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Towards Different Law and Public Policy; The significance of Article 5a CEDAW for the elimination of structural gender discrimination

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Citation

Holtmaat, H. M. T. (2004). *Towards Different Law and Public Policy; The significance of Article 5a CEDAW for the elimination of structural gender discrimination*. The Hague: Ministry of Social Affairs and Employment. Retrieved from <https://hdl.handle.net/1887/41992>

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Towards *Different* Law and Public Policy

The significance of Article 5a CEDAW
for the elimination of structural
gender discrimination

Rikki Holtmaat

Research undertaken for the Ministry of
Social Affairs and Employment in the Netherlands

May 2004

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

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FOREWORD

The Dutch government has a duty to report to Parliament every four years on the progress that it has made with regard to the implementation of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW or the Women's Convention).¹ Within this framework in recent years the Department for the Co-ordination of Emancipation Policy (DCE) of the Ministry of Social Affairs and Employment has commissioned a number of in-depth studies on the content and scope of this Convention.² These studies are part of the government's 'National Report about the Implementation of the CEDAW-Convention to Parliament' (further on: National Reports).³ They also play a role in the Country Reports that the Dutch government is required to submit to the CEDAW Committee based on Article 18 of the Convention.⁴ The present study was commissioned as part of this series of studies.

The present study contains an analysis of the meaning and scope of Article 5a CEDAW together with a method that can be used to implement its provision. The study was written by Dr. Rikki Holtmaat based on research conducted for the fifth in-depth study into the scope and meaning of the CEDAW-Convention in the Netherlands.⁵

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- 1 This obligation is based on Article 3 of the Kingdom Act of 3 July 1991 for the Ratification of the CEDAW-Convention (New York, 18 December 1979), Official Bulletin of Acts, Orders and Decrees 1991, 355.
 - 2 The first four studies were: Hes & Van Vleuten 1996, Holtrust et al. 1996, Monster et al. 1998 and Boerefijn et al. 2000.
 - 3 So far there have been two National Reports: Groenman Committee 1997 and Marchand 2003 together with ACVZ 2002. (The Groenman Committee was named after its chairperson, Louise Groenman, a former Member of Parliament.)
 - 4 The Netherlands have so far issued three Country Reports; The initial report of 1992 and a second and third report in 1999 and 2000. The fourth report will be sent to New York in 2004.
 - 5 This research, commissioned by the DCE, was presided by Professor Dr. Janneke Plantenga of *Utrecht School of Economics*. Its central subject was the meaning of article 5a CEDAW for policy-making in the field of paid labour, care and income. The results of this research will be published by the Ministry of Social Affairs and Employment. See Plantenga, Holtmaat & Koopmans 2004.

The overall aim of the Dutch government in publishing this report is to contribute to the correct implementation of CEDAW in the 176 States that have ratified this Convention as of May 2004. The report sets out to contribute to disseminating awareness about CEDAW. Within this context, the publication also has some more specific objectives.

The Convention contains the general obligation on States to eliminate discrimination against women. It also makes a specific stipulation that State parties should combat all negative or damaging stereotypes of women and men. In the Netherlands there is general acceptance of the view that Article 5a of CEDAW offers an additional legal tool to combat discrimination against women, when compared with national Dutch and European Community law that prohibits discrimination on the ground of sex. This study (which will also be published in the Dutch language) aims to stimulate international legal discussion about this important issue.⁶ To what extent can the impact of Dutch and European law in the field of equal treatment be made more effective by taking into account this provision of CEDAW?

The second aim of the report is to provide academic researchers working in the field of gender stereotypes in law and in public policy with a research method that can be used to reveal instances of structural gender discrimination. Such a method can also serve as one of the tools for achieving the general objective of public policy – that of mainstreaming gender across the policy process.

Because the Netherlands has invested a good deal of research into the meaning and scope of this important Human Rights Convention, the government has decided to publish the study in both Dutch and English. The English edition also contains a translation of some parts of the first National Report. The Appendix provides a general introduction to the aims, scope and significance of the Women's Convention.

The study was initially completed in March 2002, and updated to April 2004 prior to publication.

6 The Dutch edition will be presented to Parliament as part of the National Reporting Procedure.

TABLE OF CONTENTS

	FOREWORD	iii
	SUMMARY	xi
	PART I: STRUCTURE AND BACKGROUND OF THIS RESEARCH	1
1	INTRODUCTION TO PART I	3
1.1	The key issues for research	3
1.2	The content and structure of this book	3
1.3	The content of part I	4
2	THE PLACE OF ARTICLE 5a IN THE CEDAW-CONVENTION	7
2.1	The nature of the Women's Convention	7
2.2	The place of Article 5a in the structure of the Convention	8
2.3	The threefold aims of the Women's Convention	9
3	THE ASSUMED SPECIAL MEANING OF ARTICLE 5a CEDAW	11
3.1	Article 5a CEDAW as a principle for cultural change	11
3.2	Article 5a CEDAW as a legal basis for combating structural gender discrimination	11
	· The elimination of structural causes of sex discrimination	11
	· Towards fundamental change	12
3.3	Article 5a CEDAW in relation to combating direct and indirect sex discrimination	13
3.4	An assumption in need of proof	14

4	THE DISCONTENT WITH THE EXISTING EQUAL TREATMENT LEGISLATION	15
4.1	Introduction	15
4.2	The shortcomings of the existing equal treatment legislation	16
	· The limitations of formal equal treatment on ground of sex	16
	· Discrimination as an individual problem	16
	· The tendency towards assimilation	17
	· The invisibility of unequal power relations in equal treatment legislation	18
4.3	From the prohibition of sex discrimination to the elimination of sex as a legally relevant category	20
4.4	Final remark	20
	 PART II: CONTENT AND SCOPE OF ARTICLE 5a CEDAW	 23
5	INTRODUCTION TO PART II	25
6	ARTICLE 5a CEDAW ACCORDING TO THE DRAFTERS OF THE CONVENTION	27
6.1	The source of the provision	27
6.2	The drafting of the text of Article 5a CEDAW	28
6.3	Reservations about Article 5a CEDAW	29
6.4	Conclusion	30
7	ARTICLE 5a CEDAW ACCORDING TO THE CEDAW COMMITTEE	31
7.1	Introduction	31
7.2	The General Recommendation about Article 5 CEDAW	31
7.3	Article 5a CEDAW in other General Recommendations	32
	· Article 5a CEDAW and violence against women	32
	· Article 5a CEDAW in relation to family law	33
	· The place of Article 5a in the Convention	34
7.4	Article 5a CEDAW in the Instructions to the State parties	34
7.5	Article 5a CEDAW in the Concluding Comments of the CEDAW-Committee	35
	· Introduction	35
	· General remarks	36
	· The existence of religious and cultural traditions	36
	· Sexual violence and pornography	38
	· Political participation of women	38
	· Women's participation in paid labour	39

· Protective labour laws	40
· Part-time work and unequal pay for women	41
· Obligations on the basis of Article 5a CEDAW: general remarks	42
· Obligations on the basis of Article 5a CEDAW: information and education	42
· Obligations on the basis of Article 5a CEDAW: the revision of legislation	43
· The importance of Article 5a CEDAW in relation to European Community sex equality law	44
· Conclusion	44
8 VIEWS OF THE DUTCH GOVERNMENT ABOUT THE MEANING OF ARTICLE 5a CEDAW	47
8.1 Introduction	47
8.2 The discussion of Article 5a CEDAW during the ratification procedure	47
· Article 5a CEDAW and fundamental freedom rights	47
· A change of behavior or structural change	48
8.3 The Dutch Country Reports to the CEDAW Committee	49
· The Initial Country Report of the Netherlands	49
· The Second and Third Country Report of the Netherlands	50
· The division of paid labour and care in relation to Article 5a CEDAW	52
9 ARTICLE 5a CEDAW IN THE NATIONAL REPORTS AND IN-DEPTH STUDIES	53
9.1 Introduction	53
9.2 The first National Report	53
· The relationship between Article 5a CEDAW and diversity policies	53
· The necessity to use concrete instruments	54
· Combating gender stereotypes in law and public policy	55
9.3 The second National Report	55
· Introduction	55
· The Marchand Report	55
· The advice of the Advisory Commission for Alien Affairs	56
· The reaction of the government to the second National Report	57
9.4 The in-depth studies into the meaning of the Women's Convention	57
· A radical interpretation of Article 5a CEDAW	57
· The study into health and healthcare	58
· Article 5a CEDAW as a basis for a different organization of paid labour and care	58
· Discussion about this report between Cabinet and Parliament	59

· The relationship between gender stereotypes and violence against women	59
10 LEGAL LITERATURE ABOUT ARTICLE 5a CEDAW	61
10.1 The meaning of Article 5a CEDAW according to Dutch legal literature	61
· An instrument to bring about cultural change	61
· The under-determination of Article 5a CEDAW	62
· The importance of Article 5a CEDAW	63
· Testing policies and legislation with the help of Article 5a CEDAW	63
10.2 Literature in the English language on Article 5a CEDAW	64
· The limited instrumental value of Article 5a CEDAW	64
· The concept of discrimination in the Women's Convention	65
· The absence of an analysis of the meaning of Article 5a CEDAW	66
· The relationship between Articles 2f and 5a CEDAW	67
· Towards equality as transformation	68
11 CONCLUSIONS OF PART II	71
11.1 The significance of Article 5a CEDAW	71
· A dynamic interpretation of the Convention	71
· From awareness raising to structural change	71
· From equality as sameness to equality as transformation	72
· Article 5a CEDAW as the pillar under the third sub-aim of the Convention	73
11.2 The nature and scope of the obligations under Article 5a CEDAW	74
· The instrumental value of Article 5a CEDAW	74
· The scope of the obligations under Article 5a CEDAW	75
· Relationship to other constitutional or civil rights	75
11.3 The content of the obligations under Article 5a CEDAW	76
· The duty to banish negative gender stereotypes from social and cultural life	76
· The duty to eliminate gender stereotypes in law and public policy	77
11.4 The enforceability of cultural change	78
11.5 The danger of cultural hegemony	78
11.6 Final remark	79

PART III: TOWARDS A METHOD TO REVEAL STRUCTURAL GENDER DISCRIMINATION IN LAW AND PUBLIC POLICY	81
12 INTRODUCTION TO PART III	83
13 GENDER AND STRUCTURAL GENDER DISCRIMINATION	85
13.1 Gender	85
· Gender: a construction of masculinity and femininity that differs over time and place	85
· The dynamic character of gender	85
· Gender as an analytical category	86
· The role of gender in the construction of social relations	86
· By way of illustration: the construction of social insurance and social welfare	87
· The role of gender in the construction of power differences between the sexes	88
· By way of illustration: the power of gender in matrimonial property law	89
13.2 Structural gender discrimination	89
· The difference with the concept of sex discrimination	90
· The difference with the concept of indirect discrimination	91
14 PUBLIC POLICY AND RESEARCH IN THE FIELD OF GENDER STEREOTYPED IMAGES	93
14.1 The Dutch policy in the field of gender stereotyped images	93
14.2 Scientific research into gender stereotyped images	94
· From individual gender-identity towards gender as a mechanism for constructing social relations	94
· Gender stereotyped images and the difference in power between men and women	95
· Research into the construction of masculinity as ‘normality’	96
14.3 Gender Impact Assessments	96
· The development of GIA	96
· The GIA of changes in matrimonial property law	97
15 METHODOLOGICAL DIRECTIONS AND STARTING-POINTS FOR THE STUDY OF STRUCTURAL GENDER DISCRIMINATION	99
15.1 Introduction	99
15.2 Gender operates at different levels	99
15.3 The level of the analysis	100

15.4	The power of law	101
15.5	The apparent neutrality of law and policy	102
15.6	The development of a matrix of standards	103
15.7	Law and policy as a system of classifications	103
15.8	The dynamics of gender	104
15.9	The context in which policy or law is being developed	105
15.10	The context of unequal power relations between the sexes	106
15.11	Why a specific research model to reveal structural gender discrimination?	106
15.12	The function of this research method in the execution of a policy of gender mainstreaming	107
16	A RESEARCH MODEL TO ESTABLISH THE EXISTENCE OF STRUCTURAL GENDER DISCRIMINATION	111
16.1	Introduction	111
16.2	The central question and the design of the research	112
16.3	The first order analysis	113
16.4	The second order analysis	113
16.5	Evaluation / Conclusions	115
	REFERENCES TO LITERATURE	117
	APPENDIX: REPORT OF THE REPORT COMMITTEE ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	127
	ABOUT THE AUTHOR	165

TABLE OF CONTENTS

	FOREWORD	iii
	SUMMARY	xi
	PART I: STRUCTURE AND BACKGROUND OF THIS RESEARCH	1
1	INTRODUCTION TO PART I	3
1.1	The key issues for research	3
1.2	The content and structure of this book	3
1.3	The content of part I	4
2	THE PLACE OF ARTICLE 5a IN THE CEDAW-CONVENTION	7
2.1	The nature of the Women's Convention	7
2.2	The place of Article 5a in the structure of the Convention	8
2.3	The threefold aims of the Women's Convention	9
3	THE ASSUMED SPECIAL MEANING OF ARTICLE 5a CEDAW	11
3.1	Article 5a CEDAW as a principle for cultural change	11
3.2	Article 5a CEDAW as a legal basis for combating structural gender discrimination	11
	· The elimination of structural causes of sex discrimination	11
	· Towards fundamental change	12
3.3	Article 5a CEDAW in relation to combating direct and indirect sex discrimination	13
3.4	An assumption in need of proof	14

4	THE DISCONTENT WITH THE EXISTING EQUAL TREATMENT LEGISLATION	15
4.1	Introduction	15
4.2	The shortcomings of the existing equal treatment legislation	16
	· The limitations of formal equal treatment on ground of sex	16
	· Discrimination as an individual problem	16
	· The tendency towards assimilation	17
	· The invisibility of unequal power relations in equal treatment legislation	18
4.3	From the prohibition of sex discrimination to the elimination of sex as a legally relevant category	20
4.4	Final remark	20
	 PART II: CONTENT AND SCOPE OF ARTICLE 5a CEDAW	 23
5	INTRODUCTION TO PART II	25
6	ARTICLE 5a CEDAW ACCORDING TO THE DRAFTERS OF THE CONVENTION	27
6.1	The source of the provision	27
6.2	The drafting of the text of Article 5a CEDAW	28
6.3	Reservations about Article 5a CEDAW	29
6.4	Conclusion	30
7	ARTICLE 5a CEDAW ACCORDING TO THE CEDAW COMMITTEE	31
7.1	Introduction	31
7.2	The General Recommendation about Article 5 CEDAW	31
7.3	Article 5a CEDAW in other General Recommendations	32
	· Article 5a CEDAW and violence against women	32
	· Article 5a CEDAW in relation to family law	33
	· The place of Article 5a in the Convention	34
7.4	Article 5a CEDAW in the Instructions to the State parties	34
7.5	Article 5a CEDAW in the Concluding Comments of the CEDAW-Committee	35
	· Introduction	35
	· General remarks	36
	· The existence of religious and cultural traditions	36
	· Sexual violence and pornography	38
	· Political participation of women	38
	· Women's participation in paid labour	39

