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Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v The Philippines*

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1. Introduction

Feminist legal theorists have long criticised the impact of gender stereotypes in rape cases.¹ Through their work and that of numerous dedicated others, many people are now aware of the harm caused by stereotypes such as 'women are inherently untruthful and thus likely to fabricate allegations of rape' and 'women should physically resist sexual assault at every opportunity'. Yet, as shown in *Karen Tayag Vertido v The Philippines*,² the most recent communication decided under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women³ ('Optional Protocol to CEDAW'), stereotypical beliefs concerning rape are by no means a thing of the past.

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1 See, for example, Estrich, *Real Rape: How the Legal System Victimized Women Who Say No* (Cambridge, Massachusetts: Harvard University Press, 1987).

2 *Karen Tayag Vertido v The Philippines* (18/08), CEDAW/C/46/D/18/2008 (2010).

3 2000, 2131 UNTS 83.

Moreover, their resilience continues to harm women and impede their access to justice for rape and other forms of sexual assault.

Vertido is now the leading decision of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee' or 'the Committee'),⁴ and arguably any international human rights treaty body,⁵ on addressing wrongful gender stereotyping, although, as this short article explores, it does have several shortcomings. What is interesting about *Vertido* is that both the author and the CEDAW Committee put wrongful gender stereotyping at the heart of the case; both framed the communication as one concerning the Philippines' legal liability for judicial stereotyping in a rape trial, rather than for rape only. Also interesting is the Committee's application of the obligations to eliminate wrongful gender stereotyping in Articles 2(f)⁶ and 5(a)⁷ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸ to the right to a fair trial. This application of Articles 2(f) and 5(a) reminds us that gender stereotyping does not occur in a vacuum, and confirms the Committee's readiness to hold States Parties accountable for gender stereotyping that violates women's human rights, even where those rights are not explicitly recognised in the text of CEDAW.⁹

This note outlines the facts and views of the CEDAW Committee in the *Vertido* case. The Committee's views are discussed according to three major themes: jurisdictional limitations under the Optional Protocol to CEDAW; 'naming' gender stereotyping in rape cases; and States Parties' obligations to

4 Violations of Article 5(a) have previously been found in: *A.T. v Hungary* (2/03), CEDAW/C/32/D/2/2003 (2005); 12 IHRR 998 (2005); and CEDAW Committee, Report on Mexico and Reply from the Government of Mexico, 27 January 2005, CEDAW/C/2005/OP8/MEXICO (2005) ('*Ciudad Juárez Inquiry*'). Violations of Article 2(f) have been found in: *Fatma Yildirim v Austria* (6/05) CEDAW/C/39/D/6/2005 (2007); *Şahide Goekce v Austria* (5/05), CEDAW/C/39/D/5/2005 (2007); and the *Ciudad Juárez Inquiry*.

5 For good practice examples of addressing gender stereotyping at the regional and national levels, see the Inter-American Commission of Human Rights: Case 11.625, *Morales de Sierra v Guatemala* Report No 4/01 (2001); 9 IHRR 190 (2002); and Canadian Supreme Court: *R v Ewanchuk* (1999) 1 SCR 330, at paras 68–102 (L'Heureux-Dubé J concurring).

6 Article 2(f) CEDAW provides that 'States take 'all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

7 Article 5(a) CEDAW provides that 'States Parties shall take all appropriate measures . . . [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 practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

8 1979, 1249 UNTS 13.

9 See CEDAW Committee, General Recommendation No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2 (2010) (advanced unedited version) at para 7 (providing that '[t]he spirit of the Convention covers other rights, which are not explicitly mentioned in the Convention but which have an impact on the achievement of equality of women with men and which represent a form of discrimination against women').

address wrongful gender stereotyping. The note concludes by reflecting critically on the degree to which the CEDAW Committee succeeds in employing a transformative conception of equality.

