

Gender Stereotyping in the case law of the EU Court of Justice

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1. Introduction

Stereotyping is an enduring concern for equality scholars, including members of the European Equality Law Network. The national legal gender experts from the Network regularly report that the persistence of stereotypes hampers the realization of gender equality in their country. The European Commission also shows concern with regard to the impact of gender stereotyping on equality between men and women. For example, in the Commission's current work on addressing the work-life balance, following the tabling of the proposed Maternity Leave Directive, it is recognized that 'the current system entrenches the role of women as primary care-givers for children and elderly or frail relatives'.¹

This article explores gender stereotyping on the European level, more particularly in the Court of Justice of the EU (CJEU)² case law. The first aim of this article is to assess whether the Court contests or reinforces stereotypes. This entails studying the CJEU gender equality case law transversally through a stereotype lens. Stereotypes have appeared in the case law of the Court ever since the first gender equality cases. In the 1972 judgment in *Sabbatini*, for example, a regulation was at issue that assumed that men were the breadwinner and head of the household.³ This article will show that the Court is not consistent in addressing stereotypes across its gender equality jurisprudence. It argues that the Court has both reinforced traditional gender stereotypes and included effective anti-stereotyping reasoning in its judgments. The second aim of this article is to start exploring what the Court should do to contest stereotypes more effectively, and what challenges the Court would face in this endeavour.

The article proceeds as follows. Section 2 provides the conceptual framework by delineating the concept of stereotypes and their connection to discrimination and inequality. Section 3 assesses the case law of the CJEU and shows that the Court both reinforces and contests gender stereotypes. Section 4 discusses what challenges the Court faces in developing anti-stereotyping. Section 5 concludes.

2. Stereotypes and discrimination

Conceptualizing stereotypes

Stereotypes are beliefs about groups of people. More precisely, they are preconceptions about the characteristics, roles and attributes of groups of people.⁴ These characteristics, roles or attributes are

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1 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_012_new_initiative_replacing_maternity_leave_directive_en.pdf.

2 In this article the term CJEU also includes the European Court of Justice.

3 *Case 20/71 Sabbatini (Nee Bertoni) v European Parliament*.

4 Cf. the definition of a stereotype by Rebecca Cook and Simone Cusack: "a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group". Cook, R., Cusack,

then attributed to all individual members of the group in question, regardless of the individual's actual situation.⁵ Rebecca Cook and Simone Cusack have explained that 'gender stereotypes are concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual and social functions.'⁶

It is a common mistake to think that stereotypes (including those based on gender) are necessarily negative or statistically unsound. Stereotypes can be positive, negative or ambivalent in content.⁷ However, also seemingly positive stereotypes such as 'women are caring,' or 'African-American women are good dancers,' can have deleterious consequences as they serve patronizing approaches to the groups in question. Drawing on earlier research into ECHR, Canadian and U.S. equal protection law, it is suggested that stereotypes come in four forms: role-typing, false, statistical and prescriptive stereotypes.⁸

Role-typing stereotypes are assumptions about the proper roles or behaviour of people who belong to a certain group.⁹ The quintessential example, which – as the next section will explore further – has surfaced frequently in the CJEU case law is the idea that women are homemakers and men are breadwinners.¹⁰ *False stereotypes* include stereotypes that are based on prejudice, whether consciously or unconsciously held, as well as stereotypes that are less clearly negative but are empirically/statistically unsound. An example from the case law is the idea that women are incapable of handling firearms.¹¹ *Statistical stereotypes* are the kind that reflect a statistical truth about a group as a whole, but which does not necessarily accurately reflect the situation of the individual. In other words, these are largely accurate but overly broad assumptions. The CJEU has encountered this sort of stereotype many times in cases in which it was assumed that women do much of the care work at home.¹² *Prescriptive stereotypes* require a certain form of behaviour or standard of appearance from certain groups of people. The case of *Defrenne*, for example, concerned an airhostess whose employment was automatically terminated when she reached the age of 40.¹³ This kind of rule is based on the stereotype that women should be attractive (and that women over 40 become less attractive).

