

Discrimination and gender stereotypes in judicial decisions: The jurisprudence of the European Court of Human Rights in light of *JL V Italy* – A retreat into the shadows?

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Abstract

This article explores the European Court of Human Rights' evolving approach to gender stereotypes in judicial decisions under Article 14 of the European Convention on Human Rights (ECHR). In *Carvalho Pinto de Sousa Morais v Portugal*, the Court found the use of harmful gender stereotypes to be a breach of Article 14 ECHR using a “novel” approach to establishing discrimination. The novelty, however, appears to have been subsequently diluted in the *JL v Italy* case. Here, the Court failed to consider Article 14 altogether. Side-lining article 14 in such cases has far-reaching consequences for the individual victim, and conceals the pervasive and systemic nature of gender discrimination. Lack of a robust anti-discrimination analysis also stunts the Court's ability to formulate general remedial action that may contribute towards changing institutional structures which perpetuate harmful gender stereotypes. This article argues that a clear and consistent approach to assessing gender stereotypes under Article 14 ECHR is needed if women's substantive equality is to be practical and effective.

Keywords

Gender equality, non-discrimination, gender stereotypes, judicial decisions, ECtHR

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I. INTRODUCTION

The European Court of Human Rights (ECtHR) has been praised for its flexible and evolutive approach to discrimination and gender equality.¹ Following the doctrine of the ‘living instrument’,² according to which the Convention must be interpreted in the light of present-day conditions to ensure the highest standards of protection, the Court has, over the years, expanded the scope of protection under Article 14 ECHR and overcome some initial limitations. The Court’s interpretation of Article 14 has transcended the limits of formal equality and non-discrimination, and has expanded the scope of protection by embracing a more complex and multi-dimensional understanding of equality. In recent years, the Court has sought to tackle deep-rooted discrimination through an anti-stereotyping approach, which seeks to dispel deeply engrained, harmful attitudes and beliefs towards people with protected characteristics and that limit or annul the enjoyment of human rights.³ The Court has dealt with cases concerning the oppressive and harmful effects of gender stereotypes,⁴ which are understood as generalised views or preconceptions about attributes or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively.⁵ The practice of other international human rights mechanisms suggests that gender stereotypes are considered to be both a source, as well as a manifestation, of discrimination contributing to women’s structural subordination in society and affecting the enjoyment of their human rights.⁶

In *Carvalho Pinto de Sousa Morais v Portugal*,⁷ the Court found the use of gender stereotypes in judicial decisions to be a breach of Article 14 ECHR, together with Article 8 ECHR. The separate Concurring Opinions in *Carvalho* expanded on the inadequacy of the ECtHR’s traditional three-step discrimination test used to assess harmful gender stereotypes. In particular, the requirement for any unlawful difference in treatment to be established with reference to a – in this case – male comparator. However, in subsequent judicial decisions, the Court has been more ambivalent, and even indecisive, about using Article 14 ECHR in relation to gender stereotypes. In *JL v Italy*,⁸ the Court considered the harmful effects of gender stereotypes in domestic court proceedings concerning the right to a private life. Yet, in finding a breach of Article 8 ECHR, the Court was satisfied that there was no need to consider Article 14. This decision, arguably, casually backtracks from the more rounded understanding of equality expounded in *Carvalho*.

The Court’s side-lining of Article 14 is not a new practice, and not necessarily desirable, especially where damaging gender stereotypes are at the heart of a case. It reinforces the provision’s

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1. Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 Human Rights Law Review 273; Sandra Fredman, *Discrimination Law* (2nd edn Oxford University Press 2011) 155.
 2. *Tyrer v United Kingdom* (1978) 2 EHRR 1, para 31.
 3. On racial stereotypes see: *Horváth and Kiss v Hungary* App No 11146/11 (ECtHR, 29 January 2013); *Aksu v Turkey* App Nos 4149/04 and 41029/04 (ECtHR, 13 March 2013). On State-sanctioned anti-gay propaganda based on stereotypical notions about sexual orientation, see *Bayev and others v Russia* App No 67667/09 (ECtHR, 20 June 2017).
 4. See, for example, *Konstantin Markin v Russia* App No 30078/06 (ECtHR, 7 October 2010), para 104, where the State claimed that women have ‘a special social role associated with motherhood’.
 5. Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 59-68.
 6. CEDAW Committee, General Recommendation No 25 ‘Temporary Special Measures’ (2004), [7].
 7. *Carvalho Pinto de Sousa Morais v Portugal* App No 17484/15 (ECtHR, 25 July 2017)
 8. *JL v Italy* App No 5671/16 (ECtHR, 27 August 2021).

'Cinderella' or second-class status,⁹ and may have far-reaching consequences for the protection of women's rights. Women's experience of gendered oppression and violence remains without recognition and remedy under the law. The article argues that where harmful stereotypes are invoked or used by decision-makers, including domestic courts, the Strasbourg Court should clearly identify and challenge these stereotypes in the context of Article 14 ECHR. This would allow the Court to clearly draw the links between harmful gender stereotypes, discrimination, and, where relevant, gender-based violence, including sexual violence. It would also put the spotlight on institutional structures that perpetuate harmful stereotypes by disguising sexist stereotypes into notions of fairness and justice. This article purports that addressing gender stereotypes through the application of Article 14 could strengthen the Court's approach to substantive gender equality and to deep-seated, systemic causes of women's oppression and disadvantage, beyond the individual case at hand. The Court could consider and integrate into its reasoning the normative work on gender stereotypes by the UN's Committee on the Elimination of Discrimination against Women (CEDAW Committee).¹⁰

This article proceeds by first providing a brief overview of the ECtHR's flexible and evolving approach to Article 14 ECHR, and its expansive interpretation of non-discrimination. Section 3 considers feminist critiques of the adequacy of the male comparator discrimination test in relation to systemic forms of discrimination, such as gender stereotypes. Section 4 examines the CEDAW Committee's approach to gender stereotypes in judicial proceedings. This section assesses the Committee's work on the conceptual and normative linkages between gender stereotypes, discrimination, and, where relevant, violence against women, as well as access to justice. Section 5 discusses the Court's 'novel' anti-discrimination approach to gender stereotypes, as outlined in *Carvalho*. It analyses the Strasbourg Court's willingness to use a 'naming and contesting' approach in gender stereotyping cases, focusing on the disadvantage generated by stereotypes harmful to the group to which the applicant belongs, rather than the test requiring a disadvantage to be established in relation to a male comparator. The section also discusses the simmering disagreement amongst the Strasbourg judges about the applicable test. Section 6 explores the subsequent case of *JL v Italy*, where the Court arguably backtracked on endorsing the 'novel' anti-discrimination approach in gender stereotyping cases. Section 7 analyses how a 'deconstructing and reconstructing' critique of stereotypes and the underlying assumptions weaved throughout the domestic judicial narrative in *JL* exposes the link between gender stereotypes and discrimination, as well as the wider implications for women's substantive equality. The final section presents the conclusions.

