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GENDER STEREOTYPING IN INTERNATIONAL LAW: THE BATTLE FOR THE REALISATION OF WOMEN'S REPRODUCTIVE HEALTH RIGHTS

DAISY-MAY CARTY COWLING*

In all forms of discrimination against women, the phenomena of gender stereotyping has played a significant role; gender stereotypes are often cited as one of the most crucial barriers states need to eliminate in order to achieve substantive equality between the sexes. Gender stereotyping and its impact on the realisation of women's human rights is arguably the most pervasive in the area of reproductive health. Whilst the existence of gender stereotyping can be damaging for both men and women, such stereotyping holds the sexual freedom and physical autonomy of women to unrivalled and relentless scrutiny. Despite the existence of human rights that regulate states' conduct when it comes to gender stereotyping and reproductive health, as has been consistently outlined in the breadth of international case law, gender stereotypes and patriarchal concepts that aim to determine a woman's role in society mean that rights such as access to abortion and contraception are endangered by religious and other ideological forces. It is concluded that states and international human rights bodies must focus their attention on the importance of combatting the harmful gender stereotypes that exist within their jurisdictions to achieve any form of substantive equality for women.

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I INTRODUCTION

International human rights law has developed in such a way that states now have concrete obligations to ensure that women have adequate access to reproductive health. Further, states are also bound to eliminate harmful gender stereotypes that hinder women's access to their human rights. Through a critical analysis of international human rights case law, this article will highlight the link between gender stereotyping and reproductive health rights and argue that in order for women to adequately access their reproductive rights, states and international human rights bodies must focus their attention on the importance of combatting the harmful gender stereotypes that exist within their jurisdictions.

II GENDER STEREOTYPING

Gender stereotyping and its impact on the realisation of women's human rights is arguably the most pervasive in the area of reproductive health and will therefore be the focus of this article. The presence of gender stereotyping in reproductive health is

profound and can have extremely grave consequences for women,¹ as they are disproportionately affected by this phenomena.² Gender stereotypes include, but are not limited to, the view that women are weak and men are strong, that men are natural leaders whereas women are subordinate, and that a woman's "place" is in the home as a caregiver whereas men are the providers.³ Whilst the existence of gender stereotyping can be damaging for both men and women, gender stereotyping holds women's sexual freedom and physical autonomy to unrivalled and relentless scrutiny. As Frances Raday articulates, '[t]he most globally pervasive of ... harmful cultural practices ... is the stereotyping of women exclusively as mothers and housewives.'⁴ The motherhood stereotype is rooted in traditional religious and cultural ideas that are based on 'women's exclusion from the public power and of their subjection to patriarchal power within the family'.⁵ Many if not all of the stereotypical ideas about women stem from the 'motherhood' notion,⁶ and are intrinsically related to the plethora of challenges that women face in accessing reproductive health.⁷

III DEVELOPMENT OF REPRODUCTIVE HEALTH RIGHTS

Women's reproductive health rights are relatively recent in international human rights law. Initial human rights documents such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* did not include any provisions that were specific to the type of human rights abuses women face, but merely acknowledged that 'sex' was a category that may owe itself to discrimination.⁸

¹ Ben Quinn, 'Scandal in Ireland as Woman Dies in Galway after Being Denied an Abortion', *The Guardian* (online), 14 November 2012 <<http://www.theguardian.com/world/2012/nov/14/ireland-woman-dies-after-abortion-refusal>>.

² Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 15.

³ Simone Cusack and Rebecca J Cook, 'Stereotyping Women in the Health Sector: Lessons from CEDAW' (2009) 16(1) *Journal of Civil Rights and Social Justice* 47, 50.

⁴ Frances Raday, 'Culture, Religion, and Gender' (2003) 1(4) *International Journal of Constitutional Law* 663, 671.

⁵ *Ibid* 669.

⁶ Cusack and Cook, above n 3.

⁷ Committee on the Elimination of All Forms of Discrimination against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1 (22 April 2015) para 42.