Two things are important to note here. Firstly, many stereotypes can be classified under multiple forms simultaneously. Gender role-typing stereotypes, such as the idea that women are homemakers and men are breadwinners, are simultaneously role-types, prescriptive, and statistically sound. That is because, as the next section will explain further, stereotypes have a self-reinforcing quality: because role-types are also strongly prescriptive (the idea is that women *ought to be* homemakers) they become true in a statistical sense. They are self-fulfilling prophecies.¹⁴ Secondly, all four forms of stereotypes can be intersectional. For the purposes of this article that means that gender then intersects with other systems of oppression to produce certain stereotypes. In the case of *Defrenne*, for example, gender intersected with age: the stereotype at issue was that only young women are attractive.

S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 9.

5 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 9.

6 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 20.

7 See for example Fiske, S., Cuddy, A., Glick, P., Xu, J. (2002), 'A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition,' *Journal of Personality and Social Psychology*, Vol. 82, No. 6, p. 878; Cuddy, A. et al. (2009), 'Stereotype content model across cultures: Towards universal similarities and some differences,' *British Journal of Social Psychology*, Vol. 48, pp. 1-33.

8 Timmer, A. (2015), '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.

9 See also Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 28-29 (describing sex role stereotypes).

10 E.g. Case 20/71 *Sabbatini (Nee Bertoni) v European Parliament*.

11 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651; Case 285/98 *Kreil v. Bundesrepublik Deutschland* [2000] ECR 0069. For analysis see Cook, R., Weiss, C. (2016), 'Gender Stereotyping in the Military. Insights from Court Cases' in: Brems, E., Timmer, A. (eds.), *Stereotypes and Human Rights Law*, Intersentia, p. 175.

12 See e.g. *Danfoss*, Case 109/88, para. 21 ('female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly').

13 Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Judgment of the Court of 15 June 1978.

14 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guildford Press, pp. 215-224.

Linking stereotyping to discrimination and inequality

The preceding part showed that stereotypes come in different guises. They can be harmful in all these guises. What stereotypes do is to fixate identities and rationalize inequality.¹⁵ They thereby serve as control mechanisms. They also create hierarchies of ‘in’ and ‘out’ groups, ‘us’ and ‘them’.¹⁶ Zanita Fenton has explained that the acquisition and preservation of social power drives the formulation of stereotypes.¹⁷ The effects of stereotypes can be felt in all areas of life. Research shows that they have effects on social standing and recognition; effects on the distribution of material resources; and effects on the psychological well-being of individuals.¹⁸

The link between stereotyping and discrimination has engrossed social psychologists.¹⁹ The connections are complex, and cannot be fully explained in the short space of this article. Drawing again on previous research, it is submitted that the link between gender stereotyping and discrimination can be conceived of as a self-reinforcing circle.²⁰ Gender stereotyping can appear as a form of discrimination and inequality (such as, for example, when legal rules or policies discourage fathers from taking childcare-related leave). Next, gender stereotypes can be used to justify discrimination (for example, when States claim that these rules are justified on the basis of the special relationship between the mother and her child). And lastly, this reinforces further inequality (in this example because mothers are forced to continue in their position of primary care-givers).

Because stereotypes reinforce discrimination and inequality, it is submitted that courts, including the CJEU, need to incorporate an anti-stereotyping approach in their legal reasoning in order to achieve substantive equality.²¹ It is suggested that judicial anti-stereotyping reasoning should consist firstly in naming and secondly in contesting harmful stereotypes.²² This draws on the feminist insight that one cannot change a reality without naming it.²³ The next section will investigate to what extent the CJEU contests or reinforces gender stereotypes. The section after that will identify what challenges the Court faces in incorporating anti-stereotyping reasoning more thoroughly in its case law.

3. CJEU case law: between reinforcing and contesting gender stereotypes

This section will show that the Court has both reinforced and contested gender stereotypes, and that these two attitudes continue to coexist in the case law.

