

BEATRIZ AGAINST EL SALVADOR

Case 13.378

**EXPERT OPINION BEFORE
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

by

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I. Overview

A. Introduction

1. The claim in *Beatriz v. El Salvador* raises important questions about how harmful gender prejudices and stereotypes compromise women's access to health care and to fair trials. Beyond determining the immediate outcome of this case, the decision of the Inter-American Court of Human Rights has the potential to influence the development and application of international norms and jurisprudence relating to adverse stereotyping of women.
2. This expert opinion is accordingly offered to address how the law, public policies and state practices apply and perpetuate wrongful gender prejudices and stereotypes, especially as used by health care professionals and by members of the judiciary. It concentrates on how the present Court and other courts have determined whether gender prejudices and stereotypes constitute or exacerbate discrimination against women and how they might undermine women's ability to access health care and fair trials, including in criminal matters. This opinion highlights the key obligations under regional and international human rights law to address and remedy harmful gender prejudices and stereotypes. The opinion is of a general character and does not address the specific facts of the *Beatriz* case.

B. The author's relevant experience and qualifications to offer this expert opinion

3. The author has accumulated substantial legal expertise in international women's rights law¹ and reproductive health law,² including how the design and application of such laws are influenced by gender prejudices, stereotypes and stigma.³ She serves as an Associate Editor of the ethical and legal section of the *International Journal of Gynecology and Obstetrics*, the official journal of the over-130 members International Federation of Gynecology and Obstetrics (FIGO), of whose ethics committee she was a founding member in 1985. She has served as an expert third party intervener in wrongful gender stereotyping cases before this and other courts.⁴ The author has sought to assist in the normative development of international human rights law, policy and practice to eliminate gender discrimination, including wrongful gender prejudices, stereotypes and stigma.

II. Understanding Gender Prejudices and Stereotypes, their Contexts and Modes of Perpetuation

4. "Gender prejudices" are pre-judgments about how women and men actually or should think, feel or act. They are perceptions about types of people before their individual personal attributes or characteristics are known. This Court has explained that "gender stereotypes refer to a preconception of the attributes, conducts or characteristics of men and women and the respective roles they play or should play."⁵ "Stereo" is the Greek term for "solid" and "type" is a mold, meaning a hollow shell that shapes its contents. When stereotypes are constructed, they enable a stereotyped individual to be treated according to

that preconceived solid mold and not according to their individual attributes. Gender stereotypes take many forms, including:

- sex stereotypes that ascribe physical and cognitive attributes or characteristics to men or women. They can relate to sex-specific characteristics, such as pregnancy.
 - sexual stereotypes that ascribe sexual attributes or characteristics to men or women,
 - sex-role stereotypes that ascribe roles or behaviors to men or women because of their physical, social and cultural constructions, and
 - compounded stereotypes that ascribe attributes, characteristics or roles to different subgroups of men or women such as those who are poor, have stigmatized health conditions, or belong to particular ethnic or racial groups.⁶
5. Whatever the forms of gender stereotypes, their perpetuation depends on how individual, situational and broader factors contribute to social stratification and subordination of women or men:

Individual factors, which refer to how individuals form gender stereotypes through their everyday interactions with family, friends and, for example, colleagues, and also through exposure to cultural heritage. Stereotypic beliefs associated with sex and gender often create foundations for discriminatory treatment, for instance among health officials or judges. As explained by the American Psychological Association, “whether realized or not, stereotypic beliefs create expectations about a person before that person is encountered and lead to distorted judgments about behavior. Therefore, stereotypes become the basis for faulty reasoning leading to biased feelings and actions, disadvantaging (or advantaging) others not because of who they are or what they have done but because of what group they belong to.”⁷

Situational factors, which include antecedent or predisposing conditions in a particular sector, including the health care sector and the judiciary, that increase the likelihood of sympathetic or hostile gender stereotyping. Stereotyping is most likely to intrude when the target of the stereotype is isolated; that is, when there are few of a kind in an otherwise homogeneous environment. Where there are many more men than women in a social group, for instance, there is more likelihood that women will be stereotyped in dismissive or negative ways,⁸ or subjected to violent or oppressive controls through, for example, domestic violence.⁹

Broader factors, which include historical, cultural, religious and legal factors that facilitate the perpetuation of gender stereotypes, such as that women are unsuited for social, professional, community or spiritual leadership. Gender stereotypes can be understood as arising out of a history of patriarchy or, for example, rigid gender hierarchies and consequent legal and social practices that prejudice women’s equal exercise of their human rights and freedoms.¹⁰

6. Understanding these factors assists in determining why and how gender stereotyping pervades and persists in different sectors. “Gender stereotyping” is the practice of ascribing attributes, characteristics, or roles to individuals based on their perceived membership in a social group of women or men.¹¹ The practice of identifying women with particular social groups, especially when the individual women do not associate themselves with those groups but seek opportunities for self-determination, is a “significant challenge to the practical realization of women’s human rights.”¹²
7. Gender stereotyping persists for various reasons, including the need:
 - to describe the general attributes of a group, such as that women tend to be physically weaker than men,
 - to prescribe certain roles or attributes, such as that women should be mothers and caregivers irrespective of their individual desire to be mothers and provide care for others, and
 - to falsify identities or attributes, such as that women who wear short skirts are sexually provocative and promiscuous.¹³
8. Whatever the reasons for the persistence of stereotyping, conditions for subordination of women are exacerbated when gender stereotypes are socially pervasive, articulated across social sectors and/or socially persistent and uncritically repeated over time.¹⁴ Stereotypes are aggravated when reflected or embedded in the law, social policies or respected practices, and in the reasoning and language of state officials, including health officials and judges.

