

GENDER STEREOTYPES

IN LAWS AND COURT DECISIONS
IN SOUTHEAST ASIA

A REFERENCE FOR JUSTICE ACTORS

Canada 





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Gender Stereotypes in Laws and Court Decisions in Southeast Asia

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(UN Women)

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ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTAC	United Nations Transnational Authority in Cambodia
WHO	World Health Organization

FOREWORD

As the Convention on the Elimination of Discrimination against Women (CEDAW) points out, states have the obligation to take measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. Such restrictive gender stereotypes and norms recreate unequal power relations, limit the agency of women and girls and can cause substantial harm. No one is immune from the influence of dominant social and gender norms and so recognizing and addressing such norms is critical for effective access to justice.

Given the centrality of the justice sector to assuring the enjoyment of human rights and ending impunity particularly for gender-based violence, the UN Women Regional Office for Asia and the Pacific has prioritized awareness building of the CEDAW obligations and has worked with a range of state and non-state actors, at national and regional level, to strengthen the capacity for its domestic application in Southeast Asia. This report on **Gender Stereotypes in Laws and Court Decisions in Southeast Asia** is one output of that work and it focuses on the steps which have to be taken to ensure that the judicial process is free from gender bias and is a vehicle to advance substantive equality.

There is ample evidence that judicial transparency is key for women to be able to claim their rights. Lack of transparency also limits judicial officers in assessing and addressing discriminatory attitudes. At the 2013 Colloquium, judges agreed that gender bias impedes women’s access to justice. They noted the need to deepen appreciation of gender socialization, unequal power relations, and gender expectations and how these shape the experience of the administration of justice and contribute to the differential access to justice. At a follow up 2014 Workshop, participants spoke to the need for research, training, technical guidance and codes of conduct to ensure respect for CEDAW’s principles of gender equality and non-discrimination.

Commissioned by UN Women and ICJ, this report is such a reference for justice actors to promote women's access to justice and eradicate judicial stereotyping in court decisions. It is intended for judicial officers, attorneys, users of the administration of justice and gender equality advocates.

The preparation of the report was made possible by the support of the Canadian Government through the Global Affairs Canada (GAC). We are grateful to Evalyn G. Ursua for authoring this manual reference for justice actors and the technical cooperation of the International Commission of Jurists for the continued interest and partnership.



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INTRODUCTION

This Reference focuses on the problem of gender stereotypes in laws and court decisions in Southeast Asia as they affect women. It shows that stereotypes about women abound in society as well as in law, legal processes and court decisions. These stereotypes, referred to as “gender stereotypes”, harm women in many ways. Gender stereotypes may constitute discrimination against women and violate women’s human rights. When gender stereotypes involved in the delivery of justice harm women, they implicate state obligations under international human rights law, such as the obligation to ensure that everyone has the right to an effective remedy, to a fair and impartial trial, and to equal protection of the law.

Recognizing that the elimination of gender stereotypes in justice delivery is a critical component of promoting women’s access to justice, this Reference targets justice actors. Promoting access to justice requires that laws must be free of gender stereotypes, and justice actors must not themselves engage in gender stereotyping in investigation and adjudication. This Reference thus seeks to serve three objectives: (i) to develop critical understanding among judges and other justice actors of gender stereotypes, how they manifest in laws, legal processes and court decisions, and how they harm women litigants and restrict, impair or nullify the exercise of their human rights; (ii) to develop an understanding among justice actors of how gender stereotypes in laws or gender stereotyping in legal processes and court decisions can be addressed or avoided; and (iii) to provide judicial training institutions a training resource tool that they can use in their training programmes for justice actors in addressing gender stereotypes or avoiding gender stereotyping in investigation and adjudication.

The development of this Reference was part of the Regional Programme on Improving Women’s Human Rights in Southeast Asia (CEDAW SEA Phase II) of the UN Women Regional Office for Asia and the Pacific. The Programme aims to protect and promote women’s human rights in eight countries in Southeast Asia: Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Thailand, Timor-Leste and Viet Nam.

This Reference has eight parts. Part I explains gender stereotypes and other related concepts. Part II discusses how gender stereotypes harm women. In Part III, gender stereotypes are located in justice delivery, with examples taken from international sources. Part IV focuses on the human rights of women that are violated by gender stereotypes in laws, legal processes, and court decisions. The obligations of States to banish gender stereotypes under international human rights treaties, particularly under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), are highlighted. Part V provides summaries of actual cases decided by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which illustrate gender stereotypes in cases involving rape, employment, and domestic violence.

The cases explain the links between gender stereotypes and State obligations under international human rights law. Part VI discusses gender stereotypes in laws, legal processes and court decisions in Southeast Asia, with examples from Cambodia, Indonesia, Myanmar, Philippines, Thailand, Timor-Leste and Viet Nam. Part VII shows that, despite the gender stereotypes that abound in Southeast Asia's cultures and legal systems, some States, including their judiciaries, have taken positive measures to address gender stereotypes. It is hoped that the examples included in this Part will inspire other jurisdictions to push for positive changes in cultural and legal practices to banish gender stereotypes towards improving justice delivery for women. Finally, Part VIII offers some guidelines on how justice actors can avoid perpetuating gender stereotypes in justice delivery. The list is far from exhaustive. In using this Reference, justice actors are encouraged to identify other measures that can be adopted to avoid gender stereotyping and to address it appropriately when it occurs.

The cases found in this Reference are not limited to gender-based violence. However, there are more gender-based violence cases included here than other types of cases because the former readily illustrate gender stereotypes that are particularly harmful to women.

This Reference could have been more comprehensive had it been possible to access more data in the different countries covered by this research. Southeast Asia's diverse languages made research more difficult than it should have been in the identification of cases, their translation, and their interpretation. In two countries, Lao PDR and Viet Nam, court decisions were not accessible; in several others, only secondary sources were available.

Despite these limitations, we hope that this Reference can contribute in improving justice delivery for women in Southeast Asia, and can inspire further efforts to address the problem of gender stereotyping in the administration of justice. We also hope that the judiciaries of Southeast Asia will be strong partners in this endeavour.

PART 1. GENDER STEREOTYPES

Stereotyping has been defined as “the process of ascribing to an individual general *attributes, characteristics, or roles* by reason *only* of his or her apparent membership in a particular group”.² This process avoids or renders unnecessary any examination of the individual’s specific attributes or characteristics, abilities, skills, personal circumstances,³ or emotional or psychological processes. When stereotyping is applied to men or women⁴ based on the category of *males or females*, we speak of *gender stereotyping*. A *gender stereotype*, which is involved in gender stereotyping, has been defined as “a generalized view or preconception about attributes, or characteristics that are or ought to be possessed by women and men or roles that are or should be performed by men and women”.⁵

*We know how to act like a woman or a man precisely because we know our culture’s taken-for-granted beliefs—its stereotypes—about who men and women are and how they behave. But by acting on these beliefs, we end up materially demonstrating the differences and inequality between men and women that these stereotypes suggest.*¹

Gender stereotypes have descriptive and prescriptive qualities. Descriptive gender stereotypes “describe the traits or attributes that people associate with the typical man or woman”. They provide “a thumbnail sketch of what people take to be the way men and women behave on average”. On the other hand, the prescriptive quality of gender stereotypes concerns the “standards of behaviour from which

1 Ridgeway 2011, p. 59.

2 Cook and Cusack 2010, p. 1. Author’s emphasis in italics.

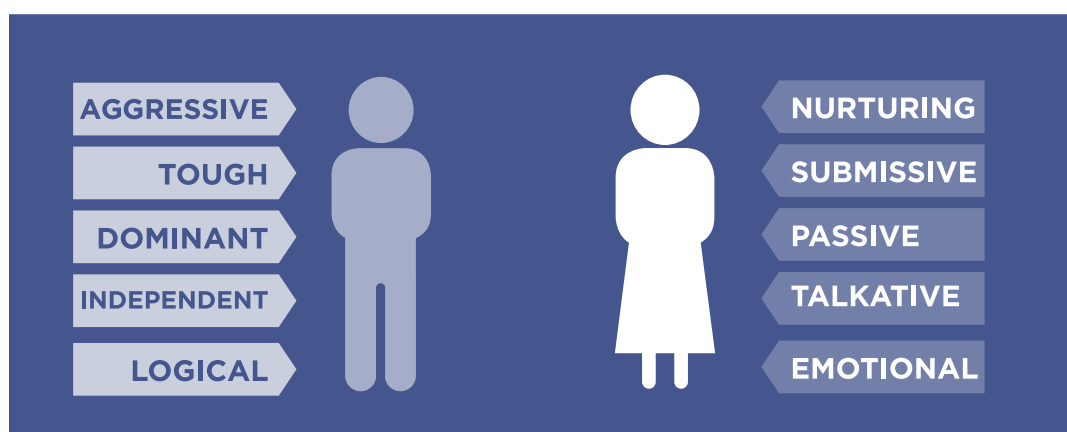
3 Ibid.

4 Except where otherwise specified, the term “women” includes “girl-children”.

5 OHCHR 2014.

deviations will be punished”.⁶ Prescriptive gender stereotypes involve “behaviours and traits that men and women *should* display (positive prescriptions) and those that they *should not* display (negative proscriptions)”.⁷

The general attributes, characteristics and roles that we ascribe to or prescribe for men and women underlie our “widely shared cultural beliefs about men and women”.⁸ These commonly held cultural beliefs are actually “cultural instructions or rules” that define our social relations as well as our social structures.⁹ “Because we not only know these gender beliefs but also take for granted that others know them, we can rely on these beliefs to begin to coordinate the dance of social relations.”¹⁰



Cook and Cusack have identified four types of gender stereotypes: (i) *sex stereotype*; (ii) *sexual stereotype*; (iii) *sex-role stereotype*; and (iv) *compounded stereotype*.¹¹

A *sex stereotype* “is a generalized view or preconception about the physical, including biological, emotional and cognitive, attributes or characteristics that are or should be possessed by women and men”.¹² Examples of sex stereotypes are the generalized beliefs that men are strong while women are weak. A *sexual stereotype* “is a generalized view or preconception about the sexual characteristics or behaviours that women and men are believed or expected to possess”.¹³ Examples of *sexual stereotypes* are the beliefs that women are sexually passive, while men have strong libidos. A *sex-role stereotype*¹⁴ “is a generalized view or preconception

6 Ridgeway 2011, p. 59.

7 Ibid., p. 60.

8 Ibid., p. 58.

9 Ibid.

10 Ibid., p. 57.

11 Cook and Cusack 2010, pp. 25-31.

12 OHCHR Commissioned Report 2013, p. 10.

13 Ibid., p. 11.

14 This stereotype is about “gender roles”. For consistency in language, “sex-roles” will be used to mean “gender roles”.

about the roles that women and men do or are expected to perform, and the types of behaviours that they possess or to which they are expected to conform”.¹⁵ Examples of sex-role stereotypes are women’s prescribed role as homemakers and men’s prescribed role as breadwinners.¹⁶ A *compound stereotype* “is a generalized view or preconception about groups that result from the ascription of attributes, characteristics or roles based on one or more other traits”.¹⁷ It is a sex stereotype, a sexual stereotype or a sex-role stereotype that combines with another stereotype ascribed to a group (e.g., persons with disability, of a certain age, or of a specific sexual orientation) “to produce unique stereotypes of different subgroups of women or men (e.g., stereotypes of women with disabilities, stereotypes of wives, stereotypes of lesbians)”. An example of a compounded stereotype is the belief that lesbian¹⁸ women are not good mothers. Another is the belief that a deaf person is also dumb, which explains the discriminatory label “deaf and dumb”, leading to the denial of their legal capacity in some cases.

The concept of gender stereotypes is at the heart of the conception of “gender” as distinguished from “sex”. “Sex” refers to the biological differences between men and women; in contrast, “gender” refers to “socially constructed identities, attributes and roles for women and men, and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women”.¹⁹ According to this definition of gender, the CEDAW Committee recognizes that the “socially constructed identities, attributes and roles for women and men” – the gender stereotypes – have material consequences for men and women. They produce a hierarchy “in the distribution of power and rights favouring men and disadvantaging women”. This will be discussed below.

15 OHCHR Commissioned Report 2013, p. 13.

16 Cook and Cusack 2010, p. 28.

17 OHCHR Commissioned Report 2013, p. 15.

18 Ibid.

19 CEDAW General Recommendation No. 28, para. 5.

PART 2.

HOW GENDER STEREOTYPES HARM WOMEN

While gender stereotypes affect both women and men, they often harm women more.²¹ It is then important to understand how gender stereotypes harm women. To do so, we need to examine how gender stereotypes work in the everyday lives of women, and how those everyday practices shape social relations and social structures.

It has been pointed out that despite the progress in law and policy protecting women's human rights, "women remain substantially disadvantaged, in the work-place, in political life, and in the home".²² This systemic disadvantage can be explained by the fact that "the structure and organization of society is built on gender stereotypes".²³ This means that gender stereotypes do not function simply as cultural ascriptions and prescriptions for men and women;

gender stereotypes constitute men and women as different and unequal, and this difference and inequality become the organizing principles of society. This results in

*Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.*²⁰

20 CEDAW General Recommendation No. 25, note 2, citing the 1999 World Survey on the Role of Women in Development (United Nations, New York, 1999), p. ix.

21 Cook and Cusack 2010, p. 1.

22 Fredman 2012, p. 1.

23 Cook and Cusack 2010, p. 2, citing Rikki Holmaat, Towards Different Law and Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination (The Hague: Reed Business Information, 2004), p. xii.

inequality between men and women in material resources, power and status.²⁴ The same social organization that is built on male and female difference and inequality ensures “that existing unequal power relations between the sexes are sustained”.²⁵ The law as a social institution is also organized to a large extent on the basis of difference and inequality of men and women.

The following examples illustrate how gender stereotypes work at different levels, how they structure social relations and social organizations characterized by unequal power relations between men and women, and how they harm women.

DOMESTIC WORK

The sexual division of labour at home is founded on gender stereotypes. Women are expected to perform the role of homemakers while men are considered the primary breadwinners. Even with women’s entry into the paid labour market, this cultural prescription or *sex-role stereotype* has not changed; thus, “women continue to bear most of the responsibilities for the home”,²⁶ even as they also hold paid jobs and contribute substantially to the family income. This sex-role stereotype constitutes women’s social status as subordinate to men. It has also economic repercussions. Where women are limited to housework, they become financially dependent on their husbands or male members of the family. Where they also enter the labour market, they do so “from a highly disadvantaged position, as the time they spend on domestic work restricts their access to full and productive employment and also leaves them with less time for education and training, leisure, self-care and social and political activities”.²⁷

In some countries, this sex-role stereotype of women is used to justify the unequal sharing in the family resources or inheritance. Women’s economic dependence also makes them more vulnerable to abuse or gender-based violence. “The low social and economic status of women can be both a cause and a consequence of violence against women.”²⁸

In some jurisdictions, laws perpetuate these sex-role stereotypes. Examples are laws that assign to women the primary or sole responsibility of taking care of the household or children, and require their husband’s consent for them to seek paid work outside the home. In addition, at times the law perpetuates these cultural arrangements by defining rights according to the traditional roles of women, their subordinate status in the home, and the undervaluation or lack of recognition of the economic value of their work in the home or household. This prevents women from making life choices for themselves, developing their personal abilities, and participating fully in the economic and political life of the nation.

24 Ridgeway 2011, p. 3.

25 Cook and Cusack 2010, p. 2, citing Rikki Holmaat, *Towards Different Law and Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (The Hague: Reed Business Information, 2004), p. xii.

26 United Nations 2010, p. 98.

27 Ibid.

28 Beijing Platform for Action 1995, para. 112.

PAID WORK

The sexual division of labour at home extends to the marketplace where women are usually assigned jobs considered *inferior*, in keeping with cultural beliefs about women's attributes or abilities and their prescribed social roles, or where women's work, regardless of its nature, is *undervalued*. Consistent with the "stereotypical gender roles that assign domestic chores to the women of the family – who are expected to take care of them without reward, recognition or remonstration", women's common sex-role in labour migration is that of a domestic helper. "This helps explain why domestic workers are often expected to be always available – notwithstanding labour standards on maximum working hours, rest days and vacation. Because domestic work was traditionally performed by female family members for free, many employers feel reticent to pay a serious salary for work they think should really cost no more than room, board and a measure of gratitude."²⁹ The same premise explains women workers' exclusion from legal protection and social benefits. Even when women's work is comparable or the same as that of men's, the pay structure is such that women earn less than men for work of equal value.



GENDER PAY GAP

"The gender pay gap reflects inequalities that affect mainly women, notably horizontal and vertical segregation of the labour market, traditions and stereotypes that influence the choice of education, professions and career paths, and the difficulty of balancing work and private life that often leads to part-time work and career breaks for women."³⁰

²⁹ Shahinian 2010, para. 66.

³⁰ United Nations 2010, p. 96 (citation omitted).

³¹ Ibid., p. 97.

“While constraints in both data and methods make it difficult to present a comprehensive global analysis of gender pay gaps, the ILO recognizes that women’s wages represent between 70 and 90 percent of men’s wages in a majority of countries.”³¹

LEADERSHIP

The widespread belief is that women, unlike men, are weak in the physical and cognitive sense, emotional, less rational or even irrational, and lack assertiveness. Since women’s attributes are deemed *inferior* to men, women are perceived to be less capable of exercising leadership in the workplace, community and society. There is a tendency not to entrust to women decision-making in matters considered significant or serious, thereby depriving them of opportunities to develop and relegating them to *inferior* roles. This explains the social organization in the workplace where the percentage of women occupying management positions is significantly lower than men,³² and the dominance of men in politics and public governance where women are severely underrepresented.³³ This is also related to the constraints that women experience because of their sex-roles in the family as explained above.

EDUCATION



³² Ibid., pp. 123-125.

³³ Ibid., pp. 112-123.

In some societies, women's or girl-children's access to education is severely limited due to gender stereotypes. Since women's life trajectory is expected to be home-bound, girl-children are discriminated against in educational opportunities, in the belief that resources will be wasted on them since they will eventually become *mere* homemakers.³⁴ This practice combines with and perpetuates the poverty of women and girls that leads to a disadvantage in education. Nearly two-thirds of the 774 million adult illiterates worldwide are women, a proportion that has remained steady between 1990 and 2007 and across most sub-regions in Africa, Asia and Europe.³⁵ In Cambodia, Indonesia, Lao PDR and Thailand, "the percentage of women with secondary or tertiary attainment was less than 25 per cent. These countries display a large gender gap in the range of 10–22 percentage points, revealing a severe educational disadvantage to women."³⁶

SEXUAL EXPLOITATION

The sexual exploitation of women, such as in the form of forced marriage,³⁷ rape, and trafficking for the purpose of prostitution, is also founded on gender stereotypes. The underlying belief in the sexual exploitation of women is that they are not full persons with human dignity who are bearers of human rights, but rather, they are *sex objects* whose sex-role is to provide "sexual services" to satisfy men's needs. The Special Rapporteur on contemporary forms of slavery, including its causes and consequences explains that "[f]orced marriage combines sexual exploitation with domestic servitude. The victims are forced to perform household chores in line with gendered stereotypes, while submitting to their husbands' sexual demands."³⁸

When sexual exploitation occurs, women get blamed for not protecting their "virtue". Women are cast in gender stereotypes of either the "slut" (i.e. the promiscuous or sexually available woman) or the "virtuous woman" (i.e. the virginal woman or woman of good reputation). These gender stereotypes affect how women are treated in the community, society and justice institutions.

34 Shahinian 2010, para. 65.

35 United Nations 2010, p. 44.

36 Ibid., pp. 50, 52.

37 "Forced marriage" is prohibited under the Supplementary Slavery Convention. The Convention obliges States Parties to take all necessary measures to completely abolish any institution or practice whereby (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person.

38 Shahinian 2010, para. 43 (citation omitted).

39 "Violence against women shall be understood to encompass, but not be limited to, the following: (a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs." UN Declaration on the Elimination of Violence Against Women 1993, Art. 2.

VIOLENCE AGAINST WOMEN IS DIRECTLY RELATED TO GENDER STEREOTYPES

“Violence against women³⁹ throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women’s lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence. Images in the media of violence against women – especially those that depict rape, sexual slavery or the use of women and girls as sex objects, including pornography – are factors contributing to the continued prevalence of such violence, adversely influencing the community at large, in particular children and young people.”

The above discussion shows how gender stereotypes maintain the “ordinal hierarchy between men and women in material resources, power, and status”,⁴⁰ which in turn reinforce the social and cultural norms that stereotype and discriminate against women. Women’s subordinate status, economic disadvantage and political marginalization in society affect their access to justice where gender stereotypes also operate.

40 Ridgeway 2011, p. 3.

PART 3.

GENDER STEREOTYPES IN JUSTICE DELIVERY

Given how social relations and social organizations are founded on gender stereotypes that harm women, it is important that laws and the justice system do not perpetuate or legitimize gender stereotypes or aggravate the harm caused to women by gender stereotypes in society.

Gender stereotypes may be found in the laws passed by parliament, in investigative processes of law enforcement agencies, in court processes, or in court decisions. Sometimes, investigative and prosecutorial processes and court decisions perpetuate gender stereotypes even though the law being applied does not contain any. When judicial decisions are based on stereotypical beliefs about the nature and roles of men and women, rather than on an unprejudiced consideration of the evidence presented, human rights are violated and injustice is committed.

According to the Special Rapporteur on the independence of judges and lawyers, gender stereotypes are often found in the following elements of the criminal justice system:⁴¹

- (1) the procedures and rules of evidence in criminal cases, particularly in cases of rape and other forms of violence against women, producing gender-biased behaviour on the part of court officials and resulting in discriminatory outcomes;
- (2) the laws defining rape and sexual assault, resulting in discriminatory treatment of victims, who are almost always female, leading to high levels of attrition and thereby contributing to the culture of impunity.

The Special Rapporteur gives the following examples:

Examples of stereotypes applied to rape cases through gender-biased criminal rules of evidence and procedure are provided by cases where the following requirements or beliefs obtain: proof of physical violence is required to show that there was no

41 Knaul 2011, paras. 46 & 47.

consent; women are likely to lie, therefore evidence should be accepted only if corroborated; women can be assumed to be sexually available; women can be inferred to be consenting to sex even if forced, threatened or coerced, because they remained silent; previous sexual experience predisposes women to be sexually available, or to automatically consent to sex; women bear the responsibility for sexual attacks or invite them by being out late or in isolated places or by dressing in a particular manner; it is impossible to rape a sex worker; raped women have been dishonoured or shamed or are guilty rather than victimized.⁴²

The Special Rapporteur on violence against women, its causes and consequences has also illustrated how gender stereotypes deprive women with disabilities of rights, including legal protection:

Women with disabilities face a number of obstacles in the justice system, including the systematic failure of the court system to acknowledge them as competent witnesses. The tendency to “infantilize” women with mental disabilities contributes to the discounting of their testimony. On the other hand, complaints may be disregarded because of views and beliefs about some women with mental disabilities as hypersexual and lacking self-control.⁴³

Stereotypical views of women with disabilities may be imposed on their parental rights or through the termination of parental rights. According to Women with Disabilities Australia, it is relatively common for everyday stereotypes and deeply rooted beliefs about women with disabilities to be legitimized in family court and used against them in a divorce hearing or custody trial. Due to such prejudices, many women have lost custody and even visitation rights with their children.⁴⁴

Women with disabilities face problems with representation and may fail to comport with society’s view on women’s roles generally, leading to invisibility and exclusion from meaningful participation in society. Women with disabilities may also be viewed as childlike and presumed to be incompetent, which prevents them from reaching their potential as full and equal members of the community.⁴⁵

The CEDAW Committee has also identified where gender stereotypes occur in justice delivery and how they harm women:

Stereotyping and gender bias in the justice system have far-reaching consequences on women’s full enjoyment of their human rights. They impede women’s access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women’s voices, arguments and testimonies, as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women’s rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to

42 Ibid., para. 48.

43 Manjoo 2012, para. 41 (citation omitted).

44 Ibid., para. 46.

45 Ibid., para. 66.

miscarriages of justice, including the revictimization of complainants.

Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment.⁴⁶

46 CEDAW General Recommendation No. 33, para. 26-27.



Photo: UN Women/Christina Yiannakis

PART 4.

STATE OBLIGATIONS IN ELIMINATING GENDER STEREOTYPES IN JUSTICE DELIVERY

States have obligations to respect, protect, and fulfil women's human rights guaranteed under treaties to which they are parties or in customary international law. The State obligations on women's human rights are placed on all State organs, including the courts.⁴⁷ States can be responsible for judicial decisions that breach their obligations on women's human rights.⁴⁸

States must perform their obligations under human rights treaties in good faith. Thus, a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.⁴⁹ States should modify, when necessary, their domestic legal order in order to give effect to their obligations under international human rights law. This may entail enacting laws that protect women's human rights, promote gender equality, and prohibit discrimination against women, or amending laws that do not conform to State obligations and international human rights standards. It may also entail implementing programs that strengthen the capacity of justice actors to ensure and enhance women's access to justice. Any of these measures must also address gender stereotypes, either by eliminating existing gender stereotypes in law or legal procedures, or by capacitating justice actors so that they do not engage in gender stereotyping.

EQUALITY AND NON-DISCRIMINATION

There is a “comprehensive international human rights legal framework directed at ensuring the enjoyment by all of all human rights and at eliminating all forms of

47 CEDAW General Recommendation No. 28, para. 25.

48 Karen Vertido v. the Philippines, para. 8.4.

49 Vienna Convention on the Law of Treaties, art. 27.

discrimination against women on the basis of sex and gender”.⁵⁰ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵¹ is part of this legal framework. Its objective is “to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms”.⁵² The CEDAW “guarantees women the equal recognition, enjoyment and exercise of *all human rights and fundamental freedoms* in the political, economic, social, cultural, civil, domestic or any other field, irrespective of their marital status, and on a basis of equality with men.”⁵³ States parties to the CEDAW “are under a legal obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order that they improve their position and implement their right of de jure and de facto or substantive equality with men”.⁵⁴

In addition to the CEDAW, the Universal Declaration of Human Rights (UDHR) and the other core international human rights treaties – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), and the Convention on the Rights of Persons with Disabilities (CRPD) – all “contain explicit provisions guaranteeing women equality with men in the enjoyment of the rights they enshrine”.⁵⁵

Equality and non-discrimination are basic and general principles as well as rights under international human rights law.⁵⁶ As *basic and general principles*, they should serve as foundations of laws, policies and programmes adopted by States in the protection and fulfilment of human rights. They also serve as hermeneutic guide in the interpretation and application of the law.⁵⁷ As *rights*, equality and non-discrimination can be invoked by individuals to demand protection and remedies in case of violations of their rights.⁵⁸

The principles of equality and non-discrimination under international human rights law prohibit differential treatment of a person or group of persons based on the person’s or group’s particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or

50 CEDAW General Recommendation No. 28, para. 2.

51 All the eight countries covered by this Reference (Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Thailand, Timor-Leste, and Viet Nam) are States parties to the CEDAW.

52 CEDAW General Recommendation No. 25, para. 4.

53 CEDAW General Recommendation No. 28, para. 4. Author’s emphasis in italics.

54 CEDAW General Recommendation No. 28, para. 16.

55 Ibid., para. 3. See UDHR, art. 2; ICCPR, arts. 2 (1) & 26; ICESCR, art. 2 (2); CRC, art. 2 (1); ICRMW, art. 1 (1); CRPD, arts. 2 & 5.

56 HRC General Comment No. 18, para. 1-3.

57 Suprema Corte de Justicia de la Nacion, Mexico 2013, p. 30.

58 Ibid., p. 32.

other status. The prohibition, however, does not require identical treatment in every instance.⁵⁹ The principle of equality may require different treatment, such as to address social conditions or socially and culturally constructed differences between men and women that cause or perpetuate discrimination, through appropriate legislative and other measures, including temporary special measures.⁶⁰ The CEDAW Committee explains that temporary special measures are those that are aimed to “accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field”. The application of temporary special measures are “not as an exception to the norm of non-discrimination, but rather as part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms”.⁶¹ Under the standards set by the Human Rights Committee, for the differentiation of treatment not to constitute discrimination, the criteria for such differentiation must be reasonable and objective, with the aim of achieving a purpose that is legitimate under the ICCPR.⁶²

Gender stereotypes, as socially or culturally constructed differences, lack reasonable and objective basis, and thus may not be used to justify a differentiation of treatment. Gender stereotypes may constitute discrimination against women under international human rights treaties where they result in violations of the rights guaranteed under the treaties. It may specifically constitute discrimination against women under the CEDAW as defined in its Article 1:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 1 of the CEDAW and the non-discrimination provisions in other human rights treaties prohibit both direct and indirect discrimination.

DIRECT V. INDIRECT DISCRIMINATION

“In certain cases, practices will openly differentiate on the basis of a ground which may lack a reasonable and objective justification. However, discrimination may also result from the use of apparently neutral criteria, procedures, or practices, the effect of which will be similar to that of direct discrimination: it is then referred to as indirect discrimination. Such criteria, procedures or practices, which result in de facto discrimination,

⁵⁹ HRC General Comment No. 18, para. 8.

⁶⁰ CEDAW General Recommendation No. 25, para. 18.

⁶¹ Ibid.

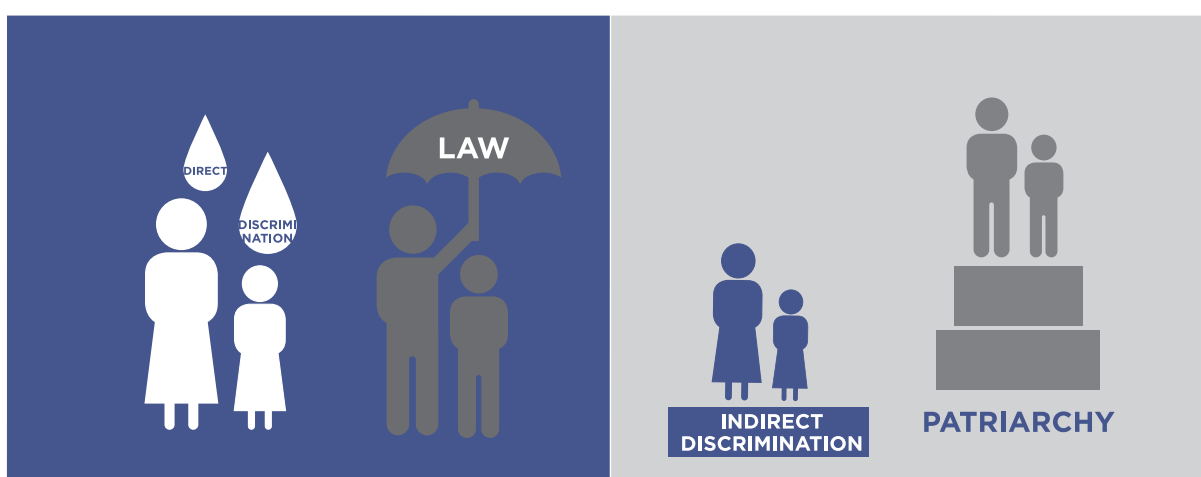
⁶² HRC General Comment No. 18, para. 13.

may be calculated in order to exclude the members of a certain category. Alternatively, even in the absence of any intention to discriminate, they may have a discriminatory impact because they are the result of established and unchecked routines, and fail to take into account the specific situation of certain groups. The notion of indirect discrimination serves, thus, two distinct ends: first, to unmask instances of conscious discrimination which hide behind the use of apparently neutral criteria, in order to arrive at the same result as would follow from the explicit use of prohibited differentiation criteria; second, to challenge certain rules or practices which, although not calculated to produce such effect, impose a specific disadvantage on certain groups, or have a disproportionate impact on such groups, without there being a justification for such disadvantage or such an impact. In this second conception, indirect discrimination may be completely detached from any kind of intention to discriminate, and it is best seen as a tool to revise permanently institutionalized habits and procedures....”

Source: De Schutter 2010, pp. 625-626

Direct discrimination against women “constitutes different treatment explicitly based on grounds of sex and gender differences”.⁶³ Such gender differences may involve gender stereotypes.

Indirect discrimination against women “occurs when a law, policy or programme does not appear to be discriminatory on its face, but has a discriminatory effect when implemented”⁶⁴ because it fails to address pre-existing inequalities. It can also “exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between



⁶³ CEDAW General Recommendation No. 28, para. 16.

⁶⁴ CESCR General Comment No. 16, para. 12. See also CEDAW General Recommendation No. 25, para. 7, note 1.

women and men”.⁶⁵ Indirect discrimination may also occur when laws, policies and programmes are “inadvertently modelled on male lifestyles and thus fail to take into account aspects of women’s life experiences” that differ from those of men due to the “stereotypical expectations, attitudes and behaviour directed towards women”.⁶⁶

In justice delivery, a judicial decision that involves differentiation based on a gender stereotype constitutes discrimination. Gender stereotypes also constitute discrimination against women when, for example, women are considered credible claimants of rights and remedies under gender-neutral laws only when they conform to gender stereotypes that are acceptable to the courts. It also occurs when a woman’s claim to rights or to legal protection is prejudiced because she displays counter-stereotypic qualities or those that are associated with negative stereotypes.

The concept of *intersectional or compounded discrimination* is also important in the problem of gender stereotyping. The CEDAW Committee explains that “discrimination against women is compounded by intersecting factors that affect some women to a different degree or in different ways than men and other women”.⁶⁷ Those factors include ethnicity or race, indigenous or minority status, colour, socio-economic status, caste, language, religion or belief, political opinion, national origin, marital or maternal status, disability, age, health status, urban or rural location, and sexual orientation and gender identity.⁶⁸ “States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”⁶⁹ The concept of intersectional discrimination is related to compounded stereotypes, which are combined or intersecting stereotypes attributed to women’s multiple identities and different situations in life.

ACCESS TO JUSTICE AND GENDER STEREOTYPES

Access to justice is a human right.⁷⁰ It is “an essential component of the system of protection and enforcement of human rights”. Gender stereotypes in laws and in justice delivery may violate women’s right to access to justice.

The right of access to justice for women is essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women. It is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms. The right to access to justice is multidimensional. It encompasses justiciability, availability, accessibility, good-quality

65 CEDAW General Recommendation No. 28, para. 16.

66 CEDAW General Recommendation No. 25, para. 7, note 1.

67 CEDAW General Recommendation No. 33, para. 8.

68 Ibid.

69 CEDAW General Recommendation No. 28, para. 18.

70 Francioni 2007, p. 1.

and accountability of justice systems, and provision of remedies for victims.⁷¹

Access to justice includes the right to an effective remedy, the right to a fair and just trial, and the right to equality before the law, equality before the courts, and equal protection of the law.

(1) THE RIGHT TO AN EFFECTIVE REMEDY

When measures designed to prevent violations of women's human rights, either by State agents or private individuals, fail, States parties to the CEDAW are under an *obligation to provide effective remedies* to women whose rights have been violated in order to ensure that sanctions are applied to the wrongdoer and that the victims will be properly compensated. This is part of the State obligation to protect women's human rights.⁷²

The right to an effective remedy cuts across all human rights. It is explicitly guaranteed under Articles 8 and 10 of the UDHR, Article 2 (3) of the ICCPR, and Article 2, subparagraphs (b) and (c) of the CEDAW.

The UDHR guarantees the *right to an effective remedy* before *competent national tribunals* for violations of human rights.⁷³ It declares further that “everyone is entitled in full equality to a *fair and public hearing* by an *independent and impartial tribunal*, in the determination of his rights and obligations and of any criminal charge against him”.⁷⁴

In Article 2 (3) of the ICCPR, each State party undertakes: (i) to ensure that any person whose rights or freedoms recognized in the ICCPR are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity; (ii) to ensure that any person claiming such a remedy shall have his right thereto determined by *competent judicial, administrative or legislative authorities*, or by any other *competent authority* provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (iii) to ensure that the competent authorities shall *enforce such remedies* when granted.

Under subparagraph (b) of Article 2 of the CEDAW, States parties have the legal duty “to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”. Thus, States parties must ensure that “legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention”.⁷⁵ Such remedies shall include bringing to justice the perpetrators of violations of women's human rights and providing reparation for victims of discrimination.⁷⁶

71 CEDAW General Recommendation No. 33, para. 1.

72 See De Schutter 2010, p. 365.

73 UDHR, art. 8.

74 UDHR, art. 10. Author's emphasis in italics.

75 CEDAW General Recommendation No. 28, para. 32.

76 Ibid.

Under subparagraph (c) of Article 2, States parties undertake “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the *effective* protection of women against any act of discrimination”.⁷⁷ The CEDAW Committee has recognized that the right to an effective remedy is particularly implied in this provision.⁷⁸

The CEDAW Committee also explains that Article 2, subparagraph (e) of the CEDAW, which establishes an obligation of States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, requires measures that “ensure that women are able to make complaints about violations of their rights under the Convention and have access to effective remedies”.⁷⁹

The right to an effective remedy is violated when gender stereotypes are enshrined in law or perpetuated in case investigations and adjudication to the detriment of women. The CEDAW Committee has linked the right to an effective remedy to the right to have a fair and impartial adjudication of one’s case, which is prejudiced by gender stereotyping:

For the remedy to be effective, the adjudication of a case must be fair, impartial, timely and expeditious. Gender stereotyping, which often occurs in many prosecutions of gender violence and other gender-related cases, affects women’s right to a fair and just trial.⁸⁰

(2) THE RIGHT TO A FAIR HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

The right to a fair hearing or to a fair and just trial by a competent, independent and impartial tribunal is an integral part of the right to an effective remedy. Gender stereotyping in the judicial process violates a person’s right to a fair hearing by a competent, independent and impartial tribunal in civil and criminal proceedings, which is guaranteed under Article 10 of the UDHR and Article 14 (1) of the ICCPR. Such a right is part of the customary rules of international law. According to the Human Rights Committee, “the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception”.⁸¹ According to the CEDAW Committee, “stereotyping affects women’s right to a fair and just trial”.⁸²

The Human Rights Committee refers to some gender stereotypes in its discussion below of women’s right to a fair trial without discrimination. For example, the Human Rights Committee requires States parties to provide information about “whether women may give evidence as witnesses on the same terms as men”. This implies

⁷⁷ Author’s emphasis in italics.

⁷⁸ Karen Vertido v. the Philippines, para. 8.3.

⁷⁹ CEDAW General Recommendation No. 28, para. 36.

⁸⁰ Karen Vertido v. Philippines, para. 8.3.

⁸¹ M. Gonzalez del Río v. Peru, para. 5.2.

⁸² Karen Vertido v. the Philippines, para. 8.4.

the gender stereotype that women are unreliable witnesses, hence the requirement of corroboration of a woman victim's testimony for a successful prosecution of a sexual violence case. This is discussed in Part VI of this Reference.

HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO. 28

"States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, States parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, Ato del Avellanal v. Peru, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters. States parties should report on whether certain categories of women are denied the enjoyment of the presumption of innocence under article 14, paragraph 2, and on the measures which have been taken to put an end to this situation."⁸³

(3) THE RIGHT TO EQUALITY BEFORE THE LAW, EQUALITY BEFORE THE COURTS, AND EQUAL PROTECTION OF THE LAW.

Gender stereotypes in law and in the administration of justice may violate women's right to equality before the law, equality before the courts, and equal protection of the law guaranteed under Article 14, paragraph 1 and Article 26 of the ICCPR. It may also violate the obligation of States parties to "accord to women equality with men before the law" under Article 15, paragraph 1 of the CEDAW.

ICCPR, ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

ICCPR, ARTICLE 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and

⁸³ Ibid., para. 18.

effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

CEDAW, ARTICLE 15

1. States Parties shall accord to women equality with men before the law.

The Human Rights Committee explains that Article 26 of the ICCPR provides an autonomous right that does not duplicate the prohibition against discrimination in Article 2 of the ICCPR. Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”. This concerns the obligations imposed on States parties in the adoption of legislation and its application. When a State party adopts legislation, “it must comply with the requirement of [a]rticle 26 that its content should not be discriminatory”.⁸⁴ In the application of that legislation, public authorities must not discriminate.

STATE OBLIGATIONS TO ELIMINATE GENDER STEREOTYPES

Three provisions of the CEDAW relate specifically to gender stereotypes.⁸⁵ Article 2 (f) and Article 5 of the CEDAW obligate States parties to take all appropriate measures to modify or abolish customs and practices that constitute discrimination against women, while Article 10 (c) obligates States parties to eliminate “any stereotyped concept of the roles of men and women at all levels and in all forms of education”.

Article 5 (a) requires States parties to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. The idea of the inferiority of women is central to gender stereotypes about women, whether they involve attributes, characteristics or roles of women in the family,

⁸⁴ HRC General Comment No. 18, para. 12.

⁸⁵ In addition to the CEDAW, the Convention on the Rights of Persons with Disabilities (CRPD) has a provision that deals with stereotypes. It provides in its Article 8 on awareness-raising:

1. States Parties undertake to adopt immediate, effective and appropriate measures:

- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- (c) To promote awareness of the capabilities and contributions of persons with disabilities.

Of the eight countries covered by this Reference, only Timor-Leste is not a party to the CRPD.

workplace, or community.

CEDAW PROVISIONS SPECIFIC TO GENDER STEREOTYPES

Preamble paragraph 14

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

Article 5

States Parties shall take all appropriate measures:

- (c) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (d) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (e) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.

Although gender stereotypes are not mentioned in the other substantive provisions of the CEDAW, the obligation to eliminate gender stereotypes is implied in the entire Convention as part of States parties' obligation to eliminate all forms of discrimination against women. According to the CEDAW Committee, "three obligations are central to States parties' efforts to eliminate discrimination against women" under the CEDAW:⁸⁶

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.⁸⁷

The *first State obligation* mentioned – to ensure that there is no direct or indirect discrimination against women in laws – requires, among others, that State laws must not contain gender stereotypes that constitute such discrimination. This involves the State *obligation to respect* women's human rights, which "requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights".⁸⁸

Related to this are States parties' obligation under Article 2, subparagraph (d) of the CEDAW, under which "States parties must ensure that State institutions, agents, laws and policies do not directly or explicitly discriminate against women" and "that any laws, policies or actions that have the effect or result of generating discrimination are abolished".⁸⁹ Also, under subparagraph (f) of Article 2, States parties obligate themselves "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".

The *first State obligation* mentioned also requires States parties to ensure that "women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies". Accordingly, justice actors should not discriminate against women through gender stereotyping in the administration of justice, and, where cases of discrimination committed by anyone are brought before courts or tribunals, the same should be

86 CEDAW General Recommendation No. 25, para. 6.

87 Ibid., para. 7. Author's emphasis in italics.

88 CEDAW General Recommendation No. 28, para. 9.

89 Ibid., para. 35.

decided fairly without discrimination, including gender stereotyping.

The CEDAW Committee explains that the *second State obligation* “to improve the de facto position of women” concerns promoting substantive equality, and “[i]nherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices *without the limitations set by stereotypes, rigid gender roles and prejudices*”.⁹⁰

Improving the de facto position of women or promoting substantive equality involves the State obligation to fulfil women’s human rights, and possibly the adoption of temporary special measures,⁹¹ where appropriate, including measures that target gender stereotypes:

States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women. Temporary special measures should also be implemented in the areas of credit and loans, sports, culture and recreation, and legal awareness. Where necessary, such measures should be directed at women subjected to multiple discrimination, including rural women.⁹²

The *third State obligation* mentioned above – “to address prevailing gender relations and the persistence of gender-based stereotypes that affect women *not only* through individual acts by individuals *but also in law, and legal and societal structures and institutions*”⁹³ – requires, among others, the adoption of positive measures aimed at educating legislators and justice actors about the principles of equality and non-discrimination so that they will not perpetuate gender stereotypes either in legislation or in the administration of justice.⁹⁴ This involves the State *obligation to protect* women’s human rights.

The obligation to protect also requires States parties to “take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles

90 Ibid., para. 22. Author’s emphasis in italics.

91 “[T]he adoption of temporary special measures [is] in line with article 4, paragraph 1, of the Convention and general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures. This entails obligations of means or conduct, and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.” CEDAW General Recommendation No. 28, para. 9. Temporary special measures are those that are aimed to “accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field”. The CEDAW Committee explains that the application of temporary special measures should be considered “not as an exception to the norm of non-discrimination, but rather as ... part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms”. CEDAW General Recommendation No. 25, para. 18.

92 CEDAW General Recommendation No. 25, para. 38.

93 Author’s emphasis in italics.

94 CEDAW General Recommendation No. 28, para. 17.

for men and women”.⁹⁵

This *third State obligation*, insofar as it extends to private individuals, organizations or enterprises, requires the due diligence obligation of States parties under Article 2 of the CEDAW. The CEDAW Committee explains:

Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.⁹⁶

With respect to gender-based violence, the due diligence obligation of States parties requires them to prevent, investigate, prosecute, and punish acts of gender-based violence.⁹⁷ This obligation is violated when gender stereotypes in the administration of justice prevent the effective investigation, prosecution and punishment of acts of gender-based violence.

In sum, under international human rights law, States parties to the CEDAW have a duty to banish stereotypes, including in the judicial process, as part of their obligation to eliminate all forms of discrimination against women.

ARTICLE 2, CEDAW

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis

⁹⁵ Ibid., para. 9.

⁹⁶ CEDAW General Recommendation No. 28, para. 13.

⁹⁷ Ibid., para. 19.

with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

PART 5.

GENDER STEREOTYPES AND STATE RESPONSIBILITY: THE CEDAW COMMITTEE JURISPRUDENCE

Four individual communications decided by the Committee on the Elimination of Discrimination against Women (the “CEDAW Committee”) under the Optional Protocol to the CEDAW illustrate how States parties to the CEDAW can be held responsible for violating their State obligations by gender stereotyping in justice delivery.⁹⁸ The CEDAW Committee Views in the four cases also provide standards for States in complying with their obligations to eliminate discrimination against women including gender stereotypes.

I. KAREN VERTIDO V. THE PHILIPPINES⁹⁹

In *Karen Vertido v. the Philippines*, the CEDAW Committee discussed gender stereotypes in relation to sexual violence. In this case, a trial court in the Philippines acquitted a 60-year-old man accused of raping a 42-year-old woman, reasoning, among others, that a rape victim must try to escape at every opportunity and since, in the assessment of the court, the complainant did not take several opportunities to escape, she was not really raped; that since the victim was a strong and educated woman, she could not possibly have been easily cowed by intimidation from the accused; that it is inconsistent for a rape victim to react to the assault by resisting the attack and, on the same occasion, also to cower in submission because of fear; and that it is unbelievable that a man in his sixties would commit rape. Ms. Vertido asserted that the judgment of acquittal is discriminatory within the meaning of Article 1 of the CEDAW in relation to General Recommendation No. 19, in that the judgment was grounded on gender-based myths and misconceptions about rape and rape victims, and that it was rendered in bad faith, without basis in law or in fact. She claimed that the acquittal is a violation of the positive obligations of the

⁹⁸ The four cases were identified and selected due to their substantial elaboration of gender stereotypes.

⁹⁹ Views, CEDAW/C/51/D/28/2010 (22 September 2010).

