

# BOFAXE

## Still (stereo-)typing...? (Part 1)

### Unpacking Art. 8 CRPD and the Jurisprudence of the Committee on the Rights of Persons with Disabilities

— The impact of harmful stereotypes on the enjoyment of human rights is increasingly acknowledged in the human rights discourse. However, the exact legal scope of States' obligations to combat harmful stereotypes, as explicitly reflected in Art. 8(1)(b) of the Convention on the Rights of Persons with Disabilities (CRPD), remains unclear. Precisely, this provision calls upon States to undertake to adopt effective measures to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life". This post outlines the Committee on the Rights of Persons with Disabilities' (CRPD-Committee) handling of individual communications related to stereotypes and critically assesses its approach to Art. 8(1)(b) CRPD.

#### Stereotypes and Human Rights Law

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was the first treaty to insert explicit stereotype-related obligations to the international human rights framework, Art. 5(a) CEDAW. Against this background, the CEDAW treaty body and leading scholars have contributed to first international attempts to dogmatically conceptualize stereotypes within the human rights doctrine (see e.g. OHCHR-commissioned report: Gender stereotyping as a human rights violation (here)). It defines stereotypes as "a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group" (p. 8). "Wrongful Stereotyping" is understood as the application of stereotypes leading to a human rights violation (p. 9). Similarly, the awareness of regional human rights courts on the effects of stereotypes is increasingly growing. Importantly, human rights jurisprudence should name and identify the impact of underlying stereotypes and contest them to challenge their societal impact (pp. 718ff.).

The CRPD-Committee has relied on the work of the CEDAW Committee on stereotypes within its general comment No. 3 on girls and women with disabilities and has repeatedly acknowledged the detrimental effects of stereotypes on many substantive rights of the CRPD, thus clarifying which stereotypes might be considered as "harmful" by posing barriers to the effective enjoyment of rights (para. 47). While Art. 8 CRPD is prominently featured within the Committee's general comments and concluding observations on State reports, stereotypes have played only a marginal role within the Committee's decisions on individual communications. As this is the only effective remedy directly available to individuals, this raises serious doubts about the justiciability of the provision. Of the 67 decisions on individual complaints, only 6 explicitly refer to Art. 8 CRPD. One appears to do so mistakenly, and only 3 were decided on the merits in relation to Art. 8 CRPD, without explicitly referencing subsection (1)(b). As will be demonstrated, the jurisprudence of the Committee has indeed confirmed the normative relevance of stereotypes but has not yet managed to develop a coherent normative approach.

#### Similar cases, different reasoning

Three similar communications filed between 2017 and 2019 against Tanzania highlight some inconsistencies in the Committees approach towards stereotypes. All three concern violence against persons with albinism, including physical assaults and forcible dismemberment based on beliefs tied to witchcraft. While the first decision (X v. Tanzania) does not reference Art. 8 CRPD or stereotypes at all, the later decisions (Y v. Tanzania and Z v. Tanzania) linked the violations to a failure to implement adequate measures to raise awareness of albinism throughout society in order to prevent discrimination and insecurity, thus finding a violation of Art. 8 CRPD. However, only the latest case (Z v. Tanzania) explicitly addresses stereotypes, criticizing Tanzania's awareness-raising efforts as neither "systematic or sufficient" to combat stereotypes, prejudices and harmful practices relating to persons with albinism (para. 8). Interestingly, while the Committee found a violation of Art. 8 CRPD in both cases, in the latter case it found that Tanzania's inaction amounted to a violation of the author's rights under Art. 8 only "read in conjunction" with other rights of the Convention.

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# BOFAXE

## Still (stereo-)typing...? (Part 2)

### Unpacking Art. 8 CRPD and the Jurisprudence of the Committee on the Rights of Persons with Disabilities

Thus, while the first case suggests that Art. 8 CRPD can be violated independently of other substantive rights, the second case seems to favor an approach that requires another substantive right to be violated when assessing a violation of Art. 8 CRPD.

#### Closed cases, open questions

Another case, *García Vara v. Mexico*, shows that the Committee is willing to deliver an in-depth analysis of the relevance of stereotypes, but ultimately leaves important questions open. Here, the complaint's author claimed that the failure to ensure reasonable accommodation during university admissions violated her rights under Arts. 24 and 5 CRPD. She also argued this reflected the State's failure to combat stereotypes, invoking Art. 8 CRPD. While Mexico denied her being subjected to stereotypes, the author pointed to the state authorities' emphasis on her presumed difficulties with abstract concepts and memory strategies as evidence of prejudiced assumptions. She further argued that determining her unsuitability without individualized assessment perpetuated harmful stereotypes. The Committee echoed these arguments and added that Mexico had not demonstrated any efforts to combat stereotypes. It found a violation of Art. 24 CRPD "read alone and in conjunction with Arts. 4 and 8."

While this generally affirms the relevance of Art. 8 CRPD for the enjoyment of other rights of the CRPD, its concrete legal reasoning remains partially unclear.

