

# Structures of Discrimination

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## I. Introduction

*S*ignificant strides have been made in many regions of the world in the improvement of women's status in the last half-century, but the challenges of achieving women's equality worldwide are hardly resolved and progress is not inexorable. We have to question why we still take steps forward and backward in bewildering alternation. Finding answers to this question requires us to address the various structures of discrimination that persist in our thinking, in our habits, and in our prejudices. The thesis of this essay is that, in order for women and men to be fully equal with each other, we need to understand the structures of discrimination against women; that is, the forms of the subordination of women that are deeply rooted in our thinking, our myths, and in our individual, institutional, and social ways of functioning.

A fuller understanding of the overarching structures of discrimination will enable us to more effectively eliminate some of the main human rights infringements that women face in the 21st century, such as violence against women, trafficking, polygyny, illiteracy and under-education, preventable maternal mortality and morbidity, and preventable HIV/AIDS. Like physical structures, social and psychological structures of discrimination and inequality are not easily dismantled. Their redesign takes bold leadership and innovative architects who appreciate the landscapes and know what kinds of habitats will enable women to live to their fullest potential. The redesign of oppressive

structures also takes dedicated workers who have the energy, patience, application, and perseverance that it takes to build liberating structures of equality. In thinking about how to design and build structures that enable everyone to be equal in dignity, we need to recognize that human dignity requires that we “acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.”<sup>1</sup>

To recognize structures of discrimination requires an understanding of how gender subordination is rooted, for instance, in our religions, cultures, media of communication, and habits, and how such structures persist over time and across sectors of life, such as the family, education, employment, criminal justice, and health. Like most forms of discrimination, gender-based discrimination is socially constructed, but its construction varies from other structures of discrimination. Gender differentials are thought to be acceptable when they are based on conventions that are regarded as “natural,” instead of part and parcel of a deliberately discriminatory structure. Groups within some religious communities, such as those that resist women bishops in the Anglican Church, insist that it is “against women’s nature” to be in leadership positions.<sup>2</sup> The Roman Catholic hierarchy continues to rely on its self-created historical conventions in order to rationalize the “attempted ordination” of women as being one of the gravest crimes under church law, placing it in the same category as clerical sexual abuse of minors.<sup>3</sup>

Some gender-based distinctions are justified by genuine biological differences between the sexes, and therefore do not constitute discrimination. For example, distinctions made on the basis of women’s reproductive functions are reasonable in order to ensure that they can access the care they need to go through pregnancy and childbirth safely. However, many societies have used distinctions drawn on the basis of biology as unreasonable justifications for discrimination against women in areas of their lives unrelated to biological differences, such as their ability to learn and to exercise judgment.

One of the reasons for the lack of improvement in women’s status is that we have failed to develop policies that treat women’s genuine biological differences in ways that actually accommodate those differences, such as with respect to reproduction, while we have also failed to treat women equally with men when biological differences do not matter, such as with respect to education. In other words, if societies and social institutions had put the effort into safeguarding women’s

interests when the difference between the sexes matters (such as for maternal health) that they have put into discriminating against women when the differences between the sexes do not matter (such as for education and social and spiritual leadership), then the human right of women to equality would be considerably more advanced than it is today.

The continuing failure to address structures of gender discrimination prevents women—and also men—from realizing their full potential. In particular, it denies societies the benefit of the capacities, ingenuities, and leadership of which their female populations are capable. We need to address the challenge of liberating the capacities of all of us by understanding the structures of perception in our minds, and how they lead to the formation of restrictive stereotypes of women, or subgroups of women. We must also address the stereotypes of men and subgroups of men, because, as has been explained, “Laws and customs that steer men out of the domestic sphere reinforce restrictions on women’s participation in the public sphere, and the maintenance of such role divisions perpetuates long-standing inequalities between the sexes.”<sup>4</sup> In other words, the stereotypes that restrict women’s involvement in the public sphere also restrict men’s fulfillment in the domestic sphere.

Once one understands one’s own biases, prejudices, and how one stereotypes, one is better equipped to engage the gender hierarchies in societies more generally. It is for this reason that I have focused my current research and this essay on gender stereotyping as one of the more daunting structures of discrimination against women to dismantle.

Stereotyping is part of human nature. We all stereotype and we have all been stereotyped. Why do we stereotype? Professor Anthony Appiah has addressed this question in illuminating ways.<sup>5</sup> He explains that we stereotype in order to maximize our understanding with a minimum of effort, to achieve simplicity and predictability, to assign difference, and to script identities. Stereotyping is not necessarily problematic, particularly when it is used to maximize simplicity and predictability. Stereotyping can, for example, be a useful tool to help process the social complexity of the world, particularly as it globalizes.<sup>6</sup> While stereotyping is not inherently problematic, it becomes problematic when it operates unjustly, such as through assigning difference or scripting identities in ways that ignore the characteristics, abilities, needs, wishes, and circumstances of individuals, with the effect of denying them their rights.<sup>7</sup>

In stereotyping to maximize predictability, we feel comforted by the familiarity that arises from repeated general characterizations.<sup>8</sup> In stereotyping to ensure simplicity, we often make statistical generalizations about people, such as that women are generally physically weaker than men. Statistical or descriptive generalizations become problematic when they are relied upon to deny a benefit to, or impose a burden upon, a particular woman who is atypical for that group to which the generalization is applied. Therefore, it is unjust and discriminatory when a particular woman is denied, for instance, a farming job, on the basis of the stereotypical belief that women are physically weak and therefore lack the strength needed to be a farmer, even though that particular woman is physically able to be a farmer. As the Constitutional Court of South Africa explained: "At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative...What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself."<sup>9</sup>

We stereotype to assign difference, to label people because they are different from the norms with which we are familiar. We label people because we do not want to take the time to know them as individuals. The tendency is to put them into categories and deal with them according to those categories, not as individuals with particular needs, characteristics, and abilities. These stereotypes are sometimes called "false stereotypes." We often use these stereotypes for hostile purposes, such as against members of new immigrant groups or groups other than our own. We "otherize" members of groups particularly when we want to feel superior. False stereotypes stigmatize members of a group by branding them with negative characteristics, irrespective of whether they have those characteristics, thus denying them their dignity or individual worth.

Stereotypes that seek to script identities are often called "normative" or "prescriptive" stereotypes. The underlying reason for these stereotypes is to prescribe attributes, roles, and behaviors to which men and women are expected to conform. An illustration of prescriptive stereotyping is the expectation that women conform to prevailing modesty, chastity, and obedience codes. All societies have such codes, including those that are embedded in dress codes that, for instance, require or expect women to wear high-heeled shoes or headscarves.

*Rebecca J. Cook*

Let me proceed by addressing various forms of gender stereotyping, including how this phenomenon creates gender hierarchies by constructing women as inferior to men. In addition, I will explore how stereotyping persists in different sectors of social activity in ways that have denied individual women their rights.

## **II. Gender Stereotyping**

How many of us realize that negative stereotyping denies individuals their dignity and their self-esteem in ways that are never to be erased? Uncovering how laws, policies, and practices apply, enforce, or perpetuate stereotypes of both women and men is critical to understanding the gendered experiences of discrimination and inequality. Examining how women and men are stereotyped in various contexts can provide insight into the ways that the genders are disadvantaged in the exercise of their rights.