· Protective labour laws	40
· Part-time work and unequal pay for women	41
· Obligations on the basis of Article 5a CEDAW: general remarks	42
· Obligations on the basis of Article 5a CEDAW: information and education	42
· Obligations on the basis of Article 5a CEDAW: the revision of legislation	43
· The importance of Article 5a CEDAW in relation to European Community sex equality law	44
· Conclusion	44
8 VIEWS OF THE DUTCH GOVERNMENT ABOUT THE MEANING OF ARTICLE 5a CEDAW	47
8.1 Introduction	47
8.2 The discussion of Article 5a CEDAW during the ratification procedure	47
· Article 5a CEDAW and fundamental freedom rights	47
· A change of behavior or structural change	48
8.3 The Dutch Country Reports to the CEDAW Committee	49
· The Initial Country Report of the Netherlands	49
· The Second and Third Country Report of the Netherlands	50
· The division of paid labour and care in relation to Article 5a CEDAW	52
9 ARTICLE 5a CEDAW IN THE NATIONAL REPORTS AND IN-DEPTH STUDIES	53
9.1 Introduction	53
9.2 The first National Report	53
· The relationship between Article 5a CEDAW and diversity policies	53
· The necessity to use concrete instruments	54
· Combating gender stereotypes in law and public policy	55
9.3 The second National Report	55
· Introduction	55
· The Marchand Report	55
· The advice of the Advisory Commission for Alien Affairs	56
· The reaction of the government to the second National Report	57
9.4 The in-depth studies into the meaning of the Women's Convention	57
· A radical interpretation of Article 5a CEDAW	57
· The study into health and healthcare	58
· Article 5a CEDAW as a basis for a different organization of paid labour and care	58
· Discussion about this report between Cabinet and Parliament	59

· The relationship between gender stereotypes and violence against women	59
10 LEGAL LITERATURE ABOUT ARTICLE 5a CEDAW	61
10.1 The meaning of Article 5a CEDAW according to Dutch legal literature	61
· An instrument to bring about cultural change	61
· The under-determination of Article 5a CEDAW	62
· The importance of Article 5a CEDAW	63
· Testing policies and legislation with the help of Article 5a CEDAW	63
10.2 Literature in the English language on Article 5a CEDAW	64
· The limited instrumental value of Article 5a CEDAW	64
· The concept of discrimination in the Women's Convention	65
· The absence of an analysis of the meaning of Article 5a CEDAW	66
· The relationship between Articles 2f and 5a CEDAW	67
· Towards equality as transformation	68
11 CONCLUSIONS OF PART II	71
11.1 The significance of Article 5a CEDAW	71
· A dynamic interpretation of the Convention	71
· From awareness raising to structural change	71
· From equality as sameness to equality as transformation	72
· Article 5a CEDAW as the pillar under the third sub-aim of the Convention	73
11.2 The nature and scope of the obligations under Article 5a CEDAW	74
· The instrumental value of Article 5a CEDAW	74
· The scope of the obligations under Article 5a CEDAW	75
· Relationship to other constitutional or civil rights	75
11.3 The content of the obligations under Article 5a CEDAW	76
· The duty to banish negative gender stereotypes from social and cultural life	76
· The duty to eliminate gender stereotypes in law and public policy	77
11.4 The enforceability of cultural change	78
11.5 The danger of cultural hegemony	78
11.6 Final remark	79

	PART III: TOWARDS A METHOD TO REVEAL STRUCTURAL GENDER DISCRIMINATION IN LAW AND PUBLIC POLICY	81
12	INTRODUCTION TO PART III	83
13	GENDER AND STRUCTURAL GENDER DISCRIMINATION	85
13.1	Gender	85
	· Gender: a construction of masculinity and femininity that differs over time and place	85
	· The dynamic character of gender	85
	· Gender as an analytical category	86
	· The role of gender in the construction of social relations	86
	· By way of illustration: the construction of social insurance and social welfare	87
	· The role of gender in the construction of power differences between the sexes	88
	· By way of illustration: the power of gender in matrimonial property law	89
13.2	Structural gender discrimination	89
	· The difference with the concept of sex discrimination	90
	· The difference with the concept of indirect discrimination	91
14	PUBLIC POLICY AND RESEARCH IN THE FIELD OF GENDER STEREOTYPED IMAGES	93
14.1	The Dutch policy in the field of gender stereotyped images	93
14.2	Scientific research into gender stereotyped images	94
	· From individual gender-identity towards gender as a mechanism for constructing social relations	94
	· Gender stereotyped images and the difference in power between men and women	95
	· Research into the construction of masculinity as 'normality'	96
14.3	Gender Impact Assessments	96
	· The development of GIA	96
	· The GIA of changes in matrimonial property law	97
15	METHODOLOGICAL DIRECTIONS AND STARTING-POINTS FOR THE STUDY OF STRUCTURAL GENDER DISCRIMINATION	99
15.1	Introduction	99
15.2	Gender operates at different levels	99
15.3	The level of the analysis	100

15.4	The power of law	101
15.5	The apparent neutrality of law and policy	102
15.6	The development of a matrix of standards	103
15.7	Law and policy as a system of classifications	103
15.8	The dynamics of gender	104
15.9	The context in which policy or law is being developed	105
15.10	The context of unequal power relations between the sexes	106
15.11	Why a specific research model to reveal structural gender discrimination?	106
15.12	The function of this research method in the execution of a policy of gender mainstreaming	107
16	A RESEARCH MODEL TO ESTABLISH THE EXISTENCE OF STRUCTURAL GENDER DISCRIMINATION	111
16.1	Introduction	111
16.2	The central question and the design of the research	112
16.3	The first order analysis	113
16.4	The second order analysis	113
16.5	Evaluation / Conclusions	115
	REFERENCES TO LITERATURE	117
	APPENDIX: REPORT OF THE REPORT COMMITTEE ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	127
	ABOUT THE AUTHOR	165

SUMMARY

Towards *different* law and public policy: The significance of Article 5a CEDAW for the elimination of structural gender discrimination

Under Article 3 of the Act of 3 July 1991, which ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, also referred to as the Women's Convention) in the Netherlands, the Dutch government is obliged to conduct regular studies on the progress of implementation. Several such reports and studies have been published in recent years on the significance of the Convention for the Dutch legal order, and the current study is part of this series. It contains an in-depth study of the content and meaning of Article 5a CEDAW together with a method that can be used when implementing this provision.

Article 5a of CEDAW provides that States that are party to this Convention, “*shall take all appropriate measures*” 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 the superiority of either of the sexes or on stereotyped roles for men and women*”.

In the Netherlands there is a widely-accepted view that the fact that the Women's Convention contains such a provision endows it with an additional significance and value over and above existing Dutch and European Community sex discrimination law. What is the basis for this assumption? And in what way does the Convention add something to these other legal instruments? What must States that are party to this Convention do to in order to implement this provision dutifully and in good faith?

According to the Committee that submitted the first National Report on the implementation of the Convention in the Netherlands, within the overarching objective of eliminating all forms of discrimination against women, the Women's Convention has three sub-aims: the achievement of full equality before the law and in public administration; improvement of the position of women; and combating the dominant gender ideology.

The Committee assumed that Article 5a CEDAW provides a foundation for this third objective. This assumption has also formed the starting point for the research that cul-

minated in the present study. Does this interpretation of the provision indeed have a firm basis in official legal documents and in academic literature about the Women's Convention?

The conclusion of this research is that Article 5a CEDAW has a twofold meaning: it not only obliges State parties to conduct an active policy to ban stereotyped images of men and women, for instance in the media and in education, but also to scrutinise law and policy for the presence of hidden gender stereotypes. The latter obligation is summarised in the phrase that the provision contains the obligation to effectively eliminate structural gender discrimination.

Article 5a CEDAW, and the implications that flow from it, does indeed entail a norm that goes further than most existing legislation in the field of equal treatment between men and women. Existing law sets out to protect individuals from discrimination; it does little to offer any form of remedy against the structural causes of the persistent exclusion or disadvantaging of women. Equal treatment legislation looks backward at instances of discrimination that already have occurred. In contrast, the Convention expressly aims to bring about structural change, and thereby prevent future discrimination. In Article 5a CEDAW not only expresses the principle of equality, but also the principle of diversity or freedom. That is: scope for individuals to make their own choices about what it means to be a man or a woman without being confined to a particular traditional understanding of masculinity or femininity by societal institutions or organisation. The significance of Article 5a CEDAW can be summarised very briefly in the statement that it is an expression of *equality as transformation*: it demands that *different* law and public policy be developed.

In this book gender is understood as the social, cultural and institutional construction of what it means to be a man or a woman, i.e. of masculinity and femininity. The concept of structural gender discrimination refers to those forms of discrimination that are a consequence of the fact that the structure or organisation of society is built on gender stereotypes, hence ensuring that existing unequal power relations between the sexes are sustained. It embraces the idea that through the use of stereotyped (often traditional and implicit) ideas, symbols and structures a certain subordination and exclusion of women and of femininity takes place. This approach exists alongside the legal concept of sex discrimination that directly refers to a difference in treatment on the basis of biological male and female sex.

The key prerequisite for combating structural gender discrimination is identifying and revealing its existence. This is not an easy task, precisely because it involves challenging self-evident 'truths' about the biological sex of males and females and about the relationships between the sexes that are constitutive of prevailing social, cultural and institutional arrangements.

This study sets out to develop a method for revealing structural gender discrimination based on the literature on the construction of gender and the role gender plays in designing law and public policy. For this purpose a number of methodological directions and starting

points are described. Following this, the method is applied to the *Wet Inburgering Nieuwkomers* (Law on the Integration of Newcomers) – a recent Act that requires immigrants and asylum seekers who want to live in the Netherlands to follow training courses in order to become acquainted with the norms and values of Dutch society. I consider the documents that need to be studied and which questions need to be asked in order to reveal the possible structural gender discrimination in this part of the law. What conclusions need to be drawn from the outcome from such a study to inform the construction of *different* policy or law is subsequently a matter for public officials and the legislature.

The method proposed here to reveal structural gender discrimination in law and public policy forms an addition to the existing instrument of Gender Impact Assessments (GIA). This instrument is mainly directed at estimating the impact of planned legislation and policy on the social and economic position of women. The method elaborated here, combined with GIA, can play an important role in the mainstreaming of gender issues across the policy process.

PART I

STRUCTURE AND BACKGROUND OF THE RESEARCH

INTRODUCTION TO PART I

1.1 The key issues for research

Article 5a of CEDAW provides that States that are party to this Convention, “*shall take all appropriate measures*” 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 the superiority of either of the sexes or on stereotyped roles for men and women*”.

How should this provision be interpreted? For example, would compliance require governments to prohibit sexist commercials on TV? Should pornography be banned? Or should all provisions in the social security system based on the notion of a ‘breadwinner’ (always assumed to be male) be abolished? What are the ‘appropriate measures’ which would meet the conditions set by the Convention?

The aim of this study is to clarify this provision, and in doing so hopefully contribute to meeting the central aim of the Convention – the elimination of all forms of discrimination against women.

1.2 The content and structure of this book

Part II of this study ‘Content and scope of Article 5a CEDAW’ tackles the issue of the obligations on State parties arising from this provision, based on an analysis of authoritative texts and the legal literature. This also embraces a discussion of the history of the drafting of this Article, the interpretation of it by the CEDAW Committee, the opinion of the Dutch government and the comments of legal experts. This part concludes with a proposition about the *twofold* meaning of Article 5a CEDAW: that is, that this Article not only obliges State parties to conduct an active policy to ban stereotyped images of men and women, for instance in the media and in education, but also to critically scrutinise law and policy with a view to uncovering the existence of hidden gender stereotypes. I term this latter obligation, the obligation *to eliminate structural gender discrimination*.

The second central question to be dealt with in the study concerns the nature of the measures that are necessary to eliminate structural gender discrimination. Part III ‘Towards a method to reveal structural gender discrimination in legislation and public policy’ provides an overview of a number of studies in which methods have been developed for ‘gender sensitive’ approaches in law and public policy. Part III begins with a discussion of the concepts of ‘gender’ and ‘structural gender discrimination’. This is followed by an overview of studies undertaken in the Netherlands about the issue of gender stereotyped images of men and women – that is, the construction of masculinity and femininity – and the role that such images play in law and public policy. One of the instruments that have been developed to track down stereotyped laws and policy measures is the Gender Impact Assessment (GIA).

Based on this, the study presents a research model that can serve to reveal the gender stereotyped images that lie at the basis of legislation or public policy. Used in addition to GIA, this research model could serve as an instrument to improve the position of women by mainstreaming gender equality in all aspects of the official policy process.¹

The responsibility for incorporating the outcomes of the approach developed here into the formation of new policy or law will therefore ultimately pass to public officials and the legislature.

The significance of Article 5a CEDAW can be summarised in the statement that it is an expression of *equality as transformation*.² It requires the development of *different* law and public policy that is free from gender stereotypes. That is, Article 5a not only expresses the principle of equality, but also that of diversity or freedom. At its heart this means enabling individuals to make a choice about what it means to be a man or a woman without being confined to a pre-given or traditional understanding of masculinity or femininity as embodied in culture and in social institutions or organisations.

1.3 The content of part I

The remainder of this introductory section deals with the legal and theoretical background to the meaning and scope of Article 5a CEDAW.

In Chapter 2, Article 5a will be placed in the wider framework of the Convention. According to the Dutch government and the CEDAW Committee it forms part of a series

1 Gender mainstreaming is official Dutch policy. See Min. SZW 2001 (letter of the DCE about Gender mainstreaming.) Mainstreaming has become a central tool in both the UN and the EU context. On the UN, see Jahan 1995; on the EU see, Beveridge & Nott 1996, Shaw 2001 and Pollack & Haffner Burton 2000. In Chapter 15 of this book I will discuss how the method that is presented in this book relates to the instrument of gender mainstreaming.

