

Gender stereotyping

in the case law of the CJEU

Alexandra Timmer
a.s.h.timmer@uu.nl



Netherlands Institute
of Human Rights

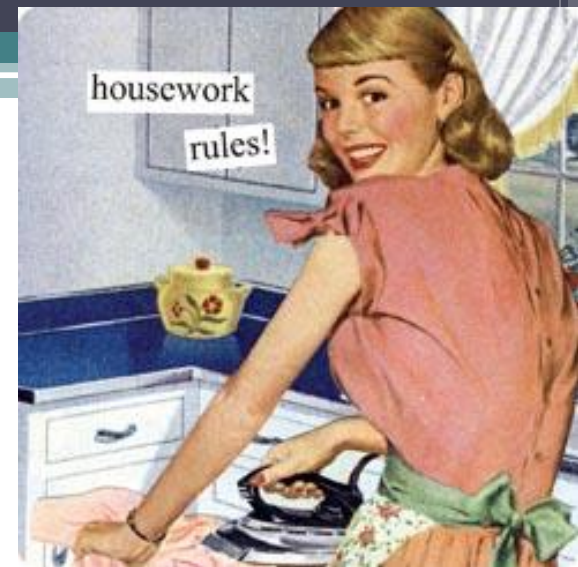


This training session is commissioned under the European Union's Programme for Employment and Social Solidarity – PROGRESS (2007-2013).

Structure

1. Introduction
2. Conceptualizing gender stereotypes
3. Stereotypes and discrimination/inequality
4. Legal approach to stereotypes
5. Case law CJEU
 - Pregnancy and maternity protection
 - Positive action in employment
 - Parenting and reconciliation
 - 'Silences' in case law
6. Developing anti-stereotyping reasoning further
7. Conclusion

Introduction



- Why care about gender stereotyping as lawyers?
- Alexandra Timmer, 'Gender Stereotyping in the case law of the EU Court of Justice', *European Equality Law Review* 2016/I, available at: <http://www.equalitylaw.eu/downloads/3867-european-equality-law-review-1-2016>

Conceptualizing stereotypes

- Simple definition: stereotypes are beliefs about groups of people
- Definition Rebecca Cook & Simone Cusack, *Gender Stereotyping*: “a stereotype is a generalized view or preconception of *attributes* or *characteristics* possessed by, or the *roles* that are or should be performed by, members of a particular group”.
- Stereotypes are not necessarily negative, but often are
- Stereotypes are both descriptive and prescriptive

Different forms of stereotypes

- Role-typing
 - False
 - Statistical
 - Prescriptive
-
- Stereotypes can take several of these forms simultaneously (e.g. ‘men are breadwinners’).
 - All of these can be intersectional



Different forms of gender stereotypes

- 1. Sex stereotypes:** concerning physical and biological differences between men and women
- 2. Sexual stereotypes:** stereotypes which focus on the sexual interaction between men and women
- 3. Sex role stereotypes:** stereotypes that ascribe certain roles and behaviour to men and women.
- 4. Compounded stereotypes:** gender stereotypes that interact with other stereotypes to produce specific beliefs about sub-groups of men and women.

Rebecca Cook and Simone Cusack, *Gender Stereotyping* (p. 25-31)

Traditional Gender Stereotypes.

Feminine.

Not aggressive.
Dependent.
Easily influenced.
Submissive.
Passive.
Home-oriented.
Easily hurt emotionally.
Indecisive.
Talkative.
Gentle.
Sensitive to other's feelings.
Very desirous of security.
Cries a lot.
Emotional.
Verbal.
Kind.
Tactful.
Nurturing.

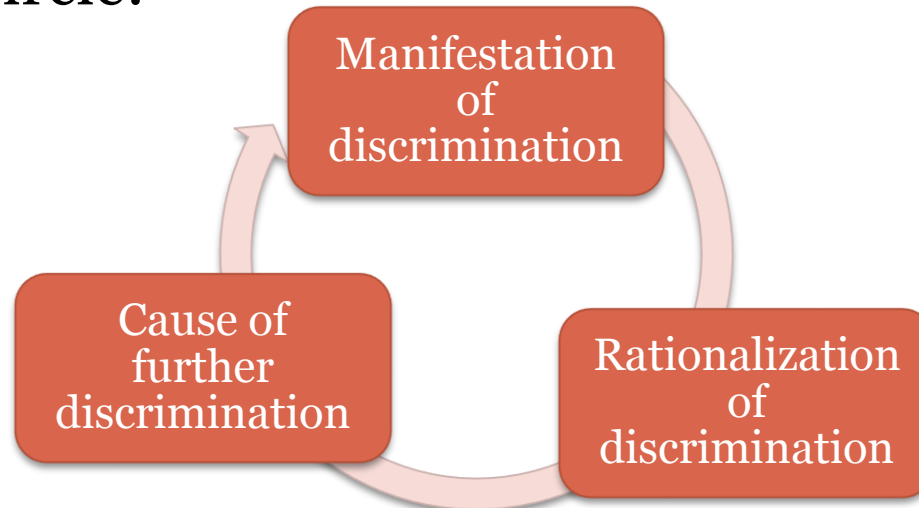
Masculine.