State party under Article 2, subparagraphs (c), (d) and (f), and 5, paragraph (a) of the CEDAW.¹⁰⁰

GENDER STEREOTYPING¹⁰¹

The CEDAW Committee declared that the trial court engaged in gender stereotyping. It explained:

8.5 The Committee notes that, under the doctrine of *stare decisis*, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the revised penal code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgement, the Committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which “an accusation for rape can be made with facility”, reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgement and classified by the author (see paras. 3.5.1-3.5.8 above), the Committee, after a careful examination of the main points that determined the judgement, notes the following issues. First of all, the judgement refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that “in any case, the law does not impose upon a rape victim the burden of proving resistance”. The decision shows, however, that the judge did not apply these principles in evaluating the author’s credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgement reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that “the failure of the victim to try and escape does not negate the existence of rape” and instead expected a certain behaviour from the author, who was perceived by the court as being not “a timid woman who could easily be cowed”. It is clear from the judgement that the assessment of the credibility of the author’s version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and “ideal victim” or what the judge considered to be the rational and ideal response of a woman in a rape situation as become clear from the following quotation from the judgement:

“Why then did she not try to get out of the car when the accused must have applied the brakes to avoid hitting the wall when she grabbed the steering wheel? Why did she not get out or even shout for help when the car must have slowed down before getting into the motel room’s garage? Why did she not stay in the bathroom after she had entered and locked it upon getting into the room? Why did she not shout for help when she heard the accused talking with someone? Why did she not run out of the motel’s garage when she claims she was able to run out of the hotel room because the accused

¹⁰⁰ All these provisions are discussed in Part IV.

¹⁰¹ There is an individual concurring opinion in this case, by CEDAW Committee member Yoko Hayashi. Ms. Hayashi’s individual concurring opinion made a “few additional observations in order to emphasize that [she does] not consider it the function of the Committee to decide upon the criminal responsibility of the accused in any given case nor in the present case”. She agreed “that the reasoning which led to the conclusion [of acquittal] may have been influenced by the so-called rape myths [or gender stereotypes]”, but she does not agree with Ms. Vertido’s allegation “that without the gender myths and stereotypes, the accused would have been convicted.”

was still NAKED AND MASTURBATING¹⁰² on the bed? Why did she agree to ride in the accused's car AFTER¹⁰³ he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?"

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

8.6 Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".

8.7 With regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code.¹⁰⁴ It recalls its general recommendation No. 19 of 29 January 1992 on violence against women, where it made clear, in paragraph 24 (b), that "States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity". Through its consideration of States parties' reports, the Committee has clarified time and again that rape constitutes a violation of women's

102 Capitalized as per judgment.

103 Ibid.

104 The definition of rape (under the Revised Penal Code) on the date of the commission of the acts was as follows:

Article 335. *When and how rape is committed.* - Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation;
2. When the woman is deprived of reason or otherwise unconscious; and
3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.

This definition was later amended in 1997 as follows:

Art. 266-A. *Rape: When And How Committed.* Rape is committed:

1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
 - (a) Through force, threat, or intimidation;
 - (b) When the offended party is deprived of reason or otherwise unconscious;
 - (c) By means of fraudulent machination or grave abuse of authority; and
 - (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

right to personal security and bodily integrity, and that its essential element was lack of consent.

The Committee stressed that:

stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.¹⁰⁵

It also declared that:

there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.¹⁰⁶

The Committee found that "the State party has failed to fulfil its obligations and has thereby violated the rights of [Karen Vertido] under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee".¹⁰⁷ The Committee recommended, among others, that the Philippines provide Karen Vertido appropriate compensation that is "commensurate with the gravity of the violations of her rights".¹⁰⁸

REDEFINING RAPE OR SEXUAL ASSAULT TO REMOVE GENDER STEREOTYPES

The CEDAW Committee gave specific recommendations to the Philippines to remove or avoid gender stereotypes in legislation concerning rape and sexual assault, and in relevant legal procedures. It focused on the legal definition of rape or sexual assault, which implicates gender stereotypes. Its recommendations recognized that when legislation requires the use of physical force in the commission of rape or sexual assault, it does not capture the essence of the crime as a violation of a person's sexual autonomy. The focus on physical force as a defining element of rape or sexual assault is due to the gender stereotypical belief that only the use of physical force constitutes a violation of women's sexual autonomy. Accompanying this stereotypical notion of sexual violation is the stereotype of a legitimate victim as someone who must have physically resisted.

Specifically, the CEDAW Committee recommended that the Philippines:

Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:

- (i) Review of the definition of rape in the legislation so as to place the lack of

¹⁰⁵ Views, para. 8.4.

¹⁰⁶ Ibid., para. 8.5.

¹⁰⁷ Ibid., para. 8.9.

¹⁰⁸ Ibid., para. 8.9, subpara. (a).

consent at its centre;

- (ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:
 - requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
 - requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.”

The CEDAW Committee referred to the *Handbook for Legislation on Violence against Women*, a 2009 United Nations publication, which discusses how rape legislation often requires proof of penetration. This limited definition does not take into account “the full range of sexual violations experienced by women and the impact of such violations on the complainant/survivor” and “[f]or this reason, some countries have instead included in their criminal law a broad definition of ‘sexual assault’ which encompasses the offence formerly classified as rape and is not dependent upon proof of penetration”. The Handbook recommends that legislation should define sexual assault as a violation of bodily integrity and sexual autonomy.¹⁰⁹

The CEDAW Committee’s recommendations reflect international and regional standards that recognize that the *absence of consent*, rather than the use of physical force or violence, is the essence of rape or sexual assault. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY), based on a survey of laws on rape in national legal systems, found that “[t]he basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalized”.¹¹⁰ It said that “[s]exual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.¹¹¹ Thus, it held that the material act (*actus reus*) of the crime of rape in international law “occurs without the consent of the victim”; that the *mens rea* is the intention to effect the act “without the consent of the victim”; and that “consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances”.¹¹² The ICTY also explained that “[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape”, and that there are:

“factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.¹¹³

109 United Nations 2009, pp. 26-27.

110 Prosecutor v. Kunarac, Kovač and Vuković, case no. IT-96-23 and IT-96-23/1-A, judgment of 22 February 2001 (ICTY Trial Chamber), para. 457.

111 Ibid.

112 Ibid., para. 460.

113 Prosecutor v. Kunarac, Kovač and Vuković, case no. IT-96-23 and IT-96-23/1-A, judgment of 12 June 2002

In *M.C. v. Bulgaria*,¹¹⁴ the European Court of Human Rights referred to the ICTY jurisprudence and similarly concluded that the trends in international and domestic law and practice on rape show that acts committed against non-consenting persons is penalized, even if they do not show signs of resistance:

[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.¹¹⁵

Following this standard, the Council of Europe Convention on preventing and combating violence against women and domestic violence requires that criminalization of sexual violence must focus on "non-consensual" acts and further provides that "[c]onsent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances".¹¹⁶

II. R.K.B. V. TURKEY¹¹⁷

In another case, *R.K.B. v. Turkey*, the CEDAW Committee referred to the different standard of morality applied to women with respect to extra-marital affairs. In this case, R.K.B., a married woman, was dismissed from her employment in a hairdresser's shop. She filed a claim for severance pay and employment-related damages with the labour court, arguing that her contract was terminated without any valid reason. In defense, the employer claimed that she was dismissed because she provoked rumours by displaying "seemingly sexually oriented relationships with persons of the opposite sex at the workplace". The employer argued "that in their area of activity, it was vital for the employees to refrain from even the slightest offence against morality". R.K.B. learned that she was specifically accused of having an extra-marital relationship with the male manager, also married, who was still employed in the shop. This prompted her to claim gender-based discrimination against her employer with the same labour court. Witnesses for R.K.B. testified on her moral integrity; that most of the men in the shop had extra-marital affairs; that R.K.B. often expressed her disgust at this state of affairs; and that her troubles started when she refused to give her house keys to a married male employee who wanted to bring his girlfriend. The employer failed to challenge these claims. The labour court found that R.K.B.'s employment was terminated without any valid reason and awarded damages, but did not find any reason to declare that the termination was due to

(ICTY Appeals Chamber), para. 129.

114 Judgment, European Court of Human Rights 2004.

115 Ibid., para. 66.

116 Council of Europe Convention on preventing and combating violence against women and domestic violence (2011), art. 36.

117 Views, CEDAW/C/51/D/28/2010 (13 April 2012).

gender-based discrimination. The CEDAW Committee found that the State party violated its obligations under Articles 2 (a) and (c), in relation to Article 1, of the CEDAW, “by not ensuring a practical realization of equal treatment provided for by the Labour Act and effective treatment of women against any act of gender-based discrimination”.

GENDER STEREOTYPING

The Committee also found that there was gender stereotyping in how the courts viewed and dealt with the evidence. It explained:

8.7. With regard to the author’s claim of a violation of article 5, paragraph (a), of the Convention, the Committee notes that the Kocaeli 3rd Labour Court concluded that the author’s dismissal was unjustified because the employer did not submit any concrete evidence regarding the author’s “sexually-oriented relations with persons of the opposite sex” and that there were contradictions in the evidence of the witnesses. The Committee notes with concern that at no time did the Kocaeli 3rd Labour Court comment adversely on the gender-biased and discriminatory nature of the evidence adduced on behalf of the employer. Instead of rejecting outright such a defence on the part of the employer, which clearly constituted gender-based discrimination against the author in breach of the principle of equal treatment, the Court examined the evidence adduced by the employer and scrutinized only the moral integrity of the author, a “female” employee and not that of the male employees, namely Mr. M.A. and Mr. D.U. Unlike the Kocaeli 1st Magistrates Court, at no time did the Kocaeli 3rd Labour Court or the Court of Cassation reject the evidence adduced by the employer as being “entirely” a matter of the author’s “private life”. The Committee rejects the contention of the State party that the author’s claim is manifestly ill-founded and not sufficiently substantiated as she did not refer to any social and cultural pattern that the State party would have failed to take appropriate measures to modify. The Committee is of the view that, in the present case, the court proceedings were based on the stereotyped perception of the gravity of extramarital affairs by women, that extramarital relationships were acceptable for men and not for women and that only women had the duty to “refrain from even the slightest offence against morality”.

8.8 The Committee emphasizes that full implementation of the Convention requires States parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women. The Committee is of the view that gender stereotypes are perpetuated through a variety of means and institutions including laws and legal systems and that they can be perpetuated by State actors in all branches and levels of government and by private actors. In this case, the Committee is of the view that the Kocaeli 3d Labour Court has clearly allowed its reasoning based on law and facts to be influenced by stereotypes and the Court of Cassation by failing altogether to address the gender aspect, has perpetuated gender stereotypes about the role of women and men with it being accepted for the latter to have extramarital affairs. The Committee therefore concludes that the State party has violated article 5, paragraph (a), of the Convention.¹¹⁸

118 The Committee also said that the employer’s treatment of R.K.B. violated her right to work and equal treatment and constituted gender-based discrimination under article 11, paragraphs 1 (a) and (d) of the CEDAW, which the State party’s courts failed to address. Views, para. 8.9.

The Committee recommended that the State party provide appropriate reparation, including adequate compensation, for R.K.B. in accordance with the State party's Labour Act. It also recommended that the State party:

[p]rovide for appropriate and regular training on the Convention, its Optional Protocol and its general recommendations for judges, lawyers and law enforcement personnel in a gender-sensitive manner, so as to ensure that stereotypical prejudices and values do not affect decision-making.¹¹⁹

III. JALLOW V. BULGARIA¹²⁰

The gender stereotype that men are more rational than and superior to women, which underpins the practice of giving men's opinion greater weight, was illustrated in the case of *Jallow v. Bulgaria*, which involved domestic violence. In this case, Jallow, a Gambian citizen who was described as an "illiterate woman with no education" and spoke only her native language and average-level English, claimed that she and her daughter were victims of discrimination from Bulgarian authorities. Jallow's husband, a Bulgarian citizen, subjected her to physical, sexual and psychological abuse. He kept all her documents and forbade her to leave the house without his permission or to seek employment. He also tried to force her to take part in pornographic films and photographs. He kept pornographic photographs all over the apartment. He also sexually abused their daughter, who was only a little over one-year-old, by masturbating in front of her, watching pornographic films in her presence, and teaching her to touch his penis. Once, the husband called the Child Protection Department to convince Jallow to stop breastfeeding their daughter and instead to make her eat ordinary food. During their visit, the social workers saw the pornographic photographs and learned of the husband's domestic violence. The police seized the photographs and informed the prosecutor about them. They advised Jallow to take her daughter and stay away from the husband, but did not tell her where to go. Jallow and her daughter stayed in a non-government shelter for a brief period until the husband found them. He convinced Jallow to return home. Meanwhile, the prosecutor did not find adequate evidence to charge the husband with any offense.

Jallow called the police several times to stop the abuse against her, but the police did not take any action beyond giving the husband an oral warning. Eventually, the husband applied for emergency protection order with the court, invoking the State's gender-neutral domestic violence law, claiming that he and their daughter were victims of domestic violence from Jallow. He asked the court to order Jallow to stay away from him and their daughter, and to force her admission in a mental hospital. He presented a photograph of a child with injuries on her back (not their daughter) and a medical certificate showing injuries he purportedly suffered from Jallow's abuse. The court believed the husband without giving Jallow an opportunity to be heard. It granted an emergency protection order in favor of the husband and

¹¹⁹ Ibid., para. 8.10 (b) (ii).

¹²⁰ Views, CEDAW/C/52/D/32/2011 (28 August 2012).

deprived Jallow of custody of their child, without any right to appeal until the end of the court proceedings. After the husband removed the child from the couple's residence, Jallow contacted various State agencies, inquiring about her daughter's whereabouts and well-being, and informing them about the husband's abuses against her and the child. The State agencies did not take any action on Jallow's requests because of the emergency protection order issued by the court. Although the court eventually dismissed the husband's application for a permanent protection order, the court's order separating Jallow from her daughter remained effective during the husband's appeal. Jallow regained custody of the child eight months later and only after she agreed, in separate proceedings, to a divorce on terms unfavorable to her in exchange for the child's custody.

The CEDAW Committee found that the State party "failed to act with due diligence, to provide [Jallow] with effective protection and to take into account her vulnerable position, as an illiterate migrant woman with a small daughter without a command of Bulgarian or relatives in the State party". It considered the State party's failure to conduct a suitable and timely investigation of the allegations of domestic violence as a violation of the State party's obligations under article 2, paragraphs (d) and (e), read in conjunction with articles 1 and 3,¹²¹ of the CEDAW. It also considered that, in the light of the vulnerable position of Jallow and her child and the allegations of domestic violence, the circumstances of the issuance of the emergency protection order in the husband's favor, the resulting forcible separation of Jallow and her daughter, and the failure to lift the emergency protection order soon after the husband's application for a permanent protection order was dismissed constituted violations of Bulgaria's obligations established in Article 2, paragraphs (b) and (c), read in conjunction with Articles 1 and 3, of the Convention.

GENDER STEREOTYPING

With respect to gender stereotyping, the Committee said that:

traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. In respect of the case before the Committee, it notes that, in issuing the emergency protection order and taking other decisions, the State party's authorities relied on the husband's statement and actions, despite being aware of [Jallow's] vulnerable position and dependency on him. The Committee also observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men. The Committee also notes that the author was separated from her daughter for almost eight months, during which time she received no information on the care that her daughter was receiving and was granted no visitation rights. Under such circumstances, the Committee considers that both [Jallow] and her daughter are victims of gender-based discrimination because the State party failed to protect [Jallow's] equal rights in marriage and as a parent and to regard her daughter's interests as paramount. That the emergency protection order that separated the author from her daughter was issued without due consideration of earlier incidents

¹²¹ Article 3 of the CEDAW provides:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

of domestic violence and of the author's claim that she and her daughter were in fact the ones in need of protection against domestic violence, and that the emergency protection order was not removed by the Sofia Regional Court when a permanent protection order was rejected, lead the Committee to conclude that the State party failed to take all appropriate measures under article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), and (f), of the Convention.¹²²

The Committee's recommendations to the State party included providing appropriate compensation for Jallow and her daughter, commensurate with the gravity of the violations of their rights.¹²³ It also recommended for the State party:

- (a) To take measures to ensure that women victims of domestic violence, in particular migrant women, have effective access to services related to protection against domestic violence and to justice, including interpretation or translation of documents, and that the manner in which domestic courts apply the law is consistent with the State party's obligations under the Convention;
- (b) To take the legislative or other measures necessary to ensure that, in the determination of custody and visitation rights of children, incidents of violence are taken into account and that the rights and safety of the victim or children are not jeopardized;
- (c) To provide for appropriate and regular training on the Convention, its Optional Protocol and its general recommendations for judges, prosecutors, the staff of the State Agency for Child Protection and law enforcement personnel in a gender-sensitive manner, having particular regard to multiple discrimination, so as to ensure that complaints regarding gender-based violence are received and considered adequately.¹²⁴

IV. V.K. V. BULGARIA¹²⁵

V.K. and F.K., both Bulgarian nationals, were married with two minor children (a son and a daughter). V.K. claimed that for years, while in Bulgaria as well as in Poland, her husband, F.K., subjected her to psychological, emotional and economic abuse, and later, also physical violence. He did not allow her to find employment and gave her money only for basic needs and for specified purposes, so she was entirely

122 Views, para. 8.6. Article 16, paragraphs 1 (c), (d), and (f) of the CEDAW provide:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

....

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

....

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

....

123 Views, para. 8.8, subpara. 1.

124 Ibid., para. 8.8, subpara. 2.

125 Views, CEDAW/C/49/D/20/2008 (27 September 2011).

economically dependent on him. She was treated like a housekeeper, not as a wife and partner, and was not allowed to communicate freely with her friends and family. After more than ten years of marriage, V.K. insisted on being treated as a person and to be allowed to look for paid work. To make her obey him and “behave”, the husband stopped V.K.’s and the children’s allowance. V.K. was forced to seek employment. Eventually, V.K. filed an application for protective measures and financial maintenance in a court in Poland, but the application remained unresolved. (The parties were living in Poland at that time because of F.K.’s work.) During this time, the abuse continued, which included F.K. locking the children in a room and attempting to strangle V.K.

V.K. eventually moved out of the family residence together with her daughter and stayed in an NGO shelter. F.K. kept their son and denied her contact with her son for two months. V.K. later managed to get her son, but only after an incident where F.K. hit her and a representative of an NGO assisting V.K., in the presence of the police. V.K. sought medical treatment for her injuries twice (once in Poland and once in Bulgaria), and was given medical certificates detailing her injuries.

While in Poland and without V.K.’s knowledge, F.K. initiated divorce proceedings in Bulgaria, where he claimed custody of both their children.

V.K. eventually left Poland for Bulgaria with her two children to hide from her husband, to seek support from her family, and to get legal help. Upon their arrival in Bulgaria, V.K. and her children were forced to stay with friends for about a week because of the lack of State-run shelters and the overcrowding in the NGO-run shelter. With the help of an NGO, she succeeded in obtaining an order for immediate protection under the Bulgarian *Law on Protection against Domestic Violence*. However, domestic courts refused to grant V.K. a permanent protection order because they considered that there was no imminent threat to the life or health of V.K. and her children. The courts applied a provision in the Law that provides that a request for a protection order must be submitted within one month from the occurrence of the domestic violence. The courts found that no domestic violence occurred on the date when F.K. hit V.K. in the presence of the police, which was within the month prior to the application.

F.K. continued to see the children and even filed a complaint against V.K. for the latter’s refusal to allow him to enter the apartment where she and the children lived. Sometime later, the court hearing F.K.’s divorce application granted the divorce, awarded custody to V.K., gave F.K. visitation rights, and ordered him to provide child maintenance.

In her communication to the Committee, V.K. alleged that Bulgaria has failed to provide her with effective protection against domestic violence, in violation of Articles 1, 2 (a)-(c) and (e)-(g), 5 (a), and 16 (1) (c), (g), and (h) of the CEDAW, read in relation to General Recommendation No. 19.

In its Views, the Committee reiterated that in accordance with its General Recommendation No. 19, gender-based violence is a form of discrimination against women that States parties to the CEDAW are required to address. It also reiterated

that under Article 2 (e) of the CEDAW, “States parties may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.¹²⁶

The Committee noted that Bulgaria had adopted the *Law on Protection against Domestic Violence*, but emphasized that in order for V.K. “to enjoy the practical realization of the principle of equality between women and men and of her human rights and fundamental freedoms, the political will that is expressed in such specific legislation must be supported by all State actors, including the courts, which are bound by the obligations of the State party”.¹²⁷

The Committee identified the central issue as whether the Bulgarian courts’ refusal to issue a permanent protection order against V.K.’s husband was discriminatory.¹²⁸ The courts found that there was no imminent threat to the life or health of V.K. and her children because they had not been subjected to domestic violence in the month prior to the application for protection. The Committee noted, however, that:

gender-based violence constituting discrimination within the meaning of article 2, read in conjunction with article 1, of the [CEDAW] and general recommendation No. 19, does not require a direct and immediate threat to the life or health of the victim. Such violence is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty.¹²⁹

The Committee noted further that the *Law on Protection against Domestic Violence* adopts a similarly expansive definition of domestic violence. Moreover, while applications under the Law for an immediate protection order require “a direct, immediate or impending threat to the life or the health of the aggrieved person”, no such threat is required to issue a permanent protection order”.¹³⁰ According to the Committee, Bulgaria’s courts had “applied an overly restrictive definition of domestic violence that was not warranted by the Law and was inconsistent with the obligations of the State party under Article 2 (c) and 2 (d) of the Convention, which forms part of the legal order of, and is directly applicable in, the State party”.¹³¹

The courts “focused exclusively on the issue of direct and immediate threat to the life or health of [V.K.] and on her physical integrity, while neglecting her emotional and psychological suffering”. Moreover, the courts deprived themselves of the opportunity to consider past history of domestic violence by interpreting that the “purely procedural requirement” that a request for a protection order must be submitted within one month from the date of the occurrence of the domestic violence precludes consideration of incidents that occurred prior to that one-month period. The Committee also observed that by requiring that acts of domestic

126 Views, para. 9.3.

127 Ibid., para. 9.4.

128 Ibid., para. 9.6.

129 Ibid., para. 9.8.

130 Ibid.

131 Ibid., para. 9.9.

violence must be proven beyond reasonable doubt in cases involving requests for protection orders, the courts applied a very high standard of proof that is not in line with the CEDAW nor with current anti-discrimination standards that ease the burden of proof of domestic violence victims in civil proceedings.¹³²

The Committee also concluded that the unavailability of domestic violence shelters in Bulgaria amount to a violation of Articles 2(c) and 2(e) of the CEDAW.

GENDER STEREOTYPING

The Committee reaffirmed that the CEDAW places obligations on all State organs and that the State can be held responsible under the CEDAW for judicial decisions that violate its provisions. It reiterated the link between gender stereotyping and the right to a fair trial, and the need to banish gender stereotypes in order to eliminate discrimination against women. It declared that “stereotyping affects women’s right to a fair trial”, and that “the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence”.¹³³

The Committee found that the refusal to grant a permanent protection order was based on gender stereotypes related to domestic violence. This constituted discrimination against V.K., in violation of Bulgaria’s obligations under Articles 2 (d) and (f) and 5 (a) to banish gender stereotypes together with its obligations to eliminate discrimination against women in marriage and the family under Article 16 (1) and violence against women under General Recommendation No. 19. The Committee explained:

9.12 The Committee considers that the interpretation of the Plovdiv District and Regional Courts that the rationale behind the one-month period within which a victim needs to apply for a protection order (article 10, paragraph 1, of the Law on Protection against Domestic Violence) is to provide for urgent court interventions rather than to police the cohabitation of partners, lacks gender sensitivity in that it reflects the preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere, which, in principle, should not be subject to State control. Similarly, as stated above, the exclusive focus of the Plovdiv courts on physical violence and on an immediate threat to the life or health of the victim reflects a stereotyped and overly narrow concept of what constitutes domestic violence. Such stereotyped interpretation of domestic violence is, for example, reflected in the reasoning of the Plovdiv Regional Court that “Striking at someone, you can exercise violence, but only after breaking certain limits of abuse, and, as is the case, the statement of V.K. does not make it clear how exactly she was struck at, namely on the procedure date, neither how her inviolability was affected.” Traditional stereotypes of women’s roles in marriage can also be found in the divorce judgement dated 8 May 2009 of the Plovdiv District Court which refers to the author’s use of “insolent language” with regard to her husband. The Committee concludes that the refusal of the Plovdiv courts to issue a permanent protection order against the author’s husband was based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence.