2 This term has been derived from the work of Sandra Fredman. See Fredman 2003, p. 115.

of general provisions that underpin the threefold aim of the Convention. Article 5a CEDAW supposedly underlies the third of these aims: combating the dominant gender ideology.

Chapter 3 discusses the most important assumption of the Groenman Committee and the research team of the fifth in-depth study into the scope and meaning of the Convention.³ The Groenman Committee held that Article 5a CEDAW has a special meaning in the sense that it (also) obliges State parties to eliminate so-called structural gender discrimination. In that respect CEDAW offers an ‘added value’ compared to existing Dutch and European Community legislation that prohibits sex discrimination.

Finally, in Chapter 4 I present a short introduction into the background of this assumption: discontent about the assimilation to male norms and the stereotyping of women as a consequence of existing equal treatment legislation in the Netherlands and in the European Union. This research stems from a deeply-felt necessity to find a legal foundation for an alternative approach to combat the discrimination of women – and specifically one which enables the structural causes of this discrimination to be both revealed and eradicated.

3 Groenman Committee 1997 and Plantenga, Holtmaat & Koopmans 2004.

THE PLACE OF ARTICLE 5A IN THE CEDAW CONVENTION

2.1 The nature of the Women's Convention

The Women's Convention is an international Human Rights document that – as of May 2004 – had been acceded to by 176 States. Compared with other international documents that guarantee the fundamental principle of equality of (or between) men and women the Women's Convention stands out in a number of respects.¹

Firstly, the Convention explicitly recognises the fact that it is *women* that are discriminated against in today's human society, not men.² This means that it is asymmetrical in its object and purpose: it is directed at the elimination of all forms of discrimination against *women* and not, as is standard in other texts, the elimination of discrimination on ground of *sex*. The latter provisions all guarantee the right not to be discriminated on the basis of the mere fact that one is a man or a woman. This means that these norms are symmetrical and formal by nature.

In the second place the Women's Convention entails the norm that *all forms* of discrimination should be combated. This means that not only overtly visible or open forms of sexism or direct discrimination are prohibited, but also forms of hidden or covert 'indirect' discrimination of individual women. The expression 'all forms' also covers, as is demonstrated in the present study, forms of systemic or structural gender discrimination. That is, the Convention not only forms a basis for individual litigation in the event of discrimination (especially following the adoption of the Optional Protocol), but also offers a solid legal ground for action aimed at combating structural forms of discrimination.

In the third place the Convention stands out compared with other legal documents in the field of non-discrimination by the fact that it clearly is not (only) about granting formal equal rights to women, but also *aims to achieve substantive equality* for women. This latter

1 I can not deal with this issue in any detail here. I recommend readers consult Chapter 2 of the Report of the Groenman Committee (included as an Appendix to this book) and Holtmaat 2003 (a).

2 See General Recommendation 25, para 5.

quality is clearly revealed in the CEDAW Committee's latest General Recommendation on the necessity for designing and implementing positive action measures, where it states that:

"In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women."³

2.2 The place of Article 5a in the structure of the Convention

Article 5a CEDAW is connected to consideration 14 of the Preamble, in which the drafters of the Convention state that they are aware that

"a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women".

The Article forms part of a group of general provisions in the Convention (Articles 1-5 and 24). This is followed by a group of provisions (Articles 6-16) in which the specific areas in which the Convention is applicable are described (such as trafficking in women, political and public life, nationality rights, education, paid labour and social security and health). In these Articles State parties are provided with detailed instructions about what to do to put an end to discrimination of women.⁴ Finally there are a number of provisions on the implementation of the Convention's norms and supervision by the Committee (Articles 17-30).

Article 5b deals with the patterns of expectations with respect to the roles of men and women in the context of parenthood.⁵ Monster, Cremers and Willems characterise the difference between the Articles 5a and 5b as follows:

³ General Recommendation 25, para 8.

⁴ These obligations are phrased as: "shall take all appropriate measures to eliminate discrimination in the field of ...". In this study we will not deal with the question what kind of obligations this puts on State parties. See Groenman Committee, Chapter 2, par. 2.2. (included in this Volume) for a detailed discussion of this question.

⁵ State parties should take all appropriate measures (b): "To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

“The drafters of the Convention on the one hand wanted to recognise the important role of women in the reproduction of mankind, but on the other hand wanted to prevent that women are solely being seen as mothers. Parenthood involves responsibilities that rest both on men and women and creates obligations for the society as a whole. (...) Article 5 CEDAW aims at disentangling the conceptual fusion of woman and motherhood by clearly separating between ‘culture’ (the social and cultural roles on ground of sex in part a) and ‘nature’ (the reproductive function of women in part b).”⁶

On the ground of this difference in meaning between the two parts of Article 5 I have chosen to concentrate solely on Article 5a CEDAW. This study also does not consider Article 10c of the Convention which deals with the elimination of stereotypes in the context of education and educational materials. The latter provision solely concentrates on education and information campaigns and can be seen as a *lex specialis* of the principle enshrined in Article 5a CEDAW.

2.3 The threefold aim of the Women’s Convention

In order to answer the question as to scope and meaning of Article 5a CEDAW, it is important to place this provision in the context of the overall object and purpose of the Women’s Convention. The first National Report (here referred to as the Groenman Committee) elaborated an analysis of the Convention’s sub-aims.⁷ According to the Committee the elimination of all forms of discrimination against women (the general aim, expressed in the Convention’s title) entails that State parties must aim to:

1. achieve full equality before the law and in public administration.
2. improving the position of women.
3. combating the dominant gender ideology.

The Dutch government endorsed this analysis of the sub-aims of the Convention and stated that there is a close connection between these three objectives and the three central aims of Dutch emancipation policy that were laid down in the Emancipation Policy Plan of 1985.⁸ The CEDAW Committee, in its Concluding Comments on the second and third Country Report of the Netherlands, indicated that it appreciates and subscribes to this analysis of the Convention’s aims.⁹ In General Recommendation number 25 on temporary special measures on the ground of Article 4(1), adopted in January 2004, the CEDAW

6 Monster et al. 1998, p. 50.

7 Groenman Committee 1997, p. 21. (We here refer to the numbers of pages in the Dutch report; a translation of the first two Chapters of this report is included as an appendix to this book.)

8 TK 1997-1998, 25 893, nr 2, p. 8

9 25th Session of CEDAW, July 2001, A/56/38, CEDAW/C/SR. 512 and 513, para 196.

Committee uses this threefold aim as a basis for a description of the object and purpose of the Convention.¹⁰

The Women's Convention details all the fields in which governments should strive to meet these aims. In fact, the Convention embraces all aspects of political, social, cultural and economic life. Relationships in private life can also be brought under the scope of CEDAW.¹¹ This means that, as far as the elimination of sex stereotypes is concerned, the intervention of government could – in principle – also extend to private life. Whether, and to what extent, Article 5a CEDAW requires measures to be taken in this sphere is one of the questions to be tackled in the present study.

10 CEDAW, General Recommendation nr. 25, par. 6 en 7. In this light it may be expected that the Committee in the future will revise the text that it has placed on its web site under the title "Reservations" about the central principles of the Convention. At that place only the Articles 2 and 16 are being mentioned as the 'core provisions' that are essential for the object and purpose of the Convention. No reservations to these provisions are allowed, according to the Committee. See: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

11 Groenman Committee 1997, p. 28-29.

THE ASSUMED SPECIAL MEANING OF ARTICLE 5A CEDAW

3.1 Article 5a CEDAW as a principle for cultural change

The view that Article 5a CEDAW has a particular and unique importance has been elaborated in the Dutch legal literature from the outset of the Convention's existence.¹ For example, in 1987 Henc van Maarseveen, Professor in Constitutional Law in Rotterdam, noted that Article 5 is one of the pillars supporting the radicalising *principle of cultural change* that underlies the entire Convention. That is, the Convention is not directed solely at providing women with equal rights (compared with the rights already possessed by men) but also aims at "(...) a possible feminisation of the culture, at least of the culture that is represented in the legal order."² However, Van Maarseveen does not develop the argument as to what type of obligations this provision might entail. Other authors interpret the Article in a less radical way, but nevertheless still deem it to be of special importance, as with Liesbeth Lijnzaad, who argues that this provision is important because it expresses the value of diversity.³ She calls Article 5a CEDAW a 'hat-peg' provision, which is of great importance for the interpretation of object and purpose of the Convention. She illustrates her point with the example of the issue of violence against women: although not expressly regulated in the Convention, it has been brought under its scope by reference to Article 5a.⁴

3.2 Article 5a CEDAW as a legal basis for combating structural gender discrimination

The elimination of the structural causes of sex discrimination

The Committee that produced the first National Report (Groenman Committee) declared that Article 5a CEDAW is the pillar for the third objective of the Convention. According

1 This literature will be discussed in detail in Chapter 10 of this book.

2 Van Maarseveen 1987 (a), p. 75.

3 Lijnzaad 1994, p. 47.

4 See CEDAW General Recommendations numbers 12 and 19 about violence against women.

to the Groenman Committee the obligation to combat the dominant gender ideology represents a legal novelty in the sense that it is not the same as prohibiting (direct or indirect) sex discrimination on the ground that – with some exceptions – men and women should have strictly equal rights. As a consequence, this Article constitutes an indispensable completion of existing national and international non-discrimination norms.

“Never before in a legal document that focuses on combating discrimination against women has there been so much emphasis on the need to change existing ideas and ideologies, where women are assigned an unequal, subordinate or ‘other’ role in human life in all its facets (in both the public and private sphere). In this way, the Convention recognises that the unequal position of women is a stubborn phenomenon and that this can only be improved if essential changes take place at the level of gender ideology.”⁵

The importance of the third objective of the Convention is described by the Committee as follows:

“The current gender ideology distinguishes between men and women by attributing different values and qualities to their behaviour, ideas, feelings, value judgements and expectations. This ideology must be exposed, and the exclusion mechanisms to which it gives rise must be combated effectively.”⁶

In this context the Committee points to the double function of gender ideologies: they not only play a role in constituting peoples’ ‘identity’, but are also constitutive for almost all societal structures and institutions. “The gender-based structuring of human life is sometimes described with the terms structural discrimination, institutional discrimination or systematic discrimination”⁷ The Article is also presumably directed at eliminating or eradicating gender differences that become ‘wired into’ in societies structures and systems. At this point, the Groenman Committee cites the example of the construction of paid labour, which is said to have a gender-specific content. The full-time working male employee (the ‘breadwinner’) still constitutes the starting-point of policy and law in this field.

Towards fundamental change

Like Van Maarseveen, the Groenman Committee also considers that Article 5a CEDAW can have a radicalising effect: “According to Article 5, the government cannot stop after completing the first two sub-aims. A fundamental change of society is essential, i.e. a change in ideas, values and structures based on the female perspective.”⁸ The Article can

5 Groenman Committee 1997, p. 25.

6 Groenman Committee 1997, p. 24. The Committee at this point refers to the report *Projectgroep Beeldvorming*, that will be discussed in Chapter 14 of this book.

7 Groenman Committee 1997, p. 25. These concepts will be defined in the next Chapter and in Chapter 13.

8 Groenman Committee 1997, p. 27.

be read as an encouragement to analyse the precise content of the concepts and assumptions that underlie law and public policy. The Committee warns:

“If this does not happen, the implementation of full equality before the law and a policy to improve the position of women could sometimes have contrary effects. The concepts and assumptions that are currently being used are often coloured by gender stereotypical relationships and expectations. If these concepts and assumptions are included unchanged in new legislation or new policy, this will lead to unwitting and unintentional reproduction of gender differences.”⁹

Implementing this Article of the Convention could help prevent (biological) differences between men and women not being sufficiently taken into account or a policy under which women are simply granted the same formal rights as men on the basis of an existing and static range of conditions. The Committee (implicitly) rejects such a policy of assimilation. Instead it observes that Article 5a CEDAW requires a policy that is directed towards diversity:

“The Article does not provide standards which men and women must satisfy – with the exception of breaking through the traditional role division. As a result, it creates the possibility that dominant (male) norms are not assumed to be self-evident. In a number of areas, this can mean that it is not *equal* rights or *equal* opportunities that must have priority, but that *other* rights must be developed or *other* opportunities must be offered.”¹⁰ (*Italics in original.*)

3.3 Article 5a CEDAW in relation to combating direct and indirect sex discrimination

The Groenman Committee has stressed that, in its view, the three objectives of the Convention are interlinked. Each objective singly cannot be attained without at the same time working to fulfil the other two. In particular, there is a direct link between the obligation to combat discrimination of women in law and public administration (first objective) and the obligation to eliminate gender stereotypes.¹¹

As regards the question as to how the third objective should be implemented, the Committee states that Article 5a CEDAW necessitates the ‘screening’ of all laws for their possible indirect discriminatory effect. The Committee further declares that a method should be developed to test whether laws or regulations might have such an impact for women.¹² One of the recommendations of the Committee, therefore, is to conduct research into the

9 Groenman Committee 1997, p. 27.

10 Groenman Committee 1997, p. 27.

11 The CEDAW Committee states in General Recommendation number 25, para 6, that the obligations that follow from the Convention “(...) should be implemented in an integrated fashion and should move beyond a purely formal legal obligation of equal treatment of women with men.”

12 Groenman Committee 1997, p. 59.

indirect discriminatory effects of legislation and the existence of those gender stereotyped assumptions that underlie legislation.¹³

3.4 An assumption in need of proof

The Groenman Committee did not provide a good deal of proof for its far-reaching statements on the content and scope of Article 5a CEDAW. The present study aims to remedy this and achieve some further clarification of the issue. That is why at the start of this research project, the Committee's thesis was presented as an assumption, the validity of which still needed to be established.¹⁴ Part II below presents the materials from which this specific meaning of Article 5a can be derived. Before this, however, I propose to consider some further arguments that help illuminate the background to the present research: the nature of the existing system of equal treatment legislation in the Netherlands and in the European Union, and the observed shortcomings that this system has in tackling systemic or structural gender discrimination.

¹³ Groenman Committee 1997, p. 140, recommendation number 4.

¹⁴ Planenga, Holtmaat & Koopmans 2004.

DISCONTENT WITH EXISTING EQUAL TREATMENT LEGISLATION

4.1 Introduction

Despite the fact that the right to equal treatment for men and women has been firmly established in most western countries for a number of years, opinions about the effects of this right are not very positive. In a report, published in 1991, The Organisation for Economic Co-operation and Development (OECD) notes that:

“Although a necessary condition for achieving gender equality, the limited impact of anti-discrimination and equal opportunity measures points to the systemic nature of gender-based inequalities, and the need for a systemic solution.”