⁸ *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 2; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3; *International*

The reason for this omission, which has been widely accepted by feminist scholars, is that international human rights law was shaped largely by men.⁹ This meant that it was men's interests that were first represented in international law, and that women benefited only 'from human rights protection indirectly, via existing norms created with the lives of men rather than women in mind'.¹⁰ It was not until the enactment of the *Convention of the Elimination of All Forms of Discrimination against Women* ('CEDAW') that the human rights issues women faced were properly considered at an international level.¹¹ As women's human rights were scarcely articulated in early human rights doctrines, it is unsurprising that women's reproductive rights did not feature heavily on the human rights agenda for some time. As Barbara Stark aptly highlights, reproductive rights focus on experiences — conception, pregnancy, childbirth — that affect women more directly than men, and so are not reflected in traditional rights discourse.¹² In fact, to date, only one international human rights document expressly grants a right to abortion.¹³ Women's reproductive rights are nonetheless universally understood to be codified in international human rights law.

Women's reproductive rights were first established in CEDAW and can be identified in Article 12, which mentions specifically those 'services related to family planning' and articulates that State parties must 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.' The strongest provision on women's reproductive health rights in international law is contained in the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* ('The Maputo Protocol').¹⁴ Article 14 specifically mentions that women have the right to control their own fertility and to choose any method of contraception available.¹⁵ Of

Covenant on Economic Social and Cultural Rights, opened for signature 19 December 1966, (entered into force 3 January 1976) 993 UNTS 3 art 2.

⁹ Hilary Charlesworth, 'Women and International Law' (1994) 9(19) *Australian Feminist Studies* 115, 119.

¹⁰ Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) 343.

¹¹ *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹² Barbara Stark, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' (2011) 18(2) *Duke Journal of Gender, Law and Policy* 261, 271.

¹³ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, opened for signature 11 of July 2003 (entered into force 25 November 2005) art 14.

¹⁴ *Ibid.*

¹⁵ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, art 14 ('Maputo Protocol').

significance is the latter part of Article 14 which is the only provision in international human rights law that specifically outlines a right to abortion.¹⁶

While this is considered a somewhat ground-breaking provision in international law, it is important to note that this provision does not expressly call abortions to be readily available for all women who should wish to have one. In fact, in the context of feminist arguments in favour of abortion, it is an extremely tame provision given that there is no option for a woman to enter a facility and access an abortion service on demand.¹⁷ This type of provision is common in many states' domestic laws and is problematic as it still gives the state power to dictate and restrict access to abortion. Yet despite its weakness in language, the sentiments outlined in Article 14c are still vehemently resisted. For example, in relation to the *Maputo Protocol*, the influential head of the Catholic Church Pope Benedict XVI stated: 'how can we not be alarmed ... by the continuous attacks on life, from conception to natural death?'¹⁸

Opposition to the *Maputo Protocol* stems from the fact that women's access to abortion remains controversial.¹⁹ Despite access to abortion being largely recognised as a women's rights issue today, 'much of the early focus on abortion was on what constitutes a human life, not on the impact on women'.²⁰ Religious institutions such as the Catholic Church often use the conception argument to oppose abortion while simultaneously espousing stereotypical ideas of women and their role in society.²¹ All religions practice gender stereotyping to some degree, and it can be said that 'claims against gender equality have largely been made under one of the monotheistic religions — Judaism, Christianity, Islam — or under Hinduism'.²²

In addition to their inclusion in human rights conventions, reproductive rights have also featured prominently in the women's human rights discourse, appearing in pivotal

¹⁶ Ibid.

¹⁷ Sally Markowitz, 'Abortion and Feminism' (1990) 16(1) *Social Theory and Practice Journal* 1, 1–15.

¹⁸ Pope Benedict XVI, 'To the Diplomatic Corps Accredited to the Holy See' (Speech delivered at the Traditional Exchange of New Year Greetings, Vatican Church, Monday 8 January 2007) <http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070108_diplomatic-corps.html>.

¹⁹ Sally Markowitz, above n 17, 2.

²⁰ Ibid.

²¹ A Denise Starkey, 'The Roman Catholic Church and Violence against Women' in Andy J Johnson (ed), *Religion and Men's Violence against Women* (Springer, 2015) 177, 183.

²² Frances Raday, above n 4, 667.

documents such as the 1995 *Beijing Platform for Action*.²³ Further, as will be demonstrated by the ensuing discussion, women have successfully used a variety of provisions in international law that do not expressly promote reproductive health rights to hold states accountable, signifying that there is an international human rights law consensus on the existence of women's reproductive health rights. However, despite this, women's rights in this area are still being infringed at an alarming rate, due to prevailing stereotypical attitudes towards women.