2. THE ECtHR'S FLEXIBLE APPROACH TO DISCRIMINATION AND GENDER EQUALITY

Article 14 ECHR enshrines the right not to be discriminated against on a number of grounds, including sex, in 'the enjoyment of the rights and freedoms set out in the Convention'.¹¹ It does not prohibit discrimination as such, but only discrimination in the enjoyment of the 'rights and

9. Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Legal Studies* 211.

10. For example: CEDAW Committee (n 6); CEDAW Committee, General Recommendation No 33 'Women's Access to Justice' (2015); *Karen Tayag Vertido v the Philippines*, Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010).

11. Convention on the Protection for Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 14.

freedoms set forth in the Convention'.¹² While autonomous, Article 14 is not a freestanding equality provision, meaning that the scope of application is limited to the rights guaranteed by the Convention and Protocols. The ECtHR has frequently underlined that Article 14 has no independent existence, rather the guarantee of the Article complements other substantive provisions of the Convention and the Protocols.¹³ Nevertheless, the impact of its 'parasitic',¹⁴ ancillary status has been offset by the Court through the expansion of the reach of Article 14 to claims that fall within the ambit of one or more of the Convention rights, without necessarily requiring a breach of these rights.¹⁵

Article 14 ECHR is understood to prohibit direct discrimination, which refers to the difference in treatment between persons in analogous positions that has no objective and proportionate justification.¹⁶ Very weighty reasons will have to be put forward before a difference in treatment on the grounds of sex can be regarded as compatible with the Convention.¹⁷ Where an applicant has demonstrated that a difference in treatment is based on sex, the State Party concerned has to show that it was justified and within the narrow margin of appreciation afforded to the State in such cases.¹⁸ The Court's interpretation of Article 14 has expanded the scope of protection by embracing a more complex and multi-dimensional understanding of equality. The Court has developed the scope of Article 14 to include more substantive conceptions, such as indirect discrimination. The latter can take the form of a general policy or measure which may not have a discriminatory intent, but, nevertheless, has a disproportionately prejudicial effect on specific individuals belonging to a certain section of the population.¹⁹ For example, educational tests and the subsequent placement of children in 'special schools' was found to have a particular discriminatory effect on Roma children.²⁰

The Court has expanded the scope of Article 14 to allow Member States to employ differential treatment for the purpose of correcting 'de facto inequalities'.²¹ In certain circumstances, positive action is indeed required from the authorities. For instance, the Court found that measures lowering the pensionable age only for women, and not men, were justified, in order to compensate women for existing inequalities, such as generally lower salaries and pensions, and the hardship generated by the expectation that they would work on a full-time basis, in addition to childcare and domestic

12. *ibid.*

13. *Marckx v Belgium* App No 6833/74 (ECtHR, 13 June 1979) para 32; *Molla Sali v Greece* App No 20452/14 (ECtHR 19 December 2018) para 123; *Carson and Others v the United Kingdom* App No 42184/05 (ECtHR 16 March 2010) para 63; *E.B. v France* App No 43546/02 (ECtHR 22 January 2008) para 47.

14. David Harris and others, *Law of the European Convention on Human Rights* (4th edn Oxford University Press 2018) 765.

15. *Sidabras and Džiautas v Lithuania* App Nos 55480/00 and 59330/00 (ECtHR 27 October 2004) para 38; *Kafkaris v Cyprus* App No 21906/04 (ECtHR 12 February 2008) para 159; *Genovese v Malta* App No 53124/09 (ECtHR 11 October 2011) para 32; *Biao v Denmark* App No 38590/10 (ECtHR 24 May 2016) para 88. See also Noel Whitty, Thérèse Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Butterworths 2001) 377; Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR.' (2006) 69 *Modern Law Review* 714, 714. Article 14 is now accompanied, for those contracting States which have ratified it, by a more general freestanding equality provision in Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental freedoms, 4.XI.2000.

16. *Biao* (n 15) para 89; *Carson* (n 13) para 61.

17. *Jurčić v Croatia* App No 54711/15 (ECtHR, 4 February 2021) para 65.

18. *ibid.*

19. *D.H. and Others v the Czech Republic* App No 57325/00 (ECtHR, 13 November 2007) para 194.

20. *ibid* para 185; *Sampanis and Others v Greece* App No 32526/05 (ECtHR, 5 June 2008) para 67.

21. *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000) para 44.

work.²² While the Court grants States a wide margin of appreciation, especially when it comes to social and economic policies with financial implications,²³ in some circumstances, a failure, without an objective and reasonable justification, to treat different individuals or groups differently may in itself give rise to a breach of Article 14.²⁴ Article 14 may imply 'positive obligations' on States to prevent, stop, or punish discrimination. Such positive obligations incumbent on the Member States can include 'positive measures' or 'affirmative action', which a State could or should adopt to correct factual or historical inequalities. In the case of the systemic placement of Roma children in special schools in Hungary, the Court concluded that structural deficiencies called for the implementation of positive measures to assist the applicants with any difficulties they encountered in following the school curriculum.²⁵ In finding a breach of Article 14, the Court stated that prejudices, biases, and stereotypes are often the mechanisms driving discriminatory treatment against groups of individuals.²⁶

Importantly, to find a breach of Article 14, applicants have to compare themselves with another class of persons which are treated more favourably, even though the more favourable treatment is not called for by the Convention. According to the traditional three-step approach, establishing discrimination under Article 14 requires: first, identifying two categories of persons who are comparable and distinguishable; second, assessing if members of these two groups are actually treated differently; and, third, examining whether the different treatment has an objective and reasonable justification. In brief, discrimination has to be established by reference to a 'comparator' in order to identify the existence of two sets of case-law that would show a difference in treatment based on a protected ground.²⁷

3. SUBSTANTIVE GENDER EQUALITY AND HARMFUL GENDER STEREOTYPES

The inadequacy of a legal agenda which requires women to claim equality with a male comparator has been critiqued by feminists and legal scholars. It has been argued that, in sex discrimination cases, the requirement of a male norm of comparison often fails to acknowledge women's different and diverse needs and experiences which are not always comparable – pregnancy being the most glaring example.²⁸ It also fails to recognise discrimination arising from the gendered power structures that historically have worked to exclude, limit, and constrain women's enjoyment of human rights. This model does little or nothing to redress the legacy of women's historical oppression and the structural power imbalance, as the male heterosexual norm remains the benchmark against

22. *Andrle v the Czech Republic* App No 6268/08 (ECtHR, 20 June 2011).

23. *ibid* para 56.

24. *Abdu v Bulgaria* App No 26827/08 (ECtHR, 11 March 2014); *Eweida and Others v the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 27 May 2013) para 87; *Pretty v the United Kingdom* App No 2346/02 (ECtHR, 29 July 2002) para 88; *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000) para 44.

25. *Horváth and Kiss v Hungary* App No 11146/11 (ECtHR, 29 January 2013) para 104.

26. *ibid*. On State-sanctioned anti-gay propaganda based on stereotypical notions about sexual orientation, see *Bayev* (n 3).

27. Harris and others have remarked that while the importance of the test is evident from the case law, the Court sometimes glosses over the analogous situation test and collapses it into the issue of whether there can be a justification for the differentiation. Harris and others (n 14) 770.