It is important to consider how both men and women are stereotyped, by reference to the terms “gender stereotype” and “gender stereotyping.” The term “gender stereotype” describes a generalized view or preconception of attributes or characteristics possessed by women and men, or the roles that are or should be performed by each respectively.<sup>10</sup> In this view, a gender stereotype presumes that all individuals in the social groups of women or men possess certain characteristics or capacities, behave in certain different ways, and/or perform specific, predetermined distinguishable roles. The term “gender stereotyping” describes the process of ascribing to an individual woman or man certain capacities, characteristics, or roles only by reason of membership in the social group of women or men respectively.<sup>11</sup>

History has shown that gender stereotyping has had particularly egregious consequences for women. Professor Sandra Fredman has observed that:

[A] useful way of examining the continued disadvantage of women is to identify the assumptions and stereotypes which have been central to the perpetuation and legitimation of women’s legal and social subordination. Such assumptions have roots which stretch deep into the history of ideas, yet continue to influence the legal and social structure of modern society. Indeed, the continuity is startling, given the extent and fundamental nature of change in the political and economic context.<sup>12</sup>

This observation notes how stereotypes remain long after the reality that generated them has changed. They impair the ability of the individuals and institutions that retain them to function effectively in the new reality.

Stereotypes can also have harmful consequences for men, particularly when men challenge the stereotypes of women as caregivers and men as breadwinners. There are numerous court cases brought by men who were denied various forms of assistance because, as caregivers in their circumstances, they did not meet the male stereotype of breadwinner. Cases include that of Mr. Wiesenfeld from New Jersey, who was denied assistance from the social security system that would have allowed him to stay home to take care of his first-born infant son. When his wife died giving birth to their son, he applied for mother's benefits, a form of assistance designed to enable widows, but not widowers, to stay at home with their children after the death of the family breadwinner.<sup>13</sup>

Another case involved Mr. Hibbs from Nevada, who was denied the twelve-week family care leave (to which women were entitled) to stay at home to take care of his ailing wife.<sup>14</sup> A further case involved Mr. Petrovic, a student from Austria working part time, who was denied a parental leave allowance under the Austrian Unemployment Benefit Act, to stay at home and take care of his child while his wife continued working.<sup>15</sup> His claim was that the distinction in the Austrian Act, allowing only mothers to take a leave when a child was born, was discriminatory.

Mr. Wiesenfeld and Mr. Hibbs were successful before the U.S. Supreme Court when they challenged the respective denials as unconstitutional. In *Wiesenfeld*, the Court went beyond simply deciding the case as an equal pay case, wrongfully denying working men the benefits that were provided to working women. It decided that the state is precluded by the Equal Protection provision of the U.S. Constitution from imposing sex-role stereotypes of male breadwinner-female caregiver. The Court similarly affirmed Mr. Hibbs' gender-nonconforming choice to stay at home to take care of his wife because "sex-role stereotyping was a constitutional problem of such magnitude that it justified an affirmative grant of twelve weeks leave. Had Congress attempted to combat such discrimination simply by requiring formal equality in the administration of leave benefits, employers would have been able to comply with the law by offering no family leave to employees of either sex."<sup>16</sup> That is, in order to achieve real or substantive equality, the

Court had to secure family care benefits for women and extend them to men in order to remedy the sex role stereotypes.<sup>17</sup>

In contrast to Mr. Wiesenfeld and Mr. Hibbs, Mr. Petrovic was unsuccessful before the European Court of Human Rights. The European Court missed an opportunity to explain how the Austrian Act restricting family care leave to only mothers violated the rights of nondiscrimination of both sexes. Such restrictions devalue the efforts of mothers who stay in the workforce, and denigrate the domestic contributions of fathers. In this sense, stereotypes of women and men can have mutually reinforcing negative consequences.

Conditions for social stratification and the subordination of women exist when practices, such as gender stereotyping, are both socially pervasive across sectors and socially persistent over time.<sup>18</sup> The conditions for social stratification and subordination are exacerbated when stereotypes are institutionalized in a state's laws, policies, and practices. An example is the widespread institutionalization, through judicial reasoning, of sexual stereotypes of women that excuse and rationalize sexual assault; for instance, that women who do not fight back against sexual assault are consenting to the aggressor's acts.<sup>19</sup> The saturation of law with sexual stereotypes, such as the stereotype that women are in a state of perpetual consent to men's initiation of sexual activity, has contributed to the frequent blaming of victims and survivors of sexual assault<sup>20</sup> and, for example, the denial of female sexual agency and the privileging of male sexuality.<sup>21</sup> This affirms the stereotype that "boys will be boys," and does nothing to dismantle the stereotype of men as creatures who are unable to control their sexual urges.

There are many forms of gender stereotypes. Sex stereotypes concern generalizations about women's and men's physical, emotional, and cognitive capacities. Sexual stereotypes concern those "characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault...sexual objectification and exploitation."<sup>22</sup> Sex role stereotypes ascribe *roles* to women and men that are perceived as culturally appropriate to each of them, based on prevailing gender ideologies.<sup>23</sup> These stereotypes often combine with other characteristics, such as race, age or immigrant status, to create compounded stereotypes, such as generalizations about adolescent girls or Muslim women.

Gender stereotypes are shaped by the contexts in which they operate. In order to accurately diagnose and effectively remedy them it is therefore important to understand the underlying contexts in which

they are applied, enforced, or perpetuated. One approach to understanding the context in which a gender stereotype operates is to think about it in terms of individual factors, situational factors in different sectors of society, and broader factors.<sup>24</sup> Understanding these conditioning influences can help to explain how gender stereotyping contributes to social stratification and the subordination of women,<sup>25</sup> how stereotyping is perpetuated, and the process by which it might be eliminated.<sup>26</sup>

As *individuals*,<sup>27</sup> we absorb stereotypes through our everyday interactions with people and our exposure to the culture in which we function.<sup>28</sup> Repeated encounters embed stereotypes deep into our subconscious minds,<sup>29</sup> where we (often) come to accept them uncritically as our “normal” understanding of the world, and we begin to act and react in conformity with them.<sup>30</sup>

*Situational factors*<sup>31</sup> provide insights into how an individual is “affected by and adapts to social contexts, ranging from proximal influences (e.g., the norms of one’s immediate work group) to more distal influences (e.g., the division of male and female roles in society).”<sup>32</sup> In the health sector, for instance, stereotypes about women have emerged in regard to their capacity to make free and informed decisions about their health care, exercise moral agency to make decisions about their reproduction and sexuality, balance influences of rationality and emotionalism, and exercise autonomy to determine their own roles in society.

*Broader factors*,<sup>33</sup> such as historical, cultural, religious, and legal considerations, can provide insights into how a community integrates gender stereotypes into its social structures and meanings, as well as how such stereotypes might be eliminated.<sup>34</sup>

Understanding the various means of perpetuating gender stereotypes in different sectors of society is critical to dismantling them.<sup>35</sup> When a state applies, enforces, or perpetuates a gender stereotype in its laws, policies, or practices, or fails to adopt legal and other measures to eliminate and remedy wrongful gender stereotyping through means such as public advertisements and public school curricula or textbooks, it institutionalizes that stereotype and gives it the force of the law or of public approval and authority. As an influential and instructive institution of the state, the law may condone the operation of a gender stereotype and create an environment of legitimacy and impunity around its use. When a state legitimizes a harmful gender



stereotype in this way, it creates a framework that enables the perpetuation of discrimination against women.