2. Factual Background and Views of the CEDAW Committee

Karen Tayag Vertido, the author, worked previously as Executive Director of the Davao City Chamber of Commerce and Industry in the Philippines. In 1996, she filed a complaint with the local police, alleging that the then President of the Chamber, Jose B. Custodio, had raped her following an evening business meeting. The author alleged that the accused took her to a nearby motel instead of giving her a lift home as promised. The author believed the accused to be armed and refused to leave the car, but was allegedly dragged to a motel room by the accused. Unable to find another exit, the author locked herself in the bathroom. The author exited the bathroom only after she thought the accused had left. However, the accused was still there and forcibly pinned her to the bed. The weight of the accused caused the author to lose consciousness. She alleged that when she regained consciousness the accused was already raping her. The author's pleas to stop were ignored and she was initially unsuccessful in her attempts to push him away. The author eventually succeeded in freeing herself, but only after she had been raped. She underwent a medical and legal examination the following day and reported the rape to police within 48 hours.

A panel of public prosecutors initially dismissed the matter for lack of probable cause. On appeal, the Secretary of the Department of Justice ordered that the accused be charged with rape. A motion for reconsideration was denied and the accused was subsequently arrested. The case languished in the trial court for eight years before Judge Virginia Hofileña-Europa finally ruled in April 2005.¹⁰ Her Honour acquitted the accused, citing insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of rape. Judge Europa based her decision to acquit on several 'guiding principles' derived from other rape cases (for example, that rape allegations are easy to make) and her unfavourable assessment of the author's testimony based, among other things, on the author's failure to take advantage of perceived opportunities to escape from the accused.

The author subsequently submitted a communication to the CEDAW Committee, alleging that the acquittal of the accused constituted a violation, by the Philippines, of the rights to non-discrimination and an effective remedy,

¹⁰ Regional Trial Court Davao City, the Philippines, *The People of the Philippines v Jose B. Custodio*, Criminal Case No 37,921-96, 11 April 2005.

and the freedoms from wrongful gender stereotyping and gender-based violence against women.¹¹ Of particular relevance for present purposes is the author's claim that Judge Europa's decision had no basis in law or fact and 'was grounded in gender-based myths and misconceptions about rape and rape victims . . . without which the accused would have been convicted.'¹²

In considering the author's claim of wrongful gender stereotyping, a majority of the CEDAW Committee affirmed that CEDAW requires States Parties to 'take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women.'¹³ It also stressed that

stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim . . .¹⁴

Turning its attention to the particular facts, the majority determined that Judge Europa expected a certain stereotypical behaviour from the author and formed a negative view of her creditability because she had not behaved accordingly. The majority reasoned that

the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation . . .¹⁵

The majority went on to say that Judge Europa's decision contained 'several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the creditability of the victim.'¹⁶ Singling out Judge Europa's reliance on the stereotype that women should physically resist rape and other forms of sexual assault at every opportunity, the Committee reasoned that to expect the author to have physically resisted the accused perpetuates that stereotypical belief.¹⁷

The majority therefore concluded that the Philippines had violated its obligations under Articles 2(f) and 5(a) of CEDAW to eliminate wrongful gender

11 *Karen Tayag Vertido v The Philippines*, supra n 2 at paras 3.1–3.17.

12 *Ibid.* at paras 3.4–3.5.

13 *Ibid.* at para 8.4.

14 *Ibid.*

15 *Ibid.* at para 8.5.

16 *Ibid.* at para 8.6.

17 *Ibid.* at para 8.5.

stereotyping, as well its obligation under Article 2(c) to provide effective remedies. It recommended that the Philippines adopt a wide range of measures, including to ensure ‘that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions’.¹⁸

3. Jurisdictional Limits of the Optional Protocol to CEDAW

The ability of the CEDAW Committee to decide communications under the Optional Protocol is subject to certain jurisdictional limitations. Some of those limitations are enumerated in the text of the Protocol itself, for example, the stipulation that the Committee consider communications alleging violations of CEDAW only against States Parties to the Optional Protocol.¹⁹ Others arise independently of the Protocol and will evolve as the Committee develops and expands its jurisprudence, including through application of principles well-established in international human rights jurisprudence, as in the *Vertido* case.