III. State Obligations to Eliminate Wrongful Gender Prejudices and Stereotypes

A. Sources of Obligations

9. Legal authority for state obligations to eliminate all forms of wrongful gender prejudices and stereotypes is found in the *American Convention on Human Rights*¹⁵ (the American Convention), the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*¹⁶ (the Convention of Belém do Pará) and, for instance, the *Convention on the Elimination of All Forms of Discrimination against Women*¹⁷ (the CEDAW Convention). The American Convention’s Article 24 codifies the right to equal protection of and before the law, while its Article 1 requires States Parties “to respect the rights and freedoms” recognized in the Convention and to ensure “the free and full exercise of those rights and freedoms, without any discrimination for reason of ... sex” Article 5(1) requires respect for the integrity of the person and Article 11(1) recognizes individuals’ rights to honor and dignity. Article 2 obligates States Parties to adopt legislative and other measures to give domestic effect to those rights and freedoms.
10. This Court has taken judicial notice of restrictive gender stereotypes, and explained that “[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women,”¹⁸ finding that these are “incompatible with international human rights law and measures must be taken to eliminate them”.¹⁹ The

Court has condemned gender hierarchies,²⁰ prejudices and stereotypes as contributing to a broad range of human rights violations including gender-based violence²¹ and denial of private and family life,²² decisional autonomy²³ and a fair trial.²⁴ The then President of the Court has explained that “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....”²⁵

11. The Belém do Pará Convention recognizes gender-based violence as “an offense against human dignity and a manifestation of the historically unequal power relations between women and men” (Preamble, para 3). It acknowledges that women’s right to be free from violence includes the right to be free from all forms of discrimination and to “be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination” (Article 6). States Parties are obligated to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women” (Article 7(e)). States Parties are further obligated “to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women” (Article 8(b)).
12. The CEDAW Convention defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms” (Article 1). States’ laws, policies and practices become discriminatory when they operate to conceal individuals’ attributes through stereotyping that have “the effect or purpose of impairing or nullifying” the exercise by women of their rights.²⁶ They also become discriminatory when they create gender hierarchies by categorizing women, or subgroups of women, into a subordinate status. Whether dealing with wrongful gender stereotyping of women generally or subgroups of women, their wrongs need to be analyzed from the perspective of the discriminatee.²⁷
13. The CEDAW Convention obligates States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (Article 2(f)). In addition, it requires the modification of “social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women” (Article 5(a)). Where a law, regulation, custom or practice makes a distinction, exclusion or restriction on the basis of a gender stereotype that has the purpose or effect of impairing or nullifying women’s equal rights and fundamental freedoms, it is a form of discrimination that States Parties must eliminate. That is, states must reformulate laws, policies and practices to ensure that they do not devalue women

or reflect the patriarchal attitudes that attribute particular subservient characteristics or roles to women through prejudices and stereotypes that deny them, for example, equal access to health care (Article 12) and equality before the law (Articles 2(c) and 15(1)).

14. The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has elaborated the nature of these obligations in its General Recommendations, its views on Communications and its findings on Inquiry reports. General Recommendation 25 obligates states to “address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts...but also in law, and legal and societal structures and institutions” in order to achieve substantive equality.²⁸ General Recommendation 28 explains that “Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.”²⁹ The CEDAW Committee has obligated states to combat discrimination and dismantle gender stereotypes as they relate to a broad range of rights.³⁰ This opinion focuses on how prejudices and stereotypes enable discrimination in the denial of essential health care and fair trials.
15. Treaty monitoring bodies have found discrimination where it is shown that laws, policies or practices make a difference in treatment on the basis of prejudices and stereotypes of women as inferior and subordinate to men, and where that differential treatment offends women’s rights.³¹ Where gender stereotypes do not constitute a form of discrimination for purposes of Articles 1 and 24 of the American Convention, Article 2(f) of the CEDAW Convention or Article 6(a) of the Convention of Belém do Pará, it is sufficient for condemnation that there is a finding that practices are based on the inferiority or subordination of women.³² Thus, states have obligations under these and other treaties³³ to ensure that their laws, policies and practices are free of hostile gender prejudices and stereotypes, including those forms and manifestations that subordinate women. This obligates states to name the prejudices and stereotypes (Section III.B.) and to ensure their non-repetition (Section III.C.).

B. Obligations to name gender prejudices and stereotypes and to articulate and condemn their harms

i. Naming prejudices and stereotypes generally

16. The ability to eliminate a wrong is contingent on it first being ‘named.’ Naming is an important tool for revealing an otherwise hidden harm, and explaining its implications. The wrong thereby is labeled as a legitimate human rights concern, and an illegitimate offense. To borrow from a medical metaphor, a pathology first needs to be diagnosed and named to be effectively treated.³⁴ Identifying and naming operative stereotypes necessitate an examination of the attributes, characteristics or roles assigned to affected individuals. This requires determining the form of the gender stereotype, whether it be a

sex, sexual, sex-role or compounded stereotype, or a combination of some forms. Determination requires a careful analysis of the contextual factors such as the individual, situational or broader factors. Assessing the broader factors helps to determine the nature and hierarchy of prevailing gender relations and how such factors contribute to and perpetuate violations of women's rights.³⁵ Naming necessitates understanding why a gender stereotype persists in different contexts, that is to describe, prescribe or falsify attributes of women or subgroups of women. Recognizing the purpose behind the formulation of gender prejudices and stereotypes is important. As a legal scholar has explained, "social power, its acquisition and maintenance, is the driving force behind the formulation of stereotypes."³⁶ A final step is articulating how gender prejudices and stereotypes harm the exercise of human rights.