The ability to eliminate harmful stereotyping is contingent on the wrong first being named.<sup>36</sup> To borrow a medical metaphor, an ailment needs first to be diagnosed in order for it to be treated.<sup>37</sup> Exposing operative stereotypes, examining their origins, contexts, and processes of perpetuation, and analyzing how their application, enforcement, or perpetuation harms individuals or groups of individuals, are critical to their remedy.<sup>38</sup> Once wrongful stereotyping has been recognized, it is then possible to identify whether, and if so how, operative stereotypes impair or nullify rights to non-discrimination and equality, and/or violate other human rights.<sup>39</sup> Let me now explore how gender stereotypes have been named, and once identified, how they have been shown to infringe upon human rights in the sectors of criminal justice, health, and the family.

### III. Gendered Disappearances and Criminal Justice

The issue of how stereotyping of young, poor migrant women in the criminal justice system of the city of Juarez, Mexico, was associated with their gendered disappearances was addressed by the Inter-American Court of Human Rights (the Court) in its recent decision in the so-called Cotton Field case.<sup>40</sup> That decision held the state of Mexico responsible under the American Convention on Human Rights (the Convention) and the Convention on Prevention, Punishment and Eradication of Violence against Women (the Convention Belém do Pará) because the police failed to investigate the disappearances and murders of three poor, migrant women, two of whom were minors. The bodies of these three women, Claudia Ivette Gonzalez, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monarrez, were found in a cotton field near Juarez, the Mexican town bordering El Paso, Texas, in the Mexican state of Chihuahua.

The decision is important for a number of reasons. For the first time, the Court considered the positive obligations of states to respond to violence against women by private actors. It also looked at the murders of these three women in the context of mass violence against women and structural discrimination, and found that gender-based violence constitutes gender discrimination. The Court decided that the state violated the obligations under the Convention not to discriminate (Article 1(1)) in connection with the obligation to guarantee the right

to life (Article 4(1)); the right to physical, mental and moral integrity (Article 5(1)); the right to be free from inhuman or degrading treatment (Article 5(2)); and the right to personal liberty and security (Article 7(1)). These multiple violations operated to the detriment of the three victims. In addition, the Court found the state in violation of the victims' next of kin's right of access to justice and to a fair trial (Article 8(1)), and to simple, prompt, effective recourse (Article 25(1)) to protections of the Convention.<sup>41</sup>

In presenting the facts of the case, the Court included a section entitled, "Stereotyping allegedly manifested by officials to the victims' next of kin."<sup>42</sup> This referenced the testimony of the victims' mothers to show how state officials had generated demeaning and hostile sexual stereotypes of the victims' roles, attributes, and characteristics, in part to justify their avoidance of their obligations to investigate. The Court cited testimony of Esmeralda Herrera's mother, who said that when she reported her daughter's disappearance, the authorities told her that the young woman "had not disappeared, but was out with her boyfriends or wandering around with friends," and "that if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home."<sup>43</sup> Importantly, the Court concluded that, "the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life...constitute stereotyping."<sup>44</sup>

In the section of its judgment entitled, "Obligation not to discriminate: violence against women as discrimination," the Court found that "gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women."<sup>45</sup> The Court then referred to the statements made by the state officers in order to identify how hostile and dismissive stereotypes were perpetuated in the particular context of the police authorities: "Bearing in mind the statements made by the State...the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case."<sup>46</sup>

Significantly, the Court concluded this section by saying that, "The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women."<sup>47</sup> This judicial recognition of harmful gender stereotyping in the criminal justice system, and how it contributed to official indifference to the gendered

*Rebecca J. Cook*

disappearances and murders of women in Juarez, has no doubt raised consciousness about this phenomenon in Mexico and beyond. Hopefully, the Cotton Field decision will promote better understanding of women's collective experiences of one of the more pernicious forms of the social practice of gender stereotyping and discrimination in other parts of the world, such as Canada, where comparable stereotyping of gendered disappearances of indigenous women prevails.<sup>48</sup>

#### **IV. Health Disparities**

Women regularly face obstacles in accessing health care services and information, especially in the area of reproductive health. The nature, frequency, and immutability of obstacles vary greatly, depending on such factors as a woman's socio-economic status, age, race, religion, sexual orientation, and geographical location. A woman might have difficulty gaining timely access, perhaps, to emergency contraception due to the refusal of her only accessible pharmacist to provide this contraceptive on grounds of conscience.<sup>49</sup> Such a refusal is based on the stereotype of women as morally inferior and lacking the capacity for moral agency.<sup>50</sup> Similarly, opponents of abortion rights, in support of their efforts to abolish, redirect, or restrict women's access to abortion, have sought to perpetuate the stereotype of women as weak and vulnerable, and therefore in need of their protection.<sup>51</sup> The stereotype of women as incompetent decision-makers in their own reproductive lives has been enforced through laws, policies, and practices that, among other matters, allow the forcible sterilization of women, particularly members of minority, immigrant, or indigenous communities.<sup>52</sup>

The stereotype of women as primarily mothers has been applied, enforced, and perpetuated through laws, policies, or practices that deny or restrict women's access to affordable contraceptives and related health care services and information.<sup>53</sup> An extreme example of such denials is shown in the Philippines through an Executive Order issued by the mayor of Manila City that prohibited the distribution of hormonal contraceptives in the public health service.<sup>54</sup> The Executive Order sends a clear message that women's natural role and destiny is as mothers, meaning that women should prioritize childbearing and childrearing over all other roles they might perform or choose in that community. The implication is that women in Manila City should be treated primarily as mothers (whether actual or potential), and not according to their individual needs or possible preferences not

to become mothers. According to this stereotypical thinking, it is not essential that women have access to affordable methods of artificial contraception since this could potentially deny women the opportunity to fulfill their “duties” as mothers, even though birth spacing is a key component to reduce rates of maternal mortality and morbidity, which is often central to the survival and well-being of children.<sup>55</sup>

In order to understand the stereotypes applied through the Executive Order, it is important to consider the contextual factors that surrounded its application.<sup>56</sup> To elaborate, at the time the Executive Order was introduced there had been a “growing Catholicization of public health policies.”<sup>57</sup> Several prominent state figures, including then national President Arroyo, justified the Order on the grounds that denying women access to artificial contraceptives is consistent with the teachings of the Catholic Church on family planning.<sup>58</sup> State officials imposed their stereotyped views about women’s proper role by invoking the exclusively male-generated doctrines of Catholicism.

It is also significant that the Executive Order was introduced in the broader context of a legal culture that perpetuates stereotypes within family and marriage relations with impunity. For example, the Family Code of the Philippines bolsters the prescriptive stereotype that men should be the decision-makers and therefore bear ultimate power and authority within their families.<sup>59</sup> In the case of disagreements over marital property or parental authority over children, the Family Code provides that the husband’s/father’s decision shall prevail over the wife’s/mother’s preferences. The Executive Order reinforces the stereotypes that married women should be constantly prepared to be mothers, that husbands should constantly welcome fatherhood, and that both should be constantly obedient to the Catholic Church.