132 Ibid., para. 9.9.

133 Ibid., para. 9.11.

The Committee recommended that Bulgaria provide adequate financial compensation for V.K., commensurate with the gravity of the violations of her rights.¹³⁴ It also recommended that Bulgaria:

- (i) Amend article 10 (1) of the Law on Protection against Domestic Violence so as to remove the one-month time limit and to ensure that protection orders are available without placing undue administrative and legal burdens on applicants;
- (ii) Ensure that the provisions in the Law on Protection against Domestic Violence ease the burden of proof in favour of the victim by amending the Law accordingly;
- (iii) Ensure that a sufficient number of State-funded shelters are available to victims of domestic violence and their children and provide support to non governmental organizations offering shelter and other forms of support to victims of domestic violence;
- (iv) Provide mandatory training for judges, lawyers and law enforcement personnel on the application of the Law on Protection against Domestic Violence, including on the definition of domestic violence and on gender stereotypes, as well as appropriate training on the Convention, its Optional Protocol and the Committee's general recommendations, in particular general recommendation No. 19.¹³⁵

134 Ibid., para. 9.16 (a).

135 Ibid., para. 9.16 (b).



Photo: UN Women/Niels den Hollander

PART 6.

GENDER STEREOTYPES IN LAWS AND COURT DECISIONS IN SOUTHEAST ASIA

The process of claiming rights or seeking remedies for rights violations is difficult for many women because of the discrimination they experience in the family, workplace, and community, and the consequential social, economic and other barriers they face in seeking justice. For example, it is recognized that “the low social and economic status of women can be both a cause and a consequence of violence against women”¹³⁷ and other violations of their human rights. This low social and economic status also prevents many women from reporting violations of their rights to the authorities. Some groups of women do not report the violations against them because of multiple and intersecting factors (e.g., being poor and raped in the context of transactional sex or prostitution, or being an undocumented female migrant worker) that lead them to fear that they will not be believed, or they will be humiliated, arrested or deported.¹³⁸ Thus, many women who report violations of their rights do so from a disadvantaged position. Recognizing this disempowerment is an important lens through which justice actors can improve their response to complaints brought by women.

*It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.*¹³⁶

The CEDAW Committee has identified some of the barriers that women face in accessing justice:

In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right of access to justice on a basis of equality. They include a lack of effective jurisdictional protection offered by the States Parties in relation to all dimensions of access to justice. These obstacles occur in a structural

¹³⁶ CEDAW General Recommendation No. 25, para. 8.

¹³⁷ Beijing Platform for Action 1995, para. 112.

¹³⁸ See CEDAW General Recommendation No. 33, para. 10.

context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All of these obstacles constitute persistent violations of women's human rights.¹³⁹

The CEDAW Committee has also pointed out that:

the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.¹⁴⁰

It is important for justice actors to note all of these factors because they not only prevent reporting of human rights violations by women, but also cause attrition where women have accessed the legal process.

The specific mention of gender stereotypes by the CEDAW Committee recognizes that they are systemic and embedded in structures, laws and practices, and seriously affect women's access to justice. They are manifestations as well as causes of discrimination. Justice actors have a responsibility to ensure that justice delivery is not made any more difficult through gender stereotyping.

Laws that address victimization of women are intended to redress violations and provide victims the justice they deserve. However, the effectiveness of those laws is affected by the existence of gender stereotypes in the substance of the laws, or by the gender stereotyping that occurs in the interpretation or enforcement of those laws in the investigation and adjudication processes.

Justice actors should bear in mind that judicial decisions have tremendous impact on the lives of litigants and communities. They can empower individuals or groups, enable the rebuilding or facilitate the shattering of lives, reshape unequal relations, set precedents for future litigants, and define the course of the life of the nation. They can also impact on the distribution of power and resources in the family or community.

Judges and other justice actors as state agents are duty bearers in eliminating all forms of discrimination against women. The State's obligation to eliminate all forms of discrimination against women requires that "all branches of government (executive, legislative and judicial branches) and all levels of government assume their respective responsibilities for implementation".¹⁴¹ Thus, justice actors must properly enforce relevant laws in cases brought before them for investigation and adjudication, and in doing so refrain from causing discrimination through gender

¹³⁹ CEDAW General Recommendation No. 33, para. 3.

¹⁴⁰ CEDAW General Recommendation No. 33, para. 13.

¹⁴¹ CEDAW General Recommendation No. 28, para. 25.

stereotyping. The following discussion of gender stereotypes in laws and court judgments in Southeast Asia is intended to capacitate justice actors to perform their duties as State actors in protecting women's human rights.

“Judicial decisions play an especially important role in the characterization of women. Judges and adjudicators have the ability to bring the right to equality into reality. For that reason, they must make sure that in the process of interpreting and applying the law, they do not rely on prejudicial notions regarding how persons of a given sex, gender, or sexual orientation “are,” or how such persons should behave.”

Supreme Corte de Justicia de la Nacion, Mexico 2013, p. 14.

A. GENDER STEREOTYPES OF VICTIMS OF GENDER-BASED VIOLENCE

Examining gender stereotypes in gender-based violence cases is important because gender-based violence is one of the most common and worst forms of discrimination that women experience. The incidence of gender-based violence against women globally is staggering. The World Health Organization (WHO) reports that “the global prevalence of physical and/or sexual intimate partner violence among all ever-partnered women was 30.0 per cent”,¹⁴² i.e., one in three women experiences sexual or physical violence or both during their lifetime from their intimate partner. According to the same WHO study, Southeast Asia has one of the highest prevalence, where “approximately 37% of ever-partnered women reported having experienced physical and/or sexual intimate partner violence at some point in their lives”.¹⁴³ Another study states that 47 percent of women in rural Thailand reported that they experienced sexual and/or physical violence from an intimate partner.¹⁴⁴

Despite the huge numbers of victims, only a small number reports the violations. This low rate of reporting can be partly attributed to the widespread cultural belief that women are to blame for the violence they experience or that the men have some justification for committing the abuse. For example, eight out of ten women and men in Lao PDR and more than seven in ten women in rural Thailand believe that “there are reasons that justify a man beating his wife”.¹⁴⁵

142 WHO 2013, p. 16.

143 Ibid.

144 WHO 2005.

145 Ibid.; United Nations Children's Fund (UNICEF) and the Department of Statistics (Lao PDR), Ministry of Health (Lao PDR) 2006.

The small number of reported cases is further reduced as victims go through the processes of the justice system. Many drop out of the process for various reasons, a phenomenon that is called attrition. Gender stereotypes are a factor in the rate of attrition in gender-based violence cases.

(1) THE “VIRTUOUS” OR “GOOD WOMAN” STEREOTYPE

The virtuous or good woman stereotype, together with the bad woman or slut stereotype, is one of the central gender stereotypes in the web of gender stereotypes that harm women. The virtuous or good woman stereotype is both prescriptive and descriptive. It is prescriptive because it constitutes society’s expectations of what a woman should be. It is also descriptive of society’s perceptions of women’s behavior, and to earn this label generally means that one conforms to the moral standards of the community. In sexual violence cases, the virtuous or good woman stereotype is usually young, single, guileless, and unsullied or virginal, or “innocent in the ways of the world”. If a woman is mature in years or married, she is then reputed to be a woman of good morals. In order for her to be recognized as a victim, it must be proven that she has struggled or resisted to the utmost in order to protect her virtue. The conditions that attended her violation must have been too reprehensible or impossible to escape from. The virtuous or good woman stereotype could not be blamed for what happened to her, for she is the archetypal victim. She is a credible witness because she is such an epitome of virtue that she simply cannot lie. When she files a complaint, the court rushes to her protection.

Based on the virtuous or good woman stereotype, only women who are virtuous or of decent repute are credible, can be victims, and deserve legal protection. This stereotype discriminates against those who do not fit society’s standards of virtue and decency. It renders complainants in sexual abuse cases vulnerable to claims of ill repute or loose morals and, thus, of a character prone to fabricate claims of abuse or harassment. When this stereotype is employed, protection and redress are extended only to those who fit this stereotype.¹⁴⁶

(2) THE “BAD WOMAN” OR “SLUT” STEREOTYPE (OR THE “SEXUALLY AVAILABLE” STEREOTYPE)

The second major stereotype is the bad woman or the slut, the opposite of the virtuous woman stereotype. The bad woman or the slut is described in various ways: as a woman of loose morals, a woman of ill-repute, and so on. The stereotyping of the “bad woman” usually arises from the perception that she behaved “indecently”, “indecorously” or “inappropriately”. The bad woman or slut is considered to be always sexually available to men, or is deemed to have invited the violation. When this stereotype goes to court, she is usually disbelieved and blamed for what happened to her.

¹⁴⁶ Ursua 2002, p. 105.

Illustrative law and cases:

- In one rape case that the Philippine Court of Appeals decided in 2007,¹⁴⁷ the court declared that the complainant behaved “with audacity and reckless abandon”. She drank, flirted and danced with men she barely knew. For this, she was not allowed to portray herself as a “demure provinciana [rural] lass” or resort to “protestation of decency as a protective shield against her own indecorous behaviour”. These statements preceded the court’s evaluation of the evidence. The court also characterized what happened as the “unfolding of a spontaneous, unplanned romantic episode”.
- In a rape case decided by the Supreme Court of Myanmar,¹⁴⁸ a 26-year-old woman reported that the accused entered her family’s hut at midnight while her father was away, threatened her and her 13-year-old sister with a knife, and proceeded to rape her. She and her sister did not shout or call for help. The victim reported the rape to her father the next day. The Myawn Mya Township court acquitted the accused. The Attorney General appealed the acquittal to the Supreme Court of Myanmar. The Supreme Court of Myanmar dismissed the appeal. It explained that it cannot be concluded that the complainant was raped because at the time of the alleged rape she was 26 weeks pregnant without a husband, and she had also previously borne a child outside of wedlock. According to the court, these facts make it difficult to give credence to the complainant’s allegation of rape. The court said that the complainant was the kind of person who can speak untruthfully and quickly make such allegations of rape.
- In *Civil Service Commission v. Belagan*, a case involving sexual harassment, the Philippine Court of Appeals declared that the complainant was an unreliable witness because her character was questionable since there had been many cases filed against her. The Court of Appeals said that “[g]iven her aggressiveness and propensity for trouble, she is not one whom any male would attempt to steal a kiss. In fact, her record immediately raises an alarm in any one who may cross her path.” On the other hand, the court considered the man’s “unblemished service record for 37 years” when it absolved him of liability.¹⁴⁹
- Article 202 of the Philippine Revised Penal Code defines a specific group of persons as criminals instead of defining an act or acts as crimes as in other provisions of the Code:¹⁵⁰

Article 202. Prostitutes; Penalty. – For the purposes of this article, women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct, are deemed to be prostitutes.

147 *People of the Philippines v. Smith*, CA-G.R. CR. HC. No. 02587, 23 April 2009 (Court of Appeals, Philippines).

148 *Union of Myanmar v. Mg Own Lwin*, 16 February 1993 (Myanmar)

149 The Supreme Court of the Philippines reversed the decision of the Court of Appeals in its Decision in G.R. No. 132164, 19 October 2004.

150 Revised Penal Code, art. 202, as amended by Rep. Act No. 10158 (2012) (Philippines).

Any person found guilty of any of the offenses covered by this article shall be punished by *arresto menor* or a fine not exceeding 200 pesos, and in case of recidivism, by *arresto mayor* in its medium period to *prision correccional* in its minimum period or a fine ranging from 200 to 2,000 pesos, or both, in the discretion of the court.

This provision assumes that women profit from prostitution, that they “indulge” in the act in the sense that they “allow[] [themselves] to have something enjoyable”¹⁵¹, or they “give[] free rein to” or “take[] unrestrained pleasure in”¹⁵² the act, when in fact what women experience in prostitution is extreme exploitation and dehumanization. Other than being considered criminals, these women, when they go to court, are considered undeserving of protection. They get blamed for all sorts of social ills. Consider the following statements of the Philippine Supreme Court in the case of *People v. Siton*,¹⁵³ a case brought by women streetwalkers questioning the constitutionality of Article 202 (2) of the Revised Penal Code criminalizing vagrants, where the Court portrayed images of the scourge of humanity:

Since the Revised Penal Code took effect in 1932, no challenge has ever been made upon the constitutionality of Article 202 except now. Instead, throughout the years, we have witnessed the streets and parks become dangerous and unsafe, a haven for beggars, harassing “watch-your-car” boys, petty thieves and robbers, pickpockets, swindlers, gangs, prostitutes, and individuals performing acts that go beyond decency and morality, if not basic humanity. The streets and parks have become the training ground for petty offenders who graduate into hardened and battle-scarred criminals. Everyday, the news is rife with reports of innocent and hardworking people being robbed, swindled, harassed or mauled – if not killed – by the scourge of the streets.

The streets must be protected. Our people should never dread having to ply them each day, or else we can never say that we have performed our task to our brothers and sisters. We must rid the streets of the scourge of humanity, and restore order, peace, civility, decency and morality in them.

(3) THE HARMFUL GENDER STEREOTYPES IN LEGAL RULES AND COURT JUDGMENTS

The virtuous-or-good-woman-versus-bad-woman-or-slut-stereotypes spawn a continuum or web of related gender stereotypes in gender-based violence cases. This web of stereotypes usually relates to (i) the victim’s behavior before, during and after the violation, and its perceived rationality or lack thereof; (ii) the credibility of the victim and her testimony; and (iii) the validity of the victim’s legal claims. The stereotypes are involved in the following rules that are usually applied in gender-based crimes.

151 See Cambridge Dictionaries Online, www.dictionary.cambridge.org/dictionary/british/indulge, accessed on 30 September 2015.

152 See Merriam-Webster, www.merriam-webster.com/dictionary/indulge, accessed on 30 September 2015.

153 G.R. No. 169364, 18 September 2009 (Philippines).

(a) The prompt reporting requirement

Crimes of violence against women are usually governed by rules of prescription or statutes of limitations, which prescribe the time frame within which complaints may be filed. For example, in the Philippines, the prescription period for the crime of rape ranges from 15 to 20 years from its commission, depending on the acts involved.¹⁵⁴ Despite the length of the period set by law for victims to file their complaints, the cultural belief is that legitimate victims file complaints promptly. Any time gap between the occurrence of the violation and the filing of the complaint is, in some cases, taken against the victims.

Women do not file complaints promptly for various reasons. The shock and trauma experienced by a survivor of sexual violence, and even the denial that the violation occurred, often prevents her from immediately filing a complaint. Many do not file complaints because of shame or self-blame. Some minimize the gravity of the violation in order to cope with its effects, and so do not file a complaint. Still others distrust the justice system and feel that they will not be believed for some reason, or fear for their life and think that the system cannot protect them.

Violence against women, and specifically rape, is severely underreported, even in countries that have well-trained and well-resourced investigative and prosecutorial agencies. In the United States, the Federal Bureau of Investigation “estimates that only 37% of all rapes are reported to the police” while the “U.S. Justice Department statistics are even lower, indicating that only 26% of all rapes or attempted rapes are reported to law enforcement officials”.¹⁵⁵ There is no estimate of the rate of reporting of gender-based violence in Southeast Asia.

(b) The cautionary rule

The cautionary rule requires judges to exercise great caution in giving credence to the testimonies of complainants in sexual assault cases on the ground that their testimonies are “inherently potentially unreliable”. Underpinning the cautionary rule is the gender stereotype that women are “lying, deceptive, and irrational creatures driven by neuroses and hormones”.¹⁵⁶ The rule traces its roots to the pronouncements of the famous English jurist Sir Matthew Hale who said in the 17th century that rape “is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent”, and of Wigmore who wrote in his book on evidence, “No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.”¹⁵⁷ The cautionary rule is the basis for the requirement in certain jurisdictions that for a rape case to prosper, there must be corroborative testimony or evidence.

154 Revised Penal Code, arts. 266-B, 90 (Philippines).

155 Hazelwood and Burgess 2009, p. ix.

156 Rickard 1998.

157 3A J. Wigmore, Evidence § 924a, at 737 (J. Chadbourne rev. 1970), cited in O’Neale 1978.

The Philippines had a cautionary rule in rape cases, which was expressed in the following principles that, as pronounced by the Philippine Supreme Court in a long line of cases, should guide trial courts in resolving rape cases: (i) an accusation for rape can be made with facility; it is difficult to prove but more difficult for the accused, though innocent, to disprove; and (ii) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution. Trial courts often cite these guiding principles in their written decisions. The Philippine Court of Appeals cited these principles in its 2009 decision in *People v. Smith*,¹⁵⁸ where it acquitted the accused. However, these two guiding principles have been noticeably absent in recent decisions of the Philippine Supreme Court,¹⁵⁹ although the Court has not pronounced that it has abandoned the cautionary rule.

(c) The corroboration rule

The corroboration rule is related to the cautionary rule. Since women's testimonies are considered "inherently potentially unreliable", corroboration is required in some jurisdictions for women's complaints to succeed. When corroboration is required, the victim's testimony is deemed insufficient regardless of its quality; there must, in every instance, be another testimony or some other evidence to support her testimony. Corroboration rules discriminate against women because they require them "to discharge a higher burden of proof than men in order to establish an offense or to seek a remedy". While the Philippine law had a cautionary rule, it never required corroboration of the testimony of the victim in a rape case. The victim's testimony alone may be sufficient to produce a conviction provided it is credible and convincing.¹⁶⁰

Illustrative laws and cases:¹⁶¹

- Myanmar's law is not clear whether a rape victim's testimony needs to be corroborated for conviction to be possible. However, one study reports that "[i]n at least one reported case, a Myanmar court stated it was 'notoriously unsafe' to convict a man of rape on the uncorroborated evidence of a woman".¹⁶² Another Myanmar court made a similar ruling in an application for divorce on the ground of domestic violence and desertion. In *Ma Saung Nam v. U L Bran Mine*,¹⁶³ the wife sought the dissolution of her marriage under Section 10 of the Myanmar Divorce Act, claiming that her husband had been violent to her and that he deserted her without reasonable grounds for more than two years. The wife suffered from a medical condition as a result of the husband's violence, for which she continued to receive treatment. The husband neither

158 CA-GR. CR. HC. No. 02587, 23 April 2009 (Court of Appeals, Philippines).

159 See, for example, *People of the Philippines v. Pareja*, G.R. No. 202122, 15 January 2014 (Supreme Court, Philippines).

160 CEDAW General Recommendation No. 33, para. 25 (a) (iii).

161 *People of the Philippines v. Manalili*, G.R. No. 191254, 28 August 2013 (Supreme Court, Philippines).

162 Gender Equality Network 2013, p. 9, citing *U Toe Sein v. King-Emperor* 40 Cr LJ 525, *Maung Ba Tin v. King-Emperor* 5 BLJ 112.

163 Case No. 1/2009, Civil General Referral Case, Myanmar Law Report (2010) 28-36.

appeared in court nor answered the complaint against him. Based on the wife's evidence, the district court decided to annul the marriage and issued an ex parte preliminary decree of annulment. The decree was referred to the Supreme Court for confirmation as required under the Myanmar Divorce Act. The Supreme Court held that the wife's allegation of torture or violence from her husband was not corroborated. Further, it held that under Section 10 of the Myanmar Divorce Act, brutality is not a sufficient ground for divorce or annulment; in addition, there must be proof of adultery. The desertion must also be combined with adultery for it to be a ground for divorce.

- Indonesia's law on domestic violence states that the testimony of the victim is adequate proof if accompanied with another legitimate instrument of proof.¹⁶⁴ In one case involving domestic violence, a military court of Indonesia did not give credence to the wife's testimony that she suffered a miscarriage as a result of the husband's physical violence because her claim was not supported by other evidence. The Supreme Court of Indonesia, in affirming the decision of the military court, did not find any issue with this ruling.¹⁶⁵

THE CORROBORATION RULE VIOLATES HUMAN RIGHTS

International human rights law guarantees women the right to an effective remedy. This right is violated when courts deny victims protection and redress, not for their failure to present adequate evidence, but solely because the evidence they presented was without any corroboration.

(d) The rule on the relevance of the victim's sexual history or reputation

The sexual history or reputation of a rape or sexual assault victim is often an issue in criminal prosecutions. Sometimes, a law explicitly allows the introduction of evidence regarding the victim's past sexual conduct or sexual history. However, even when the law does not consider the victim's sexual history relevant, in practice, justice actors often examine the victim's sexual history in determining her credibility and appreciating evidence. This rule perpetuates the stereotype that only "virtuous" or "virginal" women are credible and deserve legal protection for any violation of their "virtue", which in many societies is a culturally prized possession. In contrast, women who have had sexual experience or are perceived to be "women of bad repute" are considered more likely to lie, have no more "virtue" to protect, and are therefore sexually available; hence, they have no reason to complain of violation. In contrast, men's sexual history or reputation is not considered relevant in rape or sexual assault investigations. They are not required to be "virtuous" or men of good morals.

¹⁶⁴ Law No. 23 (2004), art. 55 (Indonesia).

¹⁶⁵ Decision No. 21-K/PMT.III/BDG/AD/III/2012 (Supreme Court, Indonesia).

Making the victim's sexual history or reputation relevant in sexual assault cases shifts the focus of the investigation from the perpetrator's acts to the victim's personal history.

Illustrative law and cases:

- Myanmar's Evidence Act "states that past sexual conduct and character evidence may be introduced in cross-examination to impugn a witness' credibility, with the weight to be given the evidence at the judge's discretion".¹⁶⁶
- In a 1987 case decided by the Supreme Court of Thailand,¹⁶⁷ the defendant was charged with taking away a minor of around 16 years of age from her father for lascivious reasons, without her consent, which was punishable under Section 318 of the Criminal Code. Section 318 penalizes whoever takes a minor over 15 years but not over 18 from the parent, guardian, or any person looking after such minor without the consent of the minor. The defendant was convicted by the trial court and sentenced to three years' imprisonment. He appealed all the way to the Supreme Court. The Supreme Court examined the testimonies of the litigants and found that the charge in question involved the third incident between the minor and the defendant. In the first, the defendant threatened her with a knife and raped her. In the second, the minor agreed to the sexual contact. In the third, the minor came from a ceremony accompanied by a neighbour, riding a bicycle, but when the bicycle tire was broken, the minor rode at the back of defendant's bicycle and left the female neighbor to find a ride on her own. Thereafter, while passing by a rice paddy, the defendant threatened her with a knife and forcibly took her to a nearby hut where he raped her twice. The court held that there was no rape because the minor had had coitus with the defendant with her consent prior to that incident, and that on the day in question, the minor went voluntarily with the defendant. While the charge was under Section 318 of the Criminal Code, the court held that the defendant was guilty under Section 319 instead, which penalizes a person taking away a minor under guardianship with the minor's consent. It also appeared that prior to the filing of the complaint, the defendant offered marriage but the parties could not agree on a dowry. The court considered this, as well as the fact that the defendant had no prior criminal record, and thus lowered the penalty to two years' imprisonment and a fine of 2,000 baht.

Notably, the court in this case did not bother to investigate the incident before it independently of the other incidents, or consider that the alleged "consent" in the previous incident may not have been genuine consent given the age and vulnerabilities of the minor in relation to the defendant.

- In a 2007 rape case decided by Timor-Leste's Court of Appeal,¹⁶⁸ the 16-year-old complainant and the accused were long-time neighbours. On the day of the incident, at night, the accused entered the victim's bedroom. He then had sexual contact with her. Thereafter, the accused left the complainant alone

166 Gender Equality Network 2013, p. 9, citing The Evidence Act (1872), s 155 (4) (Myanmar).

167 The Public Prosecutor of Uttaradit Province v. Mr. Jeerasak Uambhrom, Supreme Court Decision No. 4465/2530 (1987) (Thailand).

168 Case No. 47/CO/2007-TR, 3 October 2007 (Court of Appeal, Timor-Leste).

in her room with her clothes covered in blood. The complainant then informed her parents of what happened. The parents called the local community leaders. The woman suffered vaginal pain and inflammation and her vagina had to be sutured. She was hospitalized for a week

The trial court acquitted the accused. On appeal, the Court of Appeal affirmed the acquittal.

While the Court of Appeal considered that the pain, the inflammation of the vagina, the need to suture it, and the one-week hospitalization did not appear to be the result of “typical behaviour” in a romantic relationship, it held that these were not inconsistent with consensual sexual contact.