IV ELIMINATING STEREOTYPES IN INTERNATIONAL LAW

International human rights law has provisions on eliminating stereotyping. The strongest prohibition on gender stereotyping is Article 5 of CEDAW which instructs State 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.²⁴

This provision prohibits all types of gender stereotyping that may be harmful to women and expressly mentions the specific role of motherhood in stereotyping, which is very relevant in the context of reproductive rights.²⁵ It is also relevant that this provision is located within the first set of articulated human rights in CEDAW as this demonstrates how seriously the international community takes the issue of gender stereotyping and the impact it can have on women's human rights. Concern regarding stereotypes can also be found in regional human rights treaties that are specific to the rights of women. For example, State parties to the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* agree 'to undertake progressively specific measures ... to modify social and cultural patterns of conduct of men and women ... customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and

²³ *Beijing Declaration and Platform of Action*, A/CONF.177/20 (17 October 1995) para 97.

²⁴ *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 5(a).

²⁵ *Ibid* art 5.

women that legitimize or exacerbate violence against women'.²⁶ Similarly, State parties to the recently adopted *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* ('*The Istanbul Convention*') are required to 'take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men'.²⁷ In addition to having some of the strongest provisions relating to reproductive health rights, the *Maputo Protocol* also takes a strong stance against stereotyping, urging State parties to modify practices and conduct based on perceived inferiorities or stereotyped perceptions of women.²⁸ Given that these human rights conventions focus on women specifically, it is clear that gender stereotyping is widely understood to negatively impact on women's human rights.

In addition to the sentiment expressed in Article 5 of CEDAW, the CEDAW Committee has continuously expressed how damaging gender stereotyping can be. The Committee has concluded that 'myths and stereotypes constitute discrimination on the basis of gender',²⁹ and that harmful stereotypes of women 'perpetuate widespread practices involving violence or coercion',³⁰ impact women's voting rights,³¹ 'assign women to the private or domestic sphere,' and associate women 'with reproduction and the raising of children.'³² However, despite the articulated international human rights treaties that recognise the need to eliminate stereotypical attitudes toward women and the accepted right to reproductive health, the ensuing discussion of international case law demonstrates that gender stereotyping in reproductive health is pervasive — as is its impact on women's access to human rights.

²⁶ *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994, 1534 ILM 33 (entered into force 5 March 1995) art 8(b).

²⁷ *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature May 11 2011, CETS 210 (entered into force 1 August 2014) art 12(1).

²⁸ *Maputo Protocol*, art 2(2).

²⁹ Committee on the Elimination of Discrimination against Women, *Views: Communication No 34/2011*, 57th sess, CEDAW/C/57/D/34/2011 (10–28 February 2014) ('*R.P.B v The Philippines*').

³⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19, Violence against Women*, 11th sess, UN Doc A/47/38 (1992) 11.

³¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No 23, Article 7 (Political and Public Life)*, 16th sess, UN Doc A/52/38.

³² *Ibid.*

A The Committee on the Elimination of all Forms of Discrimination against Women

The CEDAW Committee first addressed women's reproductive health in a case concerning the forced sterilisation of Roma women — *AS v Hungary*.³³ After giving birth, the applicant discovered she had been sterilised and could no longer get pregnant. The hospital claimed that she had signed a document authorising the sterilisation; however, the applicant stated that she would never have agreed to the sterilisation as, among other reasons, 'having children is said to be a central element of the value system of Roma families'.³⁴ The State party argued that, even if the sterilisation did take place without her full and informed consent, according to the *Public Health Act* of Hungary, a physician is allowed 'to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances'.³⁵ Particularly relevant to this case is the fact that there is a widely held stereotypical belief that Roma women have too many children.³⁶ The Committee found that Hungary had deprived the applicant of her chance to plan the spacing and number of her children and so was in breach of Article 16e of CEDAW.³⁷ Though the Committee did not make specific reference to harmful stereotypes in making their decision, their views demonstrated that the Committee takes violations of women's reproductive rights seriously and paved the way for subsequent cases.

The Committee actively considered the effects of harmful stereotyping in women's reproductive health in the case of *LC v Peru*.³⁸ In this case, the applicant was thirteen when she became pregnant as a result of sexual abuse.³⁹ Upon finding out about her pregnancy, the applicant attempted suicide. She did not succeed but was severely injured and needed spinal surgery. Doctors did not want to perform the spinal surgery while the applicant was pregnant, and she was denied access to an abortion.⁴⁰ The

³³ Committee on the Elimination of Discrimination against Women, *Views: Communication No 4/2004*, 36th sess, CEDAW/C/36/D/4/2004 (7-25 August 2006) [2.4] ('*AS v Hungary*').