The particular jurisdictional limitation raised in *Vertido* concerned the extent of the CEDAW Committee’s authority to assess and review findings of fact or law in domestic proceedings, when deciding communications under the Optional Protocol. This issue is not addressed in the Optional Protocol,²⁰ although there is a long line of human rights jurisprudence that provides that it is generally for domestic courts, and not international or regional human rights bodies, to assess and review the facts and evidence in a particular case.²¹ It is not intended that treaty bodies operate as appellate courts or courts of fourth instance.²² This line of jurisprudence takes into account that, as quasi-judicial bodies that review written evidence only, treaty bodies are ‘in a worse position to assess findings, especially findings of fact, than a domestic court’.²³ It also accounts for the limited resources of treaty bodies. As CEDAW Committee member Yoko Hayashi reminded us in her concurring opinion in *Vertido*, ‘[t]he Committee is not equipped to examine the testimony of [the]

18 Ibid. at para 8.9(b).

19 See, for example, Article 3.

20 See Articles 2–4.

21 See, for example, *Semey Joe Johnson v Spain* (1102/02), CCPR/C/86/D/1102/2002 (2006) at para 6.4; *Rafael Marques de Morais v Angola* (1128/02), CCPR/C/83/D/1128/2002 (2005); 12 IHRR 644 (2005) at para 5.5; *Griffin v Spain* (493/92), CCPR/C/53/D/493/1992 (1995); 2 IHRR 571 (1995) at para 9.6; *Narrainen v Norway* (3/91), CERD/C/44/D/3/1991 (1994); 1-3 IHRR 128 (1994) at paras 9.4–9.5; *Aksu v Turkey* Application Nos 4149/04 and 41029/04, Merits, 27 July 2010 at para 55 (referred to the Grand Chamber), and *Krawczak v Poland* Application No 40387/06, Merits, 8 April 2008 at para 37.

22 See Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004) at 22–3.

23 Ibid.

parties concerned, nor to evaluate the credibility of the accused or the author.²⁴

Notwithstanding, human rights treaty bodies and courts have found that they do have a valid role to play in reviewing domestic court decisions in limited circumstances.²⁵ For example, the Human Rights Committee, the body monitoring implementation of the International Covenant on Civil and Political Rights, has indicated a willingness to step into the shoes of a domestic court if it is apparent that a decision was manifestly arbitrary or amounted to a denial of justice, or that a court otherwise violated the obligation of independence and impartiality.²⁶ The carving out of those exceptions enables the Human Rights Committee to hold States accountable for fundamental errors of judicial branches of government. Still, international jurisprudence reveals that the Committee has typically exercised caution with respect to the findings and rulings of domestic courts, interfering only in cases of clear unfairness.²⁷

In her communication to the CEDAW Committee, the author claimed that if it were not for Judge Europa's reliance on gender stereotypes, the accused would have been convicted of raping her.²⁸ Whether intentionally or not, the author effectively invited the Committee to assess and review the facts and evidence before Judge Europa. Responding to the invitation, the majority clarified that it is not its role to 'replace... domestic authorities in the assessment of facts' or 'decide on the alleged perpetrator's criminal responsibility'.²⁹ The Committee went on to say that, in performing its role as an adjudicator of communications under the Protocol, it would

consider the author's allegations that gender-based myths and misconceptions about rape and rape victims were relied on by Judge Hofileña-Europa... leading to the acquittal of the alleged perpetrator, and [would] determine whether this amounted to a violation of the rights of the author and a breach of the corresponding State party's obligations to end discrimination in the legal process under articles 2(c), 2(f) and 5(a) of the Convention.³⁰

Thus, consistent with existing jurisprudence, the majority drew a distinction between placing itself in the shoes of Judge Europa and deciding if her

24 *Karen Tayag Vertido v The Philippines*, supra n 2.

25 See supra n 21.

26 See, for example, *Semey Joe Johnson v Spain*, supra n 21 at para 6.4; *Rafael Marques de Morais v Angola*, supra n 21 at para 5.5; and *Griffin v Spain*, supra n 21 at para 9.6.