There are (at least) three possible grounds on which a violation of Art. 8 CRPD could be based. First, the violation could primarily lie in Mexico's omission of awareness-raising efforts. Secondly, it could be based on the general perpetuation of stereotypes by the design of the selection process of the public institution, which is attributable to the State under international law. Finally, the violation may stem from the fact that the author herself was individually stereotyped during the admission procedure, lacking individual assessment, making her a direct victim of stereotyping. Lastly, the violation could result (only) from a combination of all these aspects. A more detailed and precise elaboration of the legal reasoning behind the violation of Art. 8 CRPD, explicitly pointing to the relevant acts or omissions of the State and referencing the exact subparagraph of the provision, would have helped to develop a more nuanced understanding of the obligation to combat harmful stereotypes.

#### Decisions Not Referencing Art. 8 CRPD

Although these were the only cases explicitly referencing Art. 8 CRPD within the operative part of the decision, stereotypes have surfaced in other communications as well, i.e. within the authors' or third-party submissions. In *Bujdosó v. Hungary* the Committee assessed the complaints of the authors with intellectual disabilities who were placed under guardianship, leading to their exclusion from electoral participation. A third-party intervention referenced in the decision held that "restricting the right to vote on the basis of disability constitutes direct discrimination, and is predicated on the unacceptable and empirically unfounded stereotype that all persons with disabilities are incapable" (para. 5.4). However, although the Committee found several violations of the Convention, it has not addressed this argument any further in its decision and has thus neglected the relevance of stereotypes in that case. This is all the more surprising as in the very similar case *Alajos Kiss v. Hungary* against the same Hungarian law, the European Court of Human Rights (ECtHR) had already explicitly established the relevance of stereotypes and prejudice to that case (para. 42).

In *Marlon James Noble v. Australia*, the author claimed that during his detention he had been treated by authorities as a "continuous danger". Although stigmatization was central to his argument, the Committee did not address the issue in its decision but still found several rights of the CRPD to be violated.

*Medina Vela v. Mexico* concerned special procedures for persons exempt from criminal liability. The author and a third-party submission criticized these measures as stigmatizing and being based on the outdated medical model of disability.

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# BOFAXE

## Still (stereo-)typing...? (Part 3)

### Unpacking Art. 8 CRPD and the Jurisprudence of the Committee on the Rights of Persons with Disabilities

Yet, the Committee refrained from considering the stereotype dimension, despite acknowledging multiple rights violations. Although these decisions show that addressing Art. 8(1)(b) CRPD or stereotypes in general may not be necessary to find a violation of the rights, explicitly addressing and deconstructing relevant stereotypes would have contributed to a more comprehensive analysis of the case, addressing the underlying societal issues and clarifying the legal scope of Art. 8 CRPD.

#### Invisible Stereotypes

In other cases, stereotypes were not mentioned at all, neither by the Committee nor by the authors or third-party interventions, but arguably significantly shaped the facts of the case. One of these examples where the relevance of stereotypes remained completely invisible is the case of *Rékasi v. Hungary*. It concerned the conclusion, without prior consultation, of a life insurance policy exclusively covering the costs of a funeral for a woman under guardianship, aged 42 and in good physical health. She argued this decision reflected substitute decision-making, contrary to Art. 12 CRPD. The Committee agreed, finding several violations of the Convention.

What has not been addressed is the relevance of stereotypes in this case, which is at least twofold: First, the guardian assumed that the author was incapable of making decisions about her financial affairs without even attempting to verify or assess the accuracy of this assumption. In doing so, the guardian was probably influenced by stereotypes about the dependency and incapacity of people with intellectual disabilities, and applied and perpetuated such stereotypes by failing to seek any form of prior consultation. Secondly, the decision to enter into the precise contract, apparently a standard practice for guardians, was also likely to have been influenced by stereotypes about the life expectancy, financial dependency and social exclusion of people with disabilities, lacking individual assessment.

#### Conclusion

Although the committee can generally be praised for confirming the normative relevance of stereotypes for the enjoyment of human rights, it has missed several opportunities to further clarify the exact legal scope of Art. 8(1)(b) CRPD and the obligation to combat stereotypes more generally. The three (similar) cases against Tanzania illustrate the Committee's inconsistent approach, as stereotypes and Art. 8 CRPD were treated differently ranging from refraining to reference it at all to a combined and finally a stand-alone approach. Thus, the key question in this regard is whether and to what extent the obligation to combat stereotypes can be violated as a stand-alone obligation remains unsettled. Further, the decisions are not always clear as to which specific acts or omissions fall within the legal scope of Article 8(1)(b) CRPD, raising questions on the precise obligations it imposes and potential threshold for its violation. As none of the remaining currently pending cases explicitly refer to Article 8 CRPD, clarification is unlikely to come soon. Nevertheless, it is to be hoped that the Committee will look more closely at the relevance of underlying stereotypes in relation to the enjoyment of other substantive rights in future cases. The fulfillment dimension of human rights arguably is where the heart of the obligation to combat stereotypes lies as it recognizes stereotypes as what they are: persistent barriers to the enjoyment of human rights. While there is room for criticism, the Committee has already done a very important job in pointing this out.