28. Frances Raday 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) 10 *International Journal of Constitutional Law* 512; Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1.

which women's experiences are assessed, and fails to capture women's different interests and needs.²⁹ To obviate these androcentric heteronormative premises, a more elaborate concept of equality is needed which recognises women's experience of gendered oppression, or disadvantage, and which can effectively address systemic and structural factors amplifying women's vulnerability and discrimination.³⁰ Fredman suggests that for gender equality, and equality more generally, to be more yielding in this last respect, it should be understood as a multidimensional concept, pursuing four complementary and interrelated aims. The redistributive dimension aims to redress disadvantage; the participatory dimension seeks to facilitate participation; the transformative dimension aims to accommodate difference, including through structural change; and – particularly pertinent to the present discussion – the recognition dimension aims to address stigma, stereotypes, prejudice, and violence.³¹

Stereotypes can be defined as 'generalized views or preconception of attributes or characteristics possessed by, or roles that are or should be performed by, members of a particular group'.³² Stereotypes become harmful when they place a certain mould on individuals to maintain existing power relationships and act as mechanisms of control and subordination.³³ Gender stereotypes are referred to as preconceived attributes, behaviours, or characteristics possessed, or roles that are or should be performed, by men and women, respectively. They express the underlying, deep-seated, gendered power relations, and may be associated with the subordination of women in society.³⁴ A multidimensional understanding of gender equality recognises that, to capture and unseat gender stereotypes as one of the many and persistent ways in which women are affected by discrimination, a variety of conceptual and legal tools, not limited to the comparator test, might be needed.

4. THE CEDAW COMMITTEE'S APPROACH TO GENDER STEREOTYPES IN JUDICIAL PROCEEDINGS

Article 5(a) of the CEDAW places an obligation on States Parties to work towards the modification of social and cultural patterns of individual conduct in order to eliminate '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'.³⁵ The Committee has reiterated that harmful stereotypes fuel, and are often the expression of, discriminatory practices. Therefore, the general duty to eliminate all forms of discrimination against women includes the obligation to 'address prevailing gender relations and the persistence of gender-based stereotypes' and 'to improve the de facto position of women through concrete and effective policies and programmes'.³⁶

In General Recommendation 19, the Committee broke new ground by explicitly linking discrimination and violence against women by recognising the latter to be a manifestation of unequal

29. Dianne Otto 'Women's Rights' in Daniel Moeckli and others (eds) *International Human Rights Law* (Oxford University Press 2010) 318; Fredman *Discrimination Law* (n 1) 22, 168-175, 183.

30. Fredman, *Discrimination Law* (n 1).

31. *ibid.*, 25-33.

32. Cook and Cusack (n 5) 9.

33. Alexandra Timmer 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 *Human Rights Law Review* 715.

34. *Velásquez Paiz et al v Guatemala*, IACtHR Series C 307 (19 November 2015) para 180.

35. Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW), Article 5(a).

36. CEDAW Committee (n 6) para 7.

gender relations, and a crucial social mechanism, whereby women are forced into a subordinate position that impairs their enjoyment of human rights. Commenting on Articles 2(f), 5, and 10(c) of CEDAW, the Committee noted that

[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify violence as a form of protection or control of women.³⁷

In the subsequent, updated, General Recommendation 35, the Committee further elaborated on the States Parties' obligations under Articles 2(d), 2(f), and 5(a) CEDAW. Addressing the judicial branches of the State in particular, the Committee recalled that all judicial bodies are required to ensure all legal procedures in cases involving allegations of gender-based violence against women to be 'impartial, fair and unaffected by gender stereotypes'.³⁸ Importantly, the Committee warned that women's rights to equality before the law, a fair trial, and effective remedy are at risk when judicial authorities apply preconceived and stereotypical notions of what constitutes gender-based violence against women, and what women's responses to such violence should be.³⁹

In their General Recommendation 33, the CEDAW Committee drew further attention to stereotyping and gender bias in the justice system, and their consequences for women's full enjoyment of their human rights.⁴⁰ The Committee reminded that the Convention places obligations on all State organs and that States Parties can be held responsible for judicial decisions that violate provisions of the Convention.⁴¹ Through its work, the Committee observed how stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. In a case dealing with a domestic judicial decision concerning a rape trial based on gender stereotypes,⁴² the Committee affirmed that judicial stereotyping violates the rights to non-discrimination and a fair trial. They further clarified that judges must not create inflexible standards of how women should behave when confronted with a situation of rape. Such expectations are based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.⁴³ Stereotyping also affects the credibility given to women's voices, arguments, and testimonies as parties and witnesses.⁴⁴ In *ST v Russia*, the Committee found that stereotypical notions of husbands' and wives' roles shifted the weight in favour of the defence witnesses, as opposed to the victim of domestic violence.⁴⁵ The Committee warns that such stereotyping can cause judges, as well as other key actors in the criminal justice system (for example, prosecutors and law enforcement officials),

37. CEDAW Committee, General Recommendation no 19 'Violence Against Women' (1992) para 11.

38. CEDAW Committee, General Recommendation No 35 'Gender-based Violence Against Women, Updating General Recommendation No.19' (2017) para 26(c).

39. *ibid.*

40. CEDAW Committee (n 10) para 26.

41. *ST v Russia*, Communication No. 65/2014, UN Doc. CEDAW/C/72/D/65/2014 (2019) para 9.4.

42. *Vertido* (n 10). For an analysis of this case, see Simone Cusack and Alexandra Timmer 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v. The Philippines*' (2011) 11 Human Rights Law Review 329.

43. *ibid.*, paras 8.5-8.6, 8.9

44. *ibid.*

45. *ST* (n 41) para 9.6-9.7. The Committee found the manner in which the author's case was addressed by the State party's authorities constituted a violation of her rights under Article 2(c) and (d), read in conjunction with Article 1 and Article 5(a) of the Convention.

to misinterpret or misapply laws. This can compromise the accountability of perpetrators and, thereby, uphold a culture of impunity.⁴⁶ Furthermore, stereotyping has profound implications for the justice system itself, in terms of the impartiality and integrity of the system. It can lead to miscarriages of justice, including the re-victimisation of complainants.⁴⁷ The Committee's reasoning suggests that gender equality should not only be the result of a fair and impartial justice system, but also, a precondition. The Committee's approach spells out the various ramifications of the use of stereotypes. Importantly, it points to the inextricable ties between gender stereotypes and discrimination.