Equal treatment, in the sense of a prohibition of direct or indirect discrimination on the ground of sex, is, according to the OECD, not sufficient to eliminate this type of systemic discrimination. In order to make real progress in the field of equality between men and women, the OECD calls for ‘institutional change’:

“That solution lies in applying an integrated approach to institutional change aimed at addressing the contradictions and tensions generated at the interface between the household, the community and employment structures.”¹

Instead of existing approaches to sex equality law, a different type of law would have to be developed that targets the structural dimension of the unequal power relations between men and women. For readers who are not familiar with the feminist legal debate about the effects of this legislation, this Chapter provides a short introduction to the growing body of critical academic writing on this issue.²

1 OECD 1991, p. 8.

2 This is only a very brief introduction. The literature on this topic is abundant. We will discuss only a few representatives of the feminist jurisprudence. See for a Volume of critical comments on European Union Sex Equality Law Hervey & O’Keeffe. See also Fredman 2002.

4.2 The shortcomings of the existing equal treatment legislation

The limitations of formal equal treatment on ground of sex

Most laws that prohibit discrimination of women do this in the form of a prohibition of unequal treatment on grounds of sex. This means that, when attributing rights and duties to people, there shall be no distinction on the basis that somebody is of the male or female sex. The scope and meaning of this type of legislation differs from country to country. Sometimes the equal treatment norm is only directed at the government, sometimes it is also applicable in certain fields of private (corporate) life, like the field of paid labor, education or healthcare. Sometimes it is part of criminal law, sometimes the equal treatment norms can be found in labor law, civil law or administrative law. Some countries have a specific Equal Treatment Act.

There is an important similarity between all these norms: central in the concept of equal treatment of men and women is that both sexes should have *identical* rights, apart from a limited number of exceptions – mostly with regard to the protection of motherhood. This type of equal treatment norm only prohibits unequal treatment on the ground of sex. It does not impose a positive duty (on the State or private parties) to effectively put an end to the *de facto* unequal situation of women. By prohibiting discrimination of men as well as discrimination of women this legislation misses the point that in fact in today's societies women are the victims of discrimination. When a government takes positive action to do something about this factual unequal position of women by (temporarily) giving some additional rights to women compared to men, this breach of the formal principle of equality needs a very weighty justification.³ The CEDAW Convention is an exception to this dominant legal construction of the non-discrimination norm, in that it explicitly recognizes the fact that *women* are the victims of discrimination and that one of its aims is to improve the position of women.⁴

Discrimination as an individual problem

Although very important, a strategy that aims at providing the right to non-discrimination and (formal) equal treatment is not in itself sufficient to bring about equality between men and women in reality. One of the main criticisms of existing EC equal rights laws is that these laws define discrimination as an *individualised* concept.⁵

“The right not to be discriminated against on the ground of sex means the right of an individual not be subjected to specific treatment which is less favourable than that which is or would be

3 In European Law this is very problematic. See Tobler 2003 and Holtmaat 2003 (a).

4 See CEDAW General Recommendation number 25 and Holtmaat 2003 (b).

5 The same criticism applies to most Anglo-American anti-discrimination laws. See for a discussion of EC law Fredman 2002, p. 162.

received by a similarly placed member of the opposite sex, where the ground or reason for the less favorable treatment is sex.”⁶

It is up to the individual woman to claim that her right to equal treatment has been breached. That is why this strategy is called the *individual rights strategy*.

Although such equality legislation may be able to open some doors to women it can never guarantee that women will be able to participate fully behind these doors. Moreover, it is a backward-looking strategy: it only addresses harm already done! In equality law more emphasis should be placed on the position of women (or groups of women) as the subordinated or excluded sex, and more attention should be placed on the systemic or structural causes of discrimination in order to prevent discrimination in the future. That is why some critics argue for a ‘move beyond equality’ or for ‘equality as transformation’.⁷ Others, including the present author, consider that a multi-layered approach is needed within non-discrimination law, in which the existing individual rights approach is combined with a *strategy for social support* (through positive action) for women who are discriminated against together with a *strategy for social and cultural change*.⁸

The tendency towards assimilation

A major problem in relation to the formal legal right to equal treatment of men and women is that this norm always demands a comparison. The equal treatment norm generally has been formulated in such a way that it is prohibited to disadvantage women *as compared to men* (and vice versa). For example, this can be read in the definition of sex discrimination in European Community law. “Direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.”⁹

The comparison (of the situation of the disadvantaged sex) is customarily made with reference to the dominant norm. This raises the danger of assimilation to this norm. When women demand equal access to paid labour this demand will mean: equal to conditions under which men in the past gained access to paid labour. The dominant (male) norm will not be contested in such procedures. This means that, based on equal treatment legislation, no remedies are available for the fact that paid labour is organised in such a way that combining paid labour and unpaid care activities is very difficult. Granting some ‘special rights’ to women (e.g. with respect to pregnancy and maternity¹⁰) can simply reinforce

6 See Ellis 1998, p. 321. See further Sandra Fredman 2002., Chapter 4, where the author discusses the problems that arise in this approach to legal equality.

7 Fredman 2002 and 2003.

8 Holtmaat 2003 (a).

9 Article 2 (2) of Directive 2002/73/EC.

10 See for example Article 2 (7) of Directive 2002/73/EC.

gender stereotypes about the roles of women in the family, confirming views about the role of the mother in the home, the incompatibility of paid labour and caring, and essential differences in male and female roles in bringing up and caring for children.

A description of these effects of equal treatment legislation can be found in the work of Clare McGlynn, who analysed a great number of judgements of the European Court of Justice.¹¹ Her conclusion is that this case law consolidates and reinforces traditional views that maintain the subordinate position of women. At the basis of a number of these judgements of the Court lies a dominant ideology of motherhood, that stems from psychological theories about mother-child bonding developed after World War Two.¹²

Other authors, such as the Dutch lawyer Susanne Burri, have pointed to the fact that the European Court of Justice at some points does acknowledge that women are sometimes in a disadvantageous position because of certain regulations or systems. Burri discusses case law in the field of positive action, and concludes that the Court at this point understands that

“(...) as a consequence of certain prejudices and stereotypes about the roles and the capacities of women and expectations about career interruptions or desired working times in regard to their duties at home and in the family, women who have the same qualifications as men do not have the same opportunities.”¹³

On this ground the Court deems it possible that certain measures to facilitate part-time work can be justified under the provisions (in EC law) that allow positive action measures. In another case the European Court of Justice expressly rejected the argument that the legislature’s social welfare policy cannot be made responsible for general societal developments, including typical discrimination against women.¹⁴ This means that the situation might be somewhat less negative than some commentators presume.

The invisibility of unequal power relations in equal treatment legislation

The assimilation to the dominant norm that follows from the application of the formal equality principle is widely held to be one of the central problems of equal treatment legislation and case law.¹⁵ Almost all legal scholars who study this law from a feminist perspective acknowledge that as a consequence, systemic or structural discrimination cannot be eliminated.

11 McGlynn 2000.

12 In the Netherlands this analysis of McGlynn caused some debate. See Monster 2001.

13 Burri 2000, p. 389. At this place she discusses the cases of Marschall and Badeck, resp. C-409/95 and C-158/97.

14 Rust 1996, p. 445, who discusses the case of the Commissie vs Belgium, C-229-89.

15 See for example Fredman 2001, 2002 and 2003 and the literature that she discusses.

One example of this critical approach can be found in an article by the Canadian professor of law, Rebecca Cook. According to Cook, the ‘similarity and difference’ model

“(…) does not allow for any questioning about the ways in which laws, cultures or religious traditions have constructed and maintained the disadvantage of women, or the extent to which the institutions are male-defined and based on male conceptions of challenges and harms.”¹⁶

Paying attention to systemic discrimination would mean researching the ways in which legal, social and religious traditions disadvantage women:

“Systemic discrimination or inequality of conditions, the most damaging form of discrimination, cannot be addressed via the rule-based sameness of treatment approach. Indeed, the use of this model virtually makes systemic disadvantage invisible.”¹⁷

The solution that Cook proposes is an asymmetric and substantive approach to equality and equal rights.¹⁸ The test should not be whether men and women are treated *equally* but whether a rule or practice is based on the powerlessness and exclusion of women, and operates systematically to their disadvantage.¹⁹ The American feminist law professor, Catherine MacKinnon, has advocated this approach, sometimes being called the *dominance* approach. She states that in tackling discrimination against women, the test should not be whether there is a situation of sameness or difference compared to men, but that every policy or law should be tested against whether unequal power relationships between men and women are at stake.

“In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality (...) is at root a question of hierarchy, which – as power succeeds in constructing social perception and social reality – derivatively becomes a categorical distinction, a difference.”²⁰

The Dutch political scientist Selma Sevenhuijsen notes in addition:

“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.”²¹

16 Cook 1994 (a), p. 11.

17 Cook 1994 (a), p. 11, where she discusses Kathleen Mahoney’s contribution to this Volume.

18 See also Loenen 1992 en 1994.

19 Cook 1994 (a), p. 12. Such an approach still requires a comparison (disadvantaged compared to whom?) See Holtmaat 1996.

20 MacKinnon 1991, p. 87

21 Sevenhuijsen 1998, p. 30

4.3 From the prohibition of sex discrimination to the elimination of sex as a legally relevant category

In most of today's equal treatment legislation the problem of inequality between men and women does not appear as a matter of unequal power relationships between the sexes, a fact commented on in the early days of equal treatment legislation by Professor Van Maarseveen. In his view the unequal 'power of definition' also played a role in the very construction of this legislation.

"The person who has the power of definition, who succeeds at defining discrimination against women as sex discrimination, takes the sting out of the matter and at the same time does not have to fear much from it anymore."²²

The symmetric prohibition of sex discrimination protects men as well as women against unequal treatment. Very often men bring equality cases on the basis of this legislation and win them.²³ This means that the factual inequality between men and women is being denied.

The Dutch lawyer Marjolein van den Brink even takes it a step further than that:

"As long as sex difference is deemed to be essential for the human existence and human identity, it will (partly) determine the structure of society and thereby it will consolidate, reproduce and strengthen this difference."²⁴

It is the view of Van den Brink that it is necessary to eliminate the categories male and female from the law altogether. Otherwise it is impossible to put an end to all three forms of discrimination that she distinguishes: direct, indirect and systemic discrimination.

4.4 Final remark

According to the feminist critics of equal treatment law this law is not suitable when it comes down to putting an end to structural gender discrimination. Article 5a CEDAW that obligates State parties to eliminate "*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*" presumably will offer an appropriate legal tool to reach this goal. This brings me back to the subject of this book: what exactly is the content and scope of this provision in the Women's Convention? In the next part of this

²² Van Maarseveen 1987, p. 21. See also Pessers 1991, p. 1003 and Smart 1989, p. 2.

²³ In Europe we have the famous pension and positive action cases. See e.g. Barber, Kalanka and Marschall described in Whiteford 1996 and Tobler 2003.

²⁴ Van den Brink 2000, p. 30.

book I will discuss how, according to official documents and the legal literature this provision can or should be interpreted.

PART II

CONTENT AND SCOPE OF ARTICLE 5a CEDAW

INTRODUCTION TO PART II

Chapter 3 discussed the assumption that Article 5a CEDAW has a special significance. This part of the study considers what official documents and the legal literature have had to say about the content and scope of this provision.

Initially, this will entail a discussion of what the drafters of the Women's Convention meant to express in Article 5a CEDAW and what the CEDAW Committee has subsequently said about it in its Instructions, General Recommendations and the Concluding Comments to their discussions of Country Reports. This is followed by a consideration of the opinions that the Dutch government issued during the ratification procedure and in its Country Reports to the CEDAW Committee. A good deal of material on the nature of Article 5a CEDAW was found in the two National Reports and the studies undertaken in relation to the national reporting procedure in the Netherlands. Finally, there is a review of the academic legal literature on Article 5a CEDAW.¹

The key questions here are as follows:

- Does this material taken together provide enough evidence to warrant the claim that Article 5a CEDAW does indeed contain a special obligation that extends further than existing prohibitions on sex discrimination in international human rights documents and in European Community and Dutch equal treatment laws?
- If so, which specific duties can be derived from this provision?

Answers to these questions will be presented in Chapter 11.

1 For the search of Dutch literature, the bibliography on the CEDAW Convention from the Clara Wichmann Institute (Kruizinga 2000) was used. The search of non-Dutch literature was confined to publications in the English language, which were known to the Division for the Advancement of Women (DAW) and which were available in the Netherlands at that time.

ARTICLE 5a CEDAW ACCORDING TO THE DRAFTERS OF THE CONVENTION

6.1 The source of the provision

Article 5a CEDAW stems from Article 3 of the *Declaration on the Elimination of Discrimination against women*. (DEDAW):¹ “All appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of inferiority of women”.

During the process of the drafting of the Women’s Convention the Philippines formulated a text, the first paragraph of which closely corresponded with the final version of this provision but with more specific provisions as to the activities that a State party would have to undertake:

“State parties undertake to adopt immediate, effective and appropriate measures, particularly in the field of teaching, education, culture and information, with a view to the eradication of ... etc. (identical to Article 3 DEDAW).”

A second paragraph was added: “Any advocacy of hatred for the feminine sex that constitutes incitement to discrimination against women shall be prohibited by law.” The representatives of the Soviet Union proposed a text in which the social function of motherhood was included as an important element. Together with the text that was proposed by the Philippines this formed the first draft of Article 5 CEDAW:

“1. State parties shall adopt all necessary measures with a view to educating public opinion for the complete eradication of prejudices, customs and all other practices based on the concept of women and for the recognition that the protection of motherhood is a common interest of the entire society which should bear responsibility for it.

¹ Proclaimed by the UN General Assembly resolution 2263 (XXII) of 7 November 1967. See Lijnzaad 1994, p. 44-45. The history of CEDAW is described in full extend in Rehof 1993, p. 77-88.

2. Any advocacy of the superiority of one sex over the other and of discrimination on the basis of sex shall be prohibited by law.”

6.2 The drafting of the text of Article 5a CEDAW

From the *Travaux Préparatoires* of the Women’s Convention it can be derived that, on the basis of the joint proposal made by the Philippines and the Soviet Union, three issues played an important role in the drafting process of Article 5a CEDAW.²

1. Elimination of prejudices based on ideas of inferiority and superiority;
2. Education of the public; and
3. Maternity as a social function.