27 See, for example, Joseph, Schultz and Castan, supra n 22 at 416.

28 *Karen Tayag Vertido v The Philippines*, supra n 2 at para 3.5 (alleging that 'the Court relied on the gender-based myths and stereotypes... without which the accused would have been convicted').

29 Ibid. at para 8.2.

30 Ibid.

Honour's reliance on gender stereotypes violated CEDAW. In limiting its determination to the latter, the majority legitimately exercised its power to hold the Philippines legally accountable, under CEDAW, for the gender stereotyping by Judge Europa, a member of its judicial branch of Government. A challenge for the CEDAW Committee in deciding future communications concerns whether and, if so, when judicial stereotyping might require the Committee to step into the shoes of domestic courts, in order to assess and review findings of fact or law.

4. Naming Gender Stereotyping³¹

CEDAW obliges States Parties to eliminate wrongful gender stereotyping,³² that is to say, the process of ascribing to an individual specific attributes, characteristics or roles by reason only of his or her sex/gender, in ways that infringe human rights.³³ The CEDAW Committee has interpreted the obligation to 'address prevailing gender relations and the persistence of gender-based stereotypes' as being one of three obligations central to States Parties' efforts to eliminate all forms of discrimination against women.³⁴ It is not surprising, then, that the obligation to eliminate wrongful gender stereotyping has surfaced in several communications and an inquiry under the Optional Protocol to CEDAW³⁵ as well as under the reporting procedure³⁶ and in General Recommendations³⁷ of the CEDAW Committee. Yet, *Vertido* is the first CEDAW

31 See Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 39 (arguing that '[t]he ability to eliminate a wrong is contingent on it first being "named," by which is meant that a particular experience has been identified and publicly acknowledged as a wrong in need of legal and other forms of redress and subsequent prevention').

32 See Articles 2(f), 5(a) and 10(c), CEDAW.

33 See Cook and Cusack, *supra* n 31 at 9–31. Cook and Cusack use 'gender stereotyping' as an umbrella term that encompasses sex stereotyping, sexual stereotyping, sex-role stereotyping and compounded stereotyping.

34 See CEDAW Committee, General Recommendation No 25: Temporary Special Measures (art 4, para 1), A/59/38 Part I (2004); 11 IHRR 909 (2004) at para 7. The other two obligations central to State Parties' efforts to eliminate discrimination against women are 'to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination... by competent tribunals as well as sanctions and other remedies' and 'to improve the de facto position of women through concrete and effective policies and programmes': see *ibid.* See also Holtmaat, 'The CEDAW Convention's Holistic Approach to Equality and Non-Discrimination', in Hellum and Sinding Aasen (eds), *The Added Value of CEDAW* (Cambridge: Cambridge University Press, forthcoming).

35 See *supra* n 4.

36 See Article 18, CEDAW. See, for example, CEDAW Committee, Concluding Observations regarding the Czech Republic, 10 November 2010, CEDAW/C/CZE/CO/5 (2010) at paras 20–1 and 29; and CEDAW Committee, Concluding Observations regarding Tunisia, 5 November 2010, CEDAW/C/TUN/CO/6 (2010) at paras 24–5.

37 See Article 21, CEDAW. See, for example, CEDAW Committee, General Recommendation No 25, *supra* n 34 at para 7.

communication in which wrongful gender stereotyping and States Parties' obligations to eliminate that practice have been a central focus.³⁸

The author's legal strategy of expressly *naming gender stereotyping* appears to have set her communication apart from earlier communications and inquiries in which States Parties' obligations to address wrongful gender stereotyping were addressed. In her communication to the CEDAW Committee, the author focused on a particular form of gender stereotyping, namely sexual stereotyping.³⁹ In so doing, she identified a number of sexual stereotypes, including:

- *women should physically resist sexual assault at every opportunity*, which implies that failure to take advantage of perceived opportunities to escape from an alleged attacker is evidence that the woman was not raped;⁴⁰
- *women are inherently untruthful and thus likely to fabricate allegations of rape*, which implies that rape allegations made by women should automatically be viewed with suspicion;⁴¹ and,
- *older men lack sexual prowess*, which implies that an allegation of rape made against an older man must be unfounded because his age means he is not capable of committing rape.⁴²

The author also identified a number of related rape 'myths',⁴³ including the myth that *perpetrators of rape are strangers*, which implies that any sexual relations between persons who are 'more than nodding acquaintances'⁴⁴ must have been consensual and, therefore, not rape.

