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DIKE VERLAG
Gender: An analytical concept that tackles the hidden structural bias of law

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Abstracts

In this contribution to feminist legal studies the theoretical concept of gender takes a central place. This concept is used as an analytical tool to deconstruct the hidden gender stereotypes that deeply influence women's legal position. Following Joan Wallach Scott's definition of gender as "a constitutive element of social relationships based on perceived differences between the sexes, and [...] a primary way of signifying relationships of power", I will demonstrate how law is gendered, and how, in turn, it influences the concrete social and economical position of women. The role that ideology and power relations play in this respect is discussed as well. I take the position that as long as existing (unequal) gender relations are seen as "natural" and "normal" and as long as legal concepts are seen as mirroring this fixed "reality", the problem of unequal gender relations in law cannot be solved. Finally, I discuss the only existing legal norm which gives some foothold for the recognition of a (state) obligation to take account of the effect of gender stereotypes in law: Article 5 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). This provision obliges the government to apply a so-called Gender Impact Assessment (GIA) in each case of new legislation in which the position of women is at stake. The contents of such a "legal" GIA will be exposed briefly in this contribution.

In diesem Beitrag zur feministischen Rechtswissenschaft nimmt der theoretische Begriff des "Gender" eine zentrale Stellung ein. Er dient als Analyseinstrument, um versteckte Geschlechterstereotypen aufzudecken, die die rechtliche Stellung der Frau stark beeinflussen. Ausgehend von der Definition von Joan Wallach Scott, "Gender" sei ein konstitutiver Bestandteil von sozialen Beziehungen, der auf angenommenen Geschlechtsunterschieden basiere und
häufig benutzt werde, um Machtverhältnisse auszudrücken, werde ich zeigen, wie das Rechtswesen geschlechterbezogen ist und wie es die gesellschaftliche und wirtschaftliche Stellung der Frau beeinflusst. Die Rolle von Ideologie und Machtverhältnissen in diesem Zusammenhang wird ebenfalls diskutiert. Meiner Meinung nach kann das Problem der nicht auf Gleichberechtigung basierenden Geschlechterverhältnisse im Rechtswesen nicht gelöst werden, solange die bestehenden Geschlechterverhältnisse als "natürlich" und "normal" betrachtet werden und solange es heisst, die Rechtskonzepte spiegelten diese festgelegte "Wirklichkeit". Schliesslich diskutiere ich die einzige bestehende Rechtsnorm, die einigermassen eine Basis legt für die Anerkennung einer (staatlichen) Verpflichtung, die Auswirkungen von Geschlechterstereotypen im Gesetz zu berücksichtigen: Artikel 5 der Convention on the Elimination of all forms of Discrimination Against Women (CEDAW; Konvention zur Beseitigung jeder Form von Diskriminierung der Frau). Darin werden Regierungen verpflichtet, bei jeder neuen Gesetzgebung, die die Stellung der Frau betrifft, eine so genannte "Gender Impact Assessment" (GIA; Bewertung der geschlechtsspezifischen Auswirkungen) durchzuführen. Was eine solche "rechtliche" GIA umfasst, wird in diesem Beitrag kurz dargelegt.

Dans cette contribution aux études juridiques féministes, le concept théorique de "genre" occupe une place centrale. Il sert d'instrument d'analyse pour dévoiler les stéréotypes sexuels latents qui influent profondément sur la position légale des femmes. En se basant sur la définition de Joan Wallach Scott, selon laquelle le genre est "un élément constitutif des relations sociales, basé sur les différences perçues entre les sexes, et qui représente une manière fondamentale d'exprimer les relations de pouvoir", l'auteure montre comment la loi est influencée par le genre et, par contrecoup, comment elle influe concrètement sur la position sociale et économique des femmes. À son avis, tant que les rapports existants (d'inégalité) entre les sexes seront perçus comme "naturels" et "normaux" et tant que les concepts juridiques seront réputés refléter cette "réalité" figée, il sera impossible de résoudre le problème des discriminations liées au sexe dans le champ du droit. Pour finir, Rikki Holtmaat examine la seule norme légale existante susceptible de conférer un certain ancrage à la reconnaissance d'une obligation (faite à l'Etat) de prendre en compte l'effet que les stéréotypes sexuels exercent sur la loi: l'article 5 de la Convention des Nations Unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes. Avant
l'adoption de toute nouvelle législation mettant en jeu la condition des femmes, cet article oblige les gouvernements à procéder à une évaluation de ses répercussions sur les relations de genre (GIA: Gender Impact Assessment). Suit un bref exposé du contenu d'une telle évaluation dans le contexte juridique.
Introduction