The Court of Appeal considered that the trial court was correct in questioning the credibility of the victim since she had not told the truth about her previous sexual experience. Contrary to her claim that she was a virgin at the time of the alleged rape, the medical evidence showed that she had three healed tears with tissue scarring in her inner labia, which were not recent, thus indicating that she had previous sexual experience prior to the rape.

The Court of Appeal further considered other factors that, in its opinion, generated reasonable doubt as to the guilt of the accused and reinforced the allegation of a consensual sexual contact. One factor was that the accused remained in the victim’s bedroom from 9 o’ clock in the evening until the early hours of the morning. The court did not specify what time he left, nor did the court explain why it found this time frame to be true when the complainant claimed that the accused left immediately after the alleged rape. The court also considered that the accused gave a very consistent testimony without contradictions; that his denial of the rape was corroborated by the testimony of the village chief about a conversation that the latter had with the complainant; and that the complainant’s parents were still awake in the kitchen when the accused entered the complainant’s bedroom. The Court of Appeal said that the importance of the figure of the village chief in the social context in which the facts occurred should always be borne in mind. However, the content of the conversation between the village chief and the complainant was not specified in the decision of the Court of Appeal. Also, the trial court considered the delay in reporting as a factor against the complainant considering her level of credibility. This issue was not mentioned in the Court of Appeal decision.

A number of questions could be raised about this case. *First*, what was the age of the accused? His age would certainly be a material factor in the dynamics of the incident considering that the complainant was only 16 years old. *Second*, what motivated the young woman to claim that she had no previous sexual experience prior to the alleged rape? Was the claim perhaps a product of a reluctance to admit such previous sexual experience in a public investigation and trial, or in the presence of the victim’s parents? *Third*, what safeguards were in place to make the young woman feel secure and comfortable enough to disclose freely the circumstances of the alleged violation and what occurred prior? *Fourth*, was her prior sexual experience consensual and with another man? Women’s previous experience of rape may render them vulnerable to a repeat victimization, especially by the same offender. *Fifth*, how much of the

acquittal was a result of an inadequate and gender-insensitive investigation and limited inquisition from the trial court?¹⁶⁹ In the decision of the Court of Appeal, there were allegations of prior acts by the same accused of grabbing the complainant by the arms, and touching her genitals and nipples on the same day, but the complainant managed to escape. The court questioned the fact that the complainant did not tell her parents about this, without inquiring into the emotional and mental processes of the minor that could possibly explain her failure of disclosure. There were also allegations that the complainant was awakened when the accused lay on top of her, that he put a rag in her mouth to prevent her from screaming, and that he left her crying. However, these allegations were not considered proven facts, nor were their significance considered. Finally, the suggestion that the testimony of the male authority figure in the community – the village chief – should always be given significant weight brings to mind the CEDAW Committee’s discussion in *Jallow v. Bulgaria* that the practice of giving greater weight to men’s opinions over women’s constitutes gender stereotyping.

THE HARM

The stereotype of a legitimate victim as “virtuous”, “virginal” or “unsullied” is one reason why victims do not report the crimes committed against them. Many victims instinctively know that they will not be believed because they do not fit the stereotype of a “good woman”. The experiences of women who have been judged by the justice system to be undeserving of legal protection because of their sexual history or reputation also discourage other victims from reporting.

(e) The belief that false accusations are common in rape cases

It is a common belief that women who complain of rape or sexual assault are most likely lying. The “false accusation” belief is pervasive despite the lack of any credible study showing that false accusations are common in rape or sexual assault complaints. A survey of available estimates of false reporting to law enforcement agencies of sexual assault cases in the U.S., the United Kingdom, and Australia found that the more methodologically rigorous research *estimates* of false reports are only from two to eight percent.¹⁷⁰

The widely held belief that false rape accusations are common discourages victims from filing a complaint. It contributes to victims’ fear that they will not be believed, and thus they stay away from the justice system. It also explains the strong emphasis on physical evidence and the requirement of corroboration.

¹⁶⁹ Timor-Leste follows the inquisitorial system of criminal prosecution, where the judge or magistrate leads the questioning during the criminal trial.

¹⁷⁰ Lonsway, Archambault & Lisak 2009, p. 2.

It is critical to recognize that what constitute “real” rape and a “credible” victim may involve judgments that are based on prejudices or gender stereotypes. The conclusion of “false allegation” may involve victims who do not appear credible based on gender stereotypes, and not because the violation did not happen.¹⁷¹ Moreover, the concept of “false allegation” is vague and imprecise.¹⁷² “False allegation” is sometimes used to refer to cases where the evidence is simply *insufficient or inconclusive*, or where the complaint is *unsubstantiated*.

The determination that a report is false can only be made on the basis of findings from a “thorough, evidence-based investigation”.¹⁷³ Such thorough, evidence-based investigation must be free of prejudices and gender stereotypes. “False allegation” should only be used when there is a clear finding of deceit or malicious fabrication.

FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT

“[The] tendency to overestimate the percentage of false reports can introduce bias into an investigation and prosecution because it causes us to give less credibility to victims and more credibility to suspects. This is especially true if the victim’s behavior is seen as risky or problematic and if the suspect seems like a ‘nice guy’ who doesn’t look like a stereotypic rapist. We describe these characteristics as ‘red flags,’ in the characteristics of sexual assault cases.

What Are These Red Flags?

Concerns regarding the legitimacy of a sexual assault report are often triggered by the presence of ‘red flags,’ based on specific characteristics of the victim, suspect, or assault. Yet many of these ‘red flags’ are actually based on our cultural stereotypes of what constitutes ‘real rape.’ As professionals, we are often reluctant to believe that we share these stereotypes, but the reality is that **everyone in our society is exposed to the same cultural messages about sexual assault, and they inevitably influence how we think about it.** Because these are societal stereotypes, they impact not only jurors but also the other professionals involved in sexual assault response (e.g. law enforcement professionals, forensic examiners, victim advocates, prosecutors, and other professionals). They even influence friends and family, all too often preventing them from providing the emotional support that victims of sexual assault so desperately need.

¹⁷¹ Ibid., pp. 3-5.

¹⁷² Ibid., p. 4.

¹⁷³ Ibid., pp. 4-5.

A false report is a report of a sexual assault that did not happen. While we might all agree with this simplistic definition of a false report, people have different ideas about exactly when they can decide that the sexual assault did not actually happen. For example, investigators, prosecutors, and others often decide that a sexual assault did not happen based simply on their own views of the victim, the suspect, and their credibility. This is unacceptable practice.”

Source: Lonsway, Archambault & Lisak 2009, p. 2).

Illustrative cases:

- In one case decided by the Supreme Court of Thailand,¹⁷⁴ the complainant and the defendant, a married man, worked together in a rice mill. The complainant was a relative of defendant's wife. At a later date, the complainant's mother also worked with them in the same rice mill. All three stayed in a row of houses for the rice mill workers. The complainant claimed that the defendant raped her twice, using force and a knife to threaten her. During the first rape, the complainant's mother was not yet working at the rice mill nor staying with the complainant. During the second rape, the mother was on duty in the rice mill. On both occasions, the complainant did not shout or make any noise, and the defendant warned her not to tell anyone. She told her mother about the rapes only several days later, after they had stopped working at the rice mill. Her father asked the defendant to leave his wife and marry the victim, and when he refused, a rape case was filed against him. Witnesses testified that they learned of the demand of the father that the defendant leave his wife and marry the complainant, and of the filing of the case after he refused to agree with the demand. They also testified that they observed that the defendant and the complainant were close prior to the demand for marriage, and that they had a relationship. The court considered the victim's failure to report the rape promptly to the mother, the filing of the complaint only after the defendant's refusal to leave his wife and marry the victim, and the witnesses' testimonies about the parties' relationship as suspicious circumstances and so agreed with the acquittal of the defendant by the Court of Appeal.
- In one case,¹⁷⁵ the Philippine Supreme Court made the sweeping statement, without citing any supporting study, that:

[e]xperience has shown that unfounded charges of rape have frequently been proffered by women actuated by some sinister, ulterior or undisclosed motive. On more than one occasion it has been pointed out that in crimes against chastity the testimony of the injured woman should not be received with precipitate credulity.

174 Public Prosecutor of Pichit Province v. Tui Singhanath, Supreme Court Decision No. 2238/2527 (1984) (Thailand).

175 People of the Philippines v. Salarza, G.R. No. 117682, 18 August 1997 (Philippines).

(f) The belief that rape can really be avoided.

Often, justice actors believe that rape can be avoided. Because of this belief, rape survivors are often required to justify why they were not able to escape the rape situation. Justice actors often examine every detail of the rape incident to ascertain whether there were opportunities for escape. Victims then get blamed for not taking advantage of every seeming opportunity to escape, for not being rational and focused in the rape situation, and for not adopting an effective strategy to avoid the impending rape.

*Similar issues surface in the treatment of rape survivors, who often castigate themselves bitterly either for placing themselves at risk or for resisting ineffectively. These are precisely the arguments that rapists invoke to blame the victim or justify the rape. The survivor cannot come to a fair assessment of her own conduct until she clearly understands that no action on her part in any way absolves the rapist of responsibility for his crime.*¹⁷⁶

Related to this is the belief that only stupid, uneducated and weak women get raped, or conversely, that strong, competent, and educated women cannot possibly be raped. Still in the same vein, some justice actors believe that to be raped by means of intimidation, the victim must be timid, fragile or easily cowed, and to be raped by means of threat, there must be clear evidence of a direct threat.

In the following case decided by the Philippine Supreme Court, the majority decision blamed the complainant for her “inexcusable imprudence”; according to the majority, “the fault was hers”. Two justices wrote dissenting opinions. Gender stereotypes are employed in the majority decision and in J. Davide’s dissenting opinion, the most obvious of which are identified through the footnotes. Noteworthy is J. Regalado’s stinging critique of the majority’s reasoning: *The responsibility for the sexual assault is laid at the door of the victim for not detecting and preventing it from happening, and not upon the felon who schemed and caused the event to happen.*

PEOPLE OF THE PHILIPPINES V. SALARZA
G.R. NO. 117682, 18 AUGUST 1997 (PHILIPPINES)¹⁷⁷

Z, a single, 30-year-old British actress, came to the Philippines for a vacation. While in the Philippines, she started a relationship with Enrico (“Ricky”). One night, in a resort, Salarza, Ricky’s friend, entered the cottage where Z was asleep. Ricky was not in the cottage at that time because he was spearfishing with his friends. Z felt that someone was taking off her panties. Thinking that it was Ricky, she did not stop him. Salarza lay on top of her and penetrated her. The cottage was totally dark at that time. While Salarza was still penetrating Z, he told her, “[Z], this

¹⁷⁶ Herman 1992, p. 68.

¹⁷⁷ This summary retains much of the language (English) of the court’s decision and the dissenting opinions. Some parts were paraphrased to serve the interest of brevity and style.

is [Salarza], not Ricky. I love you.” When Z heard this, she pushed Salarza off, cried hysterically, and went to the bathroom to wash. While washing herself, she screamed to the accused: “Why? Why did you do it to me? You have ruined everything. You know that Ricky and I are trying to have a baby of our own, what will happen now? I might get impregnated by what you did to me.” A caretaker of the resort heard Z’s cries.

Salarza was charged with raping Z while she was asleep, with the use of force, against her will, and without her consent. The trial court convicted him, holding that Z was half-asleep and believed in good faith that the accused was her boyfriend Ricky. The case was brought to the Supreme Court on automatic review. Eight justices of the Court acquitted him. Six justices dissented, voting to affirm the conviction. The majority opinion acquitting the accused states in its penultimate paragraph:

Experience has shown that unfounded charges of rape have frequently been proffered by women actuated by some sinister, ulterior or undisclosed motive. On more than one occasion it has been pointed out that in crimes against chastity the testimony of the injured woman should not be received with precipitate credulity.

I. The Court’s reasoning for the acquittal

There was no evidence of force or intimidation. Z gave consent to Salarza’s sexual advances. It may be argued that Z gave consent to the sexual act only because of her erroneous belief that the man on top of her was Ricky, and that had she known it was someone else, she would have resisted. However, the evidence shows that this mistake was purely a subjective configuration of Z’s mind – an assumption entirely contrived by her. Salarza did nothing to mislead or deceive Z into thinking that he was Ricky. In fact, he told her, “[Z], *it’s not Ricky; it’s Jun. I love you.*” Whatever mistake there was could only be attributable to Z and her inexcusable imprudence. Clearly, the fault was hers. She had the opportunity to ascertain the identity of the man but she remained passive and allowed things to happen as they did.¹⁷⁸

Z was not unconscious when the accused had intercourse with her. Her lame excuse was that she was half-asleep. However, she admitted that she *woke up* to find someone removing her underwear. She knew, hence was conscious, when her panties were being pulled down; she knew, hence was conscious, when her legs were being parted to prepare for the sexual act; she knew, hence was conscious, when the man was pulling down his briefs; she knew, hence was conscious, when the man mounted her. Her justification was that she never objected to the sexual act from the start because she thought that the man was her boyfriend with whom she was having sex almost every night for three weeks, as they were getting

¹⁷⁸ The court engages in victim blaming here.

married and wanted to have a baby. In other words, her urge could not wait for the more appropriate time.¹⁷⁹

Her consent was given prior to the carnal act, i.e., the act was done because of her passivity, if not consent.

Since Z had been making love with Ricky almost every night for three weeks, it strains credulity that she could have mistaken Salarza for Ricky. Their constant lovemaking and togetherness would have already made her familiar with the physical attributes of Ricky and accustomed to his fornicating peculiarities.

Z had the moral responsibility not only to herself but to society to ascertain first the identity of her “ravisher” before yielding completely to him. It can hardly be said that she was not imprudent, reckless and irresponsible in giving in to her own sexual impulses.¹⁸⁰ Moreover, being almost a stranger in the place, Z should have been leery of her surroundings especially at night. In this regard, she should not have left her cottage door unlocked as much as she did leave pregnable and unshielded the portals of her womanhood.¹⁸¹

II. Dissenting Opinion (Davide, J.)

The defendant should be convicted.

Z cried loudly and screamed immediately after the sexual abuse. She angrily rebuked the accused for the violation.¹⁸² This is enough proof that she rejected and abhorred what the accused did to her. She looks decent enough to be sexually assaulted.¹⁸³

Z, with the help of her friends, lost no time in taking appropriate action against the accused, by reporting the rape to the nearest police station, undergoing a medical examination, formalizing a complaint for rape, and executing a sworn statement, which is a natural reaction of any aggrieved party who has a legitimate gripe to address against a felon.¹⁸⁴

179 This statement implies that Z is a slut.

180 Again, the court not only blames Z but also implies that she is a slut.

181 The court directly blames Z for what happened, and suggests that Z's sexual impulses were such that she could not help herself, thus impliedly portraying her as a slut. The court effectively equated the act of leaving the cottage door unlocked to leaving “pregnable and unshielded the portals of her womanhood”, thus implying that Z was negligent and actually invited the violation.

182 Shouting, screaming, and expressing anger is part of a wide range of behavioral response that victims of sexual assault exhibit. It is important to note that some women may not exhibit this response.

183 This statement implies that those who are not decent enough could not be victims of sexual assault.

184 While these are, indeed, strong indicators of a credible claim, opposite behavior should not be considered as an indicator of a false claim.

The trial court gave full faith to Z's story. According to the trial court, the testimony of Z was very credible, natural, simple, straightforward, convincing and consistent with human nature.

The trial court did not believe the defense of the accused that he did not have sexual contact with Z, including his claim that despite Z's efforts to excite his penis, it did not harden. One of the witnesses for the accused, a police officer, testified that the accused admitted having sex with Z. Also, the version of events of the accused is unnatural, abnormal and contrary to human nature and experience. Only inanimate objects do not react. The court saw and observed him to be normal. Since he is young, it is unlikely that his penis will not erect or harden if held and played by a woman younger than him and single, especially a foreigner.

Z's unhesitating admission of nightly sex with her boyfriend Ricky and sexual congresses with her previous boyfriends should not have been taken against her. They were earmarks of her truthfulness. She could have easily hidden those facts. It would then be irrelevant and thus impermissible to consider Z's behaviour and conclude that she was sexually indiscriminate as the defense would make her out to be. Clearly, a distinction may be drawn between one who is sexually active, but monogamous, on one hand, and one who engages in indiscriminate promiscuity, on the other hand. In any case, it must not be forgotten that even a prostitute may be a victim of rape, and the victim's unchaste character is neither a defense nor a mitigating circumstance in rape cases.

On two previous occasions, the accused had sexual contact with two foreigners of the opposite sex at the same cottage. He failed to convincingly refute the testimony of Enrico that at one time the accused went inside a cottage where a female foreigner was sleeping; although no rape happened, the latter cried and reported the incident to her sister. The trial court correctly took note of these previous incidents, for under Section 34 of Rule 130 of the Rules of Court, they can be received to prove a specific intent, plan, scheme, habit and the like. With those incidents as premises, the conclusion is inevitable that the accused is a woman molester, with lechery partial to Caucasians.

Under the law (then existing), rape may be committed by having carnal knowledge of a woman under any of the following circumstances: (a) by using force or intimidation; (b) when the woman is deprived of reason or otherwise unconscious; and (c) when the woman is under twelve years of age or is demented.

Deprivation of reason need not be complete, as mere mental abnormality or deficiency is enough. Since both "being deprived of reason" and "unconsciousness" are founded on absence of will to give consent

intelligently and freely, the term “unconsciousness”, then, should not be tested by a mere physical standard, *i.e.*, whether one is awake or asleep, conscious or alert. Rather, the inquiry should likewise determine whether the victim was fully informed of all considerations so as to make a free and informed decision regarding the grant of consent. It is only through this two-tiered test that a holistic appraisal of consent may be had.

Sleep, being the naturally or artificially induced state of suspension of sensory and motor activity, obviously deprives a woman of the ability to consent. However, to repeat, since it is “absence or lack of will” which is the primordial factor in the second circumstance of rape, to construe the term “unconsciousness” exclusively in light of physical considerations would be unduly restrictive and fail to heed the gravamen of the offense, *i.e.*, lack of consent.

The majority opinion makes much of Z’s testimony that she was aware that someone pulled off her underwear and spread her legs, then concludes that she must have been fully conscious and could not have been mistaken as to her partner’s identity. However, to take this at face value would not serve the ends of justice. Plainly, despite Z’s awareness of what was being done to her, the question of who was doing it to her was a totally different matter. Her accession to the *what* was premised on the belief, in good faith, that it was her boyfriend who lay with her in bed. Her failure to ascertain the identity of her partner was a mistake in good faith for which she should not be faulted; neither should it result in the acquittal of the accused.

In Z’s case, she was still “half-asleep” or drowsy when she was penetrated by the accused, having been awakened when he removed her underwear and mounted her, which she acceded to believing, in good faith, that it was her boyfriend Ricky, with whom she had nightly intercourse. When this belief turned out to be erroneous when the accused announced, in the midst of the act, that he was not Ricky, that was the only time that Z became fully aware of the totality of circumstances – critically, that of her partner’s identity – at which time she intelligently and freely exercised her will by immediately and unequivocally rejecting the accused.

An inquiry into whether or not Z was half-asleep does not suffice as regards the determination of an intelligent grant of consent. It is only when a woman is fully informed that consent may be intelligently given – which was absent in the instant case. Further, given that Z was newly awakened and still drowsy; that it was 2:30 a.m.; that she was in her cottage; and that she had known only Ricky for the last three weeks, it was then not unreasonable for her to presume that the man who lay with her that night was no one else but Ricky.

“Consciousness” has been described by medical practitioners as denoting a state of awareness of one’s self and one’s environment; conversely, whether a person is disoriented is measured by one’s degree of alertness and awareness of the environment, considering the circumstances of time, place and person.

The medical profession recognizes a spectrum of impaired or depressed consciousness and orientation in persons who are nevertheless deemed awake. The terms used in this regard are obtundity, somnolence and stupor. Given the circumstances of time and place, Z was clearly disoriented, drowsy or confused. Thus, she cannot be held culpable for her failure to immediately recognize that it was not Ricky, or to ascertain Zalarza’s identity, or for her assumption that it was Ricky who lay with her.

This orientation as to person, place, and time depends on the ongoing sensory impressions. Have you ever awakened from a deep sleep to find that momentarily you did not know the day, the hour, or even where you were? Weren’t your mental functions impaired until you became oriented, until all the pieces of the puzzle suddenly fell into place? (William E. Demeyer, *Technique of the Neurologic Examination* 383 (1984))

Any semblance of consent given was clearly and painfully a mistake in good faith, as Z was not fully aware of the totality of the circumstances, thus rendering her, for all legal intents and purposes, unconscious and unable to give consent freely and intelligently. All told, this instance of reverse error *in personae*, clearly a material factor in the grant of consent by the victim, resulted in total absence [of consent], and, thus, the accuse should be held criminally liable as charged.

III. Dissenting Opinion (REGALADO, J.)

One is hard put to rationalize why the complainant would charge the appellant with such a heinous crime with its grave penalty for no reason at all and without any [ill] motive for doing so.

The complainant’s story has all the earmarks of truth consistent with the expected reactions of a woman whose virtue has been sullied against her will. As further imprints of her credibility, not all of her revelatory statements are self-laudatory. The appellant, on the other hand, weaves a tale of fancied events to project sainted innocence against alleged erotic temptations.

For instance, the complainant could have kept quiet about or explained away her past sexual experiences abroad, or her relations with her local boyfriend, Ricky, just to strike a pitiable pose as a victim worthy of full sympathy. Instead of honestly admitting that she was half-asleep and slightly aware when the pre-coital acts were being done to her person, she could have easily claimed, without fear of contradiction, that she was

fast asleep and totally insensible to everything until her discovery of the appellant's identity. Yet, she did not do so, and, to her credit, she candidly answered all questions by the investigators and the court in the manner in which they now appear of record.

On the other hand, the appellant claims that the complainant induced him to go to her cottage; that after stripping naked, she first tried to manually stimulate him sexually; that when he did not react, she wanted to perform fellatio on him; and that when he refused, she tried to make him perform cunnilingus. He claims to have stolidly rejected all these, such that the complainant berated him for his stupidity.

This posture as a paragon of virtue was obviously aimed to counter the prosecution's theory that, taking advantage of the complainant's somnolence or drowsiness, he easily obtained physical access to her and quickly commenced sexual congress with her, but he was discovered as a lecherous impostor and the victim cried out her anguish and emotional revulsion.

A comparison of the respective narrations of the parties readily reveals that which is evidently fabricated. Indulging the appellant in his fabulous claim, one may then wonder why, with the cottage door open and her boyfriend expected to return any time, the complainant would seek to have both normal and deviant sexual relations with the appellant, despite the time that would be involved and without any precautions against discovery. Worse, after being thus spurned in her alleged desires, she is alleged to have scandalously shouted and cursed out her frustration for all to hear, instead of keeping silent so that the shameful episode would not be known by others.

However, a third person, M, the caretaker of the cottage rented by the complainant and her boyfriend, was awakened by her unrestrained wailing. M's testimony yields further light on the truth of the complainant's version.

Only naiveté or gullibility would give a seal of approval to the appellant's defensive charade. Even those sympathetic to his plea for acquittal concede that he did have sexual intercourse with the victim, thereby upholding her version and giving the lie to that of appellant.

It is posited, however, that the blame for the assault against her chastity is ascribable to the complainant. *The proposition is that it was the complainant's negligence, in not ascertaining the identity of the person who comes in the dark to lie with her, that resulted in her ravishment. This would be equivalent to saying that the stealth of the rapist would be rewarded with absolution upon proof of negligence on the part of the victim in meticulously ascertaining any semblance of duplicity in the forbidding privacy of the bedroom.* The complainant was expecting her boyfriend's momentary return, then she fell asleep; she was slightly aroused by the preliminaries for coitus which she and her boyfriend had

been indulging in and, in the dark with nothing to warn her otherwise, in her drowsy state of mind, she submitted to the person she thought was her boyfriend.