The author was able to identify those stereotypes and myths because she rigorously examined the sexual attributes, characteristics and roles that Judge Europa had ascribed to her and the accused. Once identified, the author elaborated the meaning and significance of each of the ascriptions.⁴⁵ She also demonstrated how gender stereotyping harmed her (for example, by justifying the acquittal of the accused),⁴⁶ and other rape victim/survivors (for example,

38 See Cook and Cusack, *supra* n 31 at 156–60, 165–72 (for a critique of the CEDAW Committee's approach to gender stereotyping in *A.T. v Hungary*, *supra* n 4 and the *Ciudad Juárez Inquiry*, *supra* n 4). Cf. *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain*, *supra* n 4 (Member Shanthi Dairiam dissenting).

39 See Cook and Cusack, *supra* n 31 at 27 (providing that '[s]exual stereotypes endow men and/or women with specific sexual characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault, transactional sex . . . and sexual objectification and exploitation').

40 *Karen Tayag Vertido v The Philippines*, *supra* n 2 at para 3.5.1.

41 *Ibid.* at paras 2.9 and 3.5.8.

42 *Ibid.* at para 3.5.7.

43 The term 'myth' refers to 'a widely held but false belief': see *Oxford Dictionary of Current English*, 9th edn (Oxford/New York: Oxford University Press, 2001). Compare the definition of 'gender stereotype' used in Section 4 above. Gender stereotypes can be accurate or false: Cook and Cusack, *supra* n 31 at 16–7.

44 *Karen Tayag Vertido v The Philippines*, *supra* n 2 at para 3.5.4.

45 See *ibid.* at paras 3.5.1–3.5.8.

46 See *ibid.* at paras 3.1–3.7.

by placing ‘rape victims at a legal disadvantage and significantly reduc[ing] their chances of obtaining redress for the violation they suffered’⁴⁷).

An analysis of the author’s strategy of naming gender stereotyping suggests that she understood that treating the harms of this practice required first that it be diagnosed as a social harm.⁴⁸ She appreciated, as Cook and Cusack have argued, that ‘[n]aming a stereotype is necessary in much the same way that a medical diagnosis is required before medical treatment can be applied.’⁴⁹ The success of the author’s strategy is evidenced in the consideration of the merits, where the majority expressly named and scrutinised several of the stereotypes identified by the author.⁵⁰ For example, focusing primarily on Judge Europa’s reliance on the prescriptive sexual stereotype that *women should physically resist sexual assault* at every opportunity, the Committee reasoned that ‘to expect the author to have resisted . . . reinforces . . . the myth that women must physically resist . . . sexual assault.’⁵¹ The views of the majority in *Vertido* can be contrasted with earlier communications, such as *A.T. v Hungary*⁵² or *Şahide Goekce v Austria*,⁵³ where wrongful gender stereotyping was raised in the context of domestic violence, but specific stereotypes were not named and their harms were not elaborated.⁵⁴

In the course of identifying the operative sexual stereotypes, the author drew attention to the broader context in which gender stereotyping occurs in the judicial system of the Philippines. She submitted to the CEDAW Committee that the decision of Judge Europa ‘is one among many trial court decisions in rape cases that discriminate against women and perpetuate discriminatory beliefs about rape victims.’⁵⁵ The author included information in her communication about seven rape cases decided between 1999 and 2007 to illustrate the pervasiveness of judicial stereotyping in the Philippines.⁵⁶ Through analysis of the broader context of stereotyping, the author attempted to demonstrate that judges have saturated Filipino law with harmful sexual stereotypes, resulting in their continued perpetuation. In so doing, she urged the Committee to recommend that the Philippines adopt measures to eliminate wrongful gender stereotyping across the entire judiciary.⁵⁷

Regrettably, however, the CEDAW Committee did not take the opportunity to consider the role the judiciary has played in systematically perpetuating

47 Ibid. at para 3.9.

48 See Cook and Cusack, *supra* n 31 at 40.

49 Ibid. at 175.

50 See *Karen Tayag Vertido v The Philippines*, *supra* n 2 at paras 8.1 and 8.8.

51 Ibid. at para 8.5.

52 *A.T. v Hungary*, *supra* n 4.