Situational factors include the widespread state practice of rewarding women, through monetary compensation and other gifts, for stereotype-conforming behavior (i.e., for fulfilling their natural “destiny” to be mothers). This, in turn, has facilitated the institutionalization of the stereotype of women primarily as mothers.<sup>60</sup> For example, one report has described how “[t]he mayor [of Manila City] gives prizes for having the most number of children, and the current champion has 21 kids.”<sup>61</sup> In addition, the state practice of harassing and intimidating health care providers who give women access to contraceptives has further facilitated the stereotype’s institutionalization. These practices have enabled the imposition of the state’s views of women’s “proper” role in society, restricting women to the role of motherhood and the

behavior expected of mothers (e.g., the prioritization of the needs of children over women). This has taken place even when those practices pose well-recognized, serious—even fatal—risks to women’s health,<sup>62</sup> and frustrate women’s exercise of their human rights other than to voluntary motherhood.

### V. Disparities in the Family

Prescriptive stereotypes of women’s “proper” role in the family have enabled the perpetuation of disparities in family life. One of the more extreme forms of such disparities is the practice of polygyny; that is, the practice of a man taking multiple wives.<sup>63</sup> The term “polygamy” refers to the simultaneous union of either a husband or wife to multiple spouses. As a general term, polygamy therefore includes both the rare practice of polyandry, a wife taking multiple husbands, and polygyny, the more frequent circumstance of a husband taking multiple wives.

There has been a renewed interest in the disparities associated with polygynous “marriages”; that is, social unions approximating marriage even if not legally recognized as such. This interest has arisen in the wake of recently published books on the actual experience of polygyny in North America,<sup>64</sup> several U.S. court decisions on the practice of polygyny,<sup>65</sup> and a pending reference case in Canada regarding the constitutionality of its criminal prohibition of polygyny.<sup>66</sup>

Beyond North America, the South African Constitutional Court has recently held that Muslim women in polygynous marriages should be able to inherit equally with Muslim women in monogamous marriages and with non-Muslim women, despite provisions in the South African Intestate Succession Act of South Africa.<sup>67</sup> In deciding the legal effect of this Act, the Court explained that:

By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.<sup>68</sup>

Religious and customary laws that permit polygyny continue to rely on sex differences as a central axis in the distribution of marital rights and obligations. In doing so, they are premised upon and perpetuate gender stereotypes hostile to women's equality that have been rejected in many laws.<sup>69</sup> The content of such gender stereotypes varies according to the particular legal system under which polygyny continues to be practiced. In general, however, a dominant sexual and sex role stereotype of women in polygynous unions is as "wife" and "mother." Each of these roles, including the sexual component of "wife," supports and reinforces the other. They mark married women as different *types* of persons from men.

Historically, the common law of coverture also distributed marital rights and obligations unequally according to sex, in favor of husbands' control of their wives' property.<sup>70</sup> Persons of different sex were understood to be different *types* of persons under the laws of marriage. A wife was understood to be subsumed within her husband's legal personality, under his family name. Children of a marriage were understood to fall under the name and the near-complete custodial power of their father, affording him control of their educational, religious, and other forms of upbringing. Stereotypes of feminine dependence, fragility, and commercial naivety were constructed in opposition to stereotypes of masculine protective breadwinning and financial acumen. An increasing number of family laws regulating marriage and cohabitation have since moved away from this expressly sex-based construction of family relations. Spousal rights and obligations in the legal systems of some Western countries now apply to both parties equally regardless of sex.<sup>71</sup> In fact, the legislative adoption of same-sex marriage has removed the notion of sex difference as essential to marriage altogether.<sup>72</sup>

Depending on the relevant customary or religious system that retains polygyny as an acceptable institution, it may be that the role of "wife" implies continuous sexual availability to one's husband, as it once did under laws that did not criminalize rape in marriage.<sup>73</sup> Also, when a wife is sexually unavailable, such as during pregnancy or post-partum abstinence in some contexts, polygyny can function unilaterally to satisfy a husband's "natural" masculine "sexual needs."<sup>74</sup> Abstinence is not a stereotypical expectation of men.

It may also be a condition of "wifeness" under such a system that one becomes a mother. The role of "mother" often has a more burdensome construction in the polygynous context than in the monog-

amous one. Where polygyny is practiced as a means to maximize reproduction by husbands, wives are understood primarily as procreators. Moreover, wives may be limited in their ability to determine the number and spacing of children, and therefore unable to protect their health and their very lives, in violation of their “rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights....”<sup>75</sup> The wife in a polygynous family has been described as “operating as a passive being for procreation.”<sup>76</sup> The notion that one might be a spouse, without choosing to be a parent, is foreclosed where polygyny is practiced for the express purpose of maximizing family and community reproduction.

There is evidence that maximizing reproduction is one of the theological principles of polygyny as still practiced among fundamentalist Mormon groups in Canada and the United States.<sup>77</sup> Within the polygynous community in Bountiful, British Columbia, for instance, religious teachings regarding polygyny negatively stereotype women and female children into solely reproductive and subservient roles. As one former polygynous wife of this sect has articulated, religious doctrine maintained that she, like all girls and women, had the duty to contribute to the “production” of an abundance of children through polygynous marriage in order for the community to survive the pending Apocalypse.<sup>78</sup> At the centre of this patriarchal, religious dictum lies a belief that women and girls are meant to serve men, and should they disobey, “their souls will burn in hell for eternity.”<sup>79</sup>

The centrality of motherhood (to serve the purpose of creating fatherhood) is similarly evident in some of the religious and customary norms governing marriage among Islamic and African communities. Infertility of the first wife, or her “inability” to bear a son, is often considered a sufficient reason for a court (or the first wife) to grant permission to a man to take an additional wife. A court or an earlier wife may also approve a husband taking an additional wife when a second or later wife fails to produce a male child. It has been noted that, “childless women are often sneered at for their inability to conceive. If not divorced, lack of reproductive capacity is a justification for polygamy amongst some people....”<sup>80</sup> In a study of Bedouin Arab polygynous wives, having too many daughters was one of the four main reasons cited for why a husband took an additional wife.<sup>81</sup>

If polygynous wives and mothers do not fulfill the prescribed roles of procreator and satisfier of men’s sexual urges, they may be deval-

ued in the family and community. The inherent wrong of this sex role stereotype is that it prohibits a woman from making or fairly negotiating her own life plan in ways that are equal to her husband's ability to determine his life course. Male-factor infertility, which medical evidence shows to be as common as female-factor infertility, is denied. The stereotypical view is that a couple's infertility is generally attributable to the woman's deficiency.

Stereotypes of women in polygynous marriages persist in the immigration context. The trend in immigration laws and policies in countries committed to monogamy is to prohibit the entry of polygynous families. In the immigration laws of Australia,<sup>82</sup> Canada,<sup>83</sup> the U.K.,<sup>84</sup> and the U.S.,<sup>85</sup> for instance, polygamy is a bar to immigration. The approaches countries take to ensure that only monogamous families immigrate vary and can have profound implications for the perpetuation of harmful stereotypes of immigrant women. Some countries, such as Australia and Canada, provide that only the first marriage may potentially be recognized for immigration purposes. Australia<sup>86</sup> and Canada<sup>87</sup> therefore require that the sponsoring spouse provide evidence of lawful divorce of any subsequent concurrent wives.