The link has been recognised in the case law of the Inter-American Court of Human Rights (IACtHR).⁴⁸ In criminal proceedings, the Court has found that gender stereotypes, such as 'immodest women invite sexual assaults',⁴⁹ may result in victim-blaming and compromising the effective investigation of gender-based violence. In such a case, the Court had no difficulties in finding a violation of both the right to equal protection of the law, under Article 24 of the American Convention on Human Rights (ACHR), and the duty to respect and guarantee, without discrimination, the Convention rights (Article 1.1), namely: life and personal integrity (Article 4); humane treatment (Article 5); a fair trial (Article 8); privacy (Article 11); and, judicial protection (Article 25).⁵⁰ Notably, the Court did not find it necessary to establish discrimination against a male comparator, but was satisfied that adverse gender stereotypes generate a number of obstacles for women victim of violence that men are simply unlikely to face.⁵¹

5. THE ECtHR AND GENDER STEREOTYPES IN JUDICIAL DECISIONS. THE CARVALHO CASE - A BROADER APPROACH TO DISCRIMINATION?

In *Carvalho*,⁵² the ECtHR's discrimination jurisprudence appears to have followed the direction of travel of other international human rights mechanisms in relation to gender stereotypes. The Strasbourg Court confirmed its willingness to deal with gender stereotypes under Article 14 without reference to a comparator. In *Carvalho*, for the first time, the Court attempted to elaborate upon an anti-stereotyping approach for gender equality cases. The case concerned a judicial decision to reduce the amount of pecuniary and non-pecuniary damages initially awarded to a female victim of medical negligence, which resulted in her inability to have sexual relations. In order to justify this reduction, the domestic Supreme Administrative Court had relied on the fact that the applicant was fifty years old and had two children at the time of the surgery. It considered that, at this age, sexuality was not as important as in younger years and that its significance diminished

46. *ibid.*

47. *ibid.*

48. *González v Mexico* ('Cotton Field' case), IACtHR Series C 205 (16 November 2009); *Atala Riffó and Daughters v Chile*, IACtHR Series C 239 (24 February 2012). On these cases, see Verónica Undurruga, 'Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights' in Eva Brems and Alexandra Timmer, *Gender Stereotypes and Human Rights Law* (Intersentia 2016).

49. *Velásquez Paiz* (n 34) para 182.

50. American Convention on Human Rights, 'Pact of San Jose' (1969) OAS Treaty Series no 36, 1144 UNTS 123, 9 ILM 99 (ACHR).

51. *Velásquez Paiz* (n 34) para 182. The Court relied on the expert opinion of Professor Christine Chinkin.

52. *Carvalho Pinto de Sousa Morais v Portugal* (n 7).

with age.⁵³ The domestic court also presumed that the applicant ‘only needed to take care of her husband, considering the age of her children’.⁵⁴ Finding a breach of Article 14, read in conjunction with Article 8, the Strasbourg Court noted:

The question at issue here is not considerations of age or sex as such, but rather the assumption made about women’s sexuality deemed not as significant for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people.⁵⁵

The Court echoed the CEDAW Committee’s Concluding Observations and other human rights reports on the need to address the prevalence of gender-based discriminatory stereotypes amongst the judiciary, stressing the institutional responsibility of the judiciary to avoid reproducing sexist prejudices.⁵⁶ The comparator requirement was discussed in greater depth in the separate opinions. The Concurring Opinions unequivocally called for a ‘novel’ approach to gender equality that would debunk deeply ingrained social and cultural attitudes, and myths about women. Judge Yudkivska expounded on the fact that, in spite of the myriad legal instruments guaranteeing equality for men and women, these instruments ‘are merely paying lip service to the rights and freedoms they espouse so long as a woman remains no more than a function. If this attitude is not criticised, factual discrimination will never be eliminated’.⁵⁷ Judge Yudkivska argued that the comparative exercise is not necessary where ‘prejudicial stereotypes have affected the judicial assessment of evidence, which is perfectly sufficient to find a violation of Article 14’.⁵⁸ The ‘novel’ approach recognises that making the comparator test an essential requirement to proving discrimination in such cases unnecessarily narrows the scope of protection of Article 14. Under the traditional comparator requirement, women’s unique, and often incomparable, needs and experiences, and the structural disadvantage produced by the gendered power structures may go unrecognised. According to Judge Motoc, ‘[f]or the disadvantage test it is enough to prove that the stereotypes are harmful to the group to which the applicant belongs and that the rule or practice applied by the State is based on such stereotypes’.⁵⁹ The separate opinions were, helpfully, underpinned by academic debates about notions of substantive equality aiming at redressing disadvantage, addressing stigma, and gender stereotyping.⁶⁰ Of particular relevance was the endorsement of the ‘naming and contesting’ approach in stereotyping cases.⁶¹ Judge Motoc, in her Concurring Opinion, acknowledged that, even if significant progress had already been made, gender equality is still a goal for Member States, and the Court can, and should, also address the deep roots of discrimination.⁶² She recognised the case law in the field of discrimination and stereotypes to be piecemeal, but was optimistic that the

53. *ibid*, para 16.

54. *ibid*.

55. *ibid*, para 52.

56. *ibid*, para 54.

57. *ibid*, Concurring Opinion of Judge Yudkivska, 23.

58. *ibid*.

59. *Carvalho* (n 7), Concurring opinion of Judge Motoc, para 18.

60. See Cook and Cusack (n 5). The judges, in their separate opinions, made use of the naming and contesting approach expounded by Timmer (n 33).

61. *Carvalho* (n 7), Concurring Opinion of Judge Motoc, paras 16-18.

62. *ibid*, para 5.

judgment could be an important example of the Court addressing stereotypes and discrimination in order to achieve substantive equality in the judicial system.⁶³

5.1 HESITATION AND DISAGREEMENT

Despite this ‘novel’ approach indicating the ECtHR’s willingness to use a different or modified test in gender stereotyping cases, elements of the traditional comparator approach linger in the main judgment. The Court contrasted two domestic cases of medical malpractices affecting two male patients, who, as a result of a prostatectomy, had become impotent and incontinent. In these cases, the domestic Supreme Court of Justice of the respondent State had upheld the compensation set by the lower courts, arguing that the fact that the men could no longer enjoy sexual relations had affected their self-esteem and caused severe mental trauma.⁶⁴ The Strasbourg Court found that, unlike in the case of the female applicant, the domestic courts were satisfied that the men had suffered a detriment, regardless of their ages, and had awarded them a higher compensation.⁶⁵ The comparative element was perhaps a way to paper over the disagreement evident in the Joint Dissenting Opinion. According to the latter no discrimination was identified because, from a methodological point of view, the requirement of the existence of a different treatment between two comparable, or at least analogous situations, was not satisfied.⁶⁶ The dissenting judges followed a strict three-step assessment and could not find any use of stereotypical language in the domestic judicial decision. It was suggested that ‘there would have been a use of stereotype, if the domestic judgment had stated that women’s sexual life is less important than that of men’.⁶⁷ However, this misunderstands the stereotype. As explained in the majority decision, the gender stereotype present in the case was that ‘the sexual life of middle-aged women is not as important as in their younger years for their physical and mental well-being’.⁶⁸ There is no comparative element because stereotypes refer to preconceived ideas about roles and attributes possessed by members of a particular group irrespective of the existence of any analogous situations. Often, stereotypes are not explicitly stated, but embedded and supported by a combination of gendered assumptions. For example, the domestic court stated that, ‘at the time of the operation the plaintiff was already 50 years old and had two children’,⁶⁹ justifying the reduction of the damages for medical negligence, and implied that women’s sexual life is merely functional to their reproductive role. The dissenting judges suggested that the domestic decision only referred to age,⁷⁰ however, they failed to consider how ageism and sexism interact, generating and sustaining different harmful attitudes.⁷¹ Stereotypes are harmful when they are used to facilitate rationalising an otherwise unjustifiable detrimental outcome for members of a particular group.⁷²

The *Carvalho* judgment unveils gender bias and exposes gender stereotypes’ influence on the domestic judicial decision. It also shows that the interpretation and approach to gender equality

63. *ibid*, para 11.