17. Courts need to articulate how negative inferences can be drawn from prescriptive stereotypes. For example, the Inter-American Commission on Human Rights has explained that the stereotype of women as homemakers and caretakers and the stereotype of men as breadwinners are often reflected in laws that give men sole legal authority over the family and its finances.³⁷ The homemaker/caretaker stereotype of women often evolves into prescriptive stereotypes that women should be passive, docile and deferential to men, both physically and intellectually. Such a prescriptive stereotype that men should be heads of households may perpetuate the view of men as holding exclusive power within family relations and ultimately being entitled to subordinate women within those relations. This view may, in turn, effectively give men so-called "permission" to discipline women through coercion and even violence if they do not defer to male authority.³⁸
18. Identifying how the compounded nature of these prejudices and stereotypes contributes to intersectional discrimination requires "going beyond single-axis thinking and reimagining discrimination as something which can be causally based on multiple identities."³⁹ As this author explains, "doing intersectionality" also requires exploring what "the nature of such discrimination is, namely same and different patterns of group disadvantage associated with multiple identities considered as a whole and in their relevant context." The purpose of doing intersectionality is "to transform these patterns and indeed dismantle them as structures of disadvantage and systems of power." This Court has identified the compounded stereotype of lesbian women as "bad mothers" and explained how this stereotype influenced the Supreme Court of Chile to deny child custody to a lesbian woman. This Court explained that the Chilean Court violated the rights of this woman by replacing an impartial assessment of her parental capacities with its own unproven preconception of lesbian women as bad mothers.⁴⁰ In rejecting this preconception, this Court began to dismantle the intersectional discrimination against lesbian women.

ii. Naming prejudices and stereotypes of female patients or complainants

19. There are distinctive features in the health sector and in the administration of justice that fuel the persistence of detrimental prejudices and stereotypes. A common feature in both these sectors is the predominance of men in positions of authority while women serve in

subservient positions. In the health sector, predisposing conditions for the persistence of stereotypes include the power dynamics in the doctor-patient relationship and class differentials between doctors, usually of a relatively high socio-economic status, and patients, often of a lower status. Doctors might stigmatize poor women who are acting in counter-stereotypical ways, for example women who do not want to be mothers or who want to delay motherhood. Exacerbating the individual prejudices of doctors are broader contextual factors, such as the criminalization of abortion or paid surrogate motherhood, that enable health care providers to taint women seeking or providing those services as immoral.⁴¹ As a result, this Court and treaty bodies have recognized that when discriminatory stereotypes provide rationales for obstetric abuse⁴² and restrictive abortion laws,⁴³ they have egregious effects on women seeking reproductive health services and offend the rights of those women.

20. Predisposing conditions in the administration of justice that enable the persistence of gender prejudices and stereotypes include some of the same conditions that exist in the health sector, such as gender hierarchies and lack of gender diversity within the judiciary and a relatively higher socio-economic status of judges than of individual litigants, particularly criminal defendants. A distinctive feature is that gender prejudices and stereotypes can persist in the courts' written judgments. If left unchecked, resort by judges to demeaning stereotypes of women create a climate of judicial impunity.
21. Gender prejudices and stereotypes include those of female patients or complainants as:
 - a. lacking capacity to make their own decisions
 - b. existing as reproductive instruments,
 - c. lacking credibility,
 - d. exhibiting disreputable personal characteristics, and
 - e. making unmeritorious requests for health care or for legal relief.

Some gender prejudices and stereotypes are common to both the health care and administration of justice sectors, while others are specific to the health care sector, and still others are dominant in the administration of justice.

a. lacking capacity to make their own decisions

22. Stereotypes of women as lacking capacity to make their own decisions about their health care are based on prejudices about women and girls as irrational, emotional or vulnerable. This Court found a violation when a public health doctor stereotyped a poor, refugee woman as vulnerable as a basis on which to sterilize her without her free consent.⁴⁴ The Court was careful to underscore that the health care providers wrongfully denied this woman the information and opportunity necessary to make a fully informed and free decision because she was a woman and an impoverished refugee. The compounded nature of the operative stereotype was exacerbated by the health care context, that is by "the asymmetry in the exercise of power by the physician based on his special professional knowledge and control of information."⁴⁵