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- 15 Kay, A.C. (2007), ‘Panglossian Ideology In The Service Of System Justification: How Complementary Stereotypes Help Us to Rationalize Inequality’, *Advances in Experimental Social Psychology*, Vol. 39, pp. 305-358.
- 16 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guildford Press, pp. 229-265.
- 17 Fenton, Z.E. (1998-1999), ‘Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence’, *Columbia Journal of Gender and Law*, Vol. 8 (1998-1999), pp. 1- 66 at 15.
- 18 E.g. Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 59-68; Steele, C. (2010), *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us*, New York, W.W. Norton & Company.
- 19 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guildford Press, pp. 266-320.
- 20 Timmer, A. (2015), ‘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. 281-282; Peroni, L., Timmer, A. (2016), ‘Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence’, in: Brems, E., Timmer, A. (eds.) (2016), *Stereotyping and Human Rights Law*, Antwerp, Intersentia, pp. 39-65.
- 21 Timmer, A. (2011), ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, *Human Rights Law Review*, Vol. 11, pp. 707-738. This is also in line with international human rights law, particularly Article 5(a) CEDAW. See e.g. Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press.
- 22 Timmer, A. (2011), ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, *Human Rights Law Review*, Vol. 11; Peroni, L., Timmer, A. (2016), ‘Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence’, in Brems, E., Timmer, A. (eds.) (2016), *Stereotyping and Human Rights Law*, Antwerp, Intersentia.
- 23 ‘[Y]ou can’t change a reality you can’t name’; see MacKinnon, C. (2005), *Women’s Lives Men’s Laws*, Belknap Press, p. 89. See also on naming Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 39-70.

Reinforcing stereotypes in pregnancy and maternity protection

Pregnancy and maternity protection has long been an area where the Court has been criticized for reinforcing stereotypes.²⁴ The 1984 judgment in *Hofmann* concerned a father who applied for a maternity leave allowance in order to take care of his child when the mother went back to work after the eight weeks of her mandatory maternity leave had ended.²⁵ The CJEU held that it was legitimate to protect ‘a woman’s needs.’²⁶ Two types of protection were mentioned: ‘the protection of a woman’s biological condition during pregnancy and thereafter’ and 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.’²⁷ This reasoning has since become a regular feature of EU sex equality law on pregnancy, maternity and parenting.²⁸ This reasoning encases several descriptive and normative stereotypes about motherhood. It privileges the mother-child relationship, suggesting that this is the primary relationship (similar reasoning does not exist concerning fathers). The result is a ‘paternalistic’ approach, aiming at the ‘protection’ of women.²⁹ McGlynn has pointed out that this protective language taps into images of women as the delicate sex,³⁰ which is also confirmed in the Court’s idea that mothers are ‘burdened’ if they work next to their role as care-givers.³¹

What is more, the Court took what can nearly be qualified as a ‘pro-stereotyping’ approach in *Hofmann*. It namely held that Directive 76/207,³² concerning equal treatment of men and women in employment, was not ‘designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between the parents.’³³ In other words, the Court took care to point out that EU law was not meant to challenge traditional gender-role stereotypes as regards parenthood. Much has changed since *Hofmann*, however, as the next section, discussing the recent cases of *Roca Álvarez* and *Maistrellis*, will show.³⁴

Elements of anti-stereotyping in the case law

This section will provide an overview of the most salient anti-gender-stereotyping reasoning in the CJEU jurisprudence.

Positive action in employment

One line of case law where gender stereotypes are clearly at issue concerns positive action in employment. The 1984 Council Recommendation on the promotion of positive action for women (84/635/EEC) in

24 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law’, *European Law Journal*, Vol. 6, pp. 29-44.

25 Case 184/83 *Hofmann* [1984] ECR 3047.

26 Case 184/83 *Hofmann* [1984] ECR 3047, para. 25.

27 Case 184/83 *Hofmann* [1984] ECR 3047, para. 25.

28 See for example Case C-32/93 *Webb* [1994] ECR I-3567, para. 20; Case C-394/96 *Brown* [1998] ECR I-4185, para. 17; Case C203/03 *Commission v Austria* [2005] ECR I-935, para. 43; Case C-104/09 *Roca Álvarez* [2010] ECR I-08661, para. 27.

29 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law’, *European Law Journal*, Vol. 6, p. 35.

30 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law’, *European Law Journal*, Vol. 6, p. 35.

31 Mandatory maternity leave has also been criticized as being paternalistic. See for a discussion e.g. Suk, J.C. (2012), ‘From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe’, *American Journal of Comparative Law*, Vol. 60, pp. 75-98.

32 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

33 Case 184/83 *Hofmann* [1984] ECR 3047, para. 24. See also *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) C-170/84, question 2.b.