She is now faulted for not exercising that degree of diligence necessary to detect any strategy of an impostor. The responsibility for the sexual assault is laid at the door of the victim for not detecting and preventing it from happening, and not upon the felon who schemed and caused the event to happen. This appears to be the alarming import of the arguments offered in defense of the appellant, which I cannot reconcile with any doctrinal rule I have learned in the law of crimes against chastity.

It is insisted, moreover, that the pertinent law contemplates the situation “(w)here the woman is deprived of reason or otherwise unconscious,” and the cases so far decided in our jurisdiction involved as victims women who were *fully* asleep at the time the rape may be legally deemed consummated. Hence, the case at bar does not fall within the purview of such statutory and case law since the victim was only *half* asleep and allegedly admitted to some degree of awareness when her panties were being removed.

Mr. Justice Davide has cited authoritative discussions demonstrating, from both physiological and neurological considerations, that a person who is half asleep and therefore in a stupor of drowsiness or semi-consciousness, is not capable of giving full, informed, intelligent and voluntary consent.

(g) The “standard or normal reaction” requirement, such as the requirement of physical resistance

The common belief is that women always or should physically fight back when assaulted or violated, which has become the stereotype behaviour of a “legitimate” victim. Similarly, it is a common belief that “legitimate” victims leave or stay away from their abuser. A woman who is considered to be truly a victim of battery leaves her abuser immediately, while a rape victim promptly leaves the scene of the crime or does not leave the scene with her

*Once in a situation of danger, most women have little experience in mobilizing an effective defense. Traditional socialization virtually ensures that women will be poorly prepared for danger, surprised by attack, and ill equipped to protect themselves. Reviewing the rape scenario after the fact, many women report ignoring their own initial perceptions of danger, thereby losing the opportunity for escape. Fear of conflict or social embarrassment may prevent victims from taking action in time. Later, survivors who have disregarded their own “inner voice” may be furiously critical of their own “stupidity” or “naiveté.” Transforming this harsh self-blame into a realistic judgment may in fact enhance recovery. Among the few positive outcomes reported by rape survivors is the determination to become more self-reliant, to show greater respect for their own perceptions and feelings, and to be better prepared for handling conflict and danger.*¹⁸⁵

¹⁸⁵ Herman 1992, p. 69.

abuser, nor sees him after the violation. Any behaviour that is inconsistent with these expected behaviours is often considered an indicator of a false claim.

These beliefs reveal a lack of understanding that there is no standard behavioural response that can be expected from a person who is confronted with an impending sexual assault or while being violated. They also fail to take into account the dynamics of the victim-abuser relationship in domestic violence, which produce behaviour that may confound those whose measures of normal behaviour are according to stereotypes. The psychiatrist and scholar Judith Herman explains:

A man's home is his castle; rarely is it understood that the same home may be a prison for women and children. In domestic captivity, physical barriers to escape are rare. Women are rendered captive by economic, social, psychological, and legal subordination, as well as by physical force.¹⁸⁶

In rape, "victims exhibit an extremely wide range of behaviour and emotions, which vary in intensity and duration, before the rape attack, during the rape attack, and immediately following the rape."¹⁸⁷ One Vietnamese victim of incest who escaped from shame in her home village and ended up in a brothel explains how she copes with sexual violence:

Since I started with prostitution, I've been brutally beaten and raped by a john [a slang word for a prostitute's client]. You know, once you are alone in the room with a customer you have no protection. Working in prostitution is easy to get raped, and gang rape is commonplace. They often pay hush money to keep it quiet. However I have devised my own mental way to survive sexual violence by a client. I pretend to be elsewhere. I look at the ceiling, making myself absent. I do that all the time. I would let my feelings go numb. I wouldn't even feel that I have a body. I would actually leave my body and go somewhere else with my thoughts and with my feelings until he gets off me.¹⁸⁸

What this Vietnamese woman describes as her coping mechanism is a common story of women victims. Karen Vertido, for instance, the complainant in the case of *Karen Vertido v. the Philippines*, described how she dissociated from her body during the actual rape.

The requirement of physical resistance from a rape victim ignores that the essence of rape is the absence of consent, which should make physical resistance immaterial. The Supreme Court of Mexico explains:

International standards clearly establish that the primary element of the crime of rape must be the absence of freely given, voluntary, and unequivocal consent. As a result, whether or not the victim has resisted becomes immaterial insofar as determining whether the crime has been committed. Giving legal relevance to the fact or extent of the victim's resistance means shifting responsibility from the rapist to the victim –

186 Ibid., p. 74.

187 WLB 2005, p. 55.

188 Nguyen Thu Huong 2011, p. 80.

demanding a behavior of the victim that ultimately places her in greater danger. Such an analysis also reinforces the stereotype that “when women say no, what they really mean is they want to be convinced.” The law cannot be a tool that gives force to such stereotypes.¹⁸⁹

In the following case, the Court of Appeal of Timor-Leste found the behavior of the woman consistent with what is expected of a victim who was raped and traumatized. While the decision produced a positive result for the victim, the case also presents the usual earmarks of credibility and circumstances that courts look for to justify a conviction, some of which may not be found in other cases.

Illustrative case:

- In a 2012 case decided by the Court of Appeal of Timor-Leste,¹⁹⁰ two men were charged with raping an adult woman in an isolated place in Dili. The victim had taken the mini-bus transport service operated by the two men and requested to be dropped in front of her house. The men took the victim to a different place. Upon reaching the isolated place, they ordered the victim to undress. The victim obeyed, fearing for her life. She had a voice problem that prevented her from screaming loud, which would have been useless because the place was isolated. After forcing themselves on the victim, the men left the victim almost naked. The victim was found walking by the road in search of help, and was helped by one of the witnesses. The district court convicted both accused to eight years’ imprisonment.

Court of Appeal affirmed the district court’s decision based on the totality of evidence:

- » The victim’s declaration was credible because she narrated the facts in a logical and coherent manner and established that she did not consent to the sexual act. She explained that her lack of resistance was based on her perception that any resistance would have been futile due to the physical strength of the accused, the isolated nature of the place, and her voice impediment.
- » While there was no witness who directly corroborated the victim’s testimony, the declarations of the witnesses who had contact with the victim after the crime took place strengthened the veracity of her declaration. The witnesses testified seeing the victim in a seriously disturbed state after the crime took place. If the victim were a willing participant in the sexual act, she would not be in the state of anxiety and disturbance described by the witnesses. Her state of anxiety resulted from her fear of the accused who were physically superior and by the fact that they took her to an isolated place where there was no one to help her. Based on experience, it is normal that a fragile women found in this situation enters a state of fear.¹⁹¹

189 Suprema Corte de Justicia de la Nacion, Mexico 2013, p. 17.

190 Case No. 09/CO/2012-TR (28 February 2012) (Court of Appeal, Timor-Leste).

191 This statement incorrectly assumes that women who are not “fragile” will not be in a state of fear under similar circumstances.

- » The medical examination report that was completed one day after the incident showed that the victim suffered from post-traumatic stress.
- » The absence of vaginal injuries did not weaken the credibility of the victim since she was a widow with children and certainly had a number of sexual activities in the past.

(h) The requirement of physical evidence or physical injury

Not all cases of violence have physical evidence. Not all cases involved a weapon or physical violence. Not all cases where physical violence was used produced a physical injury. Sometimes, even when the violation produced physical injuries, the delay in reporting results in the disappearance of the physical evidence. It is also common for victims to either destroy the physical evidence of the violation, or to commit acts that result in the destruction of physical evidence.

*The police had asked me if I had any signs of physical injury or abuse. Any blood, scratches, bruises? "No," I said. There was no resistance. He played with my body as he pleased. It was very neat and clean. The bruises were not on my body. I was bruised at the one place that could only be seen by me, I said.*¹⁹²

The existence of physical evidence depends on the circumstances of the commission of the crime. The relationship between the offender and the victim, which often defines the coping strategies of the victim, is also a factor. Rape, for example, is committed either by strangers or acquaintances, or those close or known to the victim. Acquaintances who rape are known as "confidence-style rapists" because they "gain access to victims by using deceit, then betrayal and use of threat or force".¹⁹³ Since they are acquaintances or known to the victim, they are able to establish "a non-threatening interaction as a prelude to the attack".¹⁹⁴ Where the rapist is known to the victim, the latter is most likely to use verbal tactics such as reasoning, begging and bargaining, instead of physical action, until it is too late to escape the attack. There is thus less likelihood of a physical injury. One study of rape in the U.S. concluded that "resisting a stranger would be more strongly associated with physical injury than would resisting someone known to the victim".¹⁹⁵

Physical injury is often the only measure of harm in law. The law often ignores the fact that violence produces harm beyond the physical and often causes lasting damage to the victim's psychological or mental integrity.

In some jurisdictions, for example, the measure of harm in rape cases is the loss of "virginity", which loss must be supported by physical evidence. In the following case reported in the Cambodian media, the court reportedly changed the nature of the verdict from rape to indecent assault, resulting in a reduced penalty, because the penetration of the vagina of the six-year-old victim was "not deep".

¹⁹² Nguyen Thu Huong 2011, pp. 66-67.

¹⁹³ WLB 2005, p. 54.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., p. 55, citing R.B. Ruback & D. Iview, Prior Relationships, Resistance, and Injury in Rapes: An Analysis of Crisis Center Records, 3 Violence and Victims 99-112 (1988).

VIRGINITY RULING LETS RAPIST OFF THE HOOK
BY STEPHEN O'CONNELL AND LON NARA
THE PHNOM PENH POST, 5 JANUARY 2001¹⁹⁶

Tha Sokha, 19, tried for the rape of a six-year-old girl, will serve only six months in jail for indecent assault because the rape of his victim “was not deep,” said Kandal Court Judge, Kong Kouy.

Though the trial was held on December 1, Kouy told the Post she delayed issuing a verdict until January 3 because she wanted to review the testimony and evidence. That review resulted in Kouy ruling that because the penetration “was not deep” and the victim’s “virginity remains,” she would change the charge against Sokha from rape to indecent assault.

The judge’s decision contradicts Article 33 of the UNTAC Criminal Code, which states that “rape is any act involving penetration against a non-consenting person” and does not specify whether “deepness” is a factor.

The same Article states that “anyone who rapes or attempts to rape another person of either sex is guilty of rape and shall be liable to imprisonment for a term of five to ten years.”

The downgrading of Sokha’s charges is even more questionable in light of the fact that Article 42 states indecent assault is “any other sexual act not involving penetration.”

But Kouy told the Post: “virginity is the important thing because it can confirm if the girl was raped.”

A midwife who examined the girl a day after the December 31, 1999 attack, certified that the girl had been raped but that her “injury was not so deep or so serious.”

An independent examination by an NGO medical team 20 days later concluded the girls hymen had been torn and she suffered pains around her genitals.

Though the results of the independent medical examination were presented to Prosecutor Kry Sok Ie, he told the Post he never received information that the victim’s hymen was torn.

Sokha was sentenced to only one year in jail - the minimum sentence for indecent assault - reduced to six months because the judge accepted that his age was 17 at the time of the rape - despite the fact that his family book states his age was 18. Sokha’s mother testified that the family book was fake.

¹⁹⁶ The Phnom Penh Post, www.phnompenhpost.com/national/virginity-ruling-lets-rapist-hook, accessed on 30 September 2015.

Sokha was also ordered to pay 800,000 riel compensation to his victim. Having already served five months in jail while waiting for trial, Sokha will be released in February.

While Article 68 of the Criminal Code allows the punishment of a convicted person under the age of 18 to be reduced by half, Article 42 states that if the victim of indecent assault is under 16 then the sentence should be doubled.

Thus if the judge followed the law, Sokha should be serving at least one year in jail.

....

But in a few weeks Sokha, who is from one of the village's wealthiest families, will be a free man. His young victim, who is from one of the poorest, still suffers from nightmares and panic attacks.

(i) A sexy outfit is evidence of sexual invitation or sexual availability.

This involves the “sexually available” woman stereotype. In court trials, this stereotyping is usually manifested in questions about what a victim was wearing when she was raped or violated. However, in reality, women get raped regardless of the clothes that they wear.

(j) The belief that women say “no” when they mean “yes”

This is a common belief that brings together, in contradictory ways, the two binary stereotypes: the good woman and slut stereotypes. Good women are expected to be sexually passive and coy. The belief is that their innate coyness makes them say “no” when they actually mean “yes”, or that their “no” “really means that they want to be convinced”.¹⁹⁷ This belief implies that all women really like sex (they are all sluts inside), except that they cannot say it outright. This stereotype harms victims because with this belief, an immediate prejudice meets women victims while a convenient explanation is provided the perpetrator without a thorough, prudent and unprejudiced inquiry into the alleged violation.

(k) The belief that a legitimate victim cannot resume her “normal activities” after the alleged violation.

The common characteristic or attribute ascribed to victims of sexual abuse is that they manifest overt or apparent evidence of trauma. Consistent with this expectation, victims who resume their “normal activities” or do not manifest evident distress after a sexual assault are often disbelieved. This belief harms victims who, despite the internal suffering they experience after a violation, do their best to show the world that they are fine and to cope by continuing with their usual, ordinary activities.

¹⁹⁷ Suprema Corte de Justicia de la Nacion, Mexico 2013, p. 17.

(I) The belief that real victims do not forget or confuse the details of their violation, or that the only credible story is a consistent story.

Some justice actors hold the view that a testimony can only be credible if it is consistent in all its details. Victims are also expected to disclose the complete details and to narrate consistently the sequence of events at the start of the investigation. Any addition to or change in the details at a later stage of the process is often viewed as an indicator of falsity. Along this line, victims are deemed credible *only* when they are absolutely certain about the details of the violation. Similarly, when the accused is able to narrate with consistency the details of his story of no guilt, he is often considered as credible. This was the view of the Court of Appeal of Timor-Leste in one case¹⁹⁸ where it cited the “very consistent testimony of the defendant without contradictions” as one reason for its decision of acquittal.

These beliefs, however, do not take into account the effect of trauma on victims of violence. A single traumatic event can impair a person’s mental functioning, and “one of the most severely impaired areas of mental functioning in a person who has experienced a severe life event is *memory*”.¹⁹⁹ Fragmentation of memory is common among victims of abuse or violence. “The fragmentation of memory is both a product of the overwhelming flooding of negative stimuli as well as an adaptive mechanism.”²⁰⁰ Given this, caution must be taken against making an automatic conclusion that inconsistencies in a victim’s testimony or narrative are indicators of false allegations.

Illustrative cases:

In the first case below, decided by the Court of Appeal of Timor-Leste, the complainant’s detailed and coherent statements passed the court’s standard of a testimony that could not be challenged in its credibility. In the second case, the court used the inconsistencies in the complainant’s narrative to conclude that rape did not occur.

- In a 2006 decision²⁰¹ of the Court of Appeal of Timor-Leste, the young woman told her sister of the rape only a few days after the incident, and she was advised to report the rape to the police. The accused raped the young woman with a knife and kept her tied up. She was able to identify the accused since he used to visit the victim’s neighbourhood. The trial court convicted the accused, and the Court of Appeal affirmed the conviction. The conviction was based on the victim’s declaration, which was very detailed and coherent, describing the facts, the place, the behavior of the accused, the victim’s fear and what occurred before, during and after the abuse. The court said that it could not find anything that would challenge the credibility of the victim’s statements which were according to the rules of common experience. The court said that the delay in reporting to the police was due to fear.

198 Case No. 01/CO/2011-TR, 29 February 2012 (Court of Appeal, Timor-Leste).

199 WLB 2005, p. 62.

200 Ibid.

201 Case No. 35/CO/2001-TR, 15 November 2006 (Court of Appeal, Timor-Leste).

- In a 2012 decision²⁰² also involving rape, the Court of Appeal of Timor-Leste acquitted the accused. In this case, the defendant was charged with raping a married woman. The defendant passed by the complainant's house on his way to buy meat. He inquired where his brother, the complainant's husband, was, and when told that the husband went to the market, he grabbed the complainant by the neck, threw her on a bench, and forced himself upon her. The husband arrived and saw what was happening. The defendant fled. The wife told her husband that his brother forced himself upon her and a report was made to the police. Subsequently, a traditional customary conciliatory practice took place, where the defendant gave the complainant two goats and US\$300, and the complainant gave the defendant a *tais* (traditional woven cloth) and a pig.

The defendant admitted that he had coitus with the complainant, but he claimed that it was consensual. The trial court sentenced the accused to four years' imprisonment. On appeal, the Court of Appeal held that the lower court was wrong in convicting the accused.

First, the Court of Appeal focused on the *inconsistencies* that it found in the complainant's story. According to the court, the complainant presented several versions of the event, thereby raising many doubts as to the veracity of her story. In contrast, the defendant presented only a single version of events, which remained unchanged throughout the process: he went to the house of the victim, asked where her husband was, and since the latter was not at home, he proposed that they have sex and she accepted. According to the court, there is only one truth, and surely it is closer to the person who always said the same thing.

The Court of Appeal pointed out that at first, the complainant said that the defendant went to visit her and without a word, went into her house, hugged her tightly and said that he wanted to have sex with her. She also said that she pushed the defendant and that her husband arrived at this time. However, she said later that the defendant first asked her where her husband was, and that when she replied that he had gone to the market, he entered her house, hugged her by the door, pulled her panties, pushed her to the bench and then had sex with her. Then she told him that her husband would soon be home. The court called the complainant's statements inaccurate, illogical and incomprehensible.

Second, the Court of Appeal considered the complainant's behavior while the alleged offense took place, particularly *her failure to scream* and *to manifest resistance*. The court said that some form of *manifest resistance* was expected from the complainant since the accused did not make use of a knife, machete or any threatening instrument.

Third, the Court of Appeal considered the complainant's testimony that her relationship with the accused was good and that there were no problems between them. According to the court, since rape traumatizes the victim and causes emotional suffering, it expected the complainant's recollection of facts to be heavily emotional, accompanied by expressions of condemnation and

202 Case No. 01/CO/2011-TR, 29 February 2012 (Court of Appeal, Timor-Leste).

repugnance towards the accused. Common experience, it said, shows that victims of these types of crimes neither forgive nor can bear to look at the person who committed such a degrading act against their honor.

As discussed in a previous section, there is no standard behavioral response that can be expected from a person who is confronted with an impending sexual assault, or while being violated. By expecting the complainant to behave in a particular way during the sexual assault, and during her testimony in court, the court engaged in gender stereotyping. A gender-sensitive investigation of the complainant's story would have inquired into the power relationship between her and the men in the family and her level of empowerment (or disempowerment) in the predominantly patriarchal cultural context of Timorese society, which could have affected or defined her ability to articulate and assert her wishes against a man like her brother-in-law. It would have also inquired into her emotional and mental processes at the time of the incident and while being assaulted, which could have explained her conduct or (alleged) lack of manifest resistance to the assault. The court's assumption, based on the so-called "common experience", that women can not even bear to look at their abusers ignores the realities of many women victims. While some women do stay away from their abusers, others have no such choice especially when their abusers are family members or are an integral part of their social or work circle. Still others continue to relate to their abusers as part of the complex psychological processes that victims go through. Hence, the "common experience" that the court cites does not represent the different experiences and realities of all women.

The following discussions may assist justice actors in understanding why inconsistencies occur in the narrations of victims, and enable them to take steps to improve investigation and adjudication:

FALSE RAPE ALLEGATIONS

"Care must be taken to distinguish a true changing of the story from a legitimate recollection of additional data. In both true and false claims, new information and more detail may be added in subsequent interviews. The false claimant wishes to "shore up" the allegation to make it more believable, while the genuine victim (as composure and equilibrium are regained) may remember more detail and descriptive data in the days following the assault. This situation places investigators in a very delicate position: Worst-case scenarios are that the pseudo victim successfully manipulates the system for personal gain or that the legitimate victim is further traumatized by aggressive attempts on the part of investigators to elicit the ultimate 'truth.'

Related to this same discussion is the distinction one must make between deliberate deceit and an honest mistake. The person making a false allegation may offer data that differ from the original report to further deceive and mislead the authorities. In the initial stages of an investigation, a legitimate rape victim, because of stress and psychic pain, may provide incorrect information related to an altered ability to accurately process information.”

Source: Hazelwood and Burgess 2009, p. 184.



Photo: UN Women/Christina Yiannakis

BUT WHAT IF PART OF THE REPORT IS FALSE?

“[W]e want to address the very common problem that investigators and prosecutors face—that parts of the victim’s account may be false, omitted, exaggerated, or inconsistent with other information that is given. In other words, how false does a false report need to be? Does the whole report have to be false to constitute a false report of sexual assault?

For most criminal justice professionals, it is not difficult to come up with reasons why sexual assault victims might omit, exaggerate, or even fabricate aspects of their report.

For example, victims might give inconsistent or untrue information out of trauma or disorganization. When we are traumatized, we do not always think clearly and cannot necessarily provide information that is 100% complete and accurate. This is especially true for victims who have been sexually assaulted more than once, because aspects of the prior sexual assault may be confused with the current one. Victims may also have memory impairment due to alcohol or drug use.

Victims might also give incomplete, inconsistent, or untrue information because they are uncomfortable relaying details of the sexual assault. This may be particularly likely for details regarding the sexual acts involved. For example, it is quite common for sexual assault victims to describe the incident as involving only penile-vaginal penetration because they are uncomfortable reporting other crimes such as oral copulation or anal penetration.

Many victims give information that is incomplete, inconsistent, or untrue because they are afraid that they won’t be believed or that they will be blamed for the sexual assault. To illustrate, victims may omit details that will undermine their credibility, such as drug or alcohol use, prostitution, or other unflattering or even illegal behavior. Of course, victims may also omit details about their own unlawful activity out of the fear of being arrested.

Victims also sometimes minimize what happened or change the details in order to protect the perpetrator. This can occur when the two people have a relationship, when the victim depends on the perpetrator for financial or emotional support, or is afraid of getting the perpetrator ‘into trouble.’ As a result, victims may give incorrect or confusing information about what actually occurred.

Victims also may give information that is incomplete, inconsistent or inaccurate because of their immigration status (or assumed status). Many victims have learned from experiences in their country of origin that authority figures are not to be trusted, particularly law enforcement

officers. In addition, suspects often use immigration status against victims, threatening to report them to immigration authorities or to have them deported if they tell anyone about the sexual assault.

There can also be cultural reasons for exaggerating or minimizing the facts of a sexual assault report. For victims from another culture, beliefs about what is acceptable to tell a stranger and taboos about sexuality and sexual activity may influence their description of what happened. This problem can be especially pronounced when the (female) victim is from a minority culture and the (male) law enforcement professional is from the dominant culture.

Victims from a minority cultural group may be particularly reluctant to report a sexual assault against another member of their cultural group, because it is sometimes seen as a betrayal of the victim's cultural group. This reluctance may be heightened when there is a perception that the cultural group is treated unfairly by law enforcement.

However, one of the most common reasons why victims alter or exaggerate the details of what happened is to create a case that seems more believable. This can be due to guilt, shame, or a fear of not being believed. Just like everyone else in society, sexual assault victims know the stereotype of a "real rape"—that it is perpetrated by a stranger with a weapon or physical violence, that it is reported to law enforcement immediately, and that the victim is emotionally hysterical. In an effort to be believed, therefore, victims may change aspects of the reported incident to make it sound more like this stereotype.

For example, victims may report that they were assaulted by a stranger when they really knew the suspect, and perhaps even had a prior sexual relationship together.

Victims may also report that the suspect used a weapon when this is not really true, or describe threats of physical violence that were not really made. Remember that victims also struggle with the same societal stereotypes as well.

When we think about these dynamics, it makes sense why victims might provide inconsistent, incomplete, or even untrue statements. Yet many investigators and prosecutors have seen this as evidence of a "false report." In fact, none of these situations meets the actual criteria for a false report—because even if aspects of the victim's account of the incident are missing, exaggerated, or false, this does not necessarily mean that the sexual assault did not happen.

Nonetheless, these issues can destroy the victim's credibility if they are not handled by criminal justice professionals. As a first step in overcoming this challenge, investigators and prosecutors must recognize that these omissions, inconsistencies, and even untrue statements are understandable and should never be confused with a "false report." Then, they can address these issues by exploring them gently and nonjudgmentally with the victim. The most important objective is to create a safe and nonjudgmental environment that encourages honesty even for unflattering or illegal behavior.