In this contribution, I develop an analytical model which can reveal the gender connotation of law, along the lines set out by the historian Joan Wallach Scott.\(^1\) The concept of gender takes a central place in my approach to feminist legal studies. This concept refers to the social constructions of maleness and femaleness, which are the constructions which in turn (partly) determine the actual position of women and men. In the present contribution, I discuss how gender is constructed, what role (the) law plays in this, and vice versa: what role gender plays in (the) law.\(^2\)

The greater part of this article is devoted to that. In the final part, I discuss the only existing legal norm which gives some foothold for the recognition of a (state) obligation to take account of the effect of gender stereotypes in law: Article 5 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). This provision, to my opinion obliges the government to apply a so-called Gender Impact Assessment (GIA) in each proposal for new legislation or a change in legislation in which the position of women is at stake. The contents of such a "legal" GIA will be exposed briefly in this contribution. To begin with, however, I will explore further the various possible approaches to the study of the relationship between women and law.

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\(^1\) With the title of my contribution, I express the debt I owe to the work of Joan Wallach Scott (see especially Joan Wallach Scott, Gender: a Useful Category of Historical Analysis; in: E. Weed [ed.], Coming to terms, London, 1989, pp. 81–100. [Originally published in the American Historical Review, 91 {dec. 1986} pp. 1053–1075]), in which I have found many useful points of departure for legal research into gender. This (revised and updated) article appeared earlier in Dutch in Justitiele Verkenningen, 1997, No. 9. With many thanks to Allison McDonnell for her excellent translation.

\(^2\) The law is here understood both as the totality of institutions, written and unwritten rules and norms, which together constitute our legal order, and also as a representation which constructs legal relations and legal subjects. The concept law refers to the substantive content of both the legal order, and the representation (law is what is or should be de jure). Therefore, I should really always use "(the) law", but for ease of reading, I will use "law" and "the law" alternatively in the following.
Women and law: three approaches

In each national legal system, there are examples to be found of unequal treatment of women. In the Netherlands, for example, the legal rule exists up to this day that if parents cannot agree on the choice of surname for their children, the man decides. The first possible approach to this discrimination of women in the area of the law concerning children's (and thus everyone's) names, presupposes a malicious purpose on the part of men: they are considered to be deliberately making use of the law to oppress women. Law is, in other words, sexist. A second possible approach is considerably more subtle: it is not conscious discrimination, but an unconscious continuation of existing unequal relationships between the sexes which is the basis for the unequal treatment. Up until now, it has been men who were primarily concerned with legislation and formation of the law, they have simply taken their own lives as frame of reference, and it is not surprising that in a number of situations they come out of it better than women. Law is "male".

In a third approach, the problem of unequal treatment of men and women in the law on names is analysed in terms of what it reveals about the gender relationships which are effective in law. The fact that the man has legal power of decision will then be seen as an example of law as a "gendered practice". In this context, we can also speak of systematic discrimination: the disadvantaged position of women results from the fact that in our culture, economic system, institutions, social and legal structures, etc., the relationships between the sexes have been ordered (and are still being ordered) in a way which systematically disadvantages women, or systematically maintains women in an oppressed position. That is caused either by the fact that no allowance is made at all for the existence of women in the world, or that women (or people who act as women, who take on the "natural" role of women) are allocated a different/inferior place.

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3 The term "law as a 'gendered practice'" is used by C. Smart, The Women in Legal Discourse. Social and Legal Studies, 1992, Vol. 1, n. r 1, p. 29–44, (Smart 1992). I use it here as identical to the term "gendered law".

4 This form of discrimination is sometimes mentioned in theories of legal equal treatment for women alongside direct and indirect discrimination.
The three approaches mentioned (sexist law, male law, and gendered law) have been extensively described by Carol Smart.⁵ According to Smart, there is a subtle but important difference between the opinion that law is male and the opinion that it is gendered:

"But whilst the assertion that law is male effects a closure in how we think about law, the idea of it as gendered allows us to think of it in terms of processes which will work in a variety of ways and in which there is no relentless assumption that whatever it does exploits women and serves men."⁶

The advantage of this approach is, according to Smart, that law no longer has to be described using the categories male and female, but that we "[...] can begin to see the way in which law insists on a specific version of gender differentiation, without having to posit our own form of differentiation as some kind of starting or finishing point"⁷. The danger of that would be that in fact we unconsciously reproduce the categories man and woman, or male and female. This means that "[...] we can begin to analyse law as a process of producing gender identities rather than simply as the application of law to previously gendered subjects."⁸ Gender is active, not passive; every person and every human structure or construct contributes to it. In the words of Silvia Gherardi: we are "doing" gender.⁹

It is already apparent from this description of what it means to consider law as gendered practice, that the concept gender is considered to be an analytical category: a means which can be used to reveal the workings of the process of reproducing the unequal relationships between men and women. This means that we do not take as starting point an essentialist definition of what women are or of what law is, but that, with the help of the concept gender, we can analyse how maleness and femaleness are (partly) (re)produced by the law.

