

BOOK REVIEW

GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES BY REBECCA J COOK AND SIMONE CUSACK (PHILADELPHIA, PA, US: UNIVERSITY OF PENNSYLVANIA PRESS, 2009). 288 PAGES. PRICE US\$49.95 (HARDCOVER) ISBN 9780812242140.

In this book, Rebecca Cook (Professor of Law and Faculty Chair in International Human Rights, Faculty of Law, University of Toronto) and Simone Cusack (public interest lawyer at the Public Interest Law Clearing House, Melbourne) provide the reader with an insight into the pervasiveness and resilience of gender stereotypes globally, and the deleterious effects of gender stereotyping on women. Through an examination of national, regional and international jurisprudence, the authors demonstrate the pervasiveness of gender stereotyping in both the content and application of the law; the role of law in reinforcing and perpetuating discrimination against women through the conscious or unconscious use of gender stereotypes; and the role of law in eliminating discrimination through the identification and dismantling of gender stereotypes. The working assumption of the book is that addressing gender stereotyping is essential to eliminating discrimination against women. The validity of this hypothesis is demonstrated through an examination of transnational case law, which demonstrates that the identification and dismantling of gender stereotypes by the judiciary is critical for ensuring substantive equality and justice for women.

The authors put forward the rights and obligations to eliminate wrongful gender stereotyping contained in the *Convention on the Elimination of All Forms of Discrimination against Women*¹ as a framework from which to understand and dismantle gender stereotypes.² This approach invokes the transformative potential of *CEDAW* — its potential to dismantle social and cultural norms, values and attitudes which undermine women's right to substantive equality, and thus transform the social relations between men and women. The book provides a methodology for identifying wrongful gender stereotypes and the harm that they cause, and for applying the obligations set forth in *CEDAW* to eliminate them. It suggests that the use of the methodology provided in this book to first, identify gender stereotypes, second, articulate state obligations under *CEDAW* to eliminate gender stereotypes and finally, devise remedies for addressing these, would facilitate the realisation of women's rights to substantive equality. In doing this, the book provides the reader with a solid understanding of the rights and obligations contained in *CEDAW* and how the CEDAW Committee has to

¹ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

² Particularly the obligation under art 2(f) 'to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women' and under art 5(a) '[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practises which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women'.

date, and could in the future, function as an effective tool for addressing gender stereotyping.

Stereotypes are both *descriptive* and *prescriptive*. As the authors explain in Chapter 1, stereotypes refer to the process by which we categorise individuals into groups on the basis of ‘preconceptions of attributes or characteristics possessed by, or roles that are or should be performed by’ an individual, because of his or her apparent membership of a group.³ Thus, as descriptors, all individuals who are members of a certain group are perceived through those stereotypes to possess the attributes or characteristics, or to perform the roles, generalised for that group, regardless of individual differences or of their accuracy or inaccuracy with regard to a particular individual. Stereotypes are also prescriptive as they set the parameters for ‘acceptable’ behaviour and appearance, and enforce this through the conscious and unconscious employment of stereotypes calling for conformity to the stereotype of acceptable behaviour or appearance. As this book demonstrates, by ignoring individual difference, agency and choice, we may deny individuals their human rights and fundamental freedoms and we may also impose discriminatory hierarchies upon them.

Chapter 1 grounds the reader’s understanding of gender stereotypes in an appreciation of ‘gender’ as both a social and cultural construction, and as a social stratifier. Gender stereotypes patrol and enforce the boundaries of gender and they perpetuate the social stratification built around the construction of gender and gender hierarchies. Seen from this point of view, dismantling gender stereotypes is particularly difficult because they result from, and in turn reinforce, patriarchal values embedded in our societies. Dismantling gender stereotypes therefore calls for a decentering of androcentric norms and a determination to value equally the attributes, characteristics and behaviours that are coded as feminine.⁴ This is the challenge and obligation that states agree to when they ratify *CEDAW* and thus the framework which the book adopts for addressing gender stereotypes.