³⁴ *Ibid*.

³⁵ Amicus Brief by the Centre for Reproductive Rights Committee on the Elimination of Discrimination against Women, *Views: Communication No 4/2004*, 36th sess, CEDAW/C/36/D/4/2004 (7-25 August 2006) 2 ('*AS v Hungary*').

³⁶ *VC v Slovakia* (2011) App 18968/07 Eur Court HR 146.

³⁷ *AS v Hungary*, CEDAW/C/36/D/4/2004, 17 [11.4].

³⁸ Committee on the Elimination of Discrimination against Women, *Views: Communication No 22/2009*, 50th sess, CEDAW/C/50/D/22/2009 (3-21 October 2011) ('*LC v Peru*').

³⁹ *Ibid* [2.1].

⁴⁰ *LC v Peru*, CEDAW/C/50/D/22/2009.

applicant miscarried and is now permanently disabled as a result of the delay in the spinal operation.⁴¹ The applicant submitted that in her case there had been a violation of Article 5 of the Convention 'because timely access to necessary medical treatment was made conditional on carrying to term an unwanted pregnancy, which fulfils the stereotype of placing ... [the applicant's] ... reproductive function above her right to health, life and a life of dignity'.⁴² The Committee agreed with the applicant's submission and found a breach of Article 5 as 'the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother'.⁴³ The Committee also found a violation of Article 12 on the right to health and urged Peru to liberalise their abortion laws.⁴⁴ However, as commentators have noted, not much has changed in Peru since the ruling.⁴⁵

In addition to hearing cases under the communications procedure, the Optional Protocol to CEDAW establishes an enquiry procedure that allows the Committee to initiate an investigation where 'it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention'.⁴⁶ The Committee has recently been investigating the Philippines in relation to a State-sanctioned contraception ban.⁴⁷ Despite acceptance in international human rights law that 'States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health',⁴⁸ since 2000, the Philippines has severely limited women's access to contraception.⁴⁹ The Committee uses the strongest language of any international human rights body when it comes to articulating the role that

⁴¹ Ibid [2.10].

⁴² Ibid [7.2].

⁴³ Ibid [8.5].

⁴⁴ Ibid [8.17 12i].

⁴⁵ Charlotte Bates, 'Abortion and a Rights to Health in International Law: L.C v Peru' (2013) 2(3) *Cambridge Journal of International and Comparative Law* 640, 656.

⁴⁶ *The Optional Protocol to the Convention on Discrimination against Women*, opened for signature 6 October 1999, 1242 UNTS (entered into force 22 December 2000) art 8.

⁴⁷ Committee on the Elimination of All Forms of Discrimination Against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1 (22 April 2015).

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) 34.

⁴⁹ Committee on the Elimination of All Forms of Discrimination against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1, 22 April 2015.

stereotypes play in limiting women's access to reproductive health. In their summary of their investigation into the Philippines, the Committee stated:

[The contraception ban] ... reinforced gender stereotypes prejudicial to women, as they incorporated and conveyed stereotyped images of women's primary role as child bearers and child rearers, thereby perpetuating discriminatory stereotypes already prevalent in the Filipino society.⁵⁰

The views expressed by the CEDAW Committee demonstrate the development of the idea that stereotypes impinge heavily on women's access to reproductive rights, and it can be said that the CEDAW Committee has taken the strongest stance on stereotyping in reproductive health. However, given the gendered nature of international law, states may be reluctant to take the views of the CEDAW Committee or even the CEDAW Convention itself seriously.⁵¹ This may be one of the reasons why women have sought to imbed reproductive rights within other more well-known treaty bodies such as the Human Rights Committee and the European Court on Human Rights, where the possibility of states being labelled as perpetrators of torture or cruel, inhumane, or degrading treatment may hold more weight.⁵²

B *The Human Rights Committee*

The Human Rights Committee has considered cases regarding breaches of women's reproductive health rights under the *International Covenant on Civil and Political Rights* ('*Covenant*') beginning with the case of *KL v Peru*.⁵³ In this case, the applicant became pregnant at 17 and was told she was carrying an anencephalic foetus, meaning that the foetus would certainly die shortly after birth, and posed a risk to her life.⁵⁴ Based on this information, the applicant sought an abortion but was told she needed permission from the hospital director. The director denied her request. She subsequently carried the foetus until nearly full term and breastfed the baby for four days until its inevitable

⁵⁰ Ibid 43.