23. Young girls are often assumed to lack capacity for decision-making in the health sector despite the requirement that they should be treated according to their evolving capacities for decision making.⁴⁶ The CEDAW Committee found a state responsible for ignoring the decision-making capacities of a thirteen-year-old sexually abused girl when it denied her emergency spinal surgery because of her pregnant status. The Committee noted that the decision to postpone the surgery, when the delay resulted in her paralysis, was due to stereotypical thinking that “the protection of the foetus should prevail over the health of the mother.”⁴⁷ Such persistent biases can cloud visions of how best to protect prenatal life consistently with women’s rights to make their own decisions.
24. The Portuguese Constitutional Court exemplified clearer vision in deciding that prenatal life is best protected through non-dissuasive counseling that supports pregnant women as responsible decision makers and that treat them with “utter respect for [their] decisional autonomy.” Such women should not face punishment for acting in what stereotypically might seem to be ‘selfish’ and ‘hedonistic’ ways.⁴⁸ The Court explained that the duty of protection of pre-natal life fundamentally “falls on the state to fight against ‘risk factors’ ... through education and to adopt social policies favoring responsible conception as well as willingness to continue pregnancy.”⁴⁹
25. The prejudice that legislators and judges have superior decision-making capacity to know better how to protect women’s interests than women themselves has found favor with the U.S. Supreme Court. The majority upheld the prohibition of an abortion procedure, and the criminalization of physicians who disregard the prohibition to serve their patients’ health interests, in observing that:

“Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”⁵⁰
26. This observation feeds into the hostile prejudice that women are incapable of reaching difficult and painful moral decisions that they may regret. The risk of regret is inherent in reaching many moral decisions in individuals’ lives, but this does not justify placing such decisions in the hands of legislators or courts. Indeed, a dissenting justice explained that:

“the Court [majority] deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women’s place in the family and under the Constitution - ideas that have long since been discredited.”⁵¹
27. The decision to continue a pregnancy, such as of a severely impaired fetus, can equally be difficult, painful and a source of regret, but courts⁵² and treaty bodies⁵³ have not considered it a justification to remove that decision from pregnant women, and impose termination of pregnancy. The Constitutional Court of Colombia dismantled the prejudice that women lack conscience, understood as their “ability to call their souls their own,”⁵⁴ by invoking

women's rights of conscience as a ground to decriminalize consensual abortion up to 24 weeks gestation and thereafter under certain conditions.⁵⁵

b. existing as reproductive instruments

28. The stereotypes of women as reproductive instruments consider women as existing only to procreate irrespective of their own wishes. The Constitutional Court of Colombia expressly rejected the stereotypical thinking that women's only natural role and destiny is motherhood, on which the then prohibitive national abortion law was based. The majority explained that:

“When the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.”⁵⁶

29. In naming the prescriptive stereotype of women as a “reproductive instrument for the human race”, the Court extended the grounds for abortion and in so doing affirmed women's right to dignity free of prescriptive stereotypes. The Human Rights Committee, established to monitor compliance with the International Covenant on Civil and Political Rights,⁵⁷ held a state accountable for violating the rights of a woman carrying a fetus with a fatal impairment because she was forced, as a result of her country's prohibitive abortion law, to travel abroad to access legal abortion services. The Committee noted that the country's “criminalization of abortion subjected [the petitioner] to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination.”⁵⁸

c. lacking credibility

30. The credibility of women requesting lawful health care is undermined by prejudices and stereotypes of women's unreliability or untrustworthiness. Such degrading prejudices are implicit in laws and protocols that require third party validation of women's abortion requests to ensure they have met the legal indications to justify the procedures. The dismantling of such derogatory assumptions about women is evident in the Bolivian Constitutional Court decision to repeal the judicial authorization requirement for abortion in cases of rape,⁵⁹ and in the Canadian Supreme Court decision to hold the abortion law unconstitutional in part because of the onerous requirement for women to obtain approval of a hospital therapeutic abortion committee.⁶⁰
31. The credibility of a complainant, a suspect or a witness is often undermined by false stereotypes. When they are, this Court has identified the stereotyping as a form of discrimination.⁶¹ The Court has held a state accountable for faulty judicial reasoning that rejected testimony of a woman suspected of having committed an offense because of prejudices that statements of suspects are invariably false.⁶² This Court explained that biased assumptions about women accused of acts of terrorism can preclude a careful investigation into the defendants' explanation of compliance under threats of sexual violence or impede access to a fair and impartial trial.⁶³ The CEDAW Committee has held states accountable for the use of false stereotypes resulting in the discriminatory denial of

the right to a fair trial.⁶⁴ Discounting female complainants' credibility on the basis of false prejudices sends a message that the state does not consider such complainants to be worthy of a fair trial or protection against discrimination. It also sends a message that discrimination against them is a lesser form of discrimination that the state does not need to remedy.⁶⁵

d. exhibiting disreputable personal characteristics

32. State officials are known to discredit or blame female patients, complainants or victims because of their perceived disreputable personal characteristics. In the health care sector, prejudices regarding Roma women as unhygienic have been used to deny them access to maternal healthcare and/or to charge them illegal fees to access care.⁶⁶ Women with perceived disreputable personal characteristics are often stigmatized. Stigma production has a variety of phases.⁶⁷ That is, women seeking abortion are often *marked* as different and that difference is *linked through stereotyping* to undesirable characteristics such as deviance or immorality. Then the health care providers can *separate* them from other patients and treat them according to those derogatory stereotypes. In so doing, they *deny* women their rights to necessary health information and health care. Throughout these phases of stigma production, the criminal nature of abortion law *disempowers* women and enables health care providers to stigmatize them and to treat them according to their spoiled identities and not according to their actual needs.
33. In a case addressing the sexual abuse of an adolescent girl, this Court explained that “personal prejudices and gender stereotypes affect the objectivity of State officials responsible for investigating complaints submitted to them, influencing their perception to determine whether or not an act of violence had occurred...”.⁶⁸ The Court found that “gender stereotypes were used by some justice operators to refer to personal attributes of the alleged victim and thus question the existence of sexual violence.”⁶⁹ In another case this Court explained how state officials had generated hostile stereotypes of the victim's attributes by citing her mother's testimony that when she reported her daughter's disappearance, the authorities told her that her daughter “had not disappeared, but was out with her boyfriend 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.”⁷⁰ This Court determined that the authorities' prejudicial comments about the victim's personal characteristics “constitute stereotyping.”⁷¹