34 In between the cases of *Hofmann* (1984) and *Roca Álvarez* (2010), the Court delivered judgment in the *Hill* case, where it held that ‘Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognized by Community law.’ Case C-243/95 *Hill* [1998] ECR I-3739, para. 42.

essence referred to stereotypes by recommending Member States 'to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women.'³⁵ However, the Court has by no means addressed stereotypes in all positive action cases. In some judgments references to stereotypes have been rather veiled, as for example when the Court alluded to 'instances of inequality which may exist in the reality of social life' in its first positive action case.³⁶

In a well-known positive action case from 1997, *Marschall*, the issue of stereotyping was foregrounded.³⁷ The Court explicitly addressed the gender stereotypes that women can face in the workplace. The case concerned a male teacher who complained that a woman was promoted instead of him. According to the applicable North-Rhine Westphalian regulation, 'women are to be given priority for promotion in the event of equal suitability' 'unless reasons specific to an individual [male] candidate tilt the balance in his favour.'³⁸ The Court pointed out that:

'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.'³⁹

In many ways this is exemplary anti-stereotyping reasoning: the Court explicitly pointed out that women face gender stereotypes in the workplace, and the Court also named the content of these stereotypes (e.g. women will interrupt their careers, they are not flexible, and they will be absent a lot). Next, the Court discussed the harm of these stereotypes: because of these beliefs, women have fewer possibilities than men to be hired or promoted. In other words, the Court recognized that because of the existence of gender stereotypes concerning the capacities of men and women, women have fewer opportunities in the labour market.

The difficulty in positive action cases is that there can be a thin line between reinforcing traditional gender role stereotypes, and taking *de facto* inequalities into account when devising law and policy.⁴⁰ This issue will be further taken up in Section 4.

Recent parenting and reconciliation cases

In a few recent judgments concerning the reconciliation of work and family life, the Court has also included explicit anti-stereotyping reasoning. *Roca Álvarez* concerned a father who applied for a reduction in his working time, because he wanted to be able to care for his child.⁴¹ The type of leave he requested was originally meant as breastfeeding leave, but – as the national court held – the legislation had since then been detached from the biological fact of breastfeeding, so that it can be considered as time purely

35 Recommendation 1(a). See also the Recital: 'Whereas existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures;' 84/635/EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women.

36 Case 312/86 *Commission v France* [1988] ECR 6315, para. 15; Later repeated e.g. in C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051, para. 18.

37 *Marschall* C-409/95. For further discussion see Selanec, G., Senden, L. (2012), *Positive action measures to ensure full equality between men and women, Including on company boards*, pp. 10-11, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf.

38 *Marschall* C-409/95, paras 3 and 5.

39 *Marschall* C-409/95, para. 29.

40 See Case C-476/99, *Lommers*, para. 41.

41 Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

devoted to the child.⁴² Mr. Roca Álvarez' request was refused because the mother of his child was self-employed. Mothers who are employed always have a right to the leave in question, but fathers only had a derived right.

The CJEU pointed out that this case did not concern the protection of the biological condition of women following pregnancy, nor did it concern the protection of 'the special relationship between a mother and her child.'⁴³ The Spanish Government had attempted to make a substantive equality argument, namely that the rule in question pursued the objective of compensating young mothers for the disadvantages they suffer in their working life (according to the Government it is more difficult for women to keep their job or to re-enter the world of work than for men with young children). The Court noted that the aim of the applicable EU rule (Article 2(4) of Directive 76/207) is indeed to achieve substantive equality.⁴⁴ However, the Court noted that the Government's argument is:

'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.'⁴⁵

The same wording has since been repeated in the 2015 judgment in *Maistrellis*.⁴⁶ This case concerned a male Greek judge who applied for paid parental leave in order to raise his child. His request was refused because the Greek Civil Service Code stipulated that if the wife of a civil servant is not employed, he cannot claim parental leave. AG Kokott, in her opinion on this case, referring to the Parental Leave Directive,⁴⁷ had stated that 'the traditional distribution of the roles of men and women in the raising of children – in particular that of fathers – is to be overcome.'⁴⁸

In terms of anti-stereotyping reasoning, the Court takes a significant step forward in these cases as compared to *Marschall*. Whereas *Marschall* – and many other EU sex discrimination cases – emphasized the importance of facilitating the careers of women/mothers, the Court now tackles the other side of the coin, namely the importance of fathers taking their equal share in parenting. The stereotypes that are at issue in *Marschall*, on the one hand, and *Roca Álvarez* and *Maistrellis*, on the other, in essence all spring from the same source. That source is the ubiquitous separate spheres ideology, which assigns women to the private sphere and men to the public sphere.⁴⁹ But only in *Roca Álvarez* and *Maistrellis* has the Court started to address the importance of men's role in the private sphere, i.e. in raising children.⁵⁰