In contrast, the U.K.<sup>88</sup> and U.S.<sup>89</sup> allow the husband to determine which of his two or more wives he will bring. In the U.K., it is the order in which polygamous wives come to the U.K. for settlement (not the order in which they married the husband) that is the decisive factor for determining which wife is recognized as the lawful spouse for immigration purposes.<sup>90</sup> The U.S. immigration policy "permits the husband in a polygamous marriage to sponsor a first wife without terminating subsequent marriages. A husband may sponsor a second or subsequent wife, provided he terminates all previous marriages and then remarries the beneficiary spouse to satisfy the requirement that the marriage is valid for immigration purposes."<sup>91</sup> It has been explained that, "the operation of U.S. immigration policy for spouse-based categories empowers a husband in a polygamous marriage to choose which wife he will sponsor for immigration status; in contrast, a second or subsequent wife cannot confer or receive status for any family category based on a relationship created solely by the polygamous marriage."<sup>92</sup>

It has been observed that, "Much of the gender bias in [U.S.] immigration law is a legacy of the centuries-old doctrine of coverture, under which a woman's legal existence merged with that of her husband upon marriage."<sup>93</sup> This provides insights into the gendered nature of



Rebecca J. Cook

immigration policies and how stereotypes of women as dependent, subordinate people are perpetuated:

At common law, a husband had ownership rights over his wife and was legally entitled to control her income and property...This headship of the husband in the family permitted him to control where the wife and family resided and all aspects of their existence...The very structure of the spouse-based immigration scheme grew out of this doctrine [cover-ture]. The first laws establishing the right of a citizen or resident alien to petition on behalf of a spouse were gender-specific—only male citizens and male resident aliens could sponsor their spouses; female citizens or resident aliens enjoyed no reciprocal rights to sponsor their husbands.<sup>94</sup>

The U.K. and U.S. approaches give almost absolute power to the husband in a polygynous marriage who is a citizen or permanent resident in a destination country. It permits “the husband to determine not only the immigration status of each wife, but also where each wife will live, whether that wife can live with and have custody of her children, and whether that wife can work if she is in the United States. These are the very powers bestowed upon a husband under the doctrine of cover-ture.”<sup>95</sup> The U.S., the U.K., and countries with comparable immigration and related laws have thereby failed to break the links of their historical stereotyping.

## VI. Dismantling Harmful Gender Stereotyping

You might well be asking how harmful stereotypes can be dismantled, and by whom. We all have a role to play in dismantling stereotypes, in particular by raising our own consciousness about how we stereotype and how we have been stereotyped. Raising awareness in our own situations can have humorous sides: How does a woman respond to a male colleague who turns to her in a meeting and asks her to take the secretarial role of taking notes? How does a female vice president of a university respond to a male professor who asks her to get him a drink at a university cocktail reception? Such anecdotes could be developed into humorous movies that elaborate different response scenarios.

I suspect many of you have your favourite movies about stereotypes that have captured your imagination in ways that other forms of communication have not. One of my favourite films is *Bend it Like Beckham*, about an adolescent girl who defied her community’s feminine stereotype in order to become a skilled soccer player like her model,

David Beckham.<sup>96</sup> Women's sports is a way to break stereotypes of women as weak and vulnerable. However, women's sports are not far removed from gender roles and stereotypes, because women are more restricted in the kind of aggressive behaviour in which they can engage. For example, body-checking is not allowed in women's ice hockey. Rewarding men's aggression and winning at any cost has led to the observation that men's "college sports culture is fostering...an increase in violence and dirty tricks."<sup>97</sup> This culture of sports violence presents a challenge as women seek equality in the recognition and rewards of their sporting accomplishments.

We all have a role to play in ensuring that our educational institutions do not perpetuate gender stereotypes in how their admissions policies are structured, in how their curricula are designed, and in how leadership is fostered. Some years ago, a Mr. Hogan challenged the Mississippi University for Women because it denied him, a qualified male applicant, admission to its all-female nursing program, because of his sex. He won before the U.S. Supreme Court because his denial violated the Equal Protection clause of the U.S. Constitution.<sup>98</sup>

In Australia, the Court of Appeals of New South Wales held that it was discriminatory to segregate students in single sex schools in which boys were given courses that equipped them for university, commerce, and industry, while girls had courses in domestic science and home economics. The Court found that these curricula differences unlawfully reflected sex-role stereotypes of men working in business, industry, and manufacturing as breadwinners, and women working as homemakers. The result was that this limited girls' future choices about education, vocations, and careers.<sup>99</sup>

We do not have to wait for brave individuals to challenge education policies before courts of law. We can proceed by reviewing how we teach in the classroom, for example, by asking colleagues to sit in on classes and advise us on how we can ensure that we are not reinforcing negative or restrictive gender stereotypes by the way we teach.

In addition to humour, films, sports, and education as methods of raising consciousness about harmful stereotypes, various human rights systems are instrumental in acknowledging negative stereotypes, exposing their harms, and providing remedies. In the Mexican "Cotton Field" case, we saw how the Inter-American Court recognized how prejudice about women is perpetuated in the criminal justice system through categorical thinking about women's appropriate roles, attributes, and characteristics in society, as well as how that thinking

discriminates against them and denies justice and protection when confronted by gross violations of their rights.

To its great credit, in the part of its judgment on Reparations, the Inter-American Court called for training that enables all state officials to recognize the effect on women of stereotyped ideas and opinions in relation to the meaning and scope of human rights.<sup>100</sup> It ordered the state “to continue implementing permanent education and training programs and courses in: (i) human rights and gender; (ii) a gender perspective for due diligence in conducting preliminary investigations and judicial proceedings in relation to the discrimination, abuse and murder of women based on their gender, and (iii) elimination of stereotypes of women’s roles in society.”<sup>101</sup>

The Court’s members were greatly assisted in their work by fact-finding reports about the disappearances of women more generally, undertaken by nongovernmental organizations<sup>102</sup> and human rights bodies established by human rights treaties to monitor state compliance.<sup>103</sup> The Committee on the Elimination of Discrimination against Women (the CEDAW Committee), the U.N. treaty body established to monitor the compliance of states with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>104</sup> used its inquiry procedures to investigate the grave and systematic nature of the gendered disappearances.<sup>105</sup> States are obligated under CEDAW Article 5(a) to address “prejudices and customary and all other practices” that are based on concepts of “the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.” This Article 5(a) wording is quoted by the Committee on Economic, Social and Cultural Rights,<sup>106</sup> established to monitor the International Covenant on Economic, Social and Cultural Rights, and in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.<sup>107</sup>

Thanks to the fact-finding report by several nongovernmental organizations that exposed the harmful effects of the Manila City Executive Order,<sup>108</sup> the CEDAW Committee is currently undertaking an Inquiry Report into the grave and systematic effects of the Manila City Ordinance on women’s health and equality.