e. making unmeritorious requests for health care or for legal relief

34. Decision-makers, such as doctors determining patients' eligibility for treatment and judges determining the legality of claims, must address the merits of the facts and evidence before them, and not be distracted by stereotypical prejudgments. The European Court of Human Rights held a state accountable for the failure of its public health doctors to provide a pregnant patient with timely diagnosis of a fetal condition due to their prejudicial belief that diagnosis of fetal impairment would cause her to make an “unmeritorious” request for medical treatment.⁷² The CEDAW Committee acknowledged that biased assumptions about the merits of a complaint can distort a judge's perception about its validity, sometimes resulting in a miscarriage of justice.⁷³

C. Obligations of non-repetition

35. Where breaches of the obligations to eliminate discriminatory gender prejudices and stereotypes are found, the American Convention's Article 63.1 empowers this Court to order remedies that address the situation that constituted the breach of a right or freedom. In addition to providing for awards of material and moral damages, this Court has ordered measures to guarantee non-repetition and to address the structural conditions that facilitated the initial violation to take place.⁷⁴ This Court has explained that

“bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [. . .], the reparations must be designed to change this situation, so that their **effect is not only of** restitution, but also of rectification. In this regard, re-establishment **of the same** structural context of violence and discrimination is not acceptable.”⁷⁵

The Court has identified that the transformative elements of reparations must aim to “restore victims to their situation prior to the violation insofar as possible [but only] to the extent that this does not interfere with the obligation not to discriminate,” ... in order to “identify and eliminate the factors that cause discrimination,” and to include a “gender perspective.”⁷⁶

36. Obligations of non-repetition require states to develop laws, policies and practices that are free of discriminatory gender stereotypes and to develop the capacities to promote gender affirming laws, policies and practices free of prejudices and stereotypes. That is, remedial measures must be “gender specific as well as gender transformative.”⁷⁷ Socially pervasive and persistent gender prejudices and stereotypes in a state's health and/or legal system generate a climate of impunity surrounding violations of women's rights. This impunity has its roots in the prejudicial conduct of public officials that fail to prevent, punish or remedy gender discrimination, and in state laws that construct women as inferior to men, and therefore not entitled to equal citizenship stature. Courts and human rights treaty bodies have called for transformative measures to address this impunity by obligating states to prevent revictimization of victims of sexual violence,⁷⁸ and to ensure proper criminal investigations⁷⁹ and, for example, fair trials.⁸⁰
37. Calls of treaty bodies and constitutional courts for depenalization, liberalization and decriminalization of abortion are ever clearer,⁸¹ including the institutionalization of procedures for pregnant women to appeal decisions denying them essential health care.⁸² These calls have exposed the dehumanizing process by which criminal abortion laws are used to mark women, link them to undesirable characteristics through hostile stereotyping and separate them from more worthy women in order to justify degrading treatment through denial of essential health care.⁸³ Due in part to these stigmatizing effects of criminally constructing women, constitutional courts are increasingly holding, albeit with some exceptions, that criminal abortion laws are not justified,⁸⁴ especially when states can effectively protect prenatal life consistently with women's rights by addressing risk factors for unplanned pregnancy.⁸⁵

38. Courts and treaty bodies are requiring states to develop capacities to ensure that public officials, including health care providers and justice operators, have the necessary knowledge to name the hostile stereotypes to which women are exposed, and recognize how such stereotyping can lead to violations of women's rights. This Court has urged states to implement gender-sensitive training to "enable all officials to recognize the effect on women of stereotyped ideas and opinions in relation to the meaning and scope of human rights."⁸⁶ Consistently with the duties under CEDAW Convention's Article 10(c) and the Convention of Belém do Pará's Article 8(b) to eliminate gender stereotypes in education, including professional education, this Court has ordered states to implement "permanent education and training programs and courses in [...] elimination of stereotypes of women's role in society."⁸⁷
39. This Court has ordered a state to inform women of their rights to free and informed decision making and the obligation of doctors to respect those rights⁸⁸ and adopt within one year a program of training on informed consent, gender-based discrimination, stereotypes and gender-based violence for medical students and all persons who are part of the health and social security system.⁸⁹ Other approaches for the development of capacities to name the stereotypes and to identify their harms include the formulation of ethical guidance, professional codes of conduct and criteria for licensure that reflect a gender perspective. For example, the Committee on Ethical and Professional Aspects of Human Reproduction and Women's Health of the International Federation of Gynecology and Obstetrics (FIGO) has issued ethical guidance explaining that professional integrity requires that doctors treat female patients and colleagues free of negative stereotypes.⁹⁰ Temporary special measures, also known as "affirmative action," might be employed to accelerate the development of such ethical guidance, professional protocols and gender-integrated curricula to promote positive gender roles among the medical and legal professions until "the objectives of equality of opportunity and treatment have been achieved."⁹¹
40. This Court⁹² and other treaty bodies⁹³ have ordered training program for judges, and other law enforcement personnel as appropriate, to develop their capacities to identify and challenge such wrongful stereotypes, prejudices and assumptions to ensure their impartiality in judging. The Canadian Judicial Council's Ethical Principles for Judges explain that judges cannot be influenced by "attitudes based on stereotype, myth or prejudice", and need to "make meaningful efforts to recognize and dissociate themselves from such attitudes."⁹⁴ Recommendations have been made to reform codes of professional conduct and rules of evidence to allow for the regulation of stereotypic speech where it prejudices the integrity and fairness of the judicial process.⁹⁵ Further, codes of conduct should require exclusion of evidence that is based on misleading "stereotypic statements, innuendo and allusions."⁹⁶ Accordingly, courts have ordered new trials of the evidence where prejudices and biases have interfered with the impartiality of judicial proceedings.⁹⁷
41. An initiative of the U.K. Judicial College to build capacity of judges to ensure that legal proceedings are conducted impartially and free of biases is the production of the *Equal Treatment Bench Book* that includes guidance for judges on gender and other forms of stereotyping. Among other things, this bench book identifies common stereotypes about