Chapter 1 provides the reader with an elaboration of different understandings of stereotypes, including the reasons why people stereotype. The authors demonstrate that stereotypes operate both consciously and unconsciously and they provide us with a framework for understanding and interpreting the world. The authors categorise gender stereotypes into four categories — sex stereotypes,⁵ sexual stereotypes,⁶ sex-role stereotypes⁷ and compounded stereotypes⁸ — and give vivid examples from diverse national and regional case law to illustrate the operation and interconnectedness of each of these on women.

³ Rebecca J Cook and Simone Cusack, *General Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2009) 9.

⁴ *Ibid* 24.

⁵ A generalised view or preconception concerning physical attributes or characteristics possessed by men or women: *ibid* 25.

⁶ A generalised view or preconception concerning specific sexual characteristics or qualities endowed to men or women: *ibid* 27.

⁷ A ‘normative or statistical view regarding appropriate roles or behaviour for men and women’: *ibid* 28.

⁸ Where gender intersects with other traits to create compounded stereotypes resulting in unique forms of discrimination: *ibid* 29.

The use of concrete examples is an effective, welcome and reader-friendly approach and indeed one of the main strengths of the book.

Chapter 1 also examines the importance of the context within which stereotypes operate in understanding both the meaning and impact of gender stereotypes on women. The authors argue that recognising the individual, situational and broader contextual factors in operation is critical to our understanding of how, and why, gender stereotypes are perpetuated — and crucial, too, for any reckoning of how best to eliminate them. The case examples used by the authors illustrate how stereotypes reflect and gain meaning from the contexts in which they are formed, and they point to the social, cultural and normative values of the time and place in which they operate. In the case of gender stereotypes, they reflect and perpetuate myths about men and women as ‘truths’, many of which reflect historic and contemporary discriminatory (patriarchal) attitudes and perceptions of women — attitudes which are frequently rooted in cultural, religious and traditional values. It is precisely because gender stereotypes are rooted so firmly in social and cultural norms (including religious norms), that discriminatory gender stereotypes are so hard to both identify and then to dismantle and dislodge.

Chapter 2 makes the case for the importance of identifying gender stereotypes to dispel the myth of their ‘truth’ and to work towards their elimination by showing the harm they cause. The chapter proposes a two-fold approach to achieving this: first, one considers how the law, policy or practice in question stereotypes men or women; and second, one looks at how the application, enforcement or perpetuation of a gender stereotype in law, policy or practice harms women.⁹ The authors also note that attention must be given to the stereotyping of men because, in addition to harming men, such stereotypes can have negative impacts on women. For example, the stereotype that men should be breadwinners may limit men’s role as caregivers and at the same time cast women into the role of caregivers, limiting their options. The authors use guiding questioning and analytic signposting, as well as three illustrative cases from the national and regional level to illustrate for the reader how to apply the methodology — *Morales de Sierra v Guatemala*¹⁰ from the Inter-American Commission on Human Rights, *R v Ewanchuk*¹¹ from the Supreme Court of Canada, and *President of the Republic of South Africa v Hugo*¹² from the Constitutional Court of South Africa.

The next two chapters examine the obligations incumbent upon states parties to CEDAW to eliminate gender stereotyping. As the CEDAW Committee has yet to provide detailed guidance on this, either through a General Recommendation or a decision under the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*¹³ that addresses the question of stereotyping in detail, the authors call upon principles of treaty interpretation and

⁹ Cook and Cusack, above n 3, 42.

¹⁰ (Inter-American Commission on Human Rights, Report No 4/01, Case No 11.625, OEA/Ser.L/V/II.111, doc 20 rev, 19 January 2001).

¹¹ [1999] 1 SCR 330.

¹² [1997] 4 SA 1 (Constitutional Court).