States that have ratified CEDAW, known as States Parties, have an obligation to report to the CEDAW Committee on a periodic basis on what they have done to bring their laws, policies, and practices into compliance with the Convention. As a guide to states for preparing their reports, the CEDAW Committee explained that, “States parties’

obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.”<sup>109</sup>

In applying this mandate to the issue of polygyny, the CEDAW Committee has consistently articulated the need to eliminate cultural, customary, and legal norms that perpetuate the practice. The CEDAW Committee views polygyny as a harmful traditional practice,<sup>110</sup> and encourages states to analyze traditions, customs, and stereotypes of women’s roles in the family that contribute to the continuation of its practice.<sup>111</sup> In its Concluding Observations on the report of one state party, the Committee noted its concern about:

the prevalence in the State party of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep-rooted adverse cultural norms, customs and traditions, including forced and early marriage, [and] polygamy...that discriminate against women, result in limitation to women’s educational and employment opportunities and constitute serious obstacles to women’s enjoyment of their human rights.<sup>112</sup>

To combat such stereotypes, the CEDAW Committee encouraged public-awareness campaigns “to eliminate the gap between statutory law and social customs and practices, especially with regard to family law.”<sup>113</sup> This may be required for women in polygynous unions in states where family practices do not accord with statutory law. In particular, the Committee’s direction that state parties have an obligation to ensure “women’s awareness of their rights”<sup>114</sup> is relevant to those states where some women may be unaware of the legal protections available to them, should they wish to leave polygynous unions.

## **VII. Concluding Thoughts**

There is no doubt that global priorities, such as terrorism, financial crises, and climate change, have eclipsed the priority of women’s issues. We need to reconfigure women’s issues in view of changing global dynamics, but we must start by restructuring our own categorical thinking. Understanding how stereotyping takes place in our minds, how it is facilitated in particular contexts, and how it is fueled by the practices of social institutions, courts of law, the media, and different religious and cultural ideologies provides insight into how societ-

ies subordinate women and, sometimes, men. In opening our eyes to gender distinctions derived from social practices and to how societies inequitably construct gender differences, we will be better equipped to address the challenge of overcoming the many manifestations of structural discrimination. ●

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### Notes

1. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1999) 1 SA 6 (CC), para. 134 (per Sachs J.).
2. Jane Kramer, "A Canterbury Tale—The Battle within the Church of England to Allow Women to be Bishops," *The New Yorker* (26 April 2010): 47.
3. Nicole Winfield, "Female Ordination and Sex Abuse of Minors," *The Globe and Mail*, Toronto (16 July 2010): A9; Maureen Dowd, "Rome Fiddles, We Burn," *The New York Times—Week in Review, Sunday Opinion* (18 July 2010): 8.
4. Cary Franklin, "The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law," *New York University Law Review* 85, no. 1 (2010): 142.
5. K. Anthony Appiah, "Stereotypes and the Shaping of Identity," *California Law Review* 88 no. 1 (2000): 41–53.
6. See Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010), pp. 13–16.
7. *Ibid.*, pp. 59–68.
8. Walter Lippman, *Public Opinion* (New York: Macmillan, 1922; repr.1957), p. 95.
9. See *supra* note 1.
10. See *supra* note 6 at 20–24.
11. See Penelope J. Oakes, S. Alexander Haslam, and John C. Turner, *Stereotyping and Social Reality* (Oxford, U.K. and Cambridge, Mass.: Blackwell, 1994), p. 1.
12. Sandra Fredman, *Women and the Law* (New York: Oxford University Press, 1997), p. 3.
13. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
14. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
15. *Petrovic v. Austria* (1998), 33 E.H.R.R. 307 (European Court of Human Rights).
16. Franklin, *supra* note 4 at 169–170.
17. *Ibid.*, p. 170.
18. See Reva B. Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification," *California Law Review* 88, no. 1 (2000): 77–118; see also David B. Grusky, ed., *Social Stratification: Class, Race and Gender in Sociological Perspective*, 3rd ed. (U.S.A.: Westview Press, 2008).
19. See, e.g., *R. v. Ewanchuk*, 1 S.C.R. 330 (Can., Supreme Court 1999) (L'Heureux-Dubé J., concurring). Naming the sexual stereotypes enforced by the lower courts, explaining how stereotyping harmed the complainant, and identifying how stereotyping influenced the lower courts' decisions to acquit the defendant.

20. See CEDAW Committee, "Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico," CEDAW, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (27 January 2005), at para. 67.
21. See, e.g., *R. v. Ewanchuk*, *supra* note 19.
22. *Supra* note 6, p. 27.
23. *Ibid.*, p. 30.
24. *Ibid.*, pp. 31–36.
25. See Zanita E. Fenton, "Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence," *Columbia Journal of Gender & Law* 8 no. 2 (1999): 39–55.
26. See *supra* note 6, pp. 36–38.
27. *Ibid.*, p. 32.
28. See The Hon. Madame Justice Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice," *Journal of Social Distress and the Homeless* 10 no. 1 (2004): 89.
29. *Ibid.*
30. See Deborah L. Rhode and Joan C. Williams, "Legal Perspectives on Employment Discrimination," in *Sex Discrimination in the Workplace: Multidisciplinary Perspectives*, edited by Faye L. Crosby, Margaret S. Stockdale, and S. Ann Ropp (U.S.A., U.K., Australia: Blackwell Publishing, 2007), pp. 235, 245.
31. See *supra* note 6, pp. 32–33.
32. Peter Glick and Susan T. Fiske, "Sex Discrimination: The Psychological Approach," in *Sex Discrimination in the Workplace: Multidisciplinary Perspectives*, edited by Faye L. Crosby, Margaret S. Stockdale, and S. Ann Ropp (U.S.A., U.K., Australia: Blackwell Publishing, 2007), p. 156.
33. See *supra* note 6, pp. 33–36.
34. See Katharine T. Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought," *Wisconsin Law Review* 2 (1995): 305, 313–325.
35. See *supra* note 6, pp. 36–38.
36. See Ruth Halperin-Kaddari, *A State of Their Own* (University of Pennsylvania Press, 2004), p. 7; see also, William L. F. Felstiner, Richard Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." *Law and Society Review* 15 (1980): 630–649.
37. See *supra* note 6, p. 3.
38. *Ibid.*, pp. 45–58.
39. *Ibid.*, pp. 59–70, 104–130.
40. *Gonzalez et al. v. Mexico*, Judgment of November 16, 2009 of the Inter-American Court of Human Rights (the Cotton Field decision).
41. *Ibid.* at paras 402, 602(6).
42. *Ibid.* at para. 196–208.
43. *Ibid.* at para. 198.
44. *Ibid.* at para. 208.
45. *Ibid.* at para. 401.