women and men and recognizes how they can be discriminatory. This text clarifies that judges should not make stereotypical assumptions about women and men and provides strategies to dismantle stereotypes and myths leading to discrimination.⁹⁸ While this bench book is aimed at judges, it could be adapted to build capacity of health care providers to ensure equal and dignified treatment of their patients.

42. Obligations of non-repetition include other measures, such as public acknowledgments of responsibility for the violations⁹⁹ and information campaigns on official websites, TV channels and radio stations.¹⁰⁰ States will know what mix of non-repetition measures is most effective in their country to transform gender hierarchies and to address any discriminatory gender stereotypes. Therefore, courts and human rights treaty bodies might ask state authorities to explain the measures that they have chosen to address derogatory gender prejudices and stereotypes, and the measures' effectiveness and benchmarks for compliance.

IV. Conclusion

43. This Court has the opportunity to show states how to move beyond prevailing gender prejudices and stereotypes by obligating them to
 - name the persistent hostile stereotypes of women in the delivery of reproductive health care and in the administration of justice,
 - articulate and condemn the stereotypes' harms to women and their subgroups, and
 - develop effective measures of non-repetition, including reforming laws, policies and practices that embed gender prejudices and stereotypes when these enable discrimination that subordinates women through stigmatization, and building capacities to promote gender affirming measures free of prejudices, stereotypes and stigma.

In taking this opportunity, this Court would deepen its legacy of gender transformation by acting within its power to eliminate all forms of discrimination against women.

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- 1 See, for example, R.J. Cook (ed.), *Frontiers of Gender Equality: Transnational Legal Perspectives* (Philadelphia: UPenn Press, forthcoming 2023); R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, (Philadelphia: UPenn Press, 1994); revised Spanish edition (Bogota: Profamilia, 1997).
- 2 See, for example, V. Undurraga & R.J. Cook, “Article 12” [Health], in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* 2nd ed. (Oxford: OUP, 2023) 459-486; R.J. Cook, J.N. Erdman & B.M. Dickens, eds., *Abortion Law in Transnational Perspective: Cases and Controversies* (Philadelphia: UPenn Press, 2014), Spanish edition: *El aborto en el derecho transnacional: Casos y controversias* (Mexico: FCE, 2016); R.J. Cook, B.M. Dickens & M. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford: OUP, 2003), *Salud Reproductiva y Derechos Humanos: Integración de la medicina, la ética y el derecho* (Bogota: Profamilia, 2003), [Spanish version.pdf](#).
- 3 See, for example, R.J. Cook & S. Cusack, *Gender Stereotypes: Transnational Legal Perspectives* (Philadelphia: UPenn Press, 2010); Spanish edition *Estereotipos de Género: Perspectivas Legales Transnacionales* (Bogota: Profamilia, 2011) [Spanish version.pdf](#); R.J. Cook, “Cecilia’s contributions to the legal understanding of gender prejudices and stereotypes,” in *La Lucha Por Los Derechos Humanos Hoy: Estudios en Homenaje a Cecilia Medina Quiroga* [The struggle for human rights today. Book Tribute to Cecilia Medina Quiroga], O. Parra et al. eds. (Valencia, Chile: Tirant lo Blanch, 2017), 269-274.
- 4 R.J. Cook, Expert Opinion submitted to the IACtHR in the case of *Gladys Carol Espinoza Gonzáles v. Peru*, 15 pp, 27 March 2014, cited in *Gladys Carol Espinoza Gonzáles v. Peru*, Judgement of November 20, 2014, (Preliminary Objection, Merits, Reparations, and Costs) (IACtHR), paras 272, 278 & 281; S. Cusack, R.J. Cook et al., *González et al. v. Mexico*, Expert Opinion submitted to the IACtHR, 21 pp., Dec 3, 2008, cited in *González et al. (“Cotton Field”) v. Mexico*, Judgment of 16 November 2009, (Preliminary Objection, Merits, Reparations, and Costs) (IACtHR), para 14; R.J. Cook, S. Dughman & M. Cavallo, *Amicus Curiae* submitted to the Supreme Court of Argentina in the case of *F, A.L. s/ Medida Autosatisfactiva*, Expte. N° 259/2010, Tomo: 46, Letra: F, Tipo: REX, a V.E., 20 pp, Sept 20, 2010, [Spanish submission](#).
- 5 *I.V. v. Bolivia*, Judgment of 30 November 2016, (Preliminary Objection, Merits, Reparations, and Costs) (IACtHR), para 187. See *Espinoza Gonzáles*, *supra* note 4, para 268, *Cottonfield*, *supra* note 4, para 401; see Cook & Cusack, *supra* note 3, 9.
- 6 Cook & Cusack, *supra* note 3, 25-31.
- 7 American Psychological Association, “In the Supreme Court of the United States: *Price Waterhouse v. Ann B. Hopkins*. Amicus Curiae Brief for the American Psychological Association” (1991) 46 *American Psychologist* 1061, at 1064.
- 8 S.T. Fiske et al., “Social Science Research on Trial: Use of Sex Stereotyping Research in *Price Waterhouse v. Hopkins*” (1991) 46 *American Psychologist* 1049, 1050.
- 9 Z.E. Fenton, “Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence,” 8 *Colum. J. Gender & L.* 1-64 (1998-1999).
- 10 Cook & Cusack, *supra* note 3, 32-36.
- 11 *Ibid.*, 12.
- 12 Commission on the Status of Women, *Commemorating 30 Years of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. E/CN.6/2010/CRP.12 (2010), paras 10–11.
- 13 Cook & Cusack, *supra* note 3, 13-20.
- 14 *Ibid.*, 22-24.
- 15 *American Convention on Human Rights*, “Pact of San José, Costa Rica,” 1144 U.N.T.S. 123, O.A.S.T.S 36 (entered into force 18 July 1978).
- 16 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, (entered into force 5 March 1995) (“*Convention of Belém do Pará*”).
- 17 *Convention on the Elimination of All Forms of Discrimination against Women*, December 18, 1979 (entered into force September 3, 1981).
- 18 *Cotton Field*, *supra* note 4, para 401.
- 19 *Artavia Murillo et al. (“in Vitro Fertilization”) v. Costa Rica*, Judgment of November 28, 2012 (Preliminary Objection, Merits, Reparations, and Costs) (IACtHR), para 302.
- 20 *I.V.*, *supra* note 5, para 186.
- 21 *Cotton Field*, *supra* note 4, para 401.

