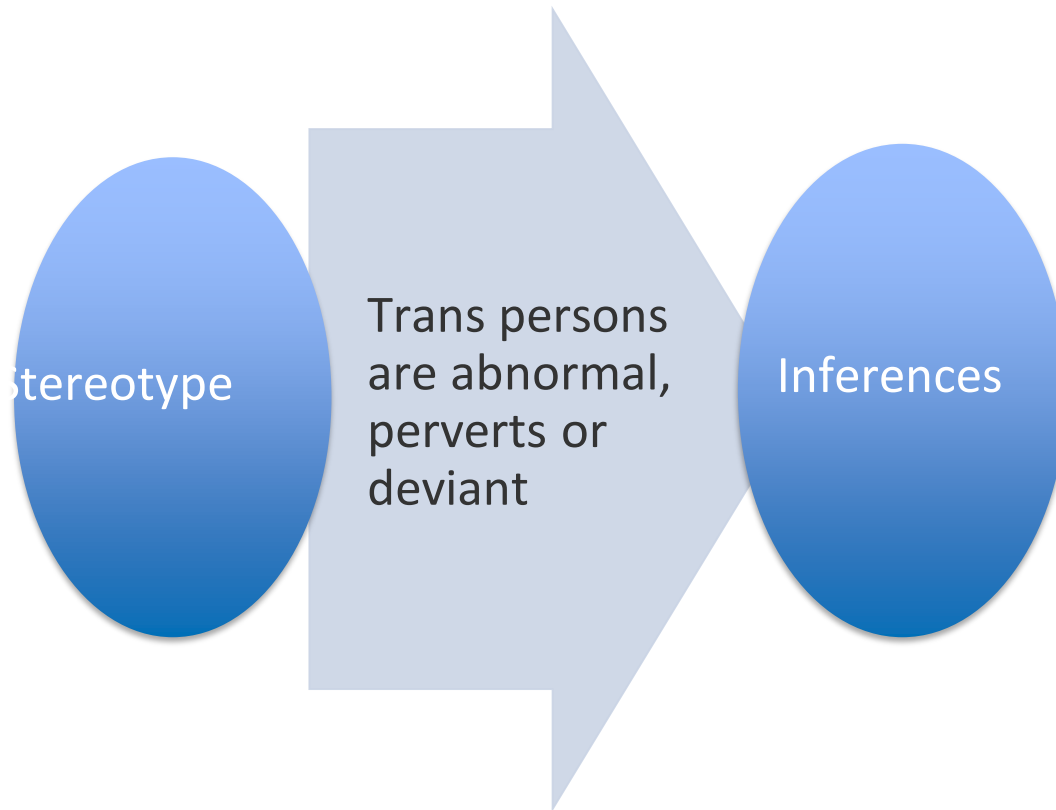
*“To the extent that Article 209 of the [Austrian] Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, **these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment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



4. 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.

Stereotypes related to gender identity



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

Stereotypes related to gender identity

Decision of Nepal's Supreme Court of Justice in the case of Pant

- The Court established that:

“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.(...)”

“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 (...) 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 grounds such as religion, culture, customs, values and the like.”



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Importance of addressing judicial wrongful gender stereotyping on SRHR

- Misperceptions and beliefs about the sex, sex role and sexual characteristics of men and women **obstruct the full enjoyment of sexual and reproductive health and rights**, operating to marginalize and exclude gender non-conforming individuals and subordinate and control women and girls.
- by explicitly identifying, debunking, and awarding effective remedies to address stereotypes, as further discussed below, courts have and can have a critically important transformative impact in catalyzing the elimination of gender stereotypes and ensuring equality throughout society.



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