



Thursd April 15, 2021

Feminist Judgments course

Gender stereotypes

Stereotypes are generalized views or preconceived ideas, according to which individuals are categorized into particular gender groups, typically defined as “women” and “men” and are arbitrarily assigned characteristics and roles determined and limited by their sex

(Rebecca Cook & Simone Cusack, *Gender Stereotyping*)

Stereotypes are both **descriptive**, in that members of a certain group are perceived to have the same attributes regardless of individual differences, and **prescriptive** as they set the parameters for what societies deem acceptable behavior.

The role of judiciary



The judiciary is the branch of government which administers justice according to law.

Individuals look to the judiciary to uphold their rights and governments look to the courts to interpret laws.



Judges may be just as biased or even more biased than the general public in deciding court cases where traditional gender roles are challenged, even when they have the best possible intentions.



The significant expertise that judges possess doesn't inoculate them against decision-making biases.

How stereotypes undermines access to justice?

Stereotypes:

1. compromise the impartiality of judges' decision

2. influence judge's understanding of violent offences

3. affect judges' views about witness credibility

4. lead to impunity

5. refrain victims from seeking protection



Karen Tayag Vertido v. The Philippines (CEDAW)

- Karen Tayag Vertido, an employee of the Davao City Chamber of Commerce and Industry in the Philippines, was raped by a former President of the Chamber in 1996, following an evening business meeting.
- The case languished in the trial court for eight years. The accused was acquitted, the judge citing insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of rape. Judge based her decision to acquit on several ‘guiding principles’ derived from other rape cases and her unfavorable assessment of the author’s testimony based, among other things, on the author’s failure to take advantage of perceived opportunities to escape from the accused.



Claim

- The decision had no basis in law or fact and ‘was grounded in gender-based myths and misconceptions about rape and rape victims . . .without which the accused would have been convicted’:
- **women should physically resist sexual assault at every opportunity**, which implies that failure to take advantage of perceived opportunities to escape from an alleged attacker is evidence that the woman was not raped
- **women are inherently untruthful and thus likely to fabricate allegations of rape**, which implies that rape allegations made by women should automatically be viewed with suspicion
- **older men lack sexual prowess**, which implies that an allegation of rape made against an older man must be unfounded because his age means he is not capable of committing rape
- **perpetrators of rape are strangers**, which implies that any sexual relations between persons who are ‘more than nodding acquaintances’ must have been consensual and, therefore, not rape

Decision

- The assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the **rational and ideal response of a woman in a rape situation** (para 8.5)
- ***Stereotyping affects women's right to a fair and just trial*** and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim (para 8.4)



Carvalho Pinto v. Portugal (ECtHR)

- The applicant, who had been diagnosed with a gynaecological disease, brought a civil action against a hospital for clinical negligence following an operation for her condition. The Administrative Court ruled in her favour and awarded her compensation. On appeal the Supreme Administrative Court upheld the first-instance judgment, but reduced the amount of damages.
- The Supreme Administrative Court had confirmed the findings of the first-instance court but considered that the applicant's physical and mental pain had been aggravated by the operation, rather than considering that it had resulted exclusively from the injury during surgery. It relied on the fact that the applicant was *“already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age”* and the fact that she *“probably only needed to take care of her husband”*, considering the age of her children.

Judgment (1)

- The question at issue was not considerations of age or sex as such, but rather *the assumption that sexuality was not as important for a fifty-year old woman and mother of two children as for someone of a younger age*. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfillment of women as people. Apart from being judgmental, it omitted to take into consideration other dimensions of women's sexuality in the concrete case of the applicant. The Supreme Administrative Court had, in other words, *made a general assumption without attempting to look at its validity in the concrete case*.
- The wording of the Supreme Administrative Court's judgment could not be regarded as an unfortunate turn of phrase. *The applicant's age and sex appeared to have been decisive factors in the final decision, introducing a difference in treatment based on those grounds*.

Judgment (2)

- The Court noted the contrast between the applicant's case and the approach that had been taken by the Supreme Court of Justice in two judgments of 2008 and 2014 in which two male patients aged 55 and 59 respectively had alleged medical malpractice. In those judgments the Supreme Court of Justice found that *the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock"*. In assessing the quantum of damages it took into consideration the fact that the men could not have sexual relations and the effect that had had on them, regardless of their age, of whether or not the plaintiffs already had children, or of any other factors.
- In the Court's view, **those considerations show the prejudices prevailing amongst the judiciary in Portugal** (pr. 54).

Aim of the course

to teach students on how to implement feminist perspective in the analysis of court decisions

to put theory into practice in a judgment form

to discuss cases from different jurisdictions: U. S. jurisdiction, EU member states, judgments of the CJEU, judgments of the ECtHR, as well as views of the CEDAW and other UN treaty bodies

judgments will cover a broad range of substantive areas

to discuss cases from the national jurisdiction from the feminist perspective and to provide critique on the approach taken by domestic courts

Course results

Understand

- understand the importance of legal reasoning and legal writing

Acknowledge

- acknowledge if greater representation of women in courts guarantees the implementation of gender perspective in legal judgments (question of court composition)

Understand

- understand how gender perspective and analytical method change the interpretation of facts of the case and lead to significant difference in decision

Be able

- to write a legal decision implementing gender perspective

Identify

- identify potential roles within judiciary introducing feminist perspective in writing legal judgments, or in writing any other legal or policy document

General topics

1. Introduction - what is legal reasoning and legal writing, gender bias in court decisions

2. Mainstreaming applied to court decisions; Feminist movement and strategic litigation; Rewriting court decisions: Feminist judgements projects around the world

3. Feminist judgements in different context: Civil Law and Common Law systems - Particularities of international and transnational decision making

4. Feminist jurisprudence of the CEDAW: main issues and standards - *R.P.B v Philippines (2014)*

5. Feminist jurisprudence of the ECtHR: main issues and standards - *Carvalho Pinto de Sousa Morais v. Portugal (2017)*

6. Feminist jurisprudence of the CJEU: main issues and standards - *CJEU, Grand Chamber, Case C-363/12 (2014)*

Different legal areas

7. Analyses of opinions in the area of family law

8. Analyses of opinions in the area of reproductive rights

9. Analyses of opinions in the area of employment and social security law

10. Analyses of opinions in the area of private law

11. Analyses of opinions in the area of criminal law

12. Analyses of opinions in the area of public law

13. Analyses of opinions in the area of tort law

14. Analyses of opinions in the area of tax law

Methodology

For case discussion, students will prepare:

facts of the case, arguments, legal issues, majority and dissenting judgments, judicial preferences/partiality/values

Students will discuss the same judgment from the feminist perspective: how to apply feminist method and what would be the result in a case that this method was implemented

15. Rewriting decision - exercise for the final exam - to summarize facts, arguments, conclusions, reasons, reflection on values, gender issues, wider context and to rewrite the judgment

Overall aim of
the course is
to

Think critically about law

Raise awareness and combat gender stereotypes
and prejudices in court decisions

Explore the need for greater diversity in the law and
how the rights of women and men have been limited
by the law

Understand how cases impact the most vulnerable
population (multiple discrimination)

Secure access to courts for women and better
protection of human rights violations in court
proceeding