22 *Atala Riffo and Daughters v. Chile*, Judgment of February 24, 2012, (Merits, Reparations and Costs) (IACtHR), paras 166-167, 178.

23 *I.V.*, *supra* note 5; see C. O’Connell & C. Zampas, “The human rights impact of gender stereotyping in the context of reproductive health care,” *Int’l J. of Gyn and Obstet.* 2019; 144: 116-121 [Article online](#).

24 *Espinoza Gonzáles*, *supra* note 4, *J v. Peru*, Judgment of November 27, 2013, (Preliminary Objection, Merits, Reparations and Costs) (IACtHR), paras 173-297; see Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA/Ser.L/V/II, Doc. 63, 9 December 2011, para 183, [English edition](#); *Acceso a la Justicia para Mujeres Víctimas de Violencia Sexual en Mesoamérica*, [Spanish edition](#).

25 Letter from Roberto F. Caldas, President of the Inter-American Court of Human Rights, to Ms. Dubravka Šimonović, Special Rapporteur on violence against women, its causes and consequences, June 8, 2016, page 1, [Letter to SR](#).

26 See A. Byrnes & P. Kapai, “Article 1” [Discrimination against women], in *CEDAW Commentary* 2nd ed. *supra* note 2, 79-107, 87; A. Timmer & R. Holtmaat, “Article 5” [Prejudice and Stereotypes], in *CEDAW Commentary* 2nd ed. *Ibid.*, 221-256, 223-4.

27 S. Moreau, “Faces of Inequality,” in *Frontiers of Gender Equality*, *supra* note 1, 19-37, 33-35.

28 CEDAW Committee, *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, U.N. Doc. A/59/38 (2004), para 7.

29 CEDAW Committee *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para 22; see also *General Recommendation No. 35 on gender-based violations against women, updating General Recommendation 19*, CEDAW/C/GC/35, (2017), paras 26 & 30.

30 See A. Byrnes & M. Campbell, “Article 2” [Obligations], in *CEDAW Commentary* 2nd ed., *supra* note 2, 110-145.

31 *Cottonfield*, *supra* note 4; *Karen Tayag Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (2010), paras 8.5, 8.9; *R.K.B. v. Turkey*, UN Doc. CEDAW/C/51/D/28/2010 (2012), para. 8.8.

32 *CEDAW Convention*, *supra* note 17, Art. 5(a), *Convention of Belém do Pará*, *supra* note 16, Art. 7(e).

33 Such as the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, July 11, 2003; O.A.U. Doc. CAB/LEG/66.6, (entered into force November 25, 2005), Arts 2(2), 6, 13; *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, May 11, 2011, C.E.T.S. No. 210 (entered into force August 1, 2014), Art. 12(1).

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35 *Ibid.*, 46.

36 Fenton, *supra* note 9, 197.

37 See *Morales de Sierra v. Guatemala*, Case 11.625, IACmHR, Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001), paras 38-9 & 44-5.

38 See *Maria Da Penha Maia Fernandes v. Brazil*, Case 12.051, IACmHR, Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. 704 (2000); *V.K. v. Bulgaria*, U.N. Doc. CEDAW/C/49/D/20/2008 (2011).