Aggressive.
Independent.
Not easily influenced.
Dominant.
Active.
Worldly.
Not easily hurt emotionally.
Decisive.
Not at all talkative.
Tough.
Less sensitive to other's feelings.
Not very desirous of security.
Rarely cries.
Logical.
Analytical.
Cruel.
Blunt.
Not nurturing.

Stereotypes <-> inequality/discrimination

- Stereotypes create hierarchies: 'in' and 'out' groups
- They fixate identities, and make these look 'natural' and inevitable.
- Stereotypes reinforce inequality and discrimination.

Invidious circle:



Legal approach to stereotypes: the questions

- Stereotyping can not be wholly eliminated:
 - Neither as a matter of psychology
 - Nor as a matter of law: law is inevitably based on classifications
- Therefore, questions to ask ourselves:
 - Which gender stereotypes should be challenged?
I.e.: which stereotypes are harmful?
 - How can law help challenge harmful gender stereotypes?

Legal approach to stereotypes: a proposal

Proposal - > two step process:

- 1. Naming** gender stereotypes and exposing their harm
- 2. Contesting** stereotypes

Case law CJEU

- Main finding: in the past, the Court has both reinforced and contested gender stereotypes. These two approaches to gender stereotypes continue to coexist in the case law.

Reinforcing stereotypes: pregnancy and maternity protection

- Case 184/83 *Hofmann* [1984] par. 25 → protection of women (later repeated in many cases)
 - ‘the protection of a woman’s biological condition during pregnancy and thereafter’
 - the protection of ‘the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.’
- See also, e.g., McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law,’ *European Law Journal*, Vol. 6, pp. 29-44.

Contesting gender stereotypes (I): positive action

- C-409/97 Marschall [1997], par. 29:
 - ‘it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.’

Contesting gender stereotypes (II): recent parenting and reconciliation cases

- Case C-104/09, *Roca Álvarez* [2010], par. 36; Case C-222/14, *Maistrellis* [2015] par. 50:
 - ‘liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.’
- Development as compared to *Marschall*: from emphasizing mothers’ work life, to emphasizing fathers’ role in raising children.
- Court not consistent in *Roca Álvarez/Maistrellis* line: C5/12 *Betriu Montull* [2013] relies only on protection of women argument.

Silent cases

- Many cases in which the Court encountered gender stereotypes without addressing them.
 - For example: cases concerning women in traditionally male jobs (e.g. Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986])
 - For example: cases concerning women doing night work (e.g. *Commission v France* (197/96); Case C-345/89; 312/86; 207/96 *Stoeckel* [1991])

Developing anti-stereotyping reasoning further

- How can the CJEU develop anti-stereotyping reasoning further? What are the challenges in this respect?
 - Naming gender stereotypes
 - Distinguishing harmful stereotypes
 - Contesting stereotypes

- Naming gender stereotypes:
 - Difficulty: stereotypes are often deeply rooted in society -> often the invisible norm
- Distinguishing harmful stereotypes:
 - There can be a fine line between perpetuating a harmful stereotype and using that stereotype to abolish *de facto* inequality
 - Contextual analysis necessary
- Contesting stereotypes:
 - Stereotyping can lead to both direct and indirect discrimination

Conclusion

Thank you! Questions/comments? Please email me at:

a.s.h.timmer@uu.nl

Recommended further reading:

- Claire McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law,' *European Law Journal*, Vol. 6, pp. 29-44 (2000).
- Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).
- Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. LAW REVIEW 83 (2010).
- Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 HUMAN RIGHTS LAW REVIEW 707 (2011).
- Alexandra Timmer, 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law', *American Journal of Comparative Law*, Vol. 63, No. 1, pp. 239-284 (2015).
- Eva Brems & Alexandra Timmer, *Stereotypes and Human Rights Law* (Intersentia: 2016).