Then when an omission, inconsistency, or untrue statement is suspected, the investigator or prosecutor can respond by pointing out the issue and asking for clarification. It is entirely possible that the victim simply made a mistake or the professional misheard or misunderstood what the victim was saying. Yet the appropriate time for this type of clarification is after the victim has completed his or her description of what happened—not immediately when the issue arises, because this will interrupt the victim's narrative account.

It is also important to fully—but gently—explain to victims the negative impact of such omissions, inconsistencies, or untrue statements on their credibility during the law enforcement investigation. By doing so, investigators and prosecutors can emphasize the importance of complete truthfulness.

If the issue remains, the professional can explain that conflicting information has arisen and ask for the victim's help to make sense of it. For example, an investigator could say: 'I need to ask these questions because I have to write a report on this, and I want to get every detail correct.'

Source: Lonsway, Archambault & Lisak 2009, pp. 5-6

(m) The belief that the offender must obviously be sick, crazy or deranged (not respectable nor likeable)

Physical attributes or appearances often trigger gender stereotypes. One common gender stereotype in gender-based violence is that the offender must appear like a "maniac" (in cases of rape) or obviously violent or deranged (in cases of domestic violence). The gentle, soft-spoken, and decent-looking man is considered an unlikely rapist or batterer.

In reality, many abusers of women are people considered "normal", who do not meet the stereotypes of offenders, and who are often known to the victims. Psychiatrist and scholar Judith Herman explains:

Little is known about the mind of the perpetrator. Since he is contemptuous of those who seek to understand him, he does not volunteer to be studied. Since he does not perceive that anything is wrong with him, he does not seek help – unless he is in trouble with the law. His most consistent feature, in both the testimony of victims and the observations of psychologists, is his apparent normality. Ordinary concepts of psychopathology fail to define or comprehend him.

This idea is deeply disturbing to most people. How much more comforting it would be if the perpetrator were easily recognizable, obviously deviant or disturbed. But he is not. The legal scholar Hannah Arendt created a scandal when she reported that Adolf Eichmann, a man who committed unfathomable crimes against humanity, had been certified by half a dozen psychiatrists as normal: “The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment, this normality was much more terrifying than all the atrocities put together.”²⁰³

B. GENDER STEREOTYPES IN MARRIAGE AND FAMILY LAW

In Part III, there was discussion illustrating how gender stereotypes work at different levels and how they structure social relations and social organizations. The discussion highlighted how the sexual division of labor in the family is based on gender stereotypes, and how this extends to and is replicated in various forms in social organizations outside the family. From Southeast Asia’s cultural traditions, the following stereotypes can be drawn.

(1) The “good mother” versus the “bad mother” stereotype

In the Philippine law on obligations and contracts, there is a legal standard of care or diligence that is called “the proper diligence of a good father of a family”.²⁰⁴ While it also applies to women, the standard itself is a gender stereotype and carries with it so much historical baggage:

[W]hat is evoked in the term “good father of a family” is not so much altruistic protectiveness as a ruthless vigilance over fiscal affairs; not so much nurturance epitomized by women, but the capitalist, patriarchal cunning characteristic of men who have been so accustomed to dealing with the material public sphere.

Furthermore, the diligence of the bonus paterfamilias is a concept that goes all the way back to Roman law, when a paterfamilias exercised complete control over the lives of all those in his household – the slaves, the women, the unemancipated children. With so many lives and so much property in his hands, a paterfamilias could not afford to make decisions unless with utmost diligence. Thus this seemingly innocuous civil law standard actually evokes one of the most deep-seated traditions of patriarchy.²⁰⁵

There is actually no concept of a “good father of a family” in the field of family law in the Philippines. What often appears in case law is the stereotype of a “good mother” as a blameless selfless creature who is a paragon of virtue willing to sacrifice

²⁰³ Herman 1992, p. 75.

²⁰⁴ Civil Code, art. 1163 (Philippines).

²⁰⁵ Sitoy 1993, p. 23.

everything for her children. This stereotype has been used against women who fail its standard, as in one custody case where the child's father argued that the mother could not properly take care of the child because of her twelve-hour work shifts thrice a week, and that she valued her career more than her family because she wanted to work as a nurse in a foreign country.²⁰⁶

In two other cases where the parents were separated,²⁰⁷ the Philippine Supreme Court deprived the mother of custody based on her conduct or life situation – that of maintaining a relationship with another man – that the court either found to be immoral and have caused emotional disturbance or considered to be an unwholesome influence to the child.²⁰⁸ However, there was no equal inquiry into the conduct or life situation of the father who was given custody, whether he also lived up to the same moral standards applied to the mother, and whether he could perform the same standard of care for the child that was expected of a good parent. In the two cases, a disproportionate burden was imposed on the woman to prove her being a good mother. In doing so, the court, in one²⁰⁹ of the two cases, labeled the woman immoral, unnecessarily denigrated her character, and unduly concluded that her allegation of rape (by the children's father) was a “tale” while engaging in gender stereotyping.²¹⁰

In stark contrast, the Supreme Court in another case said that a paramour is not sufficient basis to conclude that the father is necessarily unfit to exercise parental authority. According to the court, conventional wisdom and common human experience show that a “bad” husband does not necessarily make a “bad” father; that a husband who is not an upright man is not a sufficient ground to deprive him as a father of his inherent right to parental authority over the children.²¹¹

In a later case,²¹² where the father argued that the mother's lesbian relations were a compelling reason to deprive her of custody, the Supreme Court held that it was not enough for the father to show that the mother was a lesbian. He must also prove

206 Perez v. Court of Appeals, G.R. No. 118870, 29 March 1996 (Supreme Court, Philippines).

207 There is no absolute divorce under Philippine law, except for Muslim Filipinos.

208 Espiritu v. Court of Appeals, 312 Phil. 431 (1995); Unson III v. Navarro, 101 SCRA 182 (1980) (Supreme Court, Philippines).

209 Espiritu v. Court of Appeals, 312 Phil. 431 (1995).

210 The father (Reynaldo) who was granted custody of the children also charged the mother (Teresita) with bigamy, which fact the Supreme Court took against her in the custody case. Teresita explained that Reynaldo actually raped her (presumably the reason why she married him despite her subsisting marriage to another man). On this claim, the Supreme Court said:

Of course, to dilute this disadvantage on her part, this matter of her having contracted a bigamous marriage later with Reynaldo, Teresita tried to picture Reynaldo as a rapist, alleging further that she told Reynaldo about her marriage to Lustado on the occasion when she was raped by Reynaldo. Expectedly, [the trial court judge] lent no weight to such tale. And even if this story were given credence, it adds to and not subtracts from the conviction of this Court about Teresita's values. Rape is an insidious crime against privacy. Confiding to one's potential rapist about a prior marriage is not a very convincing indication that the potential victim is averse to the act. The implication created is that the act would be acceptable if not for the prior marriage.

211 Cang v. Court of Appeals, 357 Phil. 129 (1998) (Supreme Court, Philippines).

212 Pablo-Gualberto v. Gualberto, 461 SCRA 450 (2005) (Supreme Court, Philippines).

that she carried on her alleged same-sex relationship in her child's presence or under circumstances that were not conducive to the child's proper moral or psychological development. Since there was no evidence of this, the mother may not be deprived of custody. The court gave weight to the trial court judge's assessment that there was no compelling reason to deprive the mother of custody based on her personal observation of the child's behavior in the presence of each parent, and after talking to the boy.

(2) The sex-role stereotypes of husband and wife

The common sex-role stereotype of husbands in Southeast Asia is that of head of the family. This gender stereotype is expressed in laws that give the husband the sole right to decide over family matters or the right to override the wife's decisions. The wife is expected to be always available to their husbands and to forsake their careers to take care of the family. This cultural expectation underpins the common belief that women are to blame for the breakdown of the marriage or for their husband's infidelity. Where a woman is abused, the examination turns to her performance as a wife, in the belief that her conduct somehow caused the abuse. The absence of a law criminalizing marital rape is also the result of a gender stereotype. It is a product of the historical notion that the husband has a right to have sexual congress with his wife anytime and that marriage constitutes blanket consent to sex, even to forced sex. Such a view denies women sexual autonomy.

Illustrative laws and cases:

- The Family Code provides that with respect to the administration of marital property or of their child's property, the husband's decision shall prevail in case of disagreement with the wife.²¹³
- The Penal Code of Viet Nam has no specific provision on marital rape.²¹⁴ One author, citing a study, explains that "the concept of marital rape appeared to be non-existent in Vietnam since the conjugal right of a husband to have sex with his wife was taken for granted".²¹⁵
- In Myanmar, marital rape is not a crime unless the wife is younger than 14 years.²¹⁶
- An academic paper argues that while there is no specific Cambodian law that penalizes marital rape, Cambodia's Law on the Prevention of Domestic Violence and the Protection of Victims "should be considered applicable to marital rape" since it refers to sexual aggression in general.²¹⁷ However, this law is not being used because "many officials in the Cambodian justice sector lack this understanding and fail to properly prosecute marital rape" despite its frequent occurrence.²¹⁸ A survey found that "14 per cent of respondents know

213 Family Code, arts. 211 & 225 (Philippines).

214 Gender Equality Network 2013, p. 34.

215 Nguyen Thu Huong 2011, p. 14, citing Loi et al. 1999.

216 WHO n.d.; Gender Equality Network 2013, p. 1.

217 van Der Keur 2014, p. 8.

218 Ibid.

a woman whose husband has forced her to have sex against her will”.²¹⁹ Yet, in a study conducted by the United Nations, the “vast majority of men who had perpetrated rape (72-97%) did not suffer any legal consequences”, with the highest impunity for intimate partner rape.²²⁰ This state of things is consistent with the belief of 45 per cent of Cambodians “that it is the right of the husband to force his wife to have sex with him”, according to a 2005 study.²²¹

(3) Domestic violence and gender stereotypes

Domestic violence against women is often viewed as a normal occurrence in marital life that need not be taken seriously. The violence is often justified by attributing it to women’s failure to perform their domestic roles or marital obligations properly. In some cultures, this includes the woman’s failure to be an “obedient” wife. The CEDAW Committee has reiterated that “traditional attitudes by which women are regarded as subordinate to men contribute to violence against them”. Those traditional attitudes are embodied in some parts of the traditional code of conduct in Cambodia, the *Chap Srei*. They are also illustrated in the cases below.

Illustrative law and cases:

- The *Chhap Srei* in Cambodia is a traditional code of conduct for Cambodian women. It is “a rhyming poem instructing women how to behave in their marriage, within their family, and in the community”.²²² It instructs women “to bend to the will of their husband, to be patient and conciliatory, and not to presume to be equal to their husband”.²²³
- In one case in Indonesia, the husband who was convicted of domestic violence argued that he had the right to teach his wife to behave well and respect him, implying that she “misbehaved” and that it justified her being “disciplined” through violence.²²⁴
- An Indonesian case involving a petition for divorce²²⁵ illustrates how domestic violence is trivialized, how the dangers it poses to women are not recognized, and how marital rape is considered not a crime but about a wife’s duty to have sexual intercourse with the husband. In this case, the wife asked for divorce based on the husband’s violence and threats within the first five days after the wedding. The wife alleged that during this time she was exhausted from the wedding preparation and ceremonies and that she also had to take care of her mother who was sick. She related that for five consecutive days after the wedding, she barely slept. The husband was cruel, rude, and threatening in the bedroom. He forced her to have sexual intercourse with him. He also

219 Royal Government of Cambodia 2005, p. 3.

220 Fulu et al. 2013, p. 3.

221 Royal Government of Cambodia 2005.

222 Evans 2006.

223 International Women’s Development Agency, Inc. 2013, p. 6.

224 Decision No. 769 K/Pid. Sus/2008 (Supreme Court, Indonesia).

225 Decision No. 1730/Pdt.G/1012/PAJT (East Jakarta Religious Court, Indonesia).

told her that he could rape her because he was her husband. On the fifth day, the husband left the wife at her parents' house to go to another place to prepare for another wedding reception to be held about ten days later. The next day, the wife also left her family's residence on the pretext of joining her husband. She hid from her husband and later filed a petition for divorce. She alleged that he looked for her and made threats against her, her family, and friends. He allegedly told her sister that once he found his wife, he was going to isolate and cut her off from everyone for two years and take her property; he also said that he was going to put in a sack anyone who gave his wife protection. Mediation meetings were held to make the parties reconcile, but the wife refused to reconcile with the husband.

The court said that it was the wife's obligation to inform the husband of her whereabouts. The court also said that since marriage permits sexual intercourse, the husband was justified in his anger after the wife refused to have sexual intercourse with him. The court did not find any serious dispute between the parties, and said that the husband was in fact attentive and affectionate to the wife based on the well-prepared wedding ceremonies. The court denied the wife's petition for divorce.

- In still another case,²²⁶ Indonesia's Supreme Court noted that the purpose of Indonesia's domestic violence law is to protect the integrity of the family, and that although the law emphasizes the rights of women, it is equally important to consider the wife's duties to her husband. While the court did not elaborate on this, it made this statement after it reversed the military court's decision to discharge the accused as a soldier on the basis of his conviction for domestic violence.
- In one case in Myanmar,²²⁷ the wife and the husband had been married for thirteen years. The husband was unfaithful and violent to the wife; he tried to stab her with a knife. During an argument over one of his extra-marital affairs, he punched her, smacked her face, and beat her head with a bamboo stick. The wife was taken to a hospital. The husband signed an agreement promising to stop his violent behavior, but he did not keep his promise and beat her again many times. She filed a criminal complaint against him. The township court considered the man's age (63), occupation (professional tourist guide), social standing, and the marriage of the parties in deciding to impose a small fine. The woman's attorney and the Attorney General's Office asked the Supreme Court to increase the fine, commensurate with the severity of the acts and to deter repetition. The Supreme Court, however, held that the fine could not be increased because the President had issued an order commuting penalties imposed prior to the order.

The reasoning of the township court was based on the belief that a man's social status must always be preserved or protected. Also, as recognized by the Attorney General, the penalty reflects the court's lack of appreciation of the severity of the crime of domestic violence. The court could have sent a

226 Decision No. 89-K/PMT-I/BDG/AD/VIII/2012 (Supreme Court, Indonesia).

227 Daw Tin Tin Aung v. the Republic of the Union of Myanmar, Case No. 43(b)/2011, Criminal Revision Case, 30 November 2011 (Myanmar).

strong message to the community that domestic violence is serious and should never be trivialized.

- In a 2014 decision²²⁸ of the High Military Court III of Surabaya, Indonesia, the prosecutor appealed for a harsher sentence from a judgment where the accused was given only a sentence of three months' imprisonment. The accused was a member of the Indonesian military with the rank of chief warrant officer. He was also a church pastor. He was charged by the military prosecutor with committing physical violence against his wife in violation of Indonesia's law against domestic violence. The military prosecutor recommended imprisonment for thirteen months for the defendant and for him to pay 15,000 rupiah.

The couple had three children, aged 27, 25 and 20. After they were married, the couple lived in the house of the defendant's parents, where the wife was treated like a servant. When their first child was two years old, she filed a petition for divorce, but she did not pursue it, hoping that the defendant's and his family's behavior would change. In the last ten years, the defendant never provided for his wife's basic needs. She provided for the children's needs from her restaurant business earnings since the defendant would get angry each time she asked for money. Since the wife had to attend to her business, she often came home late. The defendant did not trust her, and often hurt her if she asked for permission, so she often did not bother to ask. On the relevant date in question, while the wife was at a doctor's clinic, the husband called to ask where she was. He became angry because she did not ask permission to see a doctor. She told him that the appointment was with his knowledge. When she reached home, he yelled at her, threw the TV remote control at her face, kicked her stomach, and punched and kicked her repeatedly on the thigh. When the defendant learned of her intention to see a doctor to have her stomach examined, he pointed a screwdriver at her neck, saying, "We should die together." The wife did not leave, but she did go to the doctor the next day. She had a fracture in her right rib. She could no longer bend over. Twice before, the husband also beat his wife, kicking her on different parts of her body and banging his head against his wife's face.

The panel of judges of the military court convicted him and imposed on him a penalty of three months' imprisonment. He was also ordered to pay 10,000 rupiah. Both the defendant and the military prosecutor appealed from the judgment to the High Military Court III of Surabaya. At the time of the appeal, the defendant was not detained.

The defendant argued that the penalty imposed on him was improper since he had no intention to injure his wife. According to him, he only wanted to induce her to ask his permission whenever she wanted to go out. He also claimed that the penalty was excessive because he had admitted the charges and had apologized to his wife; that he suffered from a coronary heart disease; and that he had never committed physical violence to anyone before.

228 Decision No. 40 K/PMT.III/BDG/AD/III/2014 (Indonesia).

Under Article 171 of the Law of the Republic of Indonesia No. 31 (1997), concerning military adjudication, a judge shall not sentence any person unless, based on two valid evidence, he believes that a criminal act was committed and that the defendant is guilty of the act. In this case, five witnesses testified (including the wife) and medical reports were also submitted.

The court handed down a conditional sentence of six months' imprisonment with a ten-month probation period. Thus, the husband did not have to serve his sentence provided he did not commit another crime. In reaching this decision, the court reasoned:

- » Should the respondent face jail time, the court is concerned that this would affect the psychological development of his children, particularly since his first and second child live with him.
- » The defendant has served as a soldier for at least thirty years and has never been disciplined or punished.
- » The reason for the respondent's act was due to a past incident when he caught his wife with another man, leading him never to trust her again.
- » The defendant had apologized to his wife. He still loved her and her children. He did not want to divorce his wife, and he would like his family to be reunited.
- » Conditional sentence is also a form of punishment. During the probation period, the defendant is given the opportunity to change himself and continue to work as a soldier. His superiors would also be able to monitor his behavior and ensure that he does not commit another crime.

The court engaged in evident gender stereotyping. First, the court assumed that sentencing the husband to jail time would harm the children more than any act of domestic violence ever would. This is an example of the stereotypical notion that domestic violence does not really inflict serious harm. The court ignored the severity of the abuse that the husband committed against his wife over a period of many years.

Second, although the court did not absolve the husband of liability, it gave weight to the husband's justification of the abuse when it cited as one reason for reducing the penalty an alleged incident where the husband caught his wife with another man, leading him not to trust her again. There was no discussion on why the court believed this claim of past infidelity to be true. In any case, the court's statement involved the stereotypical belief that women are to blame for the abuse or that the husband must have been provoked to commit it by some misbehaviour on the part of the wife. This shows a lack of understanding of domestic violence as a manifestation of male power and control of women and that it is common for abusers to shift the blame to the victim and not to take responsibility for their own acts.

Third, the court gave consideration to the husband's alleged unblemished record at work as a soldier for thirty years. This implies that a man's public conduct or social status either trumps or mitigates his liability for the violence he commits against his spouse, thereby privileging that public conduct or social status while trivializing domestic violence.²²⁹

Fourth, as in the case of *Jallow v. Bulgaria*, the court gave weight to the husband's feelings and decisions, specifically that he did not want to divorce his wife, that he still loved her and the children, and that he wanted the family to be reunited, without regard to the wife's decision and choice on the matter. The court assumed that the husband could still change, notwithstanding that his abusive behavior against his wife had continued over a period of time. The court also failed to consider the continuing danger that he posed to his wife and the latter's need for protection from further abuse. As the CEDAW Committee said in *Jallow*, "the authorities based their [decision] on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men".

Finally, the husband's assertion that his wife needed his permission at every turn to engage in perfectly legitimate acts or to pursue personal interests manifests the gender stereotype that a wife is subordinate to the husband and that she is not as an autonomous person with her own rights and life goals.

C. GENDER STEREOTYPES IN PROPERTY AND OTHER ECONOMIC RIGHTS

Gender stereotypes may affect women's autonomy and agency, and may keep them poor and financially dependent on men. They could hinder women's full development and prevent them from participating fully in the country's economic and political life. This situation of economic dependence also constrains women's assertion of rights in abusive relationships. One research in Cambodia shows that "women stay in abusive marriages for economic reasons", especially where men's income is predominant.²³⁰

Examples of gender stereotypes in property and other economic rights are below.

(1) Men are better decision-makers in property or financial matters.

Under the Family Code of the Philippines, the general rule is that the administration of any common property of the marriage is joint between husband and wife. However, the law provides that in case of conflict, the husband's decision prevails. The burden is on the part of the wife to go to court to question the husband's decision.²³¹

229 The Supreme Court of Indonesia followed a similar reasoning in Decision No. 49 K/PMT-II/AD/X/2012, a case involving domestic violence, where the court cited as the reason for reducing the penalty the fact that the defendant was a 2009 champion in pistol shooting and a 2010 champion in football.

230 van Der Keur 2014, p. 8, citing Brickell 2014, p. 18.

231 Family Code, arts. 96 & 124 (Philippines).

(2) Men are the primary breadwinners.

The predominant cultural belief, despite current social realities, is that men are the primary breadwinners and the head of the household. If women work, their income is often considered only as supplementary to men's. This belief underpins customary rules that give men a bigger share in inheritance²³² and practices that give more economic benefits to men than to women. An example is a 2004 case decided by the Supreme Court of Indonesia,²³³ where a company rule that provided company allowance only to married male workers was questioned. The Supreme Court invalidated this rule and ordered the payment of family allowance also to married female workers.

232 See Decision No. 1048 K/Pdt/2012 (Supreme Court, Indonesia).

233 Decision No. 1604K/Pdt/2004 (Supreme Court, Indonesia).

PART 7.

GOOD PRACTICES IN SOUTHEAST ASIA

The previous section showed that gender stereotypes can be found in laws and court decisions in Southeast Asia; however, some countries in Southeast Asia have also adopted measures to address them. The following laws and court judgments in Southeast Asia break gender stereotypes and can serve as examples of good practice for other Southeast Asian countries.

(1) THE “CONTEXT-AND-EMOTIONAL THRESHOLD” STANDARD IN APPRECIATING THE TIME ELEMENT IN REPORTING OF VIOLATIONS (PHILIPPINES)

In the case of *Philippine Aeolus Automotive United Corporation v. National Labour Relations Commission and Rosalinda Cortez*,²³⁴ the victim sued her employer for sexual harassment after four years of enduring the abuse, and only after she was terminated. The Philippine Supreme Court held that “any employee, male or female, may rightfully cry ‘foul’ provided the claim is substantiated”. It explained:

Strictly speaking, there is no time period within which he or she is expected to complain through proper channels. The time to do so may vary, depending upon the needs, circumstances, and more importantly, the emotional threshold of the employee.

Private respondent admittedly allowed four (4) years to pass before finally coming out with her employer’s sexual impositions. Not many women, especially in this country, are made of stuff that can endure the agony and trauma of a public, even corporate scandal. If petitioner corporation had not issued the third memorandum that terminated the services of private respondent [the victim], we could only speculate how much longer she would keep her silence. Moreover, few persons are privileged indeed to transfer from one employer to another. The dearth of quality employment has become a daily “monster” roaming the streets that one may not be expected to give up one’s employment easily but to hang on to it, so to speak, by

234 G.R. No. 124617, 28 April 2000 (Philippines).

all tolerable means. Perhaps, to private respondent's mind, for as long as she could outwit her employer's ploys she would continue on her job and consider them as mere occupational hazards. This uneasiness in her place of work thrived in an atmosphere of tolerance for four (4) years, and one could only imagine the prevailing anxiety and resentment, if not bitterness, that beset her all that time. But William Chua faced reality soon enough. Since he had no place in private respondent's heart, so must she have no place in his office. So he provoked her, harassed her, and finally dislodged her, and for finally venting her pent-up anger for years, he "found" the perfect reason to terminate her.²³⁵

In *People v. Pareja*,²³⁶ involving a case of rape, the Philippine Supreme Court stated:

Likewise, AAA's delay in reporting the incidents to her mother or the proper authorities is insignificant and does not affect the veracity of her charges. It should be remembered that Pareja threatened to kill her if she told anyone of the incidents. In *People v. Ogarte* (G.R. No. 182690, May 30, 2011), we explained why a rape victim's deferral in reporting the crime does not equate to falsification of the accusation, to wit:

The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims.²³⁷

(2) THE RULE OF "NO STANDARD BEHAVIORAL RESPONSE" (PHILIPPINES)

Since the 1990s, the Philippine Supreme Court has adopted a progressive standard in the evaluation of victim behavior in rape cases. The court has pronounced in a long line of cases that there is no standard behavioral response from persons who are confronted with a shocking incident, and that the workings of the human mind are unpredictable when placed under emotional stress.²³⁸ However, this standard is not always followed, and some trial courts and quasi-judicial bodies still use the old standard of "utmost resistance".²³⁹

235 This is the exact text from the Supreme Court's decision, which is in English.

236 G.R. No. 202122, 15 January 2014 (Philippines).

237 This is the exact text from the Supreme Court's decision, which is in English.

238 See, for example, *People of the Philippines v. Layagum*, 261 SCTA 339 (1996); *People of the Philippines v. Talaboc*, 256 SCRA 441 (1996); *People of the Philippines v. Miranda*, 262 SCRA 351 (1996) (Supreme Court, Philippines).