46. Ibid.
47. Ibid.
48. "No More Stolen Sisters—The Need for a Comprehensive Response to Discrimination and Violence against Indigenous Women in Canada" (Ottawa: Amnesty, 2009), pp. 5–6.
49. See Claire A. Smearman, "Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists," *Arizona Law Review* 48 no. 3 (2006): 522.
50. See Rebecca J. Cook, Simone Cusack, and Bernard M. Dickens, "Unethical Female Stereotyping in Reproductive Health," *International Journal of Gynecology and Obstetrics* 109 (2010): 255–258.
51. See Reva B. Siegel, "Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart," *Yale Law Journal* 117 (2008): 1694–1800.
52. See *A.S. v. Hungary*, Communication No. 4/2004, U.N. Doc.CEDAW/C/36/D/4/2004 (2006), (finding Hungary in violation of its obligations under CEDAW to protect women against forcible sterilization.); *Maria Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R. Report No.71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003) (finding Peru in violation of its obligations under the Inter-American human rights system to protect women against forcible sterilization.).
53. See Simone Cusack and Rebecca J. Cook, "Stereotyping Women in the Health Sector: Lessons from CEDAW," *Journal of Civil Rights and Social Justice*, 16 (2010) 47–78.
54. See "Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City of Manila and Enunciating Policy Declarations in Pursuit Thereof," Exec. Order No. 003 (2000) (Phil.).
55. Miriam Temin, Ruth Levine, and Nandini Oomman, *Why it's the Right Time: Moving on Reproductive Health Goals by Focusing on Adolescent Girls* (New York: Women Deliver, 2010), pp. 1, 9, 38–39.
56. See Cook and Cusack, *supra* note 6, pp. 54–56.
57. Likhaan, ReproCen, and Center for Reproductive Rights, *Imposing Misery: The Impact of Manila's Contraception Ban on Women and Families* (New York: Center for Reproductive Rights, 2007), p. 12.
58. Ibid., pp. 14–15.
59. See "The Family Code of the Philippines," Article 218.
60. See *supra* note 57, p. 23.
61. Ibid., p. 27.
62. *Supra* note 55, pp. 7–11.
63. Rebecca J. Cook and Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice Canada, 2006), available on the Department of Justice website at [justice.gc.ca/eng/dept-min/pub/poly/poly.pdf](http://justice.gc.ca/eng/dept-min/pub/poly/poly.pdf) (last visited, July 22, 2010).
64. Daphne Bramham, *The Secret Lives of Saints, Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House, 2008); Carolyn Jessop and Laura Palmer, *Escape* (New York: Broadway Books, 2007); Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (U.S.A.: Random House, 2005); Elissa Wall with Lisa

Pulitzer, *Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs* (New York: Harper Collins, 2008).

65. *State of Utah v. Green*, 2004 UT 76 (In affirming Green's conviction of criminal nonsupport and for bigamy, the Court held that Utah's bigamy statute did not violate Green's federal constitutional right to free exercise of religion, was not unconstitutionally vague as applied to Green's conduct, and the State's use of Utah's unsolemnized marriage statute to establish a legal marriage between Green and one of his polygamous wives was appropriate); and *State of Utah v. Holm* 2006 UT 31 (Holm was appropriately convicted for bigamy and unlawful sexual conduct with a minor, and was not shielded by state and federal constitutional provisions on free exercise of religion and conscience, due process, and freedom of association).

66. In the Matter of a Reference by the Lieutenant Governor in Council set out in the Order in Council No. 533 dated Oct 22, 2009 concerning the Constitutionality of s. 293 of the Criminal Code of Canada, R.S.C. 1985, c. C-46, Supreme Court of British Columbia.

67. The South African Intestate Succession Act, 81 of 1987.

68. *Hassam v. Jacobs*, Case CCT 83/08 [2009] ZACC 19 para. 34 (per Nkabinde J) (The Intestate Succession Act differentiates between widows married in terms of the civil Marriage Act and those married in terms of Muslim rites, between widows in monogamous Muslim marriages and those in polygynous Muslim marriages, and between widows in polygynous customary marriages and those in polygynous Muslim marriages, and that differentiation amounts to discrimination in violation of the equality provision of the South African Constitution).

69. See, for e.g., *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 82, 87, 94, 95, 97 (L'Heureux-Dubé J. concurring) (challenging gender stereotyping in the sexual assault context) (Supreme Court of Canada).

70. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford 1765–1769), Book 1, Chapter 15, "Of Husband and Wife": "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert* [married woman]; is said to be *covert-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture."

71. See, e.g., *Divorce Act*, R.S., 1985, c. 3 (2nd Supp.) (Canada), s. 2 defining "spouse" as "either of two persons who are married to each other."

72. *Civil Marriage Act*, S.C. 2005, c. 33 (Canada).

73. Canadian Bill C-127 came into effect on January 4, 1983, replacing the *Criminal Code* provisions regarding rape and indecent assault with a three-tier structure of sexual assault. The amendments made the sexual assault provisions gender neutral and removed spousal immunities.

74. *Combined Initial and Third Periodic Reports to the Committee on the Elimination of Discrimination against Women: Papua New Guinea*, UN CEDAWOR, 46th Sess., U.N. Doc. CEDAW/C/PNG/3 (2010), at S. 5.4.

75. Article 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, December 18, 1979, 1249 U.N.T.S. 13.



Rebecca J. Cook

76. *Combined Initial and Sixth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Guinea-Bissau*, UN CEDAW OR, 44th Sess., U.N. Doc. CEDAW/C/GNB/6 (2009), at para. 84.

77. See “Hunting Bountiful: Polygamy in Canada,” *The Economist* (10 July 2004): 34; Sally Armstrong, “Trouble in Paradise,” *Chatelaine* (September 2004): 138 at 140–142; Angela Campbell, “Bountiful Voices,” *Osgoode Hall Law Journal* 47, no. 2 (2009): 205, in which some interview participants spoke of the negotiation of contraception:

“Q: What about other forms of contraception?”

Participant #9: For example?

Q: Condoms?

Participant #9: No. Most, most men would feel like that that was a violation of, like that they would sort of be, denying their faith.

Q: Even by using a rhythm method?

Participant #9: Oh, some may, but it’s more just sort of the act of mating should be reserved for getting pregnant, right?”

78. See interview with Debbie Palmer in Sally Armstrong, “Trouble in Paradise” *Chatelaine* (September 2004): 138 at 140–142.

79. *Supra* note 77 “Hunting Bountiful: Polygamy in Canada,” *The Economist* (10 July 2004): 34.

80. *Combined Second and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Malawi*, UN CEDAWOR, 35th Sess., U.N. Doc. CEDAW/C/MWI/2–5 (2006), at S.14.4.2.

81. Alean Al-Krenawi “Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic,” *Transcultural Psychiatry* 38 (2001): 193.

82. “Only the first marriage in polygamous marital situations is capable of being recognised as a valid marriage under migration law, given the exclusion under migration law of s88E of the Marriage Act. It follows that only this ‘first spouse,’ if the current on-going relationship, is capable of satisfying regulation 1.15A (1A)(a) requirements. Regulation 1.15A (1A)(b) requirement must also be met in order for this ‘first marriage’ to be a spouse relationship. In particular, the parties to this first marriage must have a mutual commitment to a shared life to the exclusion of all others, including any concurrent ‘spouses.’” This in effect requires any concurrent “spouses relationships” to have ended. See decision of the Migration Review Tribunal of Australia in the case of Mr. Salim Bhimani, 071367301 [2007] MRTA 575 (24 October 2007), available online at [austlii.edu.au/cgibin/sinodisp/au/cases/cth/MRTA/2007/575.html?stem=0&synonyms=0&query=polygamous](http://austlii.edu.au/cgibin/sinodisp/au/cases/cth/MRTA/2007/575.html?stem=0&synonyms=0&query=polygamous) (last visited, 14 July 2010).

83. Section 13.2 “Polygamous Marriages of the Overseas Processing and Operations Manual” (Citizenship and Immigration Canada, 2006), available online at [cic.gc.ca/english/resources/manuals/op/op02-eng.pdf](http://cic.gc.ca/english/resources/manuals/op/op02-eng.pdf) (last visited, 14 July 2010).