⁵¹ Marike De Pauw, 'Women's Rights: From Bad to Worse? Assessing the Evolution of Incompatible Reservations to the CEDAW Convention' (2013) 29 *Utrecht Journal of International and European Law* 51, 52.

⁵² Catharine A MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (The Netherlands: Martinus Nijhoff Publishers, 1992) 21-31.

⁵³ Human Rights Committee, *Views: Communication No 1153/2003*, 85th sess, CCPR/C/85/D/1153/2003 (17 October – 3 November 2005) ('*KL v Peru*').

⁵⁴ Ibid [2.1].

death.⁵⁵ The applicant submitted that these events caused her to fall into a deep depression and claimed that existing harmful stereotypes prevented her from accessing her reproductive rights. She maintained that her 'special needs were ignored because of her sex'.⁵⁶ Significantly, the Committee found a violation of Article 7 of the *Covenant* which states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and Article 17 on the interference with private life.⁵⁷

In the subsequent case of *LMR v Argentina*,⁵⁸ the Human Rights Committee again considered restrictive abortion laws. The applicant in this case submitted a communication on behalf of her daughter who had a mental disability and was denied an abortion after becoming pregnant due to rape.⁵⁹ As was the case in *KL v Peru*, stereotypical attitudes toward women stemming from religious influence was a determining factor in the denial of abortion as both 'the Rector of the Catholic University and the spokesperson of the Corporation of Catholic Lawyers contributed to the pressure exerted on the family and the doctors'.⁶⁰ The Human Rights Committee found a violation of Article 7 and Article 2 stating, '[b]ecause it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant'.⁶¹

Despite the findings in both *LC v Peru* and *LMR v Argentina*, in neither case did the Human Rights Committee expressly address the harmful effects of gender stereotyping. The Committee failed to actively articulate that gender stereotypes, rooted in religious and cultural perceptions, played a significant role in the denial of abortion. Further, despite the horrific treatment inflicted upon both women by State organs, the Human Rights Committee did not find that this treatment amounted to torture in either case, demonstrating a lack of momentum for recognising the importance of women's reproductive health rights and the link with gender stereotyping.

⁵⁵ Ibid [2.3].

⁵⁶ Ibid [3.2a].

⁵⁷ *International Covenant on Economic Social and Cultural Rights*, opened for signature 19 December 1966, (entered into force 3 January 1976) 993 UNTS 3 art 7, 17.

⁵⁸ Human Rights Committee, *Views: Communication No 1608/2007*, 101th sess, CCPR/C/101/D/1608/2007 (14 March – 1 April 2011) (*LMR v Argentina*).

⁵⁹ Ibid [2.9].

⁶⁰ Ibid.

⁶¹ Ibid [3.4].

C The European Court of Human Rights

The European Court of Human Rights first dealt with women's reproductive health rights in the case of *Tysiact v Poland*.⁶² The applicant became pregnant and had a medical condition that she was told could worsen should she continue with her pregnancy. The applicant argued a violation of Article 8 in relation to interference with her private life and Article 3 on cruel inhumane and degrading treatment. In their judgement, the Court did not expressly identify that stereotypical attitudes toward women had played a role. However, the religious interest in this case is evidenced by third-party comments that were delivered by the Association of Catholic Families, Cracow, demonstrating the stronghold that religion has over reproductive rights.⁶³

In the subsequent case of *A, B and C v Ireland*, three Irish applicants claimed they had been forced to obtain abortions outside of Ireland due to restrictive abortion laws. The trio brought a case to the European Court and jointly claimed 'that their situations [of wanting to terminate a pregnancy] must outweigh religious notions of morality'.⁶⁴ With the exception of one of the applicants who had cancer and feared it would return if she carried on her pregnancy, the Court did not find Ireland to be in breach of Article 8 or Article 3 of the *European Convention*. The Court did not interrogate the reasoning behind why Ireland felt abortion was against public morals. This is disappointing as it is well established that harmful gender stereotypes are inextricably linked to notions of morality and religion.⁶⁵ Further, the European Court in this instance did not examine the notion of morality in relation to restrictive reproductive rights, which is problematic. Added to this, the Court did not highlight how disproportionately women are affected by restricting access to reproductive health, nor did it draw upon international norms or standards in relation to women's access to reproductive health. The Court simply extended the margin of appreciation to Ireland, despite the fact that the Special Rapporteur on the Right to Health has condemned the use of public morality as an excuse for curtailing women's reproductive rights:

⁶² *Tysiact v Poland* (2007) App 5410/03 Eur Court HR.