How is this analytical category itself constructed?

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⁵ Smart, (see note 2).
⁶ Smart, (see note 2), p. 33.
⁷ Smart, (see note 2), p. 34.
⁸ Smart, (see note 2), p. 34.
The use of gender as an analytical category

The concept of gender was developed within women's studies in the field of literature and the historical and social sciences. It means something fundamentally different from sex, in the sense of biological male or female sex. In women's studies, the concept is used as a fusion of biologically determined factors and socio-cultural constructions and symbols of maleness and femaleness. In this article, I use gender exclusively in this more comprehensive meaning.

In her classic article, "Gender: A Useful Category of Historical Analysis", Joan Wallach Scott distinguishes between the use of gender to describe the position of women (in relation to that of men), and the use of this concept to provide causal explanations of the nature of oppression of women. In legal women's studies, gender – insofar as it is used at all – is used primarily descriptively.

The second possible function of gender is, in my view, of more importance: gender can have a functional role in theories which aim to provide an explanation of the nature or the ultimate causes of the persistent inequality of women vis-à-vis men.

In explanatory theories concerning the oppression of women, we should – still, according to Scott – work with a non-essentialist content for the concept gender. Gender is not something which is, but something which has an effect at a particular time and in a particular manner (hence the term gendered practice). An essentialist approach to what men and women are, or what is male or female, leads in fact to a dead-end: if the unequal treatment

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11 It is then demonstrated that women occupy a different position from men on a quantitative basis, i.e. that an apparently sex-neutral rule in practice leads to a disproportionate disadvantage for women. The categories "men" and "women" are represented as unproblematic in such approaches.

12 Scott 1989, (see note 10), p. 83. Which does not mean that the aim should be to look for one comprehensive theory about the only true reason for oppression of women; such an attempt at "grand theorising" does not accord with the post-modern belief that science does not lead to the discovery of one single truth.
or the oppression of women is explained on the basis of a biological difference, or on the basis of the different nature of women and men, then the content of the concepts of femaleness and maleness will be the same throughout the history of humanity. In essence, then, what men and women are is fixed. Fundamental changes, both in the past and in the future, are excluded by such an essentialist approach. Anyone who believes as a matter of principle in the possibility of change in the relationship between women and men in and through law would therefore be well-advised to stop searching for what is essentially female.\textsuperscript{13}

After this warning, Joan Scott comes with a twofold description of what gender comprises:

"The core of the definition rests on an integral connection between two propositions: gender is (1) a constitutive element of social relationships based on perceived differences between the sexes, and gender is (2) a primary way of signifying relationships of power."\textsuperscript{14}

I will now go further into both these elements of gender, in order to show in what way this concept can be useful for the development of a feminist jurisprudence.

**The construction of maleness and femaleness**

According to Scott, four factors play a role in the construction of social relationships between the sexes:

1. culturally available symbols that evoke multiple (and often contradictory) representations of the male and the female;

2. normative concepts that set forth interpretations of the meanings of the symbols and that attempt to limit and contain their metaphoric possibilities;


\textsuperscript{14} Scott 1989, (see note 10), p. 94.
3. the notion of politics and social institutions and organisations that lead to the appearance of timeless permanence in binary gender representation;

4. the construction of subjective gender identities.\(^{15}\)

Using a number of examples, I will show how these factors (also) work in and through the law.

**Culturally available symbols**

The law makes an abundant use of cultural symbols which refer to maleness and femaleness. Symbols such as strength and weakness, autonomy and dependence, objectiveness and subjectiveness, rationality and emotionality, general and specific, public and private, rights and needs, etc., are all denominators which frequently occur during the process of classifying people, groups of people, and of situations, which are within – or, more to the point, outside – the scope of a particular field of law or of certain rights of the individual legal subject. These denominators symbolise a gendered classification: the first-mentioned concept in each pair represents thereby maleness, the second concept femaleness. It will come as no surprise that the denominators symbolizing maleness are closely connected with "objective" law and "subjective" rights, i.e. they lie within the area of legal discourse; the denominators symbolizing femaleness often lie outside law (or concern another kind of law).\(^{16}\)

Law is conceptualised as objective, rational, general and public, and confers strong (subjective) rights on autonomous individuals, while – at the other end of the spectrum – terms such as dependence, specificity, private life, etc. are used to define those areas of social life or those groups of people who are not (able to be) within the reach of the law.