Unfortunately, as Susanne Burri has pointed out, the Court is not consistent in taking the *Roca Álvarez/ Maistrellis* line.⁵¹ In the recent case of *Betriu Montull* the Court again relied on the protection of women argument, rather than on the idea that both men and women should be able to balance work and private life.⁵² Burri argued that '[i]n the *Betriu Montull* case, considerations on reconciliation issues are lacking.'⁵³

42 Case C-104/09, *Roca Álvarez*, para. 14.

43 Case C104/09, *Roca Álvarez*, para. 31.

44 Case C-104/09, *Roca Álvarez*, para. 34.

45 Case C-104/09, *Roca Álvarez*, para. 36.

46 Case C-222/14, *Maistrellis*, para. 50.

47 Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

48 Case C-222/14, *Maistrellis*, Opinion of Advocate General Kokott delivered on 16 April 2015.

49 See e.g. Pateman, C. (1983), 'Feminist Critiques of the Public/Private Dichotomy,' in Benn, S.I., Gaus, G.F. (eds), (1983), *Public and Private in Social Life*, New York, St. Martin's Press, pp. 281-303. See for a clear example in the case law *Oesterreichischer Gewerkschaftsbund*, Case C-220/02.

50 See also Carracciolo di Torella, E. (2014), 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union,' *European Law Journal*, Vol. 20, No. 1, pp. 88-106.

51 Burri, S. (2015), 'Parents who want to reconcile work and care: which equality under EU law?' in: Brink, M., Burri, S., Goldschmidt J. (eds.), (2015), *Liber Amicorum Titia Loenen*, SIM/Utrecht University, pp. 261-277.

52 C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, Judgment of the Court (Fourth Chamber) of 19 September 2013.

53 Burri, S. (2015), 'Parents who want to reconcile work and care: which equality under EU law?' SIM/Utrecht University, p. 272.

Silence on gender stereotypes in other cases

There are many sex equality cases where the Court encountered gender stereotypes without addressing them.

In this respect, one line of relevant cases concerns women in traditionally male jobs.⁵⁴ The Court has delivered several judgments related to women working in ‘male’ professions, such as the police,⁵⁵ and the military.⁵⁶ The *Johnston* case, for example, concerned a female police officer whose contract was not renewed following a new rule that only male police officers could carry firearms.⁵⁷ Johnston complained that this violated Directive 76/207, then in force, concerning equal treatment between men and women in access to employment. The UK Government attempted to justify the prohibition on policewomen using firearms on the basis of gender stereotypes, namely that women have less physical strength and ‘the probable reaction of the public to the appearance of armed policewomen.’⁵⁸ Thus, the Government argued that the sex of the person carrying out the work constituted a determining factor within the meaning of Article 2(2) of Directive 76/207. The Court did not address the stereotypes. Admittedly this is an old case, so the Court’s approach could be different today.

Related to this topic is the strand of cases concerning women doing night work.⁵⁹ In the past, many countries prohibited women from doing night work.⁶⁰ These prohibitions were based on the idea that female workers required protection, which in turn was based on gender stereotypes about the delicateness of women and their place in the home. Thus for example in the case of *Stoeckel*, the French and Italian governments claimed that a prohibition on night work for women was necessary due to social considerations, such as ‘the risks of attack and the heavier domestic workload borne by women.’⁶¹ In its judgment, the CJEU did not name the stereotypes or really contest them. It just held that women are not inherently exposed to different risks than men when doing night work, and that considerations concerning women’s domestic workload did not fall under the purpose of Directive 76/207. Thus these considerations could not justify the difference in treatment between men and women.

In several other areas of EU sex equality law, gender stereotypes appear not to have been mentioned at all. Take, for example, the cases concerning the use of gender-based actuarial factors in occupational pension schemes, private insurance schemes or statutory social security.⁶² It is submitted that gender-based actuarial factors can be viewed as a specific kind of instantiation of statistical gender stereotypes: in some ways actuarial decision-making is a form of systematic stereotyping.⁶³ The idea that women live longer is a statistically correct stereotype. The *Test-Achats* and *X* judgments do not mention anything related to stereotypes.⁶⁴ AG Kokott, however, in her opinion in the *Test-Achats* case did point out that life expectancy is related to economic and social conditions, and to habits.⁶⁵ She submitted that: ‘In

54 In some of these cases, the opinion of the AG did refer to stereotypes. See the opinion of AG La Pergola delivered on 26 October 1999, Case C-285/98 *Tanja Kreil v Federal Republic of Germany*, para. 24 (‘women would continue to be marginalised by being confined to certain sections of the Bundeswehr only – with the risk that the old stereotypical division between the sexes would be perpetuated.’).