¹³ Opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000) (*‘Optional Protocol’*).

set out authoritative approaches of comparative regional and international bodies to put forward the elements of state obligation in relation to the elimination of gender stereotyping. In the next two chapters (Chapters 3 and 4) the authors distinguish between *wrongful* gender stereotypes and *discriminatory* gender stereotypes, provide guidance as to how to identify each, and outline state obligations under *CEDAW* to eliminate both.

Chapter 3 details the obligations of states parties to *CEDAW* to eliminate ‘wrongful’ gender stereotyping under art 2(f) and 5(a) of *CEDAW*. ‘Wrongful’ gender stereotypes include both discriminatory stereotypes, prohibited under art 2(f), and stereotypes which perpetuate prejudices about women, but which do not meet the threshold of discrimination as defined by art 1 of *CEDAW* (that is, they do not impinge upon the human rights and fundamental freedoms of women in comparison with men), which are prohibited under art 5(a). The authors demonstrate that even where wrongful gender stereotypes do not reach the threshold of being ‘discriminatory’, they may maintain social and cultural patterns of behaviour that perpetuate gender hierarchies or stereotyped roles for men and women and thus trigger the obligation under art 5(a) to eliminate them. Relying on international and regional jurisprudence, the authors set out the elements of state obligation to eliminate wrongful gender stereotyping, including the extent to which the general obligations to respect, protect and fulfil human rights and fundamental freedoms by state and non-state actors require the elimination of gender stereotypes.

The chapter provides an interesting, albeit brief, discussion around the state obligation to eliminate wrongful gender stereotyping by non-state actors (broadly categorised by the authors into the family, the community and the market), in recognition of the instrumental role of non-state actors in creating, perpetuating and institutionalising wrongful stereotypes of women and thereby establishing and/or entrenching gender hierarchies.¹⁴ Particularly, the authors look at this in the context of individual violations and explore how to determine the ‘appropriateness’ of measures to eliminate wrongful gender stereotyping by non-state actors in the context of the legitimate rights of non-state actors to freedom of thought and expression. In exploring what ‘appropriate measures’ might be in this context, the authors focus on examples of where religious beliefs may contradict the principle of equality between men and women.

The authors point to some jurisprudence and principles under international human rights law which may assist the Committee in developing greater clarity on this issue, including the due diligence principles¹⁵ and, particularly, a case of the European Court of Human Rights which held that states are responsible for discrimination of non-state actors when they fail to take reasonably available measures ‘which could have had a real prospect of altering the outcome or mitigating the harm’.¹⁶ In the context of gender stereotyping, the authors apply this jurisprudence to argue that ‘State Parties are responsible when they fail to take reasonably available measures to address wrongful gender stereotyping by non-state actors “which could have had a real prospect of altering the outcome or

¹⁴ See generally Cook and Cusack, above n 3, 89–93.

¹⁵ See generally *ibid* 91.

¹⁶ *E v United Kingdom* (European Court of Human Rights, Second Section, Application No 33218/96, 26 November 2002).

mitigating the harm”¹⁷. While the CEDAW Committee has applied the due diligence standard in several cases under the *Optional Protocol* to date, the Committee’s approach to defining state obligation to prevent and remedy wrongful gender stereotyping by non-state actors will evolve over time as the Committee examines this issue in different contexts.

The chapter also sets out the kinds of remedies states would be obligated to put in place to address the impact on individual women and to effect change at the structural and systemic level. Further, the chapter examines the role of temporary special measures in eliminating gender stereotypes and makes the case that reservations to arts 2(f) and 5(a) are incompatible with the object and purpose of *CEDAW* and therefore invalid. Given the CEDAW Committee is yet to provide such a detailed elaboration of *CEDAW* obligations relating to stereotyping, the chapter is an immensely useful resource for a variety of audiences seeking to use *CEDAW* as a tool for addressing gender stereotyping, including human rights activists and lawyers, as well as states parties and the CEDAW Committee itself.