53 *Şahide Goekce v Austria*, *supra* n 4.

54 But see *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain* (7/05), CEDAW/C/39/D/7/2005 (2007) (Member Shanthi Dairiam dissenting).

55 *Karen Tayag Vertido v The Philippines*, *supra* n 2 at para 3.8.

56 Ibid.

57 Ibid. at paras 3.15–3.16.

sexual stereotypes in rape cases. Instead, the Committee framed its decision in terms of Judge Europa's stereotyping only. Despite this, several of the Committee's recommendations do call on the Philippines to take steps to address systemic stereotyping, including the call to '[e]nsure that *all* legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions'.⁵⁸ Had the Committee examined the broader context in which sexual stereotypes operate in the Filipino judiciary and how they have been perpetuated through rape cases (and not just the *Vertido* case), it could have articulated the nature and scope of States Parties' obligations, under Articles 2(f) and 5(a), to address *systemic* wrongful gender stereotyping in the judicial system, and targeted its recommendations accordingly.

In *Gender Stereotyping: Transnational Legal Perspectives*, Cook and Cusack argue that

[n]aming wrongful gender stereotyping . . . is central to the effectiveness of efforts to eliminate this practice. Unless wrongful gender stereotyping is diagnosed as a social harm, it will not be possible to determine its treatment and bring about its elimination.⁵⁹

They assert that 'the ability to eliminate wrongful gender stereotyping is contingent on the nature, forms, causes, and effects of stereotypes being examined.'⁶⁰ Karen Vertido understood the importance of this naming process and, consequently, put forward a rigorous analysis of wrongful gender stereotyping in rape cases in the Philippines. As we endeavour to hold more States Parties accountable for wrongful gender stereotyping by public (and private) authorities, a lot can be learnt from the way the author framed her communication. The CEDAW Committee, for its part, is to be applauded for putting the issue of wrongful gender stereotyping at the centre of its decision. It is unfortunate, however, that the Committee did not take this opportunity to expand more on the topic, for example, by articulating the obligations to address systemic judicial stereotyping.

5. Due Diligence and Obligations to Address Wrongful Gender Stereotyping

The concept of due diligence has played an important role in holding States legally accountable where they have failed to act diligently to prevent, investigate, punish and remedy violations of women's rights by private actors. First developed by the Inter-American Court of Human Rights in the 1988 case of

58 Ibid. at para 8.9(b) (emphasis added).

59 Cook and Cusack, *supra* n 31 at 40.

60 Ibid.

Velasquez Rodriguez v Honduras on forced disappearance,⁶¹ the due diligence standard has since been applied widely in the context of gender-based violence against women, including in the Declaration on the Elimination of Violence Against Women,⁶² the jurisprudence of the CEDAW Committee⁶³ and the work of the UN Special Rapporteur on violence against women, its causes and consequences.⁶⁴ In its General Recommendation No 28 on State obligations, the CEDAW Committee built on this substantive body of human rights law to explain that the concept of due diligence refers to the

obligation on States parties to prevent discrimination by private actors. In some cases a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women, as defined in the Convention.⁶⁵

In its discussion of States Parties' obligations in *Vertido*, the CEDAW Committee appears to affirm that there is a due diligence obligation inherent in Articles 2(f) and 5(a) of CEDAW to address wrongful gender stereotyping by private actors.⁶⁶ This pronouncement is significant as it signals a willingness on the part of the CEDAW Committee to broaden the application of the due diligence standard beyond gender-based violence against women—something that feminist legal scholars have encouraged.⁶⁷ However, in the present authors' view, the Committee misinterpreted the standard in the *Vertido* case. The majority remarked in its views that

the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2(f) and 5(a) needs to be assessed in . . . light of the level of gender sensitivity applied in the judicial handling of the author's case.⁶⁸

61 *Velasquez Rodriguez v Honduras* IACtHR Series C 4 (1988) at para 172.