64. *ibid*, para 55.

65. *ibid*, para 55.

66. *ibid*, Joint Dissenting Opinion of Judges Ravarani and Bošnjak, paras 2-4, 16, 31.

67. *ibid*, para 37.

68. *Carvalho* (n 7), para 52.

69. *ibid*, para 16.

70. *ibid*, Joint Dissenting Opinion of Judges Ravarani Bošnjak, para 37.

71. See: Senem Gurol, ‘Challenging Gender Stereotyping before the ECtHR: Case of Carvalho Pinto v. Portugal’ (*EJIL Talk*, 21 September 2017) <<https://www.ejiltalk.org/challenging-gender-stereotyping-before-the-ecthr-case-of-carvalho-pinto-v-portugal/>>.

72. See *Carvalho* (n 7), Concurring Opinion of Judge Motoc, para 10.

and non-discrimination remains contested amongst the ECtHR's own judges. Resistance to the 'novel' approach to stereotypes persists, despite the fact that the Court itself sometimes glosses over the analogous situation test,⁷³ and despite similar, broader, approaches in other human rights *fora*, as evident in the work of the CEDAW Committee and the IACtHR. It also appears out of step with wider institutional calls for gender equality to remain a policy priority, and to fight against sexism and harmful gender stereotypes, especially to protect women against intersectional discrimination.⁷⁴ The judgment might be a step forward in the Court's gender anti-stereotyping case law, but, when tackling deep-seated gendered structures, a timid advancement may prove insufficient. The nuanced differences between the majority and the concurring opinions on the one hand, and the outright disagreement expressed in the dissenting opinions on the other, underscore a less-than-settled approach that has important consequences for subsequent cases, such as the one discussed in the following sections.

6. *JL V ITALY*: A RETREAT FROM CARVALHO. JUDICIAL STEREOTYPES AND ARTICLE 8 ECHR

The *JL* case concerns criminal proceedings against seven men who were charged with the gang rape of the applicant and had been acquitted by the Italian courts.⁷⁵ The case was brought before the Strasbourg Court in January 2016. The applicant claimed a violation of Articles 8 (right to a private life) and 14 (non-discrimination) of the ECHR. It was argued that the investigation and the trial of the alleged gang rape had been traumatising for the applicant, and that the authorities' attitude towards her violated her personal integrity. She complained about the way in which she had been questioned throughout the entire criminal proceedings, and challenged the arguments upon which the judges relied in reaching their decision.

Concerning the preliminary investigations, the ECtHR found that there had been no delays in initiating the investigations, the questioning of the victim, the accused, and the witnesses, nor in the gathering and securing of the evidence.⁷⁶ Furthermore, the Court could not discern a disrespectful or intimidating attitude on the part of the investigating authorities.⁷⁷ With regards to the trial before the court of first instance, the Court noted that the 'president of the court had decided to prohibit the journalists present in the courtroom from filming them, for the specific purpose of protecting the applicant's privacy' as she had not requested that the trial be held in camera.⁷⁸ The Court observed that the judge intervened on several occasions during the cross-examinations, interrupting the defence lawyers when they asked the applicant redundant or personal questions, or when they raised matters that were unrelated to the facts. He also ordered short recesses so that the applicant could regain her composure.⁷⁹ The Court had no doubt that the proceedings as a whole had been experienced by the applicant as a particularly distressing period. Nevertheless, the Court could find no fault with the authorities and proceedings before the court of first instance, nor did

73. Harris and others (n 14), 770.

74. Marija Pejčinović Burić, *State of Democracy, Human Rights and the Rule of Law: Report of the Secretary General of the Council of Europe 2023* (Council of Europe 2021), 95.

75. *JL v Italy* (n 8).

76. *ibid*, para 123.

77. *ibid*, para 130.

78. *ibid*, para 131.

79. *ibid*.

it find a failure to ensure that the claimant's personal integrity was duly protected during the trial.⁸⁰

However, in assessing the final judgment before the Florence court of appeal, the ECtHR found a breach of the applicant's rights under Article 8 ECHR. The Court acknowledged that a victim's right to a private life might be balanced against an accused's right to a fair trial. The Strasbourg Court further clarified that the question of the applicant's credibility was of particular importance to ensure the defendants' right to a fair trial and their defence rights. Therefore, reference to her previous relationships with the defendants, or to aspects of her conduct in the course of the evening, might be justified.⁸¹ Nevertheless, the level of scrutiny of the applicant's life during the judicial proceedings was found to be a disproportionate and unjustified interference with her private life. The Strasbourg Court particularly noted several passages in the domestic judgment referring to the applicant's personal and private life which were found to be irrelevant and unjustified. The ECtHR was critical of the multiple inappropriate references in the court of appeal's judgment, such as reference to the red underwear 'shown' by the applicant in the course of the evening.⁸² The Strasbourg Court found equally unjustified and inappropriate the comments regarding her bisexuality, her 'ambivalent attitude towards sex', her 'nonlinear life', and references to casual sexual relations prior to the events in question.⁸³ The applicant's artistic decisions were also found to be inappropriately used to undermine her credibility.⁸⁴ The Strasbourg Court could not see 'how the applicant's family situation, her relationships, her sexual orientation or her clothing choices, and the subject matter of her artistic and cultural activities, could be relevant for assessing her credibility and the criminal liability of the defendants'.⁸⁵ The Court went on to consider that, where presumed victims of gender-based violence are concerned, Article 8 ECHR imposes a duty to protect their image, dignity, and private life, including through the non-disclosure of personal information and data unrelated to the facts of the case. This obligation arising from national law, as well as from various international instruments, applies to judicial proceedings too. Accordingly, the Court opined that, while the principle of judicial independence requires judges to be in a position to express themselves freely in their decisions, it finds a limit in the obligation to protect, from any unjustified interference, the image and private life of persons coming before the domestic courts.⁸⁶

6.1. DISCRIMINATION: THE ELEPHANT IN THE ROOM

When evaluating the domestic judicial proceedings, the language, and the arguments used by the court of appeal about the applicant's private life, the ECtHR did so with reference to the international normative framework on harmful stereotypes and gender-based violence. The judgment made reference to relevant international instruments, and reports by monitoring bodies, namely, the CEDAW Committee,⁸⁷ and the Council of Europe Group of Experts on Action against

80. *ibid.*, para 133.

81. *ibid.*, para 138.

82. *ibid.*, para 136.

83. *ibid.*

84. *ibid.*

85. *ibid.*, para 138.

86. *ibid.*, para 139.

87. *ibid.*, para 140.