The second and third issue have resulted in part (b) of Article 5.

The attempt by Philippines to include an additional clause prohibiting incitement to discrimination against women failed following opposition by Sweden which argued that it was difficult to demarcate the punishable area from innocent acts. Sweden also stated that such a provision might encroach upon freedom of speech and free debate. Columbia, Finland and the United States were also concerned that the wording ‘advocacy of the superiority of one sex over the other’ would result in a restriction of freedom of speech. On this ground most countries rejected the second paragraph of the proposed article (see above). Ethiopia protested that “fundamental freedoms are not generally granted to citizens without exceptions or bounds”.

Sierra Leone stated that traditional practices should be studied carefully to see whether they were indeed based on the idea of inferiority of women. Sweden preferred to mention the “inferiority or superiority of either sex”. The United States of America also suggested that this provision should be directed at stereotypes of men and women.

Together, all these interventions led to the following text of Article 5a CEDAW, as proposed by Mexico:

“The State parties shall take all appropriate measures 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 the superiority of either of the sexes or on stereotyped roles for men and women”.

2 Rehof 1993, p. 80-81. Citations of opinions of countries and draft-text in this paragraph all stem from Rehof.

6.3 Reservations about Article 5a CEDAW

The Women's Convention leaves ample room for states to submit reservations.³ Although Article 28, paragraph 2 states that reservations that are incompatible with the object and purpose of the Convention shall not be permitted, some countries nevertheless have registered reservations about Article 5a. New Zealand made a reservation to this Article, in combination with Article 2f:

“The Government of the Cook Islands reserves the right not to apply article 2 (f) and article 5 (a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions.”

For the same reason, some countries with a monarchy based on exclusive male inheritance have also made reservations to the Convention.

Niger, India and Malaysia have made a reservation to Article 5a in combination with Articles 2 and 16, in as far as these provisions are not in accordance with customs and practices. Niger phrases this as follows:

“The Government of the Republic of the Niger declares that the provisions of article 2, paragraphs (d) and (f), article 5, paragraphs (a) and (b), article 15, paragraph 4, and article 16, paragraph 1 (c), (e) and (g), concerning family relations, cannot be applied immediately, as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority.”

India says that it wants to respect the customs and practices of separate Communities:

“With regard to articles 5 (a) and 16 (1) (...), the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.”

In addition, many Islamic countries have made reservations to Articles 2 (especially 2f) and 16 – often without mentioning Article 5a – inasmuch as these provisions are deemed contrary to the Islamic Shari'a.⁴

A number of countries, among them Mexico, Norway and the Netherlands, have expressed strong objections to these reservations, arguing that such reservations undermine the object and purpose of the Convention. The CEDAW Committee states in particular that reservations

3 The Reservations can be found at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>

4 Nyuma 2000, p. 391.

to Articles 2 and 16 are in breach of Article 28, paragraph 2 of the Convention.⁵ The Committee has often noted that reservations to the Convention cannot be justified with reference to traditions and religion. This point of view has also been laid down in a general statement:

“Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.”⁶

6.4 Conclusion

Compared to Article 3 DEDAW, in which the education of public opinion and eradication of prejudice had a central place, Article 5a CEDAW is much broader. The history of the drafting process indicates that the drafters were convinced of the damaging effects of stereotyped roles of men and women and clearly wanted to instruct the State parties to do ‘something’ about the continuing existence of such stereotypes. In the end, modifying social and cultural patterns of conduct was formulated as one of the Convention’s explicit obligations. What States should do to implement the provision was left undecided.

5 At its web site only the Articles 2 and 16 are being mentioned as the ‘core provisions’ that are essential for the object and purpose of the Convention. No reservations to these provisions are allowed, according to the Committee. See: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

6 General Statement on the Impact of Reservations, A/53/38, CEDAW on its 19th session, Chapter 1, para. 17.

ARTICLE 5a CEDAW ACCORDING TO THE CEDAW COMMITTEE

7.1 Introduction

What precisely a State party must do to implement this provision cannot be read from the text of Article 5a CEDAW itself. In 1987 the UN Committee that supervises the implementation of the Convention (below referred to as the Committee or the CEDAW Committee) issued a very broad General Recommendation (number 3) on this Article. More clues about the meaning of Article 5a CEDAW can also be found in some General Recommendations on specific topics such as violence against women and family law. This chapter also reviews the directions that the Committee has given to State parties on how to report on the implementation of this provision of the Convention. The Concluding Comments of the CEDAW Committee in particular contain an abundance of material on how the Committee sees the problem of gender stereotyping and the measures it sees as necessary to eliminate damaging and repressive gender stereotypes.¹ I have chosen to let the Committee speak for itself by citing extracts from these Concluding Comments.

7.2 The General Recommendation about Article 5 CEDAW

In its Fifth Session in 1986 the Committee appealed to the State parties to

“consider the introduction of appropriate measures to overcome obstacles to equality arising from prejudices, customs or practices based upon stereotyped roles for men and women, aimed at modifying the social and cultural pattern of conduct.”²

1 Concluding Comments or Concluding Observations are included in the official reports that the CEDAW Committee delivers to the General Assembly of the United Nations on the basis of the Country Reports that State parties deliver to the Committee (on the ground of Article 18 CEDAW) and the constructive dialogue between the Committee and the governments of the State parties. I here refer to the official publication of the Committees annual report to the General Assembly.

2 UN.doc.A/41/45, para. 365, as cited by Wadstein 1988, p. 13.

In General Recommendation Number 3, adopted in 1987, the Committee again stressed the fact that Article 5 is an important provision and that State parties should give serious attention to the problem of stereotypes based on sex in their Country Reports. This General Recommendation is very short and reads as follows:

“The Committee,
considering that the CEDAW Committee has considered 34 reports from State parties since 1983,
further considering that, although the reports have come from States with different levels of development, they present features, in varying degrees, showing the existence of stereotyped conceptions of women, owing to socio-cultural factors, that perpetuate discrimination based on sex and hinder the implementation of article 5 of the Convention,
urges all States parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women.”

However, as a close reading reveals, this General Recommendation does no more than establish the fact that damaging sex stereotypes still exist and that the Committee urges the adoption of educational and public information programmes.

7.3 Article 5a CEDAW in other General Recommendations

The fact that Article 5a CEDAW is not only a norm that stands on its own, but also serves as a provision that helps to fill in the content of other Articles in the Convention, can be inferred from the way in which the CEDAW Committee regularly refers to the obligation to eliminate sex stereotypes in other General Recommendations.

Article 5a CEDAW and violence against women

This is very clear in the two General Recommendations (numbers 12 and 19) that the Committee has issued about violence against women. This subject is not explicitly regulated under the Convention. The Committee uses (among others) Article 5a as a peg on which it can bring this subject under the overall scope of the Convention. This is done by making a direct link between negative stereotyping of women and violence against women.³ This takes place very explicitly in Article 24, paragraphs d to f of General Recommendation number 19, in which the State parties are enjoined to take effective measures to ensure “that media respect and promote respect for women”, that in their Country Reports they should “identify the nature and extend of attitudes, customs and practices that perpetuate

3 The subject of violence against women was analysed in detail in Boerefijn et al. 2000. (Discussed in Chapter 9 of this book.) Also in other UN Documents, a direct link between violence and stereotyping is often asserted. See e.g. Article 4 of the 1994 Declaration on the Elimination of Violence Against Women (DEVAW).

violence against women” and that they “should take effective measures to overcome these attitudes and practices”.⁴

Article 5a CEDAW in relation to family law

Also in General Recommendation number 21, which deals with the rights of women in family law, there are various places where the role of negative sex stereotypes are discussed in relation to the unequal rights that women often have in this field of law. To begin with, the Committee stresses the fact that the Convention goes further than simply acknowledging the principle of the equal rights of women – as guaranteed in numerous International Documents – by

“(…) recognizing the importance of culture and tradition in shaping the thinking and behavior of men and women and the significant part they play in restricting the exercise of basic rights by women.”⁵

Specifically in relation to Article 16 of the Convention the Committee notes that the separation between public and private life in the legislation, that occurs as a consequence of the inferior treatment of domestic duties of women, can no longer be justified.⁶ Attributing formal equal rights to women is not enough to eradicate the different roles of men and women:

“Even where *de jure* equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in Article 16 and also in Articles 2, 5 and 24 of the Convention are being violated.”⁷

On the ground of Article 5a in the same General Recommendation polygamy is declared to be expressly prohibited under the Convention:

“(...) polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some State parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provision of article 5 (a) of the Convention.”⁸

4 In the latter consideration an explicit reference is made to General Recommendation number 3 about Article 5a CEDAW.

5 General Recommendation nr. 21, para 3.

6 General Recommendation nr. 21, para 11 and 12.

7 General Recommendation nr. 21, para 12.

8 General Recommendation nr. 21, para 14.

The Committee also rejects traditional practices, common law systems and customary law which breach such fundamental rights of women as the right to a free choice of spouse and which assign different rights and duties to men and women. Often insufficient protection is offered to women who live in a *de facto* union with a man.⁹ Finally, the Committee points out that the fact that in many cases the contribution made to the household by domestic labour is not valued in the same way as financial contributions. This can have serious consequences for the attribution of ownership and control over family assets between men and women. The Committee strongly disapproves of this kind of inequality.¹⁰ From all this the Committee draws the conclusion that “State parties should resolutely discourage any notion of inequality of women and men which are affirmed by laws, or by religious or private law or by custom (...).”¹¹

The place of Article 5a in the Convention

In January 2004 the CEDAW Committee adopted General Recommendation Number 25, in which it explains that the Convention has a threefold objective, following the line of argument made by the Dutch Groenman Committee.¹² This General Recommendation links Article 5a CEDAW to the third objective:

“Thirdly, State parties’ obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.”¹³

In connection to the general obligation to eliminate all forms of discrimination against women the CEDAW Committee remarks that it is not enough to guarantee formal legal equality:

“As steps are being taken to eliminate discrimination against women, women’s needs may change or disappear, or become the needs of both women and men. Thus, continuous monitoring of laws, programmes and practices directed at the achievement of women’s *de facto* or substantive equality is needed so as to avoid a perpetuation of non-identical treatment that may no longer be warranted.”¹⁴

9 General Recommendation nr 21, para 16, 17 and 18.

10 General Recommendation nr 21, para 31 and 32.

11 General Recommendation nr. 21, para 44.

12 See Chapter 2.

13 General Recommendation nr. 25, para 7.

14 General Recommendation nr. 25, para 11.

7.4 Article 5a CEDAW in the Instructions to the State parties

Article 5 of the Convention is discussed in detail in the Instructions that the CEDAW Committee has made available to the State parties on how they should report on their implementation of the Convention and progress in this respect.¹⁵ In this document the Committee underlines the significance of this provision, shows that it is important for various subjects that fall under the scope of the Convention, and presents a long list of questions that need to be answered in relation to this Article. On the specific issue of violence against women, and its relationship to Article 5a CEDAW, the Committee warns that prejudices and traditional practices cannot serve as a justification for gender-based violence. The list of questions proposed by the Committee clearly indicates that it is not only interested in how traditional customs and practices determine religious and cultural life, but how these are reflected in law and public policy. For example, the Committee wants to know who is considered to be the ‘head of the household’, according to national law, and whether women are banned from practising certain occupations.¹⁶

7.5 Article 5a CEDAW in the Concluding Comments of the CEDAW Committee

Introduction

The clearest indications of how Article 5a CEDAW should be interpreted and the obligations that follow from it can be found in the Concluding Comments drawn up by the CEDAW Committee after having reviewed and discussed the Country Reports submitted by State parties under their obligations in accordance with Article 18 of the Convention.

Reasons of time and limited availability of the sources meant that the present study was only able to consider the Concluding Comments and not the Country Reports that formed the basis for these discussions, nor the Shadow Reports submitted to the Committee by non-governmental organisations. For the first period (sessions 1-9) the Secretariat of the Committee compiled a report summarising the Country Reports.¹⁷ Lijnzaad concludes from this summary that “ (...) State parties report an amazing range of activities. (...) This list shows what other [*than the Dutch; RH*] State parties have done to implement Article 5 and indicates that this provision has a broad scope.”¹⁸

The following presents an overview of the relevant statements about the content and scope of Article 5a CEDAW in the Concluding Comments made between the 13th session in 1994 and the 30th session in January 2004. Material on the first 12 sessions of the CEDAW

15 DAW 2002.

16 See also UN 1997, p. 322-324

17 DAW 1990.

18 Lijnzaad 1994, p. 5. Because this involves very outdated and incomplete materials (until 1990) these have not been included in the analysis.

Committee is not available on the Internet; moreover, it is now so old that it is less relevant for current interpretations of this provision.

The overview begins with a consideration of a number of general aspects, including the continuing existence of cultural and religious traditions and practices. This is followed by more specific comments that relate to subjects covered by the Convention.¹⁹ While this research was conducted in the wider framework of a study into the meaning of Article 5a CEDAW for the fields of paid work, care and income, particular attention is devoted to the question of what the Committee said about the meaning of this provision in this specific area. Finally, there is a discussion about the measures that should be taken to implement the provision.

General remarks

The Committee frequently notes in quite general terms that it is concerned about the persistence of traditional sex stereotyped ideas and conceptions. For example, in its Concluding Comment about Zambia: “The Committee was very concerned about the persistence of traditional sex roles, which were deeply embedded in the cultural lives of the Zambians and which generally seemed to impede equality.”²⁰ This kind of commentary also can be found on a regular basis in Concluding Comments about ‘developed’ Western countries. For example, on Luxembourg:

“The Committee is concerned at the persistence of traditional and stereotypical attitudes about the roles and responsibilities of women and men in public and in private life. These attitudes are reflected in people’s behaviour and in legislation and policy, and limit women’s full enjoyment of all their rights guaranteed under the Convention.”²¹

And on Germany:

“The Committee is concerned about the continuation of pervasive stereotypical and conservative views of the role and responsibilities of women and men. It is also concerned that women are sometimes depicted by the media and in advertising as sex objects and in traditional roles.”²²

The existence of religious and cultural traditions

In the view of the CEDAW Committee, religious and cultural traditions do not excuse the persistence of repressive stereotypes. In that context it regularly raises the issue of the

19 The topic of family law and health and healthcare (articles 16 and 12 of the Convention) will be discussed in relation to the cultural and religious traditions. The field of education is not included in the survey because the Committee deals with that under Article 10c.