It will not come as a surprise that it is precisely these areas which are often of crucial importance for women. For instance, my research into the construction

\(^{15}\) SCOTT 1989, (see note 10), p. 94/95.

of the dual system of social security in the Netherlands reveals that social provisions (including national assistance benefits) are typified by concepts such as family cohesion, solidarity, distributive justice, concrete need, etc., while at the other end, social insurance is typified by concepts such as individual autonomy, performance-based rights (e.g. work related rights, rights based in contributions to social insurance schemes), equivalent justice and objectivized circumstances. On the one hand, it is about a real person in her/his concrete circumstances, on the other, it is about an abstract subject of the law (citizen). In these two groups of concepts, care (social provisions) and law (social insurance) are symbolically opposed to each other, as two mutually exclusive systems of concepts.17

Normative concepts

In the second place, Scott mentions the existence of normative concepts which give a fixed meaning to the symbols we use. These normative concepts are expressed in religious, educational, scientific and political doctrines, and take the form of fixed, binary oppositions, which petrify categorically and inevitably the meaning of being a man or woman and/of maleness and femaleness, according to Scott. This inevitability is however merely apparent: in fact, these concepts only have such a fixed meaning because alternative meanings are excluded. In some cases, there is also a (political) battle over the content of these concepts. The dominant vision however always presents itself as the only possible meaning and is therefore ideologically biased.18

In my analysis of the concept employee19 and the concept insurable social risks,20 I have shown to what extent an apparently neutral legal term can be given a one-sided content with male experiences and opinions. The implicit image of the employee, on which countless rules of public and private law are

18 SCOTT 1989 (see note 10), p. 94.
20 HOLTMAAT1992, (see note 16).
based, was for a long time that of the full-time bread-winner; a person who has no concrete care obligations which could form an obstacle to him/her as far as carrying out paid work is concerned. The concept of insurable social risks covers those risks which are linked to the manner of earning income which was traditionally primarily carried out by men (full time salaried work) and excludes those risks which (given the traditional relationships between the sexes) particularly affected women (e.g. loss of income from income-sharing within a partnership).\(^{21}\)

A good example of the role which the courts play in this is the manner in which the European Court of Justice takes the dominant (western) motherhood ideology as the basis for its case law on equal rights for women.\(^{22}\) Another example of the effect of such fixed concepts in the law is the normative occupation\(^{23}\) of the concept of time. In law, time is almost exclusively used in the sense of linear time (clock time), which as such can be (and is) divided into two sorts: working time and free time. In my analysis of the Opinion of the Advocate General of the European Court of Justice in the H e l m i g case, I have shown what kind of results this can lead to.\(^{24}\) In the Advocate General's "story", time serves only two purposes: work or leisure. Such a normative view of time excludes other ways of experiencing time (such as cyclical) and other divisions of time (such as the threefold division: work-care-leisure).

\(^{21}\) I developed this concept in my dissertation: HOLTMAAT1992, (see note 16). It indicates that alongside the "male" ways in which people can earn income (e.g. salaried work, self-employed work and capital investments), there is also an important "female" manner of providing your own means of subsistence, and that is sharing the income of a person with whom you form a household—whether married or not.


\(^{23}\) T Hart & Foqué also combat such a normative occupation of legal concepts: A. C. T. HART/R. FOQUÉ, Instrumentaliteit en Rechtsbescherming. Gouda Quint, Arnhem 1990. They argue that legal concepts should have a certain "under-determination", and should be counterfactual in nature. That is to say: they should not claim to reflect any kind of reality outside the law. I will return to this later in this article.

The appearance of timeless permanence in binary gender representation

The third factor from Scott's list is also capable of providing insight in the gender-connotation of law. Scott refers here to "general" institutions, such as the political system or the legal system and the law itself, which have an air of maleness or femaleness, or which have precisely an air of absolute gender-neutrality.²⁵ Politics is seen by many as male; the family and everything connected to it as a female institution, as the female domain par excellence. Law, on the other hand, has an almost impenetrable appearance of gender-neutrality, certainly since all the vestiges of open and/or direct discrimination have been removed.

The general acceptance of the principle of formal equal treatment (in constitutions and international treaties and conventions) has added to this appearance of gender-neutrality. Eileen Fegan points out that as long as abstract legal concepts such as equality and (subjective) rights are uncritically adopted (by feminist legal theorists) in campaigns against unjust law "[...] law itself will, paradoxically, continue to be accepted as neutral, objective, and as somehow 'fair' in the consciousness of most people". At the same time, however, so Fegan continues, the dominant ideas and opinions which are incorporated in law, as a result of the legitimating ideology of equality and rights, are almost unassailable.²⁶

One of the most important aims of (western) feminist legal studies in the last decades has been to decode or deconstruct this appearance of neutrality, and reveal the strong ideologically biased connotation of law. Although this has been carried out very successfully in particular sub-fields, it nevertheless seems that the idea of the neutrality of law has remained unassaulted.²⁷ This

²⁷ Fegan mentions the belief in legal neutrality and objectivity as the core of the ideology of law, whereby law can in turn function as a "significant reinforcer of ideologies". FEGAN, (see note 26), p. 186.
could be a partial explanation for the persistency of many forms of institutional or systematic "discrimination". In this area, therefore, there is certainly still a lot of work for feminist legal studies.