39 S. Atrey, *Intersectional Discrimination* (Oxford: OUP, 2019), 139; see *Convention of Belém do Pará*, *supra* note 16, Art. 9; CEDAW *General Recommendation No. 28*, *supra* note 29, para 18.

40 *Atala Riffo*, *supra* note 22, paras 111, 125, 131, 146; see V. Undurraga, “Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights,” in E. Brems & A. Timmer, eds., *Stereotypes and Human Rights Law* (Cambridge: Intersentia, 2016), 67–93.

41 R.J. Cook, “Stigmatized Meanings of Criminal Abortion Law,” in *Abortion Law in Perspective*, *supra* note 2, 347-369, 349.

42 *Brítez Arce et al. v. Argentina*, Judgment of November 16, 2022, (Preliminary Objections, Merits and Reparations) (IACtHR); *S.F.M. v Spain*, U.N. Doc. CEDAW/C/75/D/138/2018 (2020), para 7.3.

43 CEDAW Committee, “Inquiry concerning the United Kingdom of Great Britain and Northern Ireland,” U.N. Doc. CEDAW/C/OP/8/GBR/1 (2018), para 74.

44 *I.V.*, *supra* note 5, para 187.

45 *Ibid.*, para 160.

46 United Nations, *Convention on the Rights of the Child*, 20 November 1989, U.N.T.S. vol. 1577, 3 (entered into force September 2, 1990), art 5; Committee on the Rights of the Child, General Comment No. 4: Adolescent health

and development in the context of the Convention on the Rights of the Child, 33rd Sess. U.N. Doc. CRC/GC/2003/4 (2003) at paras 39(b), 40.

47 *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 (2011), para 8.15 (for this and other constitutional court decisions on abortion cited in this Opinion see: [English Abortion Law decisions](#); [Spanish Abortion Law decisions](#); Abortion Law Decisions, in RepoCLACAI's Legal Resources" (Spanish), forthcoming 2023 at [CLACAI link](#)).

48 Judgment of February 23, 2010, Acórdão No. 75/2010, cfr, Constitutional Court of Portugal, para 11.9.2; see R. Rubio-Marin, "Abortion in Portugal: New Trends in European Constitutionalism," in *Abortion Law in Perspective*, *supra* note 2, 36-55, 49-51.

49 *Ibid.*, para 11.4.18.

50 *Gonzales v. Carhart*, 550 United States Reporter 124, 159 (2007), Justice Kennedy for the majority.

51 *Ibid.*, 184-185, Justice Ginsburg dissenting; see R.J. Cook, S. Cusack & B. Dickens, "Unethical Female Stereotyping in Reproductive Health," 109 (2010) *Int'l J. of Gyn. & Obstet.*, 255-258, [Article online in English](#); Translation: "La Estereotipación Poco Ética de la Mujer en la Salud Reproductiva," [Spanish translation](#).

52 See, for example, Decision ADPF 54/DF, April 12, 2012 (Supreme Court of Brazil); see L.B. Barroso, "Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy," in *Abortion Law in Perspective*, *supra* note 2, 258-278.

53 See, for example, *Mellet v. Ireland*, U.N. Doc. CCPR/c/116/D/2324/2013 (2016), paras 7.4, 7.5, 7.7., 7.11.

54 D. Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (London: Profile Books, 2009), 188 (citations omitted).

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56 Judgment C-355/2006, Constitutional Court of Colombia, [para 8.1](#), Justices Araújo Rentería & Vargas Hernández for the majority, [Colombia C-355/2006 excerpts online](#).

57 *International Covenant on Civil and Political Rights*, U.N.T.S. vol. 999, 171 (entry into force 23 March 1976).

58 *Mellet*, *supra* note 53, para 7.11; see Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights: A review of case law, (United Nations Office of the High Commission for Human Rights, undated, circa 2017) [Judiciary Role Counter Stereotypes](#).

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61 *Espinoza Gonzáles*, *supra* note 4, para 288.

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63 *J. v. Peru*, *supra* note 24, paras 352-353.

64 *Karen Tayag Vertido*, *supra* note 31, para 8.4; *V.K.*, *supra* note 38, para. 9.11.

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67 B.G. Link & J.C. Phelan, "Stigma and its Public Health Implications," *Lancet* 367 (2006): 528-529; R.J. Cook, "Stigmatized Meanings of Criminal Abortion Law," in *Abortion Law in Perspective*, *supra* note 2, 347-369, 362-363; R.J. Cook & B.M. Dickens, "Reducing Stigma in Reproductive Health," *Int'l J. of Gyn. & Obstet.* 125 (2014) 89-92 [Article online](#).

68 *Angulo Losada v. Bolivia*, Judgment of November 18, 2022, (Preliminary Objections, Merits and Reparations) (IACtHR), para 163.

69 *Ibid.*, para 164.

70 *Cotton Field*, *supra* note 4, para 198.

71 *Ibid.*, para 208.

72 *R.R. v. Poland*, App. No27617/04, ECtHR (26 May 2011).

73 *Karen Tayag Vertido*, *supra* note 31, paras 8.5-8.8.

74 *Cottonfield*, *supra* note 4, para 450; see R. Rubio-Marin & C. Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment," *Human Rights Quarterly* 33.4 (2011): 1062-91, 1070-84.

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79 *Cotton Field*, *supra* note 4, paras 207-208, 541.

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