20 Zambia (1994), A/49/38, CEDAW/C/SR.241 and 246, para. 361.

21 Luxembourg (1998), A/55/38/CEDAW/C/SR. 446 and 447, para. 404.

22 Germany (2004), A/59/38, CEDAW/C/SR. 640 and 641, para. 20.

situation of women in rural areas whose economic development is hindered by traditional practices and customs.²³ In regard to the situation in Morocco the Committee emphasises:

“(...) that cultural characteristics could not be allowed to undermine the principle of the universality of human rights, which remained inalienable and non-negotiable, nor to prevent the adoption of appropriate measures in favour of women.”²⁴

And in relation to Indonesia it remarks:

“The Committee is convinced that the existence of cultural attitudes that confine women to the roles of mothers and housewives presents a great obstacle to the advancement of women. Policy measures and programmes developed on the basis of those stereotypes limit women’s participation and entitlements, thereby impeding implementation of the Convention. The Committee expresses the view that cultural and religious values cannot be allowed to undermine the universality of women’s rights. It also stated its belief that culture is not a static concept and that the core values in Indonesian society are not inconsistent with the advancement of women.”²⁵

The persistence of traditional ideas is of great concern to the Committee, especially in relation to the growth of religious fundamentalism in a number of countries.²⁶ In connection to this phenomenon the Committee regularly points to the existence of traditional religious beliefs that can endanger women’s health.²⁷ The existence of customary law alongside the official law of the State party cannot warrant acceptance of the continuation of discriminatory practices based on sex stereotypes.

“The Committee notes with great concern that, although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family. The Committee notes with dissatisfaction that prevailing traditional and socio-cultural attitudes towards women contribute to the perpetuation of negative images of women, which impedes their emancipation.”²⁸

In a Concluding Comment on Congo the Committee expresses its special concern about the continued existence of polygamy and of the unequal rights provided for in custom-based family law:

“The Committee expresses concern about the continued existence of discriminatory family laws and traditional practices, including those related to dowries and adultery. The Committee is par-

23 E.g. Paraguay (1996), A/51/38, CEDAW/C/SR. 289 and 297, para. 126.

24 Morocco (1997), A/52/38, CEDAW/C/SR. 312, 313 and 320, para. 64.

25 Indonesia (1998), A/53/38, CEDAW/C/SR. 377, para. 282.

26 E.g. Turkey (1997, A/52/38, CEDAW/C/SR. 318 and 319, para. 164 and Azerbaijan (1998), A/53/38, CEDAW/C/SR. 361, 362 and 367, para. 58.

27 Senegal (1994), A/49/38, CEDAW/C/SR.247, para. 725, Nigeria (1998), A/53/38, CEDAW/C/SR. 396 and 397, para. 153 and the Maldives (2001), A/56/38, CEDAW/C/SR. 498, 499 and 506, para. 142.

28 Zimbabwe (1998), A/53/38, CEDAW/C/SR. 366, 367 and 372, para. 139.

ticularly concerned about the practice of pre-marriage in view of the fact that Congolese law, while recognizing the practice, does not stipulate a minimum age for pre-marriage partners.”²⁹

In a Concluding Comment about the situation in Ethiopia, the Committee expresses its disapproval of the fact that 80 per cent of women in this country are victims of genital mutilation and of the widespread use of “widow inheritance with all her property”.³⁰

Sexual violence and pornography

The CEDAW Committee frequently makes a link between (sexual) violence against women, trafficking and prostitution and the failure to implement Article 5a CEDAW.³¹ An example of how the Committee sees the relationship between this issue and women’s economic dependence can be read in a report of the constructive dialogue with Zambia, in which the representative of the Zambian government summarise this problem in the following way:

“Violence against women was widespread and even traditionally accepted as a way of disciplining a wife. (...) Since most women were economically dependent on their husbands and afraid to lose their matrimonial home, they were very reluctant to prosecute their aggressors. Some women did not admit that they had been abused and considered battering as a sign of man’s affection.”³²

The Committee also often links the existence of sex stereotypes with the problem of sexual harassment in the workplace.³³ The issue of pornography is raised only a few times in the context of the discussion of Article 5a, at the same time acknowledging that legislation had been enacted that limits this phenomenon.³⁴

Political participation of women

In relation to the discussions about the implementation of Articles 7 and 8 of the Convention the Committee often highlights the relationship between the existence of gender stereotypes and the under-representation of women in political and public life. For example, in its Concluding Comment on Uruguay

29 Congo (2003), A/58/38, CEDAW/C/SR, 606 and 607, para. 180. See also Buthan (2004), A/59/38, CEDAW/C/SR, 636 and 642, para 31 and 32.

30 Ethiopia (2004), A/59/38, CEDAW/C/SR, 646 and 647, para 26 and 27.

31 Prostitution and trafficking in women is prohibited in Article 6. Since there is no provision prohibiting (sexual) violence against women in the Convention the reporting and discussing of the issue of violence often takes place under the heading of Article 5. E.g. Uganda (1995) A/50/38, CEDAW/C/SR.270 and 273, para. 332. See also above, where I discuss General Recommendation numbers 12 and 19.

32 Zambia (1994) A/49/38, CEDAW/C/SR. 241 and 246, para. 330.

33 E.g. Japan (1994), A/49/38, CEDAW/C/SR. 248 and 249, para. 570.

34 E.g. New Zealand (1994), A/49/38, CEDAW/C/SR. 243, para. 641.

“The Committee (...) urges the State party to concentrate on increasing women’s participation in all areas, particularly decision-making, and on prevailing on men to share family responsibilities. It urges the Government to strengthen its awareness-raising programmes, and to take action to change stereotyped attitudes and perceptions as to men’s and women’s roles and responsibilities.”³⁵

Women’s participation in paid labour

The field of paid labour and income is regulated in Articles 11 and 13 of the Convention. The Committee frequently links the fact that sex stereotypes exist with the existence of a segregated labour market and low pay for women. The traditional division of labour between men and women is one of the reasons why women cannot achieve economic independence. Measures to facilitate the combination of paid work and care activities that are directed solely at women are rejected by the Committee as being gender stereotypical in themselves. An example of this can be found in a Concluding Comment on Egypt.

“The Committee notes with concern that the persistence of cultural stereotypes and patriarchal attitudes impedes progress in the implementation of the Convention and the full enjoyment of their human rights. In this regard, the Committee is concerned that article 11 of the Egyptian Constitution, which states that the State shall enable a woman to reconcile her duties towards her family with her work in society and guarantee her equality with men in the sphere of political, social, cultural and economic life, appears to entrench the woman’s primary role as mother and homemaker.”³⁶

For this reason the Committee, in the context of discussing Article 5, repeatedly insists that concrete measures are needed to promote the role of men in unpaid care activities.³⁷ The enactment of pregnancy leave and/or maternity leave is not deemed sufficient for that purpose.³⁸ The Norwegian government receives an elaborate compliment for its policy in this field:

“The Committee applauded the Government of Norway for directing attention to the necessary changes in men’s roles and tasks as an important element in achieving true gender equality, including men’s encouragement to use their right to paternity leave and to increase their involvement as caretakers in the labour market.”³⁹

35 Uruguay (2002), A/57/38, CEDAW/C/SR. 539, 540 and 548, para. 27. See also Cuba (2002), A/55/38, CEDAW/C/SR. 474 and 475, para. 262.

36 Egypt (2001), A/56/38, CEDAW/C/SR. 492 and 493, para. 332.

37 Ukraine (1996), A/51/38, CEDAW/C/SR.302, para. 300 and Iceland (2002), A/57/38, CEDAW/C/SR. 532 and 519, para. 28.

38 Iceland (1996), A/51/38, CEDAW/C/SR.290 and 291, para. 94, 95.

39 Norway (1995), A/50/38, CEDAW/C/SR.277, para. 486. See also Finland (1995), A/50/38, CEDAW/C/SR. 272, para. 388.

However, in the same document the Committee warns against segregation in the labour market and points to the large pay gap between men and women, as well as to the fact that many women work part time.⁴⁰

From a Concluding Comment about Finland it appears that the Committee deems it necessary to pursue a combined approach:

“The Committee urges the Government to increase its efforts to eliminate stereotypes in women’s education as well as biased perceptions in job evaluations and pay relating to traditional areas of employment for women. In particular, it recommends efforts to encourage cross-vocational training in typical female and male-dominated areas, and to address the issue of the negative impact on women of policies of time-fixed contracts. The Committee also urges the Government to increase incentives for men to use their rights to parental leave and to set up stronger monitoring mechanisms for the plans under the Equality Act.”⁴¹ A Concluding Comment on Ireland contains the instruction to ensure that “(...) legislation and policies create the structural and systemic framework that will lead to women’s long-term participation in the labour force on a basis of equality with men.”⁴²

Protective labour laws

In the view of the Committee protective labour legislation can be especially damaging for women’s interests. “The Committee is very concerned about the relationship between sexual stereotyping and overprotective labour legislation. It noted that protective labour laws had the sole effect of restricting women’s economic opportunities, and were neither legitimate nor effective as a measure for promoting women’s reproductive health. Women should have a right to free choice as to their employment, and the high rates of infant mortality and fetal abnormality resulting from the ecological disaster should be addressed as a matter of public health.”⁴³ In its commentary on the situation in the Slovakia this relationship is described in the following manner:

“The Committee expresses its concern at the overemphasis on legislative protection of and cultural promotion of motherhood and family roles for women, rather than on women as individuals in their own right. The traditional, stereotyped view of women as mothers is thereby reinforced and negates the participation of fathers in childcare. That perception reflects a misunderstanding of such critical concepts as gender roles, indirect discrimination and *de facto* inequality.”⁴⁴

40 Norway (1995), A/50/38, CEDAW/C/SR.277, para. 491.

41 Finland (2001), A/56/38, CEDAW/C/SR. 494 and 495, para. 298.

42 Ireland (1999), A/54/38, CEDAW/C/SR. 440 and 441, para. 182.

43 Ukraine (1996), A/51/38, CEDAW/C/SR.302, para. 286. This warning can often be read in Concluding Comments on the situation in (ex-)communist countries. See e.g. Armenia (1997), A/52/38, CEDAW/C/SR. 344 and 345, para. 58, The Czech Republic (1998), A/53/38, CEDAW/C/SR. 370, 371 and 373, para. 196, China (1999), A/54/38, CEDAW/C/SR. 419-421, para. 280 and 296 and Kazakhstan (2001), A/56/38, CEDAW/C/SR. 490, 491 and 497, para. 101 and 102.

44 Slovakia (1998), A/53/38, CEDAW/C/SR 385,386 and 389, para. 74.

Part-time work and unequal pay for women

The Committee expressly rejects the encouragement of part-time work as a solution to the problem of the combination of paid work and caring activities.⁴⁵ According to the Committee, the fact that many more women work part time as compared to men is an indication of hidden discrimination against women.⁴⁶ In the Concluding Comments about the situation in the Netherlands this situation is also mentioned. The Dutch government is urged to take measures to allow women to choose to work full time, instead of working part time, as a great majority does.⁴⁷ In its discussion of the situation in Germany the Committee comments at great length on the relationship between gender stereotypical ideas about the role of women as housewives and mothers and the fact that the majority of part-time workers are women. In the same vein the Committee makes a connection between this situation and the persistence of unequal pay for women – a subject raised in virtually every Concluding Comment.

On the issue of part-time work and unequal pay in Germany, the Committee makes the following comment:

“The Committee is concerned that those differences are indicative of the persistence of indirect discrimination against women in the labour market. It is also concerned that part-time work tends to be in low skilled employment, offering fewer opportunities for professional advancement.”

And:

“The Committee expresses its concern at the persistence of stereotypical and traditional attitudes about the roles and responsibilities of women and men in private and in public life. The Committee notes that that persistence is reflected in women’s predominance in part-time work, their main responsibility for family and caring work, occupational segregation, men’s extremely low participation in parental leave, at 1.5 per cent of those taking parental leave in 1997, and the taxation of married couples. The Committee is concerned that measures aimed at the reconciliation of family and work entrench stereotypical expectations for women and men.”⁴⁸

⁴⁵ Australie (1995), A/50/38, CEDAW/C/SR.279, para. 600.

⁴⁶ Belgium(1996), A/51/38, CEDAW/C/SR.300 and 301, para. 187 and Iceland (1996), A/51/38, CEDAW/C/SR.290 and 291, para. 96.

⁴⁷ The Netherlands (2001), A/56/38/CEDAW/C/SR. 512 and 513, para. 214.

⁴⁸ Germany (2000), A/55/38, CEDAW/C/SR. 464 and 465, para. 313, 314. A sharp comment on unequal pay of women can also be read in the Concluding Comment on the situation in the UK and Northern Ireland: (1999), A/54/38, CEDAW/C/SR. 429 and 430, para. 308.

Obligations on the basis of Article 5a CEDAW: general remarks

The Committee quite frequently provides general directions on the basis of Article 5a CEDAW. One example of such a comment can be found in the Concluding Comment on the situation in the Ukraine in 2002:

“The Committee urges the State party to design and implement comprehensive programmes in the educational system and to encourage the mass media to promote cultural changes with regard to the roles and tasks attributed to women and men, as required by article 5 of the Convention. It recommends that policies be developed and programmes implemented to ensure the eradication of traditional sex roles stereotypes in the family, in employment, in politics and in society.”⁴⁹

A comparable general instruction can be read in a recent Concluding Comment about Albania, where the Committee – after having stated that Article 5 implies an obligation to put an end to gender stereotypes – discusses the need to eliminate practices based on traditional or customary law which discriminate against women.⁵⁰

Obligations on the basis of Article 5a CEDAW: information and education

In a Concluding Comment on Morocco the Committee offers guidelines as to how the State party should contribute to the elimination of gender stereotypes in society:

“The Committee recommended the establishment of specific machinery located at the highest policy level, with adequate financial and human resources, that would co-ordinate and guide action in favour of women, would be able to prevent the persistence of attitudes, prejudices and stereotypes that discriminate against women and would narrow the gap between *de jure* and *de facto* equality.”⁵¹

On a number of occasions the Committee expressed its approval about information campaigns mounted by the State parties.⁵² The Committee also regularly urges State parties to undertake more activities in this field, especially through the media and in schools. What this could mean in practice can be found a Concluding Comment on the situation in Lithuania:

“The Committee urges the Government to design and implement comprehensive programmes in education and the mass media in order to promote roles and tasks of women and men in all sectors of society. It also recommends that the draft Code of Advertising Ethics be amended in order to cover not only the prohibition of the promotion of discrimination against women and men, or of

49 Ukraine (2002), A/57/38 (part II), CEDAW/C/SR, 555 and 556, para. 196.

50 Albania (2003), A/58/38, CEDAW/C/SR, 594, 595 and 605, para. 69.

51 Morocco (1997), A/52/38, CEDAW/C/SR, 312, 313 and 320, para. 72.

52 Cyprus (1996), A/51/38, CEDAW/C/SR.287, para. 51.

the alleged superiority of one sex over the other, but also of the more subtle utilization of and support for traditional role stereotypes in the family, in employment and in society.”⁵³

Obligations on the basis of Article 5a CEDAW: the revision of legislation

In several Concluding Comments a connection is made between the obligation to eliminate gender stereotypes and the need to undertake a profound revision of the legislation and public policy that sustain these stereotypes. The Committee urges the State parties, in unmistakably clear language, to change such laws and public policy.