Violence against Women and Domestic Violence (GREVIO).⁸⁸ The judgment mentioned the concerns expressed by the CEDAW Committee in its Concluding Observations on Italy's State Report including: the entrenched stereotypes concerning the roles and responsibilities of women and men in the family and in society; the high prevalence of gender-based violence against women and girls; the underreporting of gender-based violence against women; and the low prosecution and conviction rates resulting in impunity for perpetrators.⁸⁹ The judgment also referred to a key passage in Italy's GREVIO report, recommending the State to implement effective gender equality and women's empowerment policies 'that clearly recognize the structural nature of violence against women as a manifestation of historically unequal power relations between women and men'.⁹⁰ The Court went on to conclude that criminal prosecutions and sanctions play a crucial role in the institutional response to gender-based violence, and in the fight against gender inequality. Judicial authorities must play their part, and avoid reproducing sexist stereotypes in court decisions by using judgmental and condescending language minimising gender-based violence and exposing women to secondary victimisation.⁹¹

Surprisingly, despite references to historically unequal power relations, gender inequality, and non-discrimination, the Court, in *JL*, did not consider it necessary to examine whether there had been a breach of Article 14 of the Convention.⁹² There is a disconnect between the analysis and subsequent findings. Why did the Court not make use of Article 14? Why did it not clearly bring harmful gender stereotypes into the fold of Article 14 and follow *Carvalho's* 'novel' approach? One reason could be that Article 14 can still be marginalised because of its 'Cinderella' status,⁹³ whereby the Court can choose to decide a case on the basis of articles other than Article 14, even where discrimination is central to the case.⁹⁴ Skirting the issue of stereotypes and Article 14 might have also been a way to avoid exposing the fault lines in *Carvalho* on how to establish discrimination in gender stereotype cases. Instead of clarifying its approach and resolving the uncertainty, the Court chose silence.

The rather glaring absence in the *JL* case considerably weakens *Carvalho's* 'novel' approach. The consequences are multiple and detrimental to a robust protection of women's rights, and to the development of anti-discrimination case law. The ECtHR judgment is a missed opportunity to grapple with the impact of gender stereotypes as a manifestation of discrimination, and to articulate and strengthen the conceptual, and normative dimensions of gender equality under Article 14 ECHR. The Court's approach stands to be critiqued as arbitrary, and marginalising equality rights on non-transparent, expediency grounds.⁹⁵ Furthermore, the lack of engagement with Article 14 unwittingly reinforces the private/public life divide, relegating the issue exclusively to an Article

88. *ibid.*

89. *ibid.*, para 64.

90. *ibid.*, para 66.

91. *ibid.*, para 141.

92. *ibid.*, para 147.

93. On Article 14's 'poor relative status', see the Partly Dissenting Opinion of Judge Motoc in *N v Romania (N 2)* App No 38048/18 (ECtHR, 16 February 2022).

94. See, for example, *Goodwin v UK* App No 28957/95 (ECtHR, 11 June 2002); *V.C. v Slovakia* App No 18968/07 (ECtHR, 8 February 2012); *N v Romania* (n 93).

95. Margarita S. Ilieva, 'J.L. v Italy: A Survivor Of Trivictimisation – Naming A Court's Failure To Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation' (*Strasbourg Observers*, 6 September 2021) <<https://strasbourgobservers.com/2021/09/06/j-l-v-italy-a-survivor-of-trivictimisation-naming-a-courts-failure-to-fully-recognize-and-acknowledge-judicial-gender-based-revictmisation/>>.

8 matter, to be balanced against the competing defence interests of the accused and judicial independence. The victim remains an abstract subjectivity, devoid of the social markers that define their experience. This conceals the pervasive and systemic nature of discrimination, and undermines the ability of Article 14 to address the structural disadvantage women face beyond the specific individual case.⁹⁶ Furthermore, the Court deprived itself of a solid legal tool for venturing into a much-needed, thorough, examination of the impact of gender stereotypes on sustaining and reproducing the power structures that facilitate violence against women, and women's unequal access to justice.⁹⁷

7. WOMEN'S RIGHTS AND INEQUALITY: EXPOSING HARMFUL GENDER STEREOTYPES

Harmful gender stereotypes in judicial decisions were examined by the CEDAW Committee in the *Vertido* case.⁹⁸ The facts are similar to *JL*. The applicant alleged she was raped and that, at trial, the judge had relied on gender-based myths and stereotypes about rape and rape victims in acquitting the accused. The CEDAW Committee's approach to discriminatory gender stereotypes is based on a 'deconstructive and reconstructive' critique of stereotypes. The approach allows the Court to identify the harmful stereotype, the underpinning assumptions, and beliefs, and then to challenge and dislodge them. Considering the merits of the Communication, the CEDAW Committee was critical of the domestic judge's reliance on preconceived ideas of the victim's expected behaviour, as expressed through rhetorical questions. The latter included:

why did [the presumed victim] not try to get out of the car when the [alleged attacker] must have applied [...]the brakes? [...] Why did she not shout for help when she heard the accused talking with someone? Why did she agree to ride in the accused's car after he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?⁹⁹

The Committee found that these predetermined expectations only reinforce the stereotype that women must physically resist sexual assault. The Committee went on to stress 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.¹⁰⁰ Naming the stereotypes and the underlying assumptions is instrumental to disentangling them and bringing to light their harmful effects. It allows us to point to the ways in which assumptions are woven into 'rationalised' gendered narratives, leading to the production of stereotypes that detrimentally harm women's lives and hinder their enjoyment of human rights.

96. With the cases' respective differences considered, see concerns expressed by Judge Bonello in his Dissenting Opinion in *Angelova v Bulgaria* App No 38361/97 (ECtHR, 2 June 2022) in relation to the failure to use Article 14 in cases involving protection from racial discrimination. Similarly, in *Aksu v Turkey* (n 3) para 1, in the Joint Dissenting Opinion, Judges Tulkens, Tsotsoria and Pardalos were critical of the failure to find a violation of Article 14 in relation to publications littered with anti-Roma prejudices and stereotypes which they found 'a particularly sensitive question as, in respect of a minority and highly vulnerable social group, prejudice is the breeding ground of discrimination and exclusion'.

97. In the context of violence against women and racist attitudes, the Court found in *BS v Spain* App No. 47159/09 (ECtHR, 24 October 2012) that Article 14 (in conjunction with Article 3) is breached when violence is not effectively and adequately investigated, and, in *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009), the State's failure, even if unintentional, to protect women against domestic violence may breach women's right to equal protection of the law.

98. *Vertido* (n 10) para 3.5-3.11. For a case analysis and the 'naming stereotypes' approach, see Cusak and Timmer (n 42).

99. *ibid*, para 8.5.

100. *Ibid* para 8.5. This was reiterated in *RPB v The Philippines*, Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (2014).