⁶³ *Ibid* 107.

⁶⁴ *A, B and C v Ireland* (2010) App 25579/05 Eur Court HR 185.

⁶⁵ Alexandra Timmer, 'Toward and Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707, 737.

Public morality cannot serve as a justification for enactment or enforcement of laws that may result in human rights violations, including those intended to regulate sexual and reproductive conduct and decision-making.⁶⁶

This case aptly illustrates the limits of the European Court of Human Rights in cases relating to stereotyping and women's reproductive health as 'the Court, mindful of its supranational position, usually prefers to show constraint, rather than oblige Member States down a path they are not ready for'.⁶⁷

Harmful gender stereotyping was glaringly evident in the subsequent case of *P & S v Poland*.⁶⁸ In this case, the applicant was a teenage girl who became pregnant after being raped. The applicant submitted that the first doctor she consulted advised her not to get an abortion and to get married.⁶⁹ The hospital also forced the teenage applicant to speak unattended with a priest who told her not to go through with the termination.⁷⁰ Disturbingly, in what appears to be a move to mobilise stereotypical religious beliefs around motherhood, the hospital issued a press release and consulted with the Polish media about their decision to refuse to grant an abortion. This meant that the personal decision of a teenage rape victim became national news and cause for public debate.⁷¹ Further, in an attempt to shame the applicant, the Polish authorities instituted a 'criminal investigation into unlawful intercourse against her ... when she should have been considered to be a victim of sexual abuse'.⁷² Gender stereotypes associating women with motherhood coupled with other harmful stereotypes such as the fact that women are not to be believed when they report cases of rape and sexual abuse were rife in this case.⁷³ Despite the fact that women 'should be able to rely on a justice system free from myths and stereotypes and on a judiciary whose impartiality is not

⁶⁶ Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 18.

⁶⁷ Timmer, above n 65, 737.

⁶⁸ *P & S v Poland* (2012) App 57375/08 Eur Court HR.

⁶⁹ *Ibid* 13.

⁷⁰ *Ibid* 19.

⁷¹ *Ibid* 27.

⁷² *Ibid* 165.

⁷³ Barbara Masser, Kate Lee and Blake McKimmie, 'Bad Woman, Bad Victim? Disentangling the Effects of Victim Stereotypicality, Gender Stereotypicality and Benevolent Sexism on Acquaintance Rape Victim Blame' (2010) 62(7) *Sex Roles* 494, 494-504.

compromised by these biased assumptions,⁷⁴ this action from the State illustrates the way in which women cannot trust the domestic legal system to be free from harmful gender stereotypes. The court found a breach of Article 8, specifically due to the fact that the applicant's personal information was made public.⁷⁵ The court also found a breach of Article 3, although stating that the conduct of Poland did not meet the threshold for torture.⁷⁶

D *The Inter-American Court on Human Rights*

The Inter-American Court on Human Rights has decided cases regarding women's reproductive rights that concern the same types of reproductive issues that have been heard in the case law of the CEDAW Committee, the Human Rights Committee, and European Court.⁷⁷ Of a different nature to the cases discussed is the recent finding in *Artavia Murillo et al v Costa Rica*. The applicants in this case sought to challenge Costa Rica's constitutional ban on access to In Vitro Fertilisation Treatment ('IVF').⁷⁸ The Court actively mentioned that the IVF ban disproportionately affects the human rights of women, due to the stereotyped perception of women as the 'basic creator of the family'.⁷⁹ Whilst articulating that they exist, the Court did not want to appear to condone these stereotypes and emphasised that 'these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them'.⁸⁰ The Court found Costa Rica to be in breach of the *American Convention on Human Rights* Article 5 regarding the right to humane treatment, Article 7 regarding the right to personal liberty, and Article 11(2) regarding the right to non-interference with private life.⁸¹ Whilst this was an effective outcome for women's access to reproductive health in Costa Rica, it is disappointing that the Court took a similar approach to that of the European Court of Human Rights and the Human Rights Committee in that it did not 'address the root causes of the violation in its reparations.