The construction of subjective gender identities

The fourth element, the construction of subjective gender identities, is also a mechanism which takes place in and through law. Carol Smart mentions the examples of the unmarried mother, the female criminal, and the prostitute. I have also studied the construction of the welfare mother: a woman with a child or children, who lives off national assistance.

The welfare mother is a political and legal term for a person, but – just like that of the bastard child or the unmarried mother – it is also an economic position and, at least for some women, has become a psychological condition or an identity. Thirty years ago, this phenomenon was unknown. Nowadays, welfare mothers experience themselves as such, and call themselves by this term. Their position (that they exist and what they are) is determined by cultural, social, economical and legal factors. My analysis of this phenomenon revealed that subtle and covert mechanisms are responsible for bringing into being this new identity. The analysis shows that the term welfare mother cannot be replaced by or equated with the term welfare father. In that sense, the term welfare mother is a gendered legal construction.

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28 The use of the word 'discrimination' in this respect might be misleading. It concerns not a conscious maltreatment or harassment of a person by another person or an institution on the basis of a characteristic like race, ethnicity, sex, sexual orientation or religion (to name the most common 'suspect' criteria listed in many international documents on discrimination) but it concerns a fixed practice or structural feature of a society that is detrimental to certain groups of people. There is not a clear line between cases of indirect discrimination (in which an apparently neutral criterion or practice has a disproportionate negative effect on the members of a protected group) and a gendered system of law, in which the system presupposes certain fixed gender relations.


What the effects are exactly of the fact that this specific group of people dependent on welfare benefits is termed welfare mothers needs to be studied further. I will mention one effect here. By using this terminology, a special characteristic of this group is concealed, and that is the unemployment of these women. Welfare mothers are not seen as unemployed women, but as mothers with a care obligation, and that care obligation prevents them from supporting themselves by means of paid work (which is seen as the normal way of gaining income). They can, however, provide for their means of existence in the way which is "normal" for women: claiming alimentation from an ex-husband, or finding a new partner, who is then expected to provide for them. They are therefore not merely mothers, but are primarily seen as persons dependent on income that is supplied by a spouse or partner (and in last instance by the state by means of welfare). Thus the term welfare mother hides part of the reality of these women: that they are unemployed and that in the present social and economic circumstances they do not manage to support themselves by means of remunerated work.\footnote{Holtmaat 1994, (see note 30).}

**The effect of gender in terms of power**

The four factors discussed above, by and through which gender is (re)produced, all concern gender as a constitutive element of social relations. The second part of Scott's definition (gender as a primary way of signifying relationships of power) may be of even more importance for the substantial development of feminist legal theory. The realisation that gender fulfils this role, combined with insight into the workings of law in terms of power\footnote{See in particular C. Smart, Feminism and the Power of Law, London 1989.} offers possibilities to investigate how it can be that, in the year 2000, gender-inequality is still so fundamental and structural, and how it can come about that this inequality is reproduced. In the words of the Dutch political scientist Selma Sevenhuijzen:
"An analysis in terms of power, discourse and gender makes it possible to assess political and legal texts for their inclusionary and exclusionary effect, analysing which and whose perspective can be expressed and with which normative message."\(^{33}\)

The signifiers which Sevenhuijsen speaks of are also reproduced by means of law: by using gendered categories in law, law itself contributes to the (re)confirmation of the underlying unequal positions of the two sexes.

The analysis of the ideological effect of gender in terms of power\(^{34}\) should be carefully carried out. There are a number of pitfalls.

In the first place, gender should be understood as a continuum, instead of a binary view that there are two genders. The latter opinion ignores the fact that shifts in meaning are continually taking place. "[...] gender, then is rather something that we do than what we are."\(^{35}\) In the second place, feminist research must break open the belief in gender identity as a homogeneous category. Various aspects of gender-identity can be united in one person. In the third place, we should be liberated from the false opposition between nature and culture and equality and difference. The body is not a blank page, or something which of itself already has a male or female form before culture has written its message thereupon. Fourthly, Sevenhuijsen states that gender cannot be located in a single social sphere, nor can it be reduced to patterns of socialisation and care within the family. Gender is a multi-layered phenomenon, with multiple power effects: it works at the symbolic level, at the level of collective and individual identity and at the level of social structures. Sevenhuijsen thus uses gender, following Scott, as an analytical category: by using this instrument she wants to make visible how gender signifies apparently gender neutral concepts and practices.\(^{36}\)

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\(^{34}\) In the following section I will go further into the role of ideology in this context.

\(^{35}\) SEVENHUIJSEN, (see note 34), p. 80.