The image of a birdcage is a useful metaphor. It is impossible to see how any single wire may hold a bird captive; you can only appreciate the cage by stepping back and seeing how all the wires work together.¹⁰¹ Having identified and dislodged the stereotype, the CEDAW Committee was then able to make specific recommendations to the State Party aiming to redress the harm inflicted upon the individual victim. Importantly, the Committee's approach clearly identified the harmful consequences, not just for the specific individual woman, but for women more generally. It created the space for the Committee to address general recommendations to the State Party to prevent potential future wrongs. Recommendations required, for example, the State to implement measures in a gender-sensitive manner, including the provision of appropriate training for judges, lawyers, law enforcement officers, and medical personnel in approaching crimes of rape.¹⁰²

7.1 GENDER STEREOTYPES AND DISCRIMINATION IN *JL*

Arguably, had the Court been willing, the *JL* case would have lent itself quite well to the CEDAW Committee's or *Carvalho*'s approach.¹⁰³ It is uncontested that, in the *JL* case, the ECtHR was unequivocally critical of the domestic appeal judgment and its use of gender stereotypes. However, the Court did not expound on why the court of appeal's comments in the legal reasoning were 'regrettable and irrelevant'.¹⁰⁴ In this respect, Judge Wojtyczek was correct. In his Dissenting Opinion, he criticised the majority's reproach to the Italian judges, particularly concerning the language and the arguments used by the court of appeal to convey the prejudices on the role of women in Italian society. He argued '[...], this reproach is not supported by any argument. In particular, it is not explained what prejudices on the role of women are conveyed by the Court of Appeal'.¹⁰⁵ He did not attempt to identify them himself, but went on to argue that the impugned statements made by the domestic court were 'factual propositions and not value judgment'.¹⁰⁶ Judge Wojtyczek's Dissenting Opinion illustrates how, in the absence of a rigorous examination, neither the presence of stereotypes in judicial proceedings, nor what exactly might be wrong about them is immediately obvious. The danger then is that stereotypes and the underlying prejudices are rationalised and disguised as simple statements of fact or 'factual propositions'.

Scrutiny of gender stereotypes can be a rather elaborate process as it is important not only to identify stereotypes, but contesting them also requires an understanding of their effects, which are experienced differently, depending on the social attributes of the individuals, and the disadvantaged groups to which they belong.¹⁰⁷ A gendered analysis, deconstructing and reconstructing disputed stereotypes, can help to lift stereotypes from the shadows of perceived normalcy and reveal

101. O'Connell (n 9).

102. *Vertido* (n 10) para 8.9. On the importance of naming stereotypes as the first step in the process of publicly acknowledging, redressing and preventing future wrongs, see Cook and Cusack (n 5) 39. On the limits of the recommendations in *Vertido*, see Cusack and Timmer (n 41).

103. Referred to as the 'naming and contesting' approach in *Carvalho*; see *Carvalho* (n 7) Concurring Opinion of Judge Motoc, paras 16-18.

104. *JL* (n 8) paras 138-136.

105. *ibid*, Dissenting Opinion of Judge Wojtyczek, para 5.

106. *ibid*, para 6.

107. Magdalena Zawisza, 'The Terrifying Power of Stereotypes and How to Deal with Them' (*The Conversation*, 28 August 2018) <<https://theconversation.com/the-terrifying-power-of-stereotypes-and-how-to-deal-with-them-101904>>.

their discriminatory effects on women. In *JL*, this approach would reveal the many gender stereotypes and rape myths which plagued the domestic judgment.¹⁰⁸

For example, the stereotype that sexually active women are likely to consent automatically, or renew consent, to sexual activity was reinforced by the domestic court of appeal. According to its reasoning, because the alleged victim had had a sexual encounter with one of the accused earlier in the evening, consent could be presumed to continue for the rest of the evening.¹⁰⁹ It was also assumed to continue in respect of the whole group of men, as the applicant ‘had not been bothered by the touching and groping made by the group of friends on the dance floor’.¹¹⁰ Women are assumed to be in a state of perpetual consent to sexual activity, which, in turn, often results in blaming victims and survivors of sexual assault.¹¹¹ The stereotype harks back to the idea that a married woman could never be raped by her husband as she gave her consent to sex, once and for all, upon marriage.¹¹²

The stereotype that passivity equals consent was also deployed and reinforced on the basis that the alleged victim had admitted to remaining ‘inert and at the mercy of the group’ throughout the gang rape.¹¹³ According to the domestic judges, consent could be furthermore inferred, in light of the fact that there were no traces of scratches or scuffles on the bodies of the defendants, who had been arrested immediately after the events.¹¹⁴ Similarly to the *Vertido* case, the domestic judgment implies that, in the absence of refusal or resistance evidenced by lack of physical harm, consent is presumed. This proves a very resilient harmful stereotype, in spite of the fact that women’s rights movements, legal scholars, and feminists have long criticised these notions. Brought to their limits, this harmful stereotype would regard even unconscious women as consenting.¹¹⁵

The domestic judgment also referred to the alleged victim’s ‘extremely provocative and vulgar attitude’, dancing ‘in a lascivious manner, showing off her red lingerie’,¹¹⁶ to the alleged victim’s

108. Here, rape myths are understood as ‘a combination of stereotypical attitudes about rape with the cultural functioning of a myth, leading to the most common definition: ‘prescriptive or descriptive beliefs about rape that serve to deny, downplay or justify sexual violence’. See Olivia Smith and Tina Skinner, ‘How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials’ (2017) 26 *Social Legal Studies* 441, 443.

109. *JL* (n 8) para 43.

110. *ibid*.

111. Rebecca Cook, ‘Teaching Gender through Stereotypes’ (2011) 36 *Oklahoma City University Law Review* 507, 509.

112. Joanne Conaghan and Yvette Russell, ‘Rape Myths, Law, and Feminist Research: ‘Myths About Myths’?’ (2014) 22 *Feminist Legal Studies* 25, 41.

113. *JL* (n 8) para 43.

114. *ibid*, para 44.

115. See: David Archard, ‘The Wrong of Rape’ (2007) 57 *The Philosophical Quarterly* 374; Catherine MacKinnon ‘Sexuality, Pornography, and Method: “Pleasure Under Patriarchy”’ (1989) 99 *Ethics* 314, 340; Joan McGregor, *Is It Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously* (Ashgate Publishing 2005); Joan McGregor, ‘Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law’ (1996) 2 *Legal Theory* 175. On the difficulties associated with consent-based definitions of rape, especially in cases of ‘survival consent’ (for example, in the context of severe poverty, economic oppression, familial or intimate abuse or other abusive circumstances), see Vanessa Munro, ‘An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales’ (2010) 63 *Current Legal Problems* 45; Jenny Pearce, ‘A Social Model of “Abused Consent”’ in Margaret Melrose and Jenny Pearce, *Critical Perspectives on Child Sexual Exploitation* (Palgrave Macmillan 2013); Dina M. Siddiqi ‘Of consent and contradiction: forced marriages in Bangladesh’ in Lynn Welchman and Sara Hossain (eds) ‘*Honour*’: *Crimes, Paradigms and Violence Against Women* (Zed Books 2005).