62 GA Res 48/104, 23 February 1994, A/RES/48/104, at Article 4.

63 CEDAW Committee, General Recommendation No 19: Violence against Women, A/47/38 at 1 (1993); 1-1 IHRR 24 (1994), at para 9; *Fatma Yildirim v Austria*, supra n 4; *Şahide Goekce v Austria*, supra n 4; *A.T. v Hungary*, supra n 4; and *Ciudad Juárez Inquiry*, supra n 4.

64 See, for example, Commission on Human Rights, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, Report by the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, 20 January 2006, E/CN.4/2006/61 (2006).

65 CEDAW Committee, General Recommendation No 28, supra n 9 at para 13.

66 *Karen Tayag Vertido v The Philippines*, supra n 2 at para 8.4.

67 See Byrnes, Graterol and Chartres, 'State Obligation and the Convention on the Elimination of All Forms of Discrimination against Women', UNSW Law Research Paper No 2007-48 (2007) at para 130; and Holtmaat, 'Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention', in Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Leiden: Martinus Nijhoff, 2009) at 63.

68 *Karen Tayag Vertido v The Philippines*, supra n 2 at para 8.4.

From this statement, it appears that the majority is suggesting that the due diligence obligation is applicable to the decision of Judge Europa. Yet, as a member of the Filipino judiciary and therefore a State actor, Judge Europa's wrongful gender stereotyping is directly attributable to the Philippines; that is to say, there is no need to invoke the due diligence standard, as the State Party is automatically liable for the actions of its own agents and officials. However, had the case concerned the State's liability for its failure to protect against wrongful gender stereotyping by a private actor (for example, an employer), the majority would have been justified in its application of the standard.

It is not only the Committee's misinterpretation of the due diligence obligation, but also its conflation of different types of State obligations that causes confusion in the *Vertido* case. There are three types of obligations that are relevant to the case. The first is the obligation imposed on all branches and levels of government to refrain from wrongful gender stereotyping. This is distinct from both the obligation to act with due diligence to protect against wrongful gender stereotyping by private actors and to act with due diligence to protect women against gender-based violence, including rape, by private actors. As *Vertido* primarily concerns the first of those types of obligations, it is puzzling why the majority dismissed the author's allegation of a violation of Article 2(d) of CEDAW (which requires States Parties to ensure that its organs—including the judiciary—refrain from discrimination), as being less relevant than the other alleged violations.

How, then, might the majority have taken advantage of the opportunity in *Vertido* to articulate the nature, scope and extent of States Parties' obligations in respect of wrongful gender stereotyping? One approach might have been to enumerate States Parties' obligations in Articles 2(f) and 5(a) of CEDAW according to the well-known tripartite framework of the obligations to 'respect, protect and fulfill'.⁶⁹ The Committee might have explained, for instance, that the obligation to respect requires States Parties

not to enact or enforce laws that institutionalise harmful gender stereotypes, and to reform or repeal laws that contain them. It further entails taking steps to ensure that policies, regulations, programmes, administrative procedures and institutional structures are not based on gender stereotypes, and to rescind or alter those that are.⁷⁰

In articulating States' obligations, it would have been helpful for the majority to identify the differences in the obligations imposed on States Parties under Articles 2(f) and 5(a), and consider when gender stereotyping might be

69 See CEDAW Committee, General Recommendation No 28, supra n 9 at para 9. See also Cook and Cusack, supra n 31 at 76–84.