The most far-reaching remark in this respect can be found in a Concluding Comment on Ireland, where the Committee is of the opinion that the Irish Constitution reflects a stereotyped image of the roles of women “in the home and as mothers” and urges the Parliamentary Committee engaged on a revision of the Constitution to be “fully aware of Ireland’s obligations under the Convention, including article 5.”⁵⁴ In other words, the Committee makes a direct link between the continued existence of sex stereotypes and the existence of certain laws in which these stereotypes are reaffirmed.⁵⁵ Sometimes the Committee connects this problem with the obligation to (also) combat indirect discrimination in law and to sensitise lawyers to this type of discrimination.

“The Committee recommended that Italy expand its existing legislation and/or enact new legislation, where needed, in order to effectively deal with the phenomenon of indirect discrimination. To that end it emphasized the importance of measures to sensitise judges, lawyers and law enforcement personnel to indirect discrimination and to Italy’s international obligations, in particular those outlined in the Convention.”⁵⁶

In a Concluding Comment on the Fiji Islands the Committee recommends that work be undertaken to effect

“(...) changes in laws and administrative regulations to recognise women as heads of households, and the concept of shared economic contribution and household responsibilities.”⁵⁷

Finally, in a report on Croatia a comment can be found as to how government should eliminate sex stereotypes in law:

53 Lithuania (2000), A/55/38, CEDAW/C/SR. 472, 473 and 480, para. 139. See also e.g. Romania (2000), A/55/38, CEDAW/C/SR. 481 and 482, para. 303, Egypt (2001), A/56/38, CEDAW/C/SR. 492 and 493 para. 334, 335, Vietnam (2001), A/56/38, CEDAW/C/SR. 518 and 519, para. 251 and Estonia (2002), A/57/38, CEDAW/C/SR. 539, 540 and 548, para. 25, 26.

54 Ireland (1999), A/54/38, CEDAW/C/S. 440 and 441, para 193, 194.

55 Venezuela (1997), A/52/38, CEDAW/C/SR. 323 and 324, para. 223, Mexico (1998), A/53/38, CEDAW/C/Sr. 376 and 377, para. 398 and Thailand (1999), A/54/38, CEDAW/C/SR. 417 and 418, para. 244, 245.

56 Italy (1997), A/52/38, CEDAW/C/SR. 346 and 347, para. 357.

57 Fiji Islands (2002), A/57/38, CEDAW/C/SR. 530, 531 and 538, para. 32.

“The Committee recommends that the Government take advantage of existing bodies of knowledge relating to indirect and structural patterns of discrimination. It emphasises that the Government, rather than women themselves, have primary responsibility for implementing strategies to eliminate these forms of discrimination.”⁵⁸

The importance of Article 5a CEDAW in relation to European Community sex equality law

In a Concluding Comment on Slovenia, dating from 2003, the Committee comments both on the necessity to implement Article 5a CEDAW and the fact that Slovenia has mostly oriented itself to European law in its fight against discrimination against women. It appears as if the Committee is implying that European law is not sufficient for a correct implementation of the Convention:

“The Committee urges the State party to strengthen measures to eradicate traditional sex role stereotypes in the family, in employment, in politics and in society. The Committee recommends that the State party encourage the mass media to promote cultural changes with regard to the roles and responsibilities attributed to women and men, as required by article 5 of the Convention. While noting that the State party’s efforts to promote gender equality appear to be oriented primarily towards the framework of European Union provisions, the Committee is concerned that the Convention has not been given central importance as a legally binding human rights instrument and basis for the elimination of all forms of discrimination against women and the advancement of women. The Committee urges the State party to base its efforts to achieve gender equality on the wide scope of the Convention, as a legally binding human rights instrument. It therefore urges the State party to take proactive measures to raise awareness about the Convention, in particular among parliamentarians, the judiciary and the legal profession.”⁵⁹

A comparable remark can be read in the Concluding Comments on Germany, where the Committee expresses its concern that the Convention is not taken seriously by lawyers (this time in relationship with article 4(1) of the Convention):

“The Committee is concerned that the Convention has not received the same degree of visibility and importance as regional legal instruments, particularly European Union directives, and is therefore not cited regularly as the legal basis for measures, including legislation, for the elimination of discrimination against women and the advancement of women in the State party. The Committee urges the State party to place greater emphasis on the Convention as a legally binding human rights instrument in its efforts to achieve the goal of gender equality.”⁶⁰

58 Croatia (1998), A/53/38, CEDAW/C/SR. 363, 364 and 368, para. 113.

59 Slovenia (2003), A/58/38, CEDAW/C/SR. 620 and 621, para. 217, 218 and 219.

60 Germany (2004), A/59/38, CEDAW/C/SR. 640 and 641, para. 26 and 27.

Conclusion

The Concluding Comments of the CEDAW Committee illustrate the rich variety of subject matter that can be brought under the scope of Article 5a CEDAW. Because the Committee is always re-active in these reports (that is, it responds to Country Reports and sometimes to NGO Shadow Reports) it is difficult to say whether the developments revealed in these documents can be attributed to a change in the opinions of the Committee, or whether they were (also) inspired by what the State parties and Non-Governmental Organisations brought to the Committee's attention.⁶¹

What is evident is that the Committee not always discusses Article 5a CEDAW as a free-standing obligation, but is increasingly making a connection between this provision and specific obligations under the Convention in relation to labour, health, political participation, and other relevant issues.

One further visible development is that over the years the Committee has placed less and less emphasis on information campaigns and education, and instead increasingly argued for concrete action to be taken (for example, with regards to violence against women based on sex stereotypes or unequal pay and labour market segregation). Finally, it is noteworthy that the Committee repeatedly stresses that formal equal treatment in law and public policy-making is not sufficient, and that there should be a critical review as to whether law and policy remains based on stereotyped role models and traditional ideas of masculinity and femininity.

61 As said in the introduction to this Chapter, time constraints and limited facilities meant that the Country Reports could not be studied.

VIEWS OF THE DUTCH GOVERNMENT ON THE MEANING OF ARTICLE 5a CEDAW

8.1 Introduction

The first section of this Chapter outlines the discussions between the Cabinet and Parliament which took place about Article 5a CEDAW during the ratification procedure.¹ Two themes played a central role in these discussions: the relationship between the provision and fundamental rights and freedoms; and what kind of measures are necessary as result of adopting the provision. Following this, there is a review of the observations made by the Dutch government about Article 5a CEDAW in its Country Reports to the CEDAW Committee.² What can we learn from these documents about the content and scope of this provision?

8.2 The discussion of Article 5a CEDAW during the ratification procedure

Article 5a CEDAW and fundamental freedom rights

The history of the Ratification Act makes it clear that the main concern of Members of the Dutch Parliament was the question as to whether Articles 5a and 10c CEDAW are compatible with the principle of freedom of education and whether implementing these Articles could lead to a form of ‘state indoctrination’.³ It was the view of some political parties that government should avoid seeking to give direction about the allocation of roles between men and women. For this reason the small (fundamentalist) Christian parties voted against the Ratification Act.

The notion that Article 5a CEDAW would lead to indoctrination by the state was vehemently opposed by the Cabinet.⁴ In this connection, there was a short – but not very

1 See also Lijnzaad 1994, p. 52-54, Lijnzaad 1991, p. 7 and Monster et al. 2001, p. 50 et.seq.

2 The next Chapter discusses the opinions that the Dutch government expressed in its response to the National Reports and the first four in-depth studies.

3 TK 1984-1985, 18 950 (R 1281), VV, nr. 4, p. 14.

4 TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 29.

illuminating – discussion about the meaning of the word ‘stereotype’, in which the Cabinet simply repeats the wording of this provision of the Convention.⁵ One Member of Parliament of a Christian party expressed concern about advertising commercials in which traditional role models are swapped. In his view, this undermined the natural order of the family and led to divorce.⁶ The fundamentalist Christian parties also asked which legal principle in a democratic state based on the rule of law gave the government the right to change men’s and women’s social and cultural patterns of behaviour.⁷ The response was that the freedom of citizens to arrange their lives according to their own views about humanity and society constitutes the primordial norm in such a state. However, this freedom may be limited if this is necessary to guarantee an equal amount of freedom for everybody.⁸

The opposite view was expressed by the Social Democrats who wanted the government to play an active role in combating sex stereotypes in the media.⁹ The Cabinet acknowledged that the media can indeed play an important role in changing social and cultural patterns of behaviour and announced a series of measures and state-supported programmes.¹⁰

During the ratification procedure the Dutch government expressly conceded that there is a connection between sex stereotypes and violence against women, and that the Convention entails an obligation to put an end to this violence.¹¹

A change of behaviour or structural change

In first instance the Dutch government appears to interpret Article 5a CEDAW as an obligation to promote a change of attitudes and patterns of behaviour of men and women at an individual, subjective level. The Explanatory Memorandum to the Bill of Ratification notes that in its emancipation policy, the government acknowledges the fact that formal equal rights are not enough, but that “(...) in essence, only a general re-evaluation of the roles of women and men in society will lead to the emancipation of women.”¹² According to the government, emancipation policies aim to change the traditional attribution of roles and to tackle the accumulated backlog of discrimination experienced by women.

5 TK 1984-1985, 18 950 (R 1281), VV, nr. 4, p. 14 and TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 29.

6 Oral debate on the Ratification Bill, Handelingen TK 4 July 1990, p. 86-4867.

7 TK 1984-1985, 18 950 (R 1281), VV, nr. 4, p. 14.

8 TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 29.

9 TK 1984-1985, 18 950 (R 1281), VV, nr. 4, p. 13.

10 TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 26.

11 TK 1984-1985, 18 950 (R 1281), VV, nr. 4, p. 14 and TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 28

12 TK 1984-1985, 18 950 (R 1281), MvT, nr. 3, p. 14.

This approach was criticised by Members of Parliament:

“If one wants to change social and cultural patterns of behaviour it is not enough to design a specific emancipation policy; rather, this is one aspect which must be taken into account in all policy-making and legislation. This is especially the case in the fields of healthcare and social services, but also in social security and tax. As long as these (indirect) obstacles for women to change their patterns of behaviour exist, traditional views will persist.”¹³

The government acknowledged that this was (also) the case and referred to the objectives of the emancipation policy programme in force at that time, which were formulated in terms of “the achievement of structural changes to ensure that difference between the sexes is no longer one of the organising principles of society” and “to eradicate traditional images of masculinity and femininity”.¹⁴

During the ratification procedure there was a good deal of discussion about the question as to whether the Convention implied an obligation to prohibit indirect discrimination, and hence whether it would require a corresponding adaptation of legislation. However, this discussion was not linked to the discussion about Article 5a CEDAW.

8.3 The Dutch Country Reports to the CEDAW Committee

This section considers the views of the Dutch government on Article 5a CEDAW as expressed in the Country Reports submitted to the CEDAW Committee. Article 18 of the Convention requires State parties to submit such reports on a regular basis. In total the Netherlands has reported three times between 1991 (year of ratification) and May 2004 (when this research was completed).

The Initial Country Report of the Netherlands

The initial Country Report of the Netherlands to the CEDAW Committee, written in 1992, contains a long list of measures that the government had implemented in the light of Article 5a CEDAW.¹⁵ All these measures were aimed at raising awareness and changing attitudes through information campaigns, research and state-supported programmes. One example is the media campaign encouraging girls to choose a technical education. The Report highlights the fact that such programmes can collide with freedom of expression. At the

13 TK 1984-1985, 18950 (R1281), VV, nr. 4, p. 14.

14 TK 1986-1987, 18 950 (R1281), MvA, nr. 6, p. 27. In Dutch this is formulated as: “Het doorbreken van beeldvorming in termen van mannelijkheid of vrouwelijkheid.” It is particularly difficult to translate this phrase. *Beeldvorming* is something like ‘the social and cultural construction of images’. In this book I have chosen to translate it as ‘to combat stereotyped images of masculinity and femininity’ or shorter: ‘to combat (or eradicate) gender stereotyped images’.

15 Min. SZW 1992 (b): Initial report, p. 85-87.

same time, it argues that, despite this constitutional right, it is legitimate to place limits on the distribution of pornographic material. According to the government, it is not appropriate to draft new legislation to implement Article 5a CEDAW because such legislation could infringe the autonomy of various social sectors. The Report concludes with the observation that government policy in this field appears to be effective. However, immediately after having said this, the government admits that its own policy had been less systematic than would have been desirable.¹⁶

In its review of this Report the CEDAW Committee does not discuss the policy of the Dutch government with respect to Article 5a CEDAW. It only requested clarification on the policy of the government on guaranteeing the equal rights of lesbian women.¹⁷

*The Second and Third Country Report of the Netherlands*¹⁸

In the Second and Third Country Report of the Netherlands, Article 5a CEDAW is no longer discussed as a separate issue. This is a consequence of the fact that the Dutch government decided to structure its Reports to the CEDAW Committee on the basis of the threefold aims of the Convention, a system developed by the Groenman Committee between the First (Initial) and the Second Report. The Reports review progress in meeting these aims in the Netherlands in relation to every policy field that falls under the scope of the Convention.¹⁹

Consideration of these two Country Reports suggests that Article 5a CEDAW is viewed as an important interpretative framework for both the second sub-aim (improving the position of women) and the third sub-aim (combating the dominant gender ideology) of the Convention. In policy-making language, the second sub-aim has been translated into the expression ‘towards diversity’. According to the Dutch government, diversity policy is mainly directed at increasing the proportion of women in processes of social and political decision-making, and in facilitating different roles for men and women with regard to paid labour and care.²⁰ The main instrument cited by the government for implementing this policy is that of Gender Impact Assessment.