\(^{36}\) SEVENHUIJSEN, (see note 34), p. 79–82.
Law, ideology and gender

In the above, we dealt with the idea that an important element in the way gender works is that it "is a primary way of signifying relationships of power". Gender bestows, in other words, a very specific meaning on power relationships. This bestowal of meaning can – in the legal context – also be described as a process of ideologisation of law. As a result of the ideological occupation of legal concepts and constructions, we cannot think outside fixed (dominant) gender relationships. Two approaches to ideology and the role of ideology in relation to law are relevant in this context and will be discussed briefly here.

Ideology as a process of naturalisation of social phenomena

In the first place, I will discuss the position of Eileen Fegan (which she takes from writers such as Thompson, Eagleton and Hunt) that a concept of ideology which could be useful in a feminist theory of gender should stress the process whereby certain relationships are presented as natural and inevitable:

"Ideology might then be defined as the process of naturalisation within social consciousness, whereby certain immutable (often biological) facts are idealised in a system of ideas, beliefs, and practices, which are in turn taken for granted as 'natural' and necessary to the proper functioning of society. Whilst other facts and human possibilities are either ignored or implicitly rejected as 'unnatural' in this process, the production of ideology necessarily involves some form of selective interpretation."\(^{37}\)

Fegan shows that without a correct understanding of the ideological effect of law, it is impossible to gain an insight into the effect of gender in terms of power. These power effects of gender can be investigated further at three levels: (1) concrete legal norms; (2) legal principles; and (3) the ideological form of law.\(^{38}\) Ideological opinions about relationships between the sexes play


\(^{38}\) Herewith she refers to "[...] those principles which make it appear fair and just in individual consciousness. [...] [T]he internal aspect of law is its acceptance by individuals as natural and necessary in the form it takes and the values it expresses." FEGAN, (see note 11), p. 186.
a role on each of these three levels, both through external influences and internal mechanisms.\textsuperscript{39} The former refers to the fact that social opinions can – via certain channels – make their way into the law. On this point, according to Fegan, the role of the judge is particularly interesting, as well as the role of "open" legal concepts (such as reasonable and fair), which function as conveyor belts, along which ideologically biased opinions of sex relationships are imported into the law.\textsuperscript{40} As for the internal mechanisms, Fegan points to the need for a thorough analysis of the ideological form of law. Concepts such as objectivity and neutrality, principles such as equality and justice, and legal constructions such as the legal subject and individual (subjective) rights are ideologically occupied. Gender ideology thus has a double power effect, via both the external and the internal ideological operation of law, according to Fegan:

"First, ideology operates to construct femininity in such seductive terms that women cannot but accept or even celebrate it – at least not without suffering feelings of inadequacy or guilt for being less then a 'proper woman'. Secondly, once adopted and reproduced by dominant discourses such as law, these ideas are translated into actual practices and decisions which materially affect women's lives – most often to their disadvantage."\textsuperscript{41}

I have illustrated above what the result of this can be, with the example of welfare mothers.

The above may lead to a certain pessimism: if the power effect of gender ideology is so comprehensive, are we not entirely at its surrender? In other words, what can we do to combat it? In addition, the post-modern tendency to see everything in terms of constructions can lead to paralysis:

"This creates some reasons to fear that an over-dependence upon this particular theoretical framework may [...] lead contemporary feminists into a state of political paralysis."\textsuperscript{42}

\textsuperscript{39} K. O'DONOVAN, Sexual Division in Law, London 1975.
\textsuperscript{40} See e.g. the analysis which McGlynn has carried out of the case law of the European Court of Justice, on the point of protection of motherhood as ground for exception to the principle of equal treatment. McGlynn comes to the conclusion that the Court reproduces the dominant motherhood ideology, and therefore legitimizes it. McGLYNN, (see note 22).
\textsuperscript{41} FEGAN, (see note 26), p. 189.
\textsuperscript{42} FEGAN, (see note 26), p. 175.
In other words: if the category of women is a (mere) construct, how can action be carried out for and by women, in search of a better or a more just society, or of a truly gender-neutral law? Selma Sevenhuijsen states it as follows:

"[...] the postmodern turn in women's studies has obscured the idea that there are countless moments in which the necessity for judging is inherent in the situation and the position from which we act."\(^43\)

Attention for taking binding decision, and bearing responsibility for these decisions, has been pushed into the margin, according to Sevenhuijsen. For feminist legal studies, this danger is also imminent: what is the good of all these deconstructions of legal concepts, and demonstrations of their gender-connotations, if we do not at the same time devote attention to the development of new or different concepts which enable the forming of legal opinions?