⁷⁴ Simone Cusack, 'Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases' (2014) *Office of the High Commissioner for Human Rights* 20.

⁷⁵ *P & S v Poland* (2012) App 57375/08 Eur Court HR 134.

⁷⁶ *Ibid* 168.

⁷⁷ In relation to the forced sterilisation of Peruvian Indigenous women, see *Maria Chaves v Peru* (2003) Case 12.191 Inter-Am HR.

⁷⁸ *Artavia Murillo et al v Costa Rica* (2012) Case 257 Inter-Am HR 67.

⁷⁹ *Ibid* 195.

⁸⁰ *Ibid* 199.

⁸¹ *Artavia Murillo et al v Costa Rica* (2012) Case 257 Inter-Am HR.

These causes are directly connected to the relationship that exists between the Catholic Church and the State and also societal norms of inequality, discrimination, and violence that are disproportionately harmful to women'.⁸²

V REFORM: INTERROGATION OF STEREOTYPES

The international case law articulated in this research demonstrates that states have breached different aspects of women's reproductive health rights ranging from access to contraception and IVF treatments to forced sterilisation and denial of abortion. In all of these cases, women's physical and/or mental health has been adversely affected, and women's agency to make decisions regarding their own bodies has been denied. International human rights bodies have found breaches of reproductive rights in relation to the right to health, privacy rights, freedom from cruel and inhumane treatment, and the right to decide freely on the number of children. Hence, there are a number of ways women's reproductive rights can be infringed upon, and a number of ways women have been able to argue against the infringement in international law. However, despite this variety, what is very clear from the case law discussed is the impact that gender stereotyping has on women's ability to access their human rights. It is also worth noting that, while it is rarely articulated by human rights bodies, in all of the cases discussed in this research, religious influence has been a factor, demonstrating that the 'church exerts an incredible amount of power and control of women through an almost single-minded focus on reproduction and sexuality'.⁸³

It is clear that gender stereotypes and patriarchal concepts not only uphold the status quo in relation to women's oppression, but they also serve to inform and influence government law and policy.⁸⁴ For example, in 2011, 'twenty five per cent of the world's population live[d] under legal regimes that prohibit all abortions except for those following rape or incest, as well as those necessary to save a woman's life'.⁸⁵ It has been established in international law that 'women are entitled to participate in all decisions

⁸² Ciara O'Connell, 'Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?' (2014) 16(2) *Health and Human Rights* 117, 122.

⁸³ Denise, above n 21,183.

⁸⁴ Rebecca J Cook, Simone Cusack and Bernard M Dickens, 'Unethical Female Stereotyping in Reproductive Health' (2010) 109(3) *International Journal of Gynecology and Obstetrics* 255, 255.

⁸⁵ Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 23.

affecting their sexual and reproductive health at all levels of decision-making'.⁸⁶ However, gender stereotyping prevents this from being a lived reality for many women. In order to fully eradicate harmful legislation and policy in the area of reproductive health, the focus needs to be on working toward substantive equality for women by the elimination of gender stereotypes. In order to achieve any meaningful change, 'governments must first honestly engage with the problem by identifying its root causes of patriarchy, economic inequality and lack of access, harmful traditional practices, and use human rights based solutions'.⁸⁷ The responsibility on states to eliminate harmful gender stereotypes should also extend to the international human rights bodies who should interrogate states in relation to the reasoning behind their restrictive reproductive rights policies. Simone Cusack and Rebecca J Cook emphasise the importance of this, stating that all forms of society should be 'exposing the operative gender stereotypes, examining their origins, contexts and means of perpetuation, and analysing how their application, enforcement or perpetuation harms women'.⁸⁸ Reform in this area is urgently needed. It is imperative that stereotypical notions of women in society are phased out and that it is universally understood that women are 'bearers of rights, as well as babies'.⁸⁹

⁸⁶ Ibid 54.

⁸⁷ Zarin Hamid, 'More Than Just a Theme: Violence against Women and Girls', *Thomson Reuters Foundation* (online), 8 March 2013 <<http://www.trust.org/item/?map=more-than-just-a-theme-violence-against-women-and-girls>>.

⁸⁸ Cusack and Cook, above n 3, 52.

⁸⁹ Markowitz, above n 17, 2.

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