84. U.K. Immigration Directorates’ Instructions Ch 8 Sec 1, Annex C.

85. U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sec 212(a)(10)(A) (current version at 8 U.S.C. Sec 1182(a)(10)(A) (2008)) polygamy is a bar to admission into the US. See also, Claire Smearman, “‘Second Wives’ Club: Mapping Impact of Polygamy in U.S. Immigration Law,” *Berkeley Journal of International Law* 27, no. 2 (2009): 387–388, 400–403.

86. *Supra* note 82.
87. *Supra* note 83.
88. The European Commission on Human Rights in *Bibi v. the United Kingdom*, Appl 19628/92, 29 June 1992 (Eur. Comm. H.R.). Children from a first marriage who were resident in the U.K. with their father and his second wife, and were separated from their mother, the first wife of their father who was living in Bangladesh, claimed that their right to family life was violated. The Commission found that the denial of a visa to the first wife was a violation of the right to family life, but that it was justified as being necessary for the preservation of “monogamous culture.”
89. See Smearman *supra* note 85, pp. 438–446.
90. See *supra* note 88.
91. Smearman *supra* note 85, p. 441.
92. *Ibid.*, p. 439.
93. *Ibid.*
94. *Ibid.*, pp. 439–440.
95. *Ibid.*, p. 442.
96. *Bend it Like Beckham*, film directed by Gurinder Chadha (2002; Beverly Hills, Calif: 20th Century Fox Home entertainment, 2003).
97. Jeré Longman, “In Women’s Sports, Pushing Back at Stereotypes,” *New York Times–Sports Sunday* (21 March 2010): 1, 5.
98. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).
99. *Haines v. Leves*, 8 NSWLR 442 (Austl., Court of Appeal of New South Wales 1987).
100. *Supra* note 40, at para. 540.
101. *Ibid.*, para. 541.
102. Amnesty International, *Mexico: Intolerable Killings: 10 Years of Abductions and Murders of Women in Ciudad Juarez and Chihuahua: Summary Report and Appeals Cases*, AMR 41/026/2003 (10 August 2003).
103. Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser. L/V/II.117 Doc. 44 (7 March 2003) (Original in Spanish).
104. Arvonne Fraser, “Becoming Human: The Origins and Development of Women’s Human Rights,” *Human Rights Quarterly* 21 (1999): 853–906.
105. CEDAW, “Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico,” CEDAW/C/2005/OP.8/MEXICO (27 January 2005).
106. “General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights),” UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 11.
107. September 13, 2000, O.A.U. Doc. CAB/LEG/66.6.
108. *Supra* note 57.

109. *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., U.N. Doc. HRI/GEN/1/Rev.7 (2004), at para. 7.

110. See Committee on the Elimination of Discrimination against Women, “General Recommendation 21: Equality in Marriage and Family Relations” (13th Sess., 1994), in “Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies,” at 222, para. 14, U.N. doc. HRI/GEN/1/Rev.5 (2001). The CEDAW Committee has expressed concern and called for prohibition of the practice in numerous concluding observations. See, e.g., Bangladesh, para. 245, U.N. doc. A/59/38 (2004); Benin, para. 147, U.N. doc. A/60/38 (2005); Burkina Faso, para. 281–282, U.N. doc. A/55/38 (2000); Burkina Faso, para. 340, U.N. doc. A/60/38 (2005); Cameroon, para. 54, U.N. doc. A/55/38 (2000); Cape Verde, para. 33, U.N. doc. CEDAW/C/CPV/CO/6 (2006); Congo, para. 180, U.N. doc. A/58/38 (2003); Democratic Republic of the Congo, para. 215–216, U.N. doc. A/55/38 (2000); Egypt, para. 354–355, U.N. doc. A/56/38 (2001); Equatorial Guinea, para. 191, U.N. doc. A/59/38 (2004); France, para. 265, U.N. doc. A/58/38 (2003); Ghana, para. 35, U.N. doc. CEDAW/C/GHA/CO/5 (2006); Guinea, para. 122–123, U.N. doc. A/56/38(2001); Indonesia, para. 284(a), U.N. doc. A/53/38 (1998); Iraq, para. 191, U.N. doc. A/55/38 (2000); Israel, para. 163, U.N. doc. A/52/38 Rev.1, Part II (1997); Jordan, para. 174–175, U.N. doc. A/55/38 (2000); Kyrgyzstan, para. 169, U.N. doc. A/59/38 (2004); Maldives, para. 35, U.N. doc. CEDAW/C/MdV/CO/3 (2007); Mali, para. 11, U.N. doc. CEDAW/C/MLI/CO/5 (2006); Namibia, para. 110, U.N. doc. A/52/38/Rev.1, Part II (1997); Nepal, para. 208, U.N. doc. A/59/38 (2004); Nigeria, para. 153, U.N. doc. A/53/38/Rev.1 (1998); Senegal, para. 721, U.N. doc. A/49/38 (1994); Tajikistan, para. 13, 19, 35, U.N. doc. CEDAW/C/TJK/CO/3 (2007); Togo, para. 12, U.N. doc. CEDAW/C/TGO/CO/5 (2006); Turkey, para. 367, U.N. doc. A/60/38 (2005); Turkmenistan, para. 40, U.N. doc. CEDAW/C/TKM/CO/2 (2006); Uganda, para. 153, U.N. doc. A/57/38 (2002); United Republic of Tanzania, para. 229, U.N. doc. A/53/38/Rev.1 (1998); Uzbekistan, para. 31, U.N. doc. CEDAW/C/UZB/CO/3 (2006); Yemen, para. 392, U.N. doc. A/57/38 (2002); Zambia, para. 252, U.N. doc. A/57/38 (2002), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 48; Guinea-Bissau, U.N. Doc. CEDAW/C/GNB/CO/6 (2009), at para.41; Tanzania, U.N. Doc. CEDAW/C/TZA/CO/6 (2008), at para. 117–118.

111. See, e.g., Bhutan, para. 116, U.N. doc. A/59/38 (2004); Burkina Faso, para. 342, U.N. doc. A/60/38 (2005); Equatorial Guinea, para. 192, U.N. doc. A/59/38 (2004); Guinea, para. 122–123, U.N. doc. A/56/38 (2001); Iraq, para. 191–192, U.N. doc. A/55/38 (2000); Israel, para. 262, U.N. doc. A/60/38 (2005); Mali, para. 12, U.N. doc. CEDAW/C/MLI/CO/5 (2006), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights (2008), p. 50.

112. “Concluding Observations of the Committee on the Elimination of Discrimination against Women: Timor-Leste,” UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/TLS/CO/1 (2009), at para. 27; see also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/COD/CO/4 (2009), at para. 1; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Madagascar, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/MDG/CO/2 (2009), at para. 16.

113. "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Guinea," UN CEDAWOR, 25th Sess., UN Doc. A/56/38 (para. 97-144), (2001), at paras 122 & 123.

114. *Ibid.* at para. 123; see also "Concluding Observations of the Human Rights Committee: Uzbekistan," UN HRCOR, 98th Sess., U.N. Doc. CCPR/C/UZB/CO/3 (2010), at para. 21.