**Ideology as a mediator between the individual and society and between past and future**

For a more optimistic or positive theory about the possibilities to combat the ideological effect of (gendered) law, we can – in my opinion – turn to the approach developed by the Belgian legal philosopher René Foqué. The concept of ideology used by Foqué – following in the footsteps of the French philosophers Jacques Ellul and Paul Ricoeur – is formulated in significantly more positive terms than that of Fegan:

"An ideology makes a link between man and culture, between individual and society. It functions as the driving motor of culture and society, and gives them stability and lasting cohesion. That is possible because an ideology is not just an arbitrary external thing, which is imposed on our consciousness merely from the outside. It can only fulfil its stabilising and integrating role when the individuals in that society and in that culture have internalised it, and start to use it as a lens, through which man and the world are observed and understood."\(^44\)

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\(^{43}\) **SEVENHUIJSEN**, (see note 34), p. 29 (our emphasis).

Ideology, in other words, mediate both between the individual and society, and between the past and the future: each ideology tends to break free of the direct (factual) cause for its creation, and direct itself to the future, forming a framework of reference for future judgements and actions. This positive approach to the concept of ideology does not mean that the author is not conscious of the dangers which an ideology involves. Each ideology which becomes independent (breaks free of the material conditions for existence from which it emerged) threatens the social and cultural diversity and also pluriformity:

"That which falls outside the social code of interpretation does not exist, cannot exist even, because it does not fit in with our mental patterns, and is thus uninterpretable..."\(^{45}\)

When law is thus ideologically occupied, the law itself becomes a threat for the liberty of citizens; law functions as a univocal interpretative code, cutting out other opinions or positions. Foqué, together with his Dutch colleague 't Hart, has noted a tendency on the part of law to present itself as a fixed reflection of relationships and situations which actually exist in reality. In reaction to that, these legal philosophers state that – if law really wishes to provide protection for citizens, in the sense of protection against one dominating perspective or ideological framework of reference – law must be based on a certain under-determination, as a matter of principle, and counterfactuality of legal concepts. Only then can other views, other experiential worlds, other perspectives on reality and other ideologies than the dominant one also win a place.\(^{46}\)

This means that it is not just "open" concepts in law (such as good faith, being a good employer, reasonableness and fairness or decency) which should be seen as vehicles with which other ideologies (e. g. other views about relationships between the sexes) can be imported into law, but that all legal concepts in principle should have a certain under-determination; that is to say, they should not claim once and for all to reflect the true or real relationships between the sexes. Only when this criterion can be met, can an end be put to the exclusionary effect of gender in/through law.

\(^{45}\) Foqué, (see note 44), p. 149.

\(^{46}\) 't Hart/Foqué, (see note 23).
The Women's Convention, and the fight against the dominant gender-ideology

The only foothold which exists in the positive law of the international legal order for combatting gender-ideology is – in my opinion – Article 5 sub a of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW):

"State Parties shall take all appropriate measures

(a) To 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 superiority of either of the sexes or on stereotyped roles for men and women."

In the literature on the Women's Convention, this Article has been seen in the first place as a tool to be used in interpreting the other (more substantive) articles of the Convention. Article 5 is generally thought to lack an independent significance. Over the last years, new interpretations of this Article have emerged which could give a basis for a legal policy which aims at the elimination of all forms of discrimination of women by means of fighting the dominant gender-ideology. For instance, the Netherlands national reporting committee, which reported in 1997 to the Dutch Lower Chamber of Parliament on the implementation of the Women's Convention in the Netherlands, mentioned Article 5 as the articulation of the third partial objective of the Convention.47

On the basis of this Article, there is a positive obligation on the national authorities to combat the dominant gender ideology, in which a distinction is made between men and women by attributing to them different values and behavioural qualities, thoughts, feelings, value judgements and expectations,

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47 L. Groenman et al., Het Vrouwenverdrag in Nederland anno 1997. Rapport van de Nationale Rapportagecommissie VN-Vrouwenverdrag. Den Haag, Min. SZW/DCE, 1997. The Committee sees the main objective of the Convention (elimination of all forms of discrimination against women) as capable of being split into three partial objectives. As well as (3) combating the dominant gender-ideology, these are (1) realising complete equality before the law and in the public administration; and (2) improving the position of women (by means of emancipation policies, in the broad sense of the word).
and also to combat effectively the exclusion mechanisms associated there with. The reporting Committee states that this obligation is new:

"Never before in a legal document aimed at combating discrimination of women has so much emphasis been placed on the need to alter existing ideas or ideologies, in which are attributed an unequal, subordinate or 'other' role to men and women, both in public and private life. Herewith, the Convention acknowledges that the unequal position of women is a persistent phenomenon, and that improvement in the position of women can only be brought about when real changes occur on the level of gender ideology."\(^{48}\)

In a report entitled "Hidden Sex-Discrimination", commissioned by the Netherlands Ministry of Social Affairs and Employment, the task of the public authorities in this area is described as follows:

"For the public authorities this means that they must try and break out of the continual reproduction of these differences in symbols, language and norms, in institutions and structures and in behaviour."\(^{49}\)

You could express this in today's policy jargon by saying that all legislative operations should be preceded by a Gender Impact Assessment (GIA). I think there is good ground to postulate that the government, on the basis of Article 5 CEDAW is obliged to order a GIA (carried out by an independent institute or expert) in each case where new or changed legislation will possibly have an impact on the position of women.\(^{50}\)

\(^{48}\) GROENMAN, (see note 47), p. 25.