55 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651.

56 Case 285/98 *Kreil v. Bundesrepublik Deutschland* [2000] ECR 0069 and Case 273/97 *Sirdar* [1999] ECR I-07493.

57 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651.

58 Case 222/84, *Johnston*, para. 31.

59 *Commission v France* (197/96); Case C-345/89; 312/86; 207/96 *Stoeckel* [1991] ECR I-4066.

60 See also ILO Convention concerning Night Work of Women Employed in Industry (Revised 1948) (Entry into force: 27 February 1951) Adoption: San Francisco, 31st ILC session (9 July 1948). Article 3 states, for example, ‘Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.’

61 Case C345/89 *Stoeckel* [1991] ECR I4066, para. 14.

62 This topic is analyzed in Jacquemain, J., Wuïame, N. (2015), ‘Gender based actuarial factors and EU gender equality law’, *European Equality Law Review 1*, available at: <http://www.equalitylaw.eu/downloads/2935-european-equality-law-review-1-2015-pdf-1-579-kb>.

63 See Schauer, F. (2003), *Profiles, Probabilities and Stereotypes*, Cambridge, MA, Harvard University Press, pp. 4-6.

64 Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100; and Case C-318/13, *X*, ECLI:EU:C:2014:2133.

65 Opinion of Advocate General Kokott in *Test-Achats*, ECLI:EU:C:2010:564, para. 62.

view of social change and the accompanying loss of meaning of traditional role models, the effects of behavioural factors on a person's health and life expectancy can no longer clearly be linked with his sex.⁶⁶ As an example, she dismantled a few gender stereotypes about women nowadays also doing demanding and stressful work, and participating in sport.

4. Challenges in developing anti-stereotyping reasoning

Naming stereotypes

Gender stereotypes make inequalities appear 'natural' and inevitable. Naming gender stereotypes makes them visible, and thereby challenges their normalcy. If the CJEU would wish to challenge gender stereotypes, the first requisite is to notice them and name them in its judgments. This will not be a simple matter as gender stereotypes are deeply rooted in society. The fact that the Court frequently reinforces gender stereotypes suggests that it is often unaware of them. This has to do with the phenomenon that in feminist legal theory has been termed the dominant standard:⁶⁷ legal norms are (often implicitly/covertly) gendered in a way that devalues the feminine. A clear example is the case of *Sirdar*, a judgment concerning women's exclusion from the UK Royal Marines, where the Court did not even question that combat effectiveness requires marines to be male.⁶⁸ The criterion of 'combat effectiveness' was automatically male. Another example can be found in labour law, where the full-time worker is the dominant standard and where part-time workers (*de facto* often women) are seen as deviating from the norm.⁶⁹

For this reason, some scholars rightly view the idea that judges could apply anti-stereotyping reasoning with scepticism.⁷⁰ As human beings, judges harbour their own unacknowledged biases. What is more, judges are part of dominant groups – in the case of the CJEU most judges are male, are all highly educated, and are all white – and will 'therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions.'⁷¹ This raises particular concerns as regards the judges' ability to 'see' and subsequently name and contest stereotypes. Intersectional stereotypes are even harder to make visible and dismantle.

Distinguishing harmful stereotypes

Another reason why contesting stereotypes is a difficult task for judges is that not all instances of stereotyping are harmful let alone legally wrongful. Stereotyping neither can nor should be completely eliminated, as law is per definition based on generalizations and categories. In naming and contesting stereotypes, the Court thus faces the challenge of distinguishing between wrongful and 'acceptable' forms of stereotyping.⁷² Section 2 claimed that all forms of stereotyping, be they descriptive or prescriptive, false or statistically true, can be harmful. False stereotypes are of course always harmful, but how can the Court assess whether other forms of stereotyping are harmful?

A related challenge immediately emerges, namely that there can be a fine line between, on the one hand, reinforcing harmful stereotypes and, on the other, taking current realities into account in order to achieve substantive equality. For example, the stereotype that 'women care for children' is frequently deployed

66 *Test-Achats*, ECLI:EU:C:2010:564, para. 63.