Chapter 4 explores the specific nature of the state obligation to eliminate gender stereotyping that constitutes *discrimination* within the definition of discrimination set out in art 1 of *CEDAW* — that is, where laws, regulations, customs and practices are based on discriminatory forms of gender stereotypes in violation of art 2(f). The chapter uses the definition of discrimination contained in art 1 to determine if a gender stereotype is discriminatory, namely, whether it makes any ‘distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... of human rights and fundamental freedoms’¹⁸ in situations where to do so is not justified. The chapter explores the various arguments states have made to justify gender stereotyping in particular cases and where courts and human rights treaty bodies have found such discrimination to be justified — first, where it served a legitimate purpose, and the means chosen to attain that purpose were reasonable and proportionate, or second, where the harms caused were ‘too insignificant to warrant legal protection’.¹⁹ Indeed, several CEDAW Committee members in a minority concurring opinion held in *Muñoz-Vargaz y Sainz de Vicuña v Spain*²⁰ that the threshold of harm caused by gender stereotyping that must be met to attract a legal obligation to prevent and remedy is that set out in art 1 — the impairment or nullification of the recognition, enjoyment or exercise of a woman’s human rights and fundamental freedoms. While noting that this question must be addressed on a case-by-case basis, the authors suggest at the end of this chapter that this is a valid approach to determining which harms of gender stereotyping will be sufficiently significant to attract legal protection under *CEDAW*, although they later critique the decision of the minority concurring opinion in finding that no harm was caused by the stereotype operational in this case.²¹

¹⁷ Cook and Cusack, above n 3, 91.

¹⁸ *CEDAW* art 1.

¹⁹ Cook and Cusack, above n 3, 123.

²⁰ CEDAW, *Communication No 7/2005*, 39th sess, UN Doc CEDAW/C/39/D/7/2005 (9 August 2007) (*Muñoz-Vargaz y Sainz de Vicuña v Spain*).

²¹ See Cook and Cusack, above n 3, 136–7.

Significant time is dedicated to elaborating these two different obligations in Chapters 3 and 4 — the obligation to eliminate discriminatory gender stereotypes and the obligation to eliminate gender stereotypes which are not discriminatory, but which do perpetuate social and cultural patterns of conduct of men and women based on gender hierarchies or on stereotyped roles for men and women. Given the CEDAW Committee's apparent lack of clarity and consensus on this distinction and the corresponding rights and obligations, a problem that is reflected in the recent decision of the CEDAW Committee under the *Optional Protocol* in *Muñoz-Vargas y Sainz de Vicuña v Spain*,²² this work is an important contribution to providing clarity on this. In this way, the book can be viewed, on one level, as a strong and compelling advocacy document that is aimed at strengthening the Committee's contribution to identifying and eliminating gender stereotypes.

In Chapter 5, the authors outline the mandate and functions of the CEDAW Committee and focus on the role of the CEDAW Committee in eliminating gender stereotypes under two of these mandates: monitoring compliance through the reporting procedure and making decisions and recommendations under the communication and inquiries procedures under the *Optional Protocol*. The authors are critical of the shortcomings of the Committee's approaches to gender stereotypes to date, with the constructive purpose of presenting opportunities for the CEDAW Committee to better identify the harmful effects of gender stereotyping under each of these functions. Particularly, the authors critique the missed opportunities of the Committee to identify the operation of wrongful gender stereotypes in their views under communications to the *Optional Protocol*,²³ the absence of a General Recommendation specifically focusing on gender stereotyping,²⁴ and the opportunities for greater guidance to states through the interactive dialogue and Concluding Observations under the reporting procedure.²⁵ The authors suggest that the methodology provided in this book could be applied to strengthen the Committee's contributions to the elimination of gender stereotypes under each of their mandates. The chapter also urges the CEDAW Committee to adopt a General Recommendation on gender stereotyping as a way in which to bring greater clarity and significance to the issue and proposes a framework for such a General Recommendation.²⁶

Chapter 6 concludes the book with a useful summary of the key points of the book. The authors also propose some areas which would benefit from further reflection and research, but were beyond the scope of this book, such as the