\(^{50}\) The assembled Dutch women's movement who published a so-called 'shadow report' complains that the government does not actively apply a GIA in each case that this is obligatory. The shadow report will be discussed at the 25th session of the Committee on Elimination of all forms of Discrimination Against Women in New York (July 2001). The shadow report can be ordered from E-Quality; email: info@e-quality.nl; internet: www.e-quality.nl
The use of Gender Impact Assessments in law

In the Netherlands the instrument of the GIA\textsuperscript{51} is sometimes applied by the government, but not consequently with respect to all governmental "actions" that could have an impact on the position of women. Until now a GIA is rarely applied with respect to the process of preparing new legislation or a proposed change in existing legislation. An example is the preparation of a change in the system of matrimonial property law. In order to apply a GIA to (proposed) legislation the GIA-model has to be adjusted in such a way that the assessment will also include the analysis of the gender bias of the existing legal system and will be directed at exposing the possible gendered presuppositions of the proposed new legal rules. In the case of the proposal to change the system of matrimonial property law this resulted into the following steps:\textsuperscript{52}

1. The description of relevant social and economical differences in the actual position of men and women with respect to the subject matter at hand (in this case: the differences in the amount of property and income, divorce rates, et cetera). This contains statistical data and sociological studies.

2. The development and description of a framework to "test" the proposed changes in the legal system; this contains:
   (a) relevant legal norms that are applicable to this field (like the constitutional non-discrimination clause, EU-gender equality legislation and case-law, relevant parts of CEDAW, et cetera)
   (b) relevant policy aims, formulated by the government (like the strive for economic independence of women, the policy to facilitate cultural diversity, et cetera).

\textsuperscript{51} A general model of a GIA has been developed by Verloo en Roggeband (\textit{Mieke Verloo/ Conny Roggeband}, Emancipatie-effectrapportage; theoretisch Kader, methodiek en voorbeeld-rapportages, Ministerie van Sociale Zaken en Werkgelegenheid, uitg. VUGA, Den Haag 1994); this model should be adjusted, dependent on the question what kind of government action (e.g. subsidizing, facilitating, legislation) is at hand.

\textsuperscript{52} At this moment (Winter 2000/2001) this GIA is applied by the Clara Wichmann Institute; the results will become public in Summer 2001. (Clara Wichmann Instituut, Ambonplein 73, 1074 PW Amsterdam; www.clara-wichmann.nl)
3. The description and analysis of the existing legal system. In this step the above mentioned aspects of the definition of gender become utterly important; e.g.: what are the main concepts, symbols, structures used in this part of the legal system which (may) have an impact on gender relations? This step should involve not only an analysis of legal and political texts on the subject of matrimonial property law, but also an analysis of the exiting legal practice by interviewing legal practitioners and parts of the women's movement that are active or specially involved in this subject matter.

4. A description and analysis of future developments when you leave the (legal) situation as it is. What are current developments (like increase in labour market participation of women and divorce rates) that will take place independent of a change in matrimonial property law? What changes in the law are needed from this perspective?

5. A description and analysis of the proposed changes by the government. Like in step 3 the concept of gender can be of use here as an analytical instrument.

When applied in this way the concept of gender can be of important use in the application of Gender Impact Assessments to proposals for new laws or changes in existing laws.

**Conclusion**

Can an analysis of law in terms of gender really contribute to eliminating the subordination or oppression of women? Gender is not a concept which readily lends itself to direct application in legal practice, particularly in case law. In other words: we can not (as yet) go to a court and say that there is evidence of "gender" and therefore a rule should not be applied, or should be adapted.\(^\text{53}\) As an analytical category, however, gender can be of service to feminist lawyers who are investigating the persistence of legal distinctions and classifications

\(^{\text{53}}\) Perhaps Article 5 CEDAW will offer this possibility in the future, when the protocol guaranteeing individual right of complaint on the basis of this Convention enters into force.
based on gender, and who want to develop alternatives for this. On the basis of Article 5 of CEDAW the government is obliged to facilitate this by ordering a GIA in each case of new legislation or changes in existing legislation that could have an impact on women's legal position. The use of gender as an analytical category is, however, not without dangers. In particular, there is a danger of defeatism: law really does (re)produce gender, that cannot be avoided. Our task is therefore not just to deconstruct law – right down to the bone – but also to reconstruct law and legal concepts, to develop Other Law.⁵⁴

⁵⁴ The term Other Law was introduced by me in 1989, (see note 19).