239 See Civil Service Commission 2002, pp. 105-106.

The Philippine Supreme Court's judgment in *People v. Pareja*²⁴⁰ reiterated the rule that rape victims should not be expected to exhibit a standard behavioral response:

AAA's conduct, *i.e.*, acting like nothing happened, after being sexually abused by Pareja is also not enough to discredit her. Victims of a crime as heinous as rape, cannot be expected to act within reason or in accordance with society's expectations. It is unreasonable to demand a standard rational reaction to an irrational experience, especially from a young victim. One cannot be expected to act as usual in an unfamiliar situation as it is impossible to predict the workings of a human mind placed under emotional stress. Moreover, it is wrong to say that there is a standard reaction or behavior among victims of the crime of rape since each of them had to cope with different circumstances (*People v. Saludo*, G.R. No. 178406, April 6, 2011).

It is a settled rule that failure of the victim to shout or seek help do not negate rape. Even lack of resistance will not imply that the victim has consented to the sexual act, especially when that person was intimidated into submission by the accused. In cases where the rape is committed by a relative such as a father, stepfather, uncle, or common law spouse, moral influence or ascendancy takes the place of violence (*People v. Pacheco*, G.R. No. 187742, April 20, 2010). In this case, AAA's lack of resistance was brought about by her fear that Pareja would make good on his threat to kill her if she ever spoke of the incident.²⁴¹

(3) THE RAPE SHIELD RULE (PHILIPPINES)

Rape shield laws prohibit or limit the use in sexual assault cases of evidence of a complainant's sexual history or reputation to undermine her credibility. Rape shield laws recognize that a victim's sexual history or reputation is irrelevant to the case since the essence of sexual assault or rape is the absence of consent. Hence, each allegation of sexual assault must be examined on its own merits without regard for the complainant's sexual history or reputation. The introduction of such evidence also causes the complainant emotional distress and humiliation, and produces fear among victims, discouraging them from coming forward and reporting the violation.

The Philippines has adopted a rape shield rule in Republic Act No. 8505 (1998), which provides:

Section 6. Rape Shield. - In prosecutions for rape, evidence of complainant's past sexual conduct, opinion thereof or of his/her reputation shall not be admitted unless, and only to the extent that the court finds, that such evidence is material and relevant to the case."

However, under the exception to the rape shield rule, evidence of the complainant's sexual history or reputation is still admissible where it is considered "material and relevant", an exception that can still accommodate gender stereotypes. Further, a section in the Rules of Court of the Philippines provides that:

240 G.R. No. 202122, 15 January 2014 (Supreme Court, Philippines).

241 For a similar ruling, see *People of the Philippines v. Quintos*, G.R. No. 199402, 12 November 2014 (Supreme Court, Philippines)

The good or bad moral character of the offended party may be proved if it tends to establish in any reasonable degree the probability of the offense charged.²⁴²

In a 2004 case,²⁴³ the Supreme Court explained the admissibility of evidence on “character for chastity” in rape cases under this rule:

Not every good or bad moral character of the offended party may be proved under this provision. Only those which would establish the probability or improbability of the offense charged. *This means that the character evidence must be limited to the traits and characteristics involved in the type of offence charged. Thus, on a charge of rape – character for chastity, on a charge of assault – character for peaceableness or violence, and on a charge of embezzlement – character for honesty. In one rape case, where it was established that the alleged victim was morally loose and apparently uncaring about her chastity, we found the conviction of the accused doubtful.*²⁴⁴

In stating that “character for chastity” of the offended party is relevant in establishing the probability or improbability of a rape charge, the Court appears to affirm the “virtuous woman” stereotype of a legitimate victim. It also negates the rape shield rule and the change of characterization of rape under Philippine law in 1997 from a crime against chastity to a crime against persons.²⁴⁵

(4) THE RULE THAT RAPE IN MARRIAGE IS A CRIME (INDONESIA, PHILIPPINES, THAILAND AND TIMOR-LESTE)

Indonesia, Philippines, and Thailand have addressed through legislation the gender stereotype that women’s sex role in marriage is to provide sexual pleasure to their husbands and that women’s consent is irrelevant because marriage constitutes a blanket consent to sexual intimacy. Law No. 23 (2004) of the Republic of Indonesia regarding the elimination of violence in the household penalizes “forced sexual intercourse” committed by a spouse against the other.²⁴⁶ The Philippine law against rape provides that rape may be committed by a husband against his wife.²⁴⁷ In 2007, Thailand outlawed marital rape by amending its definition of rape; the amendment removed the requirement that the victim must be a person who is not the offender’s wife.²⁴⁸

242 Rules of Court, Rule 130, sec. 51 (3) (Philippines).

243 Civil Service Commission v. Belagan, G.R. No. 132164, 19 October 2004 (Supreme Court, Philippines).

244 This is an exact quote from the Supreme Court’s decision, which is in English. Author’s emphasis in italics.

245 See Republic Act No. 8353 (1997), sec. 2 (Philippines)

246 Law No. 23 (2004), art. 8 in conjunction with art. 2 (1) (Indonesia).

247 Revised Penal Code, art. 266-C in relation to art. 266-A, as amended by Rep. Act No. 8353 (1997) (Philippines); People of the Philippines v. Jumawan, G.R. No. 187495, 21 April 2014 (Supreme Court, Philippines). The court did not discuss the issue of whether a wife may commit rape against her husband, since it was not before the court. However, the definition of rape under article 266-B of the law covers rape committed by any person.

248 Criminal Code, art. 276, as amended (Thailand); Health Info in Thailand. n.d.

Timor-Leste's Penal Code does not mention rape by a spouse against the other spouse, but its definitions of rape²⁴⁹ and sexual coercion²⁵⁰ penalize *any person* who commits the crime against *any other person*, and the penalty is higher when the same is committed through abuse of authority arising from a family relationship.²⁵¹ Timor-Leste's Ministry of Justice has declared in the government's 2013 CEDAW Report that these provisions include marital rape.²⁵²

The Philippine Supreme Court handed down a conviction in the first-ever marital rape case that reached the court, *People v. Jumawan*.²⁵³ In explaining the law penalizing marital rape, the Supreme Court stated:

The ancient customs and ideologies from which the irrevocable implied consent theory evolved have already been superseded by modern global principles on the equality of rights between men and women and respect for human dignity established in various international conventions, such as the CEDAW. The Philippines, as State Party to the CEDAW, recognized that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between them. Accordingly, the country vowed to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. One of such measures is R.A. No 8353 insofar as it eradicated the archaic notion that marital rape cannot exist because a husband has absolute proprietary rights over his wife's body and thus her consent to every act of sexual intimacy with him is always obligatory or at least, presumed.

In a subsequent case, the Philippine Supreme Court said that the relationship between the offender and the victim is not a defense against a rape charge since even a spouse may commit rape against the other spouse.²⁵⁴

(5) “NOTHING JUSTIFIES DOMESTIC VIOLENCE” (TIMOR-LESTE)

In a decision promulgated in 2014,²⁵⁵ the Dili District Court of Timor-Leste convicted a husband of domestic violence despite his protestations that his wife provoked the violence. In that case, the wife left the husband alone to go see her parents, leaving the jerry cans out of place and the house untidy. When the husband inquired why she left the house untidy, she answered, “Our eldest son (of one year and six months old) cannot walk and is sick. I’m holding the baby (of one month old), we don’t have

249 Penal Code of the Democratic Republic of Timor-Leste (Law Decree No. 19/2009), art. 172.

250 Ibid., art. 171.

251 Ibid., art. 173.

252 Republica Democratica De Timor-Leste 2013, pp. 16, 17.

253 G.R. No. 187495, 21 April 2014 (Supreme Court, Philippines).

254 *People of the Philippines v. Quintos*, G.R. No. 199402, 12 November 2014 (Supreme Court, Philippines)

255 NUS.0980/2011.PD.DIL, Proc. No 125/C.Ord. (Ordinary Crimes) 2014/TDDL (Dili District Court, Timor-Leste, 2011).

anyone to look after our children, so, see if you can help to tidy up.” All these upset the husband and so beat her up.

(6) THE RULE THAT HOUSEWORK HAS ECONOMIC VALUE (CAMBODIA, PHILIPPINES AND VIET NAM)

The Cambodian Civil Code provides that, in case of divorce, the parties may agree on the division of their common assets. In the absence of such an agreement, each of the parties shall be entitled to 50 percent of the common assets, but the court may order a different division under special circumstances and when applied for by a party. In such a case, the court shall consider factors such as the contribution of each party to the acquisition of the property, the period of the marriage, the physical and mental condition of the parties, and the income and earning capacity of each. A third paragraph in the same Article of the Code declares that housework shall be deemed to have the same value as work outside the house.²⁵⁶ This provision breaks the stereotypical belief that housework has little or no economic value. It recognizes that the housework of one's spouse (usually the wife) enables the other spouse (usually the husband) to pursue gainful employment or economic activities outside the home.

Viet Nam's Law on Marriage and Family has provisions similar to those of Cambodia on the division of common assets in case of divorce. In the absence of any agreement on the division of assets, the court will decide for the parties, taking into account factors such as the party's situation and contribution to the acquisition or development of the property. It provides that the housework done in the family by the husband or wife or both is regarded as income-generating labor.²⁵⁷

In the Family Code of the Philippines, couples who live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage are given equal shares in the properties they acquired during their cohabitation, even if one party did not have any financial contribution to their acquisition but he or she took care of and maintained the family and the household.²⁵⁸

(7) WOMEN HAVE THE EQUAL RIGHT TO INHERIT (INDONESIA AND MYANMAR)

In a 2012 decision²⁵⁹ of the Supreme Court of Indonesia, the patrilineal inheritance system under the customary law of one district in Indonesia, providing that women are not entitled to inheritance, was questioned. The Supreme Court of Indonesia invalidated the customary rule and stated that the inheritance rights of women are equal with those of men. The court held that the customary law violated the principles of equality before the law and non-discrimination under the Constitution

²⁵⁶ Civil Code, art. 980 (Cambodia).

²⁵⁷ Law No. 52/2014/QH13, art. 59 (Viet Nam).

²⁵⁸ Family Code, art. 147 (Philippines)

²⁵⁹ Decision No. 1048 K/Pdt/2012 (Supreme Court, Indonesia).

of Indonesia, Article 5 (a) of Law No. 7 of 1984 on the ratification of the CEDAW, which clearly prohibits cultural practices that discriminate against women, Article 17 of Law No. 39 of 1999 regarding the right of every person to justice without discrimination, and the jurisprudence of the Supreme Court of Indonesia.²⁶⁰ It declared that any customary law that does not recognize the equal rights of women can no longer be maintained.

In the 2007 case of *Daw San Lwin v. Daw Than (aka) Daw Than Than*,²⁶¹ Myanmar's Supreme Court recognized a widow's right to inherit from her late husband's inherited property even though she has already remarried. In this case, Daw San Lwin (the wife) was married to U Khin Maung Myint (the husband). The husband's father (the father-in-law) died, leaving a piece of land and a building. The husband died less than a year after his own father's death and before he could claim his inheritance from his father's property. Daw San Lwin remarried three months after the death of her husband. After her remarriage, Daw San Lwin filed a suit against her mother-in-law, Daw Than, to claim her inheritance from the land that was left behind by her late husband's father. The mother-in-law claimed that Daw San Lwin was not entitled to any inheritance because she remarried. The Supreme Court held that U Khin Maung Myint inherited the rights of primogeniture upon his father's death, which rights are perpetual. Upon U Khin Maung's death, his widow, Daw San Lwin, acquired her late husband's inheritance. She does not lose that right by reason of remarriage.

260 The Court cited its previous decisions recognizing women's inheritance rights despite customary rules to the contrary, including its ruling in Decision No. 179 K/SIP/1961 of 11 November 1961.

261 Case No. 19/2007, Special Civil Appeal Case, Supreme Court, Myanmar Law Report 2007, pp. 29-42.

PART 8.

AVOIDING GENDER STEREOTYPING IN JUSTICE DELIVERY: SOME GUIDELINES

Effective protection of human rights depends largely on domestic legal systems. The ways by which a State can bring its domestic legal system to conform to its international legal obligations on human rights include constitutionalization of human rights including the principles of equality and non-discrimination, the enactment of laws and policies protecting human rights, and the proper implementation and enforcement of those laws and policies. In so doing, States must be careful not to perpetuate gender stereotypes. Courts also have an obligation to ensure that gender stereotypes are not perpetuated in court processes or judgments. Avoiding gender stereotypes or gender stereotyping in justice delivery is a critical component of human rights protection and promotion. The following are some guidelines that justice actors should bear in mind in order to avoid gender stereotyping in justice delivery.

(1) UNDERSTAND GENDER STEREOTYPES, THEIR FORMS AND MANIFESTATIONS, AND HOW THEY HARM WOMEN.

Avoiding gender stereotyping in justice delivery requires, as a starting point, understanding the nature of gender stereotypes, identifying their forms and manifestations, and appreciating the harm they cause to women. When the forms and manifestations of gender stereotypes are identified and the harm they cause is recognized, measures can be taken to avoid their perpetuation in legislation, legal processes and court decisions. When cases brought before the courts involve gender stereotyping by individuals, courts can address them and assist in educating litigants, justice actors and society in general about the pernicious effects of gender stereotypes. An example of this powerful educative function of court judgments is the Philippine Supreme Court's enlightening discussion of marital rape in *People v. Jumawan*, where the Court discussed the evolution of rape laws and the principles and norms of international human rights law underpinning the crime of marital rape, and debunked the husband's stereotypical notions of male sexual privilege against his wife.

(2) REMEMBER THAT EVERY PERSON, WHETHER MALE OR FEMALE, AND REGARDLESS OF THEIR PERSONAL CIRCUMSTANCES AND STATUS, HAVE HUMAN RIGHTS.

When justice actors have internalized human rights principles, norms and standards, they are better able to treat litigants with fairness. Through the lens of human rights, justice actors are able to see every litigant as entitled to a fair hearing and to a sound assessment of the evidence, and to be free from any prejudice that can result in injustice. Justice actors should bear in mind that a human rights approach that emphasizes the equality of everyone challenges the power imbalance that underpins every case of violation of women's rights.

The use of gender stereotypes in investigation and adjudication may contribute to a culture of impunity when it results in a failure to hold accountable perpetrators of violations of women's human rights. This, in turn, will intensify the subordination of women. As explained, in relation to violence against women in particular:

Impunity for violence against women compounds the effects of such violence as a mechanism of control. When the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behavior are normalized.²⁶²

(3) KNOW AND APPLY INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS IN JUSTICE DELIVERY, INCLUDING THOSE RELATED TO GENDER STEREOTYPING.

Law enforcement agencies and courts have the responsibility, together with other State organs, to ensure that the State complies with its international obligations on human rights. The performance of this duty requires that justice actors apprise themselves of their countries' international obligations on human rights and international human rights norms and standards, including those related to gender stereotyping. Justice actors should also know how international human rights norms and standards can be applied in domestic investigation and adjudication in compliance with their country's international obligations. This can help ensure that the delivery of justice adheres to international standards of competence, independence, impartiality and fairness.²⁶³

The Bangalore Principles on the Domestic Application of International Human Rights Norms²⁶⁴ explains that:

²⁶² Report of the Secretary General, para. 76.

²⁶³ See CEDAW General Recommendation No. 33, para. 18 (a).

²⁶⁴ The Bangalore Principles on the Domestic Application of International Human Rights Norms were the result of a high-level Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Bangalore, India on 24-28 February 1988 and administered by the Commonwealth Secretariat. It was attended by chief justices, justices and judges from India, Zimbabwe, United States, Pakistan, Papua New Guinea, Australia, Mauritius, Britain, Sri Lanka and Malaysia. The Convenor, Justice P N Bhagwati, former Chief Justice of India, summarized the discussions by the experts in ten paragraphs of principles, which became known as the Bangalore Principles on the Domestic Application of International Human Rights Norms.

[i]t is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Building on the Bangalore Principles, the Judicial Colloquium on the Domestic Application of International Human Rights Norms convened by the Office of the United Nations High Commissioner for Human Rights in Bangkok in March 2009²⁶⁵ approved an Outcome Document that explains how courts can apply international human rights norms and standards in domestic adjudication:

- (a) ...the judiciaries should consider referring, where pertinent, to the jurisprudence of the UN human rights treaty bodies and of the regional human rights mechanisms, in interpreting the international human rights treaties binding their States and their domestic Constitutions and Bills of Rights protecting these rights;
- (b) Where lacunae in the domestic law are identified, the judiciary should, as far as possible, resort to interpretations consistent with principles of international law and customary international law, as well as the meaning of international instruments, as interpreted and applied by the UN human rights treaty bodies;
- (c) Where domestic laws or principles prevail over international law and thereby prevent the judiciary from applying international standards – where for instance such norms are expressed as non-justiciable in the domestic legal order or where domestic law which is inconsistent binds the judiciary – such inconsistency should be highlighted in the judgments.

The capacity of the judiciary to apply international human rights norms and standards, including those that relate to gender stereotypes, must be developed through continuous training of members of the judiciary. The Special Rapporteur on the independence of judges and lawyers has highlighted the importance of this:

[the] development of training and continuing legal education programmes, particularly in international human rights law, is the cornerstone for developing the capacity of the judiciary to challenge gender stereotypes within and outside the criminal judicial system and provide the basis for more equal application of criminal legislation, and therefore for a more equal access to justice for women.²⁶⁶

265 The Outcome Document states that “[t]wenty-four Justices and Judges from Cambodia, Malaysia, the Philippines, Sri Lanka and Thailand participated in the Judicial Colloquium, as well as observers from Lao PDR and the Philippines”.

266 Knaut 2011, p. 2.

(4) EXAMINE THE CONTENT OF LAWS AND POLICIES, RULES OF EVIDENCE AND PROCEDURE, AND JURISPRUDENCE OR PREVIOUS COURT DECISIONS AND ASCERTAIN WHETHER THEY CONTAIN GENDER STEREOTYPES. TAKE STEPS TO ELIMINATE THOSE STEREOTYPES.

Where laws and policies discriminate against women through gender stereotypes, courts should consider invalidating the laws by applying the principles of equality and non-discrimination under international human rights law or under domestic laws or both. The application of human rights principles and standards should be considered following the Bangalore principles and the Outcome Document of the 2009 Judicial Colloquium discussed above.

Where it is not possible to invalidate laws that discriminate against women, judges should bring them to the attention of lawmakers in order that they may be modified or amended to conform to State obligations on human rights. Similarly, where gender stereotypes are found in rules of evidence or procedure, justice actors have the responsibility to bring them to the attention of the appropriate agency or body responsible for their modification.

Under Article 2, subparagraph (c) of CEDAW:

States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention. However, where it is not possible to do so, courts should draw any inconsistency between national law, including national religious and customary laws, and the State Party's obligations under the Convention to the attention of the appropriate authorities, since domestic laws may never be used as justification for failures by States parties to carry out their international obligations.²⁶⁷

Some measures that may be taken to remove gender stereotypes in laws and rules of evidence and procedure are:

- removal of the adverse inference from delay in reporting the offense, especially rape;
- revising evidentiary rules, including any rule that accords inferior status to the testimony of women,²⁶⁸ to ensure equality between women and men litigants and fair judicial treatment of both sides in the presentation and assessment of evidence;²⁶⁹ specifically, the removal of the cautionary rule and the corroboration rule that discriminate against women complainants or witnesses, and instead placing emphasis on the quality of the evidence presented;

²⁶⁷ CEDAW General Recommendation No. 28, para. 33.

²⁶⁸ CEDAW General Recommendation No. 33, para. 25 (a) (iv).

²⁶⁹ Ibid., para. 15 (g).

- disallowing the introduction of evidence of the victim's past sexual history;
- eliminating the practice of concluding "false allegation" or the existence of consent as a consequence of lack or insufficiency of evidence or failure of proof, and instead simply declaring that there was failure to prove the crime or there was insufficiency of evidence;²⁷⁰
- establishing mechanisms to ensure that investigations, whether judicial, quasi-judicial or administrative, are impartial and not influenced by gender stereotypes or prejudice.

(5) ADOPT A GENDER PERSPECTIVE IN INVESTIGATION AND ADJUDICATION.

Integrating a strong gender perspective in the justice system is essential to avoid discrimination through gender stereotypes. Adopting a strong gender perspective does not mean taking the side of the woman in every case and throwing out standards of fairness in investigations or reneging on the duty to make sound evidence-based adjudication.

A good example of efforts to adopt a gender perspective in adjudication is the *Protocol on Judicial Decision-Making with a Gender Perspective* developed by the Supreme Court of Mexico,²⁷¹ which started from a knowledge assessment of the justice actors about applying a gender perspective in the judicial decision-making process.

The Protocol explains that understanding the difference between sex and gender is a starting point in employing a gender perspective. It enables an understanding of "how society and its legal infrastructure impose different consequences based on the anatomy of our bodies". The Protocol explains that employing a gender perspective entails:

- identifying the different roles and duties that are socially assigned on the basis of sex, gender, or sexual orientation/preference;
- revealing the different rights and opportunities that these social assignments precipitate;
- exposing the power relationships that these differences create;
- accounting for the links between gender and race, religion, age, political beliefs, etc.;
- enquiring into the different impacts that laws and policies have on the bases of these assignments and power differentials; and

²⁷⁰ CEDAW General Recommendation No. 33, para. 18(e).

²⁷¹ Suprema Corte de Justicia de la Nacion, Mexico 2013.

- determining whether a different treatment is either arbitrary or necessary, in light of the above.²⁷²

When a gender perspective is employed, the gender dimensions of a given legal problem that are usually invisible can be exposed, considered and addressed towards protecting and fulfilling human rights. These dimensions may include the discriminatory social contexts in which violations against women occur (e.g., the context of female poverty or the context of female subordination), the power differentials between men and women (e.g., men have rights and privileges that women do not have in the family and community), how these define and affect their actions and behavior, including the exercise of their rights (e.g., how disempowered women are most likely unable to resist or assert themselves against their abusers, and if they take action, they are most likely unable to do so promptly), or the disparate impact of laws and policies on men and women resulting from their power differentials (e.g., how in divorce, gender neutral rules leave women poorer than they were during the marriage). When justice actors employ a gender perspective in investigation and adjudication, they can avoid perpetuating gender inequalities through their actions and decisions.

(6) ADOPT AN INTERDISCIPLINARY APPROACH IN INVESTIGATION AND ADJUDICATION.

Adopting an interdisciplinary approach to investigation and adjudication can help justice actors avoid gender stereotyping. The tools and researches of other disciplines, such as psychology or psychiatry, forensic medicine and sociology, can be used to expose and challenge gender stereotypes as well as other practices and beliefs that harm women and to debunk outdated knowledge. Encouraging the participation of experts, helping professionals and groups that provide services for victims of gender-based violence can also assist justice actors in understanding the issues that are brought before them.

272 Ibid



Photo: UN Women/Christina Yiannakis

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