²² UN Doc CEDAW/C/39/D/7/2005. This case was a claim brought by a woman challenging a Spanish law which denied women the ability to inherit a title of nobility when they had a brother (either younger or older). In this case, several of the Committee members held that the denial of a nobility title on the basis of sex was not discriminatory under the definition contained in art 1 because a title of nobility is not a 'human right or fundamental freedom'. In a dissenting opinion, one CEDAW Committee member, Ms Shanthi Dairiam, asserted that the communication did reveal a violation of *CEDAW*. She argued that exceptions to the constitutional guarantee for equality are in principle a violation of women's right to equality and that the impugned legislation contained wrongful gender stereotypes which contributed to the denial of the complainant's right to equality.

²³ See generally Cook and Cusack, above n 3, 142–60.

²⁴ See generally *ibid* 140–2.

²⁵ *Ibid* 138.

²⁶ See generally *ibid* 140–2.

specific impact of gender stereotyping on sub-groups of women. While recognising the roles of state and inter-governmental agencies and non-state actors such as NGOs in eliminating gender stereotyping, the Conclusion underscores the significant role of the CEDAW Committee in advancing work towards the elimination of wrongful gender stereotypes and reiterates encouragement to the CEDAW Committee to show greater leadership on this issue.

In short, this book does four things. It points to the need to identify and name gender stereotypes to eliminate discrimination against women and ensure substantive equality for women. It provides a methodology for identifying wrongful and discriminatory gender stereotypes. It sets out the obligations of state parties to *CEDAW* to eliminate gender stereotypes and remedy their impact. Finally, it offers the CEDAW Committee a resource from which to strengthen their work in eliminating gender stereotypes under each of their functions.

The book has many notable strengths. It is accessible and reader-friendly, using concrete examples to illustrate conceptual ideas. With this approach the authors are able to explain their arguments in a graphic and engaging way. For activists with an agenda of eliminating discrimination against women, the book is a useful tool for strengthening claims at the national and international level towards the recognition of wrongful gender stereotypes and the harm they cause. The framework in this book can be used by activists to strengthen national advocacy efforts towards pushing states to meet their obligations to shift social and cultural patterns of behaviour which are prejudicial to women, as well as by lawyers engaged in strategic litigation to ensure national, regional and international jurisprudence recognises the operation and harm of wrongful gender stereotypes. By highlighting the importance of identifying and eliminating gender stereotypes in ending inequality between men and women, the book is a call to action to actively pursue an agenda against wrongful gender stereotyping. The authors remind us that equality between men and women will not be realised unless we pursue the transformation of gender relations.

The book also addresses issues of burning contemporary significance given that the tension between gender equality and social, cultural and traditional values and norms arguably continues to be one of the most contentious and politically charged debates in the international human rights arena today. What is interesting about this book's approach is its suggestion that the prohibition against wrongful gender stereotyping under *CEDAW* can be used as the principal entry point for pushing states to address discriminatory social, cultural (including religious) and traditional norms, values and practices. The various opportunities and risks of using the entry point of 'gender stereotypes' to circumvent the highly politicised language of 'social, cultural and traditional practices, values and norms' provokes interesting reflections. For example, do we risk trivialising what are in fact egregious discriminatory social and cultural practices and norms by using the language of 'stereotypes', given that stereotypes may be perceived as less significant and of a less serious nature? Does the language of 'stereotypes' help us to address the extremely controversial issue of 'policing culture' which arises where the term discriminatory social and cultural norms is applied, particularly in relation to minority groups in a plural society or religion?

As *CEDAW* is a dynamic instrument that is subject to constant evolution as it is interpreted and applied by the *CEDAW* Committee and by others who engage with *CEDAW*, this book is an important contribution to the interpretation of *CEDAW* in relation to gender stereotyping. The book is an immensely useful and practical resource for a range of audiences, including human rights activists and lawyers, states parties and the *CEDAW* Committee itself.

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