67 See e.g., Lunneman, K.D., Loenen, M.L.P., Veldman, A.G. (1999), *De onzichtbare standaard in het recht*, Deventer, Gouda Quint.

68 Cf. Case C-273/97, *Sirdar*, para. 30.

69 See e.g. Case 170/84, *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* ECLI:EU:C:1986:294 concerning a department store that had a policy of employing as few part-time workers as possible.

70 E.g. Young, M. (2010), 'Unequal to the Task: Kapping the Substantive Potential of Section 15,' *Supreme Court Law Review*, Vol. 50, pp. 207-08.

71 Minow, M. (1991), *Making All the Difference: Inclusion, Exclusion and American Law*, Ithaca, Cornell University Press, p. 62.

72 See also Timmer, A. (2015), 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection,' *American Journal of Comparative Law*, Vol. 63, No. 1.

to keep women confined to traditional roles. But this stereotype can also be deployed to design measures that will help women in achieving a work-life balance (think of maternity, paternity and parental leave measures). In its positive action case law, the Court itself recognized this difficulty. In *Lommers*, the Court noted: 'A measure ... whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women.'⁷³

It is submitted that a contextual analysis is required to determine whether a specific instance of stereotyping is invidious. Only by taking into consideration in what context a specific instance of stereotyping occurred can the Court assess whether it was wrongful in the sense of causing or reinforcing gender inequality. It goes beyond the scope of this article to theorize what contextual factors the Court should exactly take into account.⁷⁴ The Court could conceivably find inspiration in the case law of other Courts, such as the European Court of Human Rights and the Canadian Supreme Court.⁷⁵

Contesting stereotypes

It appears that many EU equality law authorities,⁷⁶ including AG Kokott, assume that the presence of stereotypes indicates direct discrimination. In her recent opinion in the *Achbita* case, and referring to the case of *CHEZ*,⁷⁷ Kokott claims that this is the position of the CJEU:

'the Court considers a measure taken on the basis of stereotypes and prejudices in relation to a particular group of individuals to be an indication of direct discrimination.'⁷⁸

When gender stereotyping explicitly occurs, the Court should indeed analyze the case from the perspective of direct sex discrimination. However, it should bear in mind that much stereotyping occurs implicitly or unconsciously. As a result, also facially neutral norms can be based on gender stereotypes. And facially neutral norms and practices can likewise reinforce existing gender stereotypes.⁷⁹ In other words, gender stereotypes can lead to indirect as well as direct discrimination. For example, there are cases concerning part-time workers where the arguments provided as objective justification for the indirect discrimination of women were stereotypical (maintaining in essence that part-timers were less committed to their work).⁸⁰

5. Conclusion

The CJEU's approach to gender stereotyping is fragmentary. While the Court does not consistently take issue with gender stereotypes, in some areas of EU equality law the Court has certainly addressed gender stereotypes. This article has shown that in some cases concerning positive action the Court has foregrounded the problem of stereotyping. More recently, reconciliation between work and family commitments is the area of gender equality law where developments in anti-stereotyping reasoning

73 Case C-476/99, *Lommers*, para. 41.

74 If done thoroughly, such an exploration would require a full theory of what makes inequality of treatment amount to discrimination. Others have done this: see, e.g. Hellmann, D. (2006), *When is Discrimination Wrong?*, Boston: Harvard University Press.

75 Timmer, A., (2015), 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection,' *American Journal of Comparative Law*, Vol. 63, No. 1.

76 See e.g. Selanec, G., Senden, L. (2012), *Positive action measures to ensure full equality between men and women, Including on company boards*, p. 12, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making_report_gender-balance_2012_en.pdf. ('The measure went beyond eliminating concealed prejudice and stereotypes, which are tightly related to direct sex discrimination.')

77 *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, para. 82).

78 Case C-157/15, *Achbita*, opinion of AG Kokott, n. 30.

79 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 115-116.

80 See e.g. *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) C-170/84, para. 33; *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co.* (1989) C-171/84, para. 13.

have been most marked. While in *Hofmann* the Court was careful not to challenge gender roles in the household, in *Roca Álvarez* and *Maistrellis* it wanted the traditional roles to be disrupted.

Gender stereotypes make the traditional roles of men and women still appear natural and inevitable. By naming and contesting stereotypes, the Court can challenge their stranglehold. This is no easy task. The Court faces many challenges, such as distinguishing harmful forms of stereotyping from acceptable ones. But this complexity should not induce the Court to be passive.