116. *JL* (n 8) para 42.

bisexuality, and her ‘ambivalent attitude to sex’.¹¹⁷ These prejudicial notions perpetuate the stereotype that women’s sexually provocative, promiscuous, and ‘unconventional’ behaviour engenders implied consent, an enforceable agreement to have sex – ‘she was asking for it’. These notions maintain that male sexuality is uncontrollable past a certain point, and that women are not to be trusted in matters of sexuality.¹¹⁸ So much so that women often lie about being raped, either because they regret having sex with someone, out of spite, or for attention – yet another myth: ‘women cry rape’. As Justice McLachlin in the Canadian case *R v Seaboyer* noted, notions that sexually active women are less credible as witnesses, and more likely to consent are not based on facts,

but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.¹¹⁹

Indeed, the image of ‘the compulsively mendacious, vindictive, mad woman who uses her sexual wiles to entrap and ‘ruin’ the reputation of good men has endured remarkably well in the popular imaginary’,¹²⁰ and is clearly preserved in the court of appeal’s judgment. Here, the condescending judicial remarks noted that the applicant’s decision to lodge a complaint about the events resulted from a wish to ‘denounce’ and repudiate a ‘moment of fragility and weakness that was open to criticism’.¹²¹ The effect of the deployment of these myths is to shift the focus of the trial from the defendant’s actions to those of the complainant in order to undermine her credibility to such an extent that, eventually, the victim becomes the accused.¹²²

The string of stereotypes casually deployed and perpetuated by the domestic court, and that the Strasbourg Court failed to dislodge, also include the myth that rape is a crime of passion and is committed to satisfy sexual desire. The Florence court of appeal found it appropriate to proclaim that the sexual intercourse ‘had ultimately satisfied no one’,¹²³ not the ‘lascivious’ remorseful woman, and not the ‘fun-loving’ (*goliardico*) group of men who could not find sexual satisfaction, as evidenced by the fact that none of the men ejaculated.¹²⁴ It is worth recalling that, as noted in *Vertido*, from the perspective of the prosecution, the fact that the accused did, or did not, ejaculate is entirely immaterial. Ejaculation is not an element of the crime of rape, and does not prove that the intercourse was consensual.¹²⁵

When the stereotypes about a victim’s sex role are exposed and presented not as factual propositions, but as socially constructed notions that both reflect and reinforce gender-power differentials, the detrimental impact becomes evident. This impact is not limited solely to the applicant’s ability to enjoy her right to private life and personal integrity. In *JL*, the Strasbourg Court clearly emphasised that judicial authorities should not reproduce sexist stereotypes, and expose victims of gender-

117. *ibid.*, para 42.

118. Lois Pineau, ‘Date Rape: A feminist Analysis’ (1989) 8 *Law and Philosophy* 217.

119. *R v Seaboyer* [1991] 2 SCR 577, para 634 as cited in Clare McGlynn, ‘Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence’ (2017) 81 *The Journal of Criminal Law* 367, 369.

120. Conaghan and Russell (n 112) 41.

121. *JL* (n 8) para 136.

122. McGlynn (n 119), 371.

123. *JL* (n 8) para 43.

124. *ibid.*, para 27.

125. *Vertido* (n 10) para 3.5.6.

based violence to re-victimisation, by using judgmental and demeaning comments that affect victims' confidence in the justice system.¹²⁶ However, the impact of stereotyping on the prosecution of gender-based violence, and on women's access to justice remains, regrettably, underexplored. The CEDAW Committee has warned that, when judicial authorities apply preconceived and stereotypical notions of what constitutes gender-based violence against women, and what women's responses to such violence should be, women's rights to equality before the law, a fair trial, and effective remedy are jeopardised.¹²⁷ This, in turn, has profound implications for the justice system itself, in terms of the impartiality and integrity of the system.¹²⁸ Furthermore, failure to identify the harmful use of gender stereotypes in judicial proceedings, through a broader and robust anti-discrimination understanding of Article 14 ECHR, obscures their systemic and pervasive impact on women's rights. It also stunts the Court's ability to formulate remedial action indicating general measures that may contribute towards changing institutional structures which perpetuate gender stereotypes.¹²⁹

In line with the CEDAW Committee's General Recommendation 33, as well as with its Concluding Observations on the State Report, a step towards eliminating harmful stereotypes in judicial proceedings would be to ensure appropriate training and capacity building for judges, lawyers, law enforcement officers, and any relevant personnel on gender perspectives on access to the law, the discriminatory effects of gender stereotypes, and their links to gender-based violence.¹³⁰

On a more general level, an additional step could be promoting Member States' ratification of the Convention Protocol No. 12.¹³¹ This creates a general freestanding, non-discrimination obligation applicable to any law,¹³² not limited to Convention rights. Moreover, it creates an obligation for any public authority, including the judiciary, not to discriminate on any grounds.¹³³

8. CONCLUSION

The ECtHR's jurisprudence has evolved and has undoubtedly contributed to the development, and strengthening of the protection offered under Article 14 of the ECHR. It has transcended the limits of formal equality and non-discrimination, and has expanded the scope of protection by embracing a more complex understanding of equality. However, in the context of gender stereotypes in judicial proceedings, the Court has been ambivalent, and even indecisive, in its application of Article 14 ECHR. The *JL* case showcases the harmful attitudes and presumptions about women's roles,

126. *JL* (n 8) para 141.

127. CEDAW Committee (n 38).

128. *ibid.*

129. On types of general remedies and execution of judgments, see: Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19 Human Rights Law Review 83.

130. CEDAW Committee (n 10) para 29; CEDAW Committee, Concluding Observations on the Seventh Periodic Report of Italy, UN Doc CEDAW/C/ITA/CO/7 Italy, [28(b)(c)]. The Concluding Observations were cited in the *JL* judgement but were not reflected in the Remedies.

131. Only 20 out of 47 Member States have ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) Rome, 4.XI.2000. See: Council of Europe, 'Chart of Signatures and Ratifications of Treaty 177' (*Council of Europe*, n.d.) <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177>> accessed 2 November 2022.

132. *ibid.*, Article 1(1).

133. *ibid.*, Article 1 (2); See also: Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.2000, para 30.

sexuality, and behaviour that continue to haunt legal discourse, and their direct and indirect impact on women's claims to justice. The elision of Article 14 in such cases has far-reaching consequences for women, whose experience of structural gendered oppression, or disadvantage remains without recognition and remedy under the law. Subsequently, this has ramifications for the integrity and impartiality of the justice system. When dealing with gender stereotypes in future cases, the Strasbourg Court could further clarify the protective scope of Article 14, and elaborate on the 'naming and contesting' approach expounded in the separate opinions in *Carvalho*, and in light of the CEDAW Committee's normative work. The need for a renewed, unwavering commitment to equality, in all its different dimensions, is even more urgent now. Especially, at a time when women's rights are coming under intense scrutiny, and subverted by domestic courts, even in countries believed to guarantee and preserve the hard-fought gains of women's equal rights movements. The Court cannot shy away from unequivocally exposing stereotyped beliefs, and attitudes about women, and their roles as bogus and harmful when deployed to buttress women's subordination in society. The Court, on its own, may not be able to deliver on gender equality. Likewise, law alone – including international human rights law – cannot dismantle the legacy of women's historical oppression, and the underlying deep-seated cultural and social beliefs. Nonetheless, the Court has a role to play in resisting any erosion of women's human rights, and in positively contributing to the advancement of substantive equality.


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