70 See Cusack, 'CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping', in Hellum and Sinding Aasen, supra n 34.

justified under CEDAW. In addition, the Committee might have clarified that States Parties can be held directly accountable for the wrongful gender stereotyping of state agents and officials and persons acting on behalf of governments, and indirectly accountable for wrongful gender stereotyping of private actors (for example, media employers) if they fail to act diligently to prevent, investigate, punish and remedy related violations of women's rights.

Finally, a note about the due diligence obligation to prevent, investigate, punish and remedy gender-based violence against women perpetrated by private actors. In the words of the Committee, this obligation 'needs to be assessed in . . . light of the level of gender sensitivity applied in the judicial handling of the author's case.'⁷¹ It is worth noting that with this approach, the CEDAW Committee takes a step beyond the approach taken by the European Court of Human Rights. The central issue in the 2003 judgment of *M.C. v Bulgaria* was the State's positive obligations in cases of acquaintance rape.⁷² The European Court, unlike the CEDAW Committee, based its finding that Bulgaria had violated its positive obligations under the European Convention on Human Rights⁷³ primarily on the fact that the Bulgarian judicial authorities took physical resistance rather than lack of consent, as the central defining element of rape.⁷⁴ The CEDAW Committee could have done the same in *Vertido*, as the Filipino judge also focused on the seeming lack of physical resistance. Instead, the CEDAW Committee went further, in that it dismantles the gendered assumptions that form the basis of the focus on resistance:

[T]he Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.⁷⁵

If we want to make progress in eradicating and punishing violence against women, it is vitally important that this type of gender analysis is applied consistently. The example set by the CEDAW Committee is to be applauded and it is to be hoped that other human rights treaty bodies and courts will follow.

To reiterate: the obligation on State agents and officials to refrain from wrongful gender stereotyping is distinct from the obligation to act with due diligence to protect against wrongful gender stereotyping by private actors

71 *Karen Tayag Vertido v The Philippines*, supra n 2 at para 8.4.

72 *M.C. v Bulgaria* 2003-VII: 40 EHRR 20.

73 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 2 UNTS 221.

74 *M.C. v Bulgaria*, supra n 72 at paras 178–85.

75 *Karen Tayag Vertido v The Philippines*, supra n 2 at para 8.5.

and the due diligence obligation to protect against gender-based violence against women perpetrated by private actors. In so far as the CEDAW Committee suggests that the due diligence standard should be applied in the gender stereotyping context, this is an exciting development that is to be celebrated. What is needed, now, is for the CEDAW Committee to develop the scope and content of the obligations to address wrongful gender stereotyping, including the due diligence obligation.

6. Conclusion

In the literature on CEDAW, feminist legal scholars have developed the concept of ‘transformative equality’.⁷⁶ Fredman describes this as

re-structuring society so that it is no longer male-defined. Transformation requires a redistribution of power and resources and a change in the institutional structures which perpetuate women’s oppression.⁷⁷

In other words, transformative equality is aimed at disrupting the *status quo*.⁷⁸ Though the decision in *Vertido* holds great transformative potential through its focus on wrongful gender stereotyping, in the end it does not reach this potential. One reason the decision falls short in this respect is that the CEDAW Committee failed to address systemic stereotyping of rape victims in the Philippines judiciary. Another reason is that the Committee did not explain the nature and scope of the due diligence obligation as applied to wrongful gender stereotyping. Because the Committee does not address the systemic nature of judicial gender stereotyping in the Philippines or point States Parties to appropriate tools to address wrongful gender stereotyping in the private sphere, in some ways, the structural discrimination of women in general, and rape victims/survivors in particular, is left intact. Nevertheless, *Vertido* provides an important contribution and fresh impetus to jurisprudence on gender stereotyping. It also serves as a reminder of the challenges confronting us as we seek to navigate the road to a re-structured society that is no longer male defined.

⁷⁶ See, for example, Holtmaat, *supra* n 34.

⁷⁷ Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights’, in Boerefijn et al. (eds), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Antwerp/Oxford/New York: Intersentia, 2003) at 115.

⁷⁸ Otto, ‘Rethinking the “Universality” of Human Rights Law’ (1997–1998) 29 *Columbia Human Rights Law Review* 1 at 19.