¹⁶ Initial report, p. 87.

¹⁷ The Netherlands (1994), A/49/38, CEDAW/C/SR. 234 and 239, para. 270. See Lijnzaad 1994, p. 56 and Jacobs & Van den Brink 1994, p. 31.

¹⁸ See Min. SZW 1998 and 2000 (a), here referred to as ‘Second Report’ and ‘Third Report’. Both reports have been discussed by the CEDAW Committee in July 2001. We here refer to the page numbers of the Reports as they were published by the Min. SZW.

¹⁹ Second Report, p. 4-6.

²⁰ Second Report, p. 12-13.

The third sub-aim of the Convention has been translated into ‘promoting and supporting social and cultural change’.²¹ According to the government, Article 5a CEDAW does embody this sub-aim.

“Each subsequent level attempts to penetrate more deeply into the structures of society. And the more deeply the issue of emancipation penetrates into this structure, the more difficult it is to formulate policy to cover it. Traditional ideas and customs are by definition regarded as so self-evident that they are never questioned.”²²

It also notes that the Convention does not give a good deal of direction as to how these changes should be brought about. Under the heading of ‘strategies for cultural change’ the government understands the following:

“(…) increasing attention has been focused in the Netherlands on this third level: that is, identifying and eliminating hidden gender discrimination. The Netherlands has decided to tackle the problem by formulating a strategy for cultural change. This is based on the recognition that policy has hitherto been determined as a matter of course by reference to the criterion of the white middle-class male. The implicit concomitant of this approach has been that women too have had to fulfil this criterion. In recent years the authorities have conducted an in-depth analysis of the problem. This has generated many new ideas. Translating these ideas into specific policy measures is not easy. However, the report will show that it is not impossible.”²³

The instruments mentioned in the context of this third sub-aim all lie (again) at the level of campaigns for awareness raising and information. That this third sub-aim can also have consequences for legislation and policy making becomes apparent when the reports are discussed with the Committee. At that point the government states that this sub-aim “(…) provides a framework for reviewing legislation, policy and the implementation of policy.”²⁴

In its Concluding Comments the Committee expressed its appreciation for the presentation of Dutch policies on the basis of the threefold aims of the Convention.²⁵ During the ‘constructive dialogue’ between the Committee and the Dutch government in July 2001, the third sub-aim was not a separate issue for debate. The CEDAW Committee also did not discuss it in its Concluding Comments. Nevertheless, this document gave some consideration to the issue of stereotypes in relation to paid labour and care.

21 The Dutch women’s NGOs have objected to this transformation in their Shadow Report. See E-Quality 2000, p. 12-13.

22 Second Report, p. 8

23 Second Report, p. 8-9.

24 Press Release on the 512th and 513th meeting of the CEDAW Committee (2001). WOM 1288.

25 The Netherlands, A/56/38, CEDAW/C/SR. 512 and 513, para 196.

The division of paid labour and care in relation to Article 5a CEDAW

Both Country Reports lack an analysis of the obstacles and stereotypes that stand in the way of (re)distributing paid labour and care. Nor is any attention given to the ways in which legislation and public policy might serve to reflect and reinforce such stereotypes. The Dutch government stresses the importance of the so-called combination-model, as the main means of solving the problems of combining paid labour and care.²⁶ Positive action policy (part of the government's emancipation policy in the early-1990s) has been replaced by a policy that (once more) focuses on awareness raising.

The Shadow Report presented to the CEDAW Committee by 23 Dutch women's NGOs notes that the activities of the Dutch government have been very limited as far as efforts to achieve the third sub-aim of the Convention are concerned. The emphasis has been placed on achieving economic independence for women, and the (intrinsic) value of unpaid care work seems to have disappeared from view.²⁷

The CEDAW Committee is also critical about the one-sided emphasis on the economic aspects of women's emancipation, and the approach to facilitating part-time work.²⁸ The Committee stresses that the government should make greater efforts to eliminate gender stereotypes in certain parts of the labour market. Finally, the CEDAW Committee states that positive action measures are indispensable for real progress as far as an equal representation of women in all positions in professional and commercial life is concerned.²⁹

26 Third Report, p. 113. "The basic idea of this model is that workers at a time of life when they have heavy family responsibilities can work rather fewer hours and so provide part of the necessary care themselves (helped by the special leave schemes) while contracting out the rest (to organised child care facilities and home care services)." This involves an average working week of 30-32 hours for both parents.

27 E-Quality 2000, p. 16.

28 The Netherlands (2001) A/56/38, CEDAW/C/SR. 512 and 513, para. 213, 214.

29 The Netherlands (2001), A/56/38/CEDAW/C/SR 512 and 513, para. 213, 214.

ARTICLE 5a CEDAW IN NATIONAL REPORTS AND IN-DEPTH STUDIES

9.1 Introduction

Article 3 of the Ratification Act requires the Dutch Government to report on the state of implementation of the Convention to the Dutch Parliament before it sends its Country Report to the CEDAW Committee.¹ In 1997 the first so-called National Report appeared.² As noted in Chapter 3 of this book, the Committee that produced this Report attached special importance to Article 5a CEDAW. This Chapter explores in more detail what obligations can be derived from this provision, according to this Committee. This is followed by an analysis of the second National Report, issued in 2002-2003. In addition, four in-depth studies were undertaken between 1996 and 2000: one was on the significance of the Convention for the Dutch legal order and three about specific policy areas covered by the Convention. What insights about the meaning of Article 5a CEDAW can be derived from these materials?

9.2 The first National Report

The relationship between Article 5a CEDAW and diversity policies

In its Report the Groenman Committee paid a good deal of attention to Article 5a CEDAW. As discussed before – see Chapter 3 – the Committee derived the third aim of the Convention from this provision: combating the dominant gender ideology. The Committee places this sub-aim in the context of the promotion of diversity and a policy in which various life styles are made possible.

1 Kingdom Act of 3 July 1991 for the Ratification of the CEDAW Convention (New York, 18 December 1979), Official Bulletin of Acts, Orders and Decrees 1991, 355.

2 Report of the Groenman Committee (named after its chairperson, Louise Groenman). Parts of this Report are included as an Appendix to this book.

In its response to this Report the Cabinet fully subscribes to this conclusion:

“In a social state based on the rule of law, the perspective of one group of citizens – be it the majority or the minority of the population – should not be dominant. Granting equal rights to citizens does not imply that the only work that needs to be done is in the framework of equal rights or equal opportunities.”³

This suggests that government has acknowledged that Article 5a CEDAW adds a different value to the equal rights framework already in place.

The necessity to use concrete instruments

The Committee’s evaluation of the existing legislation and policy of the Dutch government, viewed against the background of the Convention’s obligations, indicates that very few actions have been taken towards meeting the third sub-aim of the Convention.⁴ The Committee points out that gender ideology is active at different levels and that, for that reason, it must be combated using a range of different instruments.⁵ Since gender stereotypes are also active at the level of social structures, it is not enough to use only ‘soft’ measures.

“According to the Committee more ‘hard’ instruments, like legislation, directives and gender impact assessments should be used, also when this third sub-aim is concerned. This means that not only information campaigns should be held (...)”⁶

The Committee finds that there is no agreement about the role that the government can play in this. Restraint, dictated by respect for constitutional rights such as freedom of expression or freedom of religion, and by doubts about the government’s potential to influence gender issues, is to be expected – but is not justified: “(...) because the excluding effect of gender stereotypes has sufficiently been studied and their existence is not subject for debate.”⁷

3 TK 1997-1998, 25 893, nr, 2, p. 10.

4 The Committee discusses with approval the activities of the *Projectgroep Beeldvorming* (to be discussed in Chapter 14 of this book), but is critical about the fact that the actions of the government have been very one sided, i.e. only directed at education and information. Groenman Committee 1997, p. 59.

5 Groenman Committee 1997, p. 73. The Commission here refers to the ‘layered meaning’ of gender according to women’s studies: it has power at the symbolic level, at the level of individual and collective identities and at the level of social structures.

6 Groenman Committee 1997, p. 74.

7 Groenman Committee 1997, p. 74.

Combating gender stereotypes in law and public policy

Law and public policy are a component part of the structural level at which gender stereotypes operate. “Administering the principle of equality before the law does not automatically lead to the elimination of gender ideology that is active in law.” Therefore, it is of great importance “(...) to critically analyse legal concepts and to continually call into question the assumptions that underlie the interpretation of legal concepts.”⁸ This demands that the legislator develop gender sensitivity and that some concepts and structures in law are subject to a fundamental reconsideration. By way of example the Committee cites the reconsideration of the division between the system of social insurance and that of welfare benefits and to reconsider which income risks should be covered by means of social security in a modern (emancipated) society. Within the latter system the risk of losing income as a result of combining paid labour and care should also be taken into consideration.⁹

The Dutch government subscribed to the conclusion of the Groenman Committee that it is necessary to develop a clear framework of reference within which legislation can be tested for its indirect discriminatory effects on women. It also promised that the recommendations that the Committee made at this point would be included in the design of further explorative studies.¹⁰

9.3 The second National Report

Introduction

In 2002 and 2003 for the second time a National Report on the implementation of CEDAW in the Netherlands was delivered to the Dutch Parliament. The Report consisted of two separate parts: a Report by Professor Marianne Marchand, containing a general overview, and a Report by the Advisory Commission for Alien Affairs, which contained a review of the position of female foreign nationals in the Netherlands. This section reviews if and how these Reports discussed the obligations arising under Article 5a CEDAW.

The Marchand Report

Professor Marchand, the second National Rapporteur, cites the threefold aims of the Convention described by the Groenman Committee as the framework for her assessment as to whether the Convention is being correctly implemented.¹¹ When making an assessment of the emancipation policy of the government she does not specify the requirements

8 Groenman Committee 1997, p. 75.

9 Groenman Committee 1997, p. 76.

10 Reaction of the Cabinet to the first National Report, TK 1997-1998, 25 893, nr 2, p. 20.

11 Rapport Marchand 2003, p. 3.

set by the Convention's provisions that underpin these three sub-aims, nor does she evaluate whether these requirements are met.¹² Only with regard to the gender mainstreaming policy of the government does she conclude that the Ministries that are required to carry out this policy had not tackled the third sub-aim of the Convention. She notes that:

“(…) in formulating the concrete tasks one often gets stuck at the level of aiming at formal and substantive equality of men and women, but does not include in those objectives fundamental changes of paradigms about gender stereotyping and traditional male-female relationships.”¹³

As far as the realisation of the third sub-aim is concerned, Professor Marchand reports that little progress has been made.¹⁴ She cites a few activities, mostly in the field of awareness raising and information campaigns, aimed at eliminating gender stereotyped images. She is especially concerned by the fact that care work is still seen as a burden or as a deviation from paid labour.

The advice of the Advisory Commission for Alien Affairs

The thematic study carried out in the context of the second National Report was dedicated to the position of female foreign nationals in the Netherlands. The Advisory Commission for Alien Affairs mentions the threefold aims of the Convention in a footnote,¹⁵ but then summarises the impact of the Convention as follows, using its own words: “From the first five Articles of the Convention it should be derived that the Women’s Convention not only aims at formal legal equality but also at *de facto* equality between men and women.”¹⁶ From this the Commission concludes that it should analyse whether Dutch legislation on aliens contains direct or indirect discriminatory provisions. However, in doing so the Commission overlooked the fact that combating direct and indirect discrimination belongs to the first sub-aim of the Convention, according to the schema elaborated by the Groenman Committee. In order to prevent indirect discrimination the Advisory Commission at some points deems it necessary to assemble and analyse statistical data, and to conduct a Gender Impact Assessment (GIA).¹⁷

12 One explanation for this omission is that Prof. Marchand had only a few months in which to do this research and submit her Report. Moreover, she is not a lawyer.

13 Report Marchand 2003, p. 15.

14 Report Marchand 2003, p. 65.

15 ACVZ-advice 2002, p. 14, footnote 14 .

16 ACVZ-advice 2002, p. 14. The Commission thereby neglects the instructions laid down in the assignment that it got from the government before doing this research. See appendix 2 to the ACVZ-Advice.

17 ACVZ-advice 2002, p. 19.

The reaction of the government to the second National Report

The official response of the Cabinet to the two parts of the second National Report only mentions the third sub-aim of the Convention in one specific paragraph where the subject of the ‘security and rights’ of women is discussed.¹⁸ With regard to all the other issues discussed in this response (gender mainstreaming, work, care, income, power and decision making and the position of female foreign nationals) the multi-layered approach which characterised the government’s emancipation policy (in terms of the threefold aims of the Convention) is no longer visible.¹⁹ The comments made by the government on the scope and meaning of the third sub-aim in the paragraph about security and rights do not seem particularly hopeful. “Combating the dominant gender ideology” (as the Groenman Committee has formulated this sub-aim) has been ‘translated’ into “to eliminate a culture based on traditional role patterns and prejudice”.²⁰ The government does not indicate which of the measures mentioned in this paragraph are targeted at this particular sub-aim.

9.4 In-depth studies into the meaning of the Women’s Convention*A radical interpretation of Article 5a CEDAW*

The first in-depth study into the implications of CEDAW for the Dutch legal order, which preceded the first National Report, mentions Article 5a CEDAW as the final goal of the Convention, and as such of major importance for a dynamic interpretation of the Convention.²¹ The Report does not indicate which specific obligations this Article entails.

As part of the preliminary work for this Report Lammy Betten and Mies Westerveld conducted a study into the field of social security.²² These researchers attached a far more important role to Article 5a CEDAW. According to them, the essential difference between the Women’s Convention and other international non-discrimination norms lies in this provision in which “(...) a more far-reaching substance is given to the concept of discrimination than in any other international Convention, a situation which can have radical consequences for social security.” In their view, Article 5a CEDAW demands “(...) *tout court* and without any qualification, a change of habits and customs based on traditional role models (...). And not simply where possible or when deemed expedient.” They conclude that Article 5a CEDAW necessitates the eradication of all gender stereotypes in

18 Min. SZW 2003, p. 30.

19 Only in the paragraph about mainstreaming it is noticed that in many policy areas ‘old role models’ are still implicitly the norm, while these models can hinder the full participation of every citizen in society. Min. SZW 2003, p. 13

20 Min. SZW 2003, p. 30.

21 Hes & Van Vleuten 1996.

22 Betten & Westerveld 1994.

the social security system, including the elimination of all instances of ‘breadwinner-thinking’, even if in practice this might worsen the position of women. They subsequently qualify this stance by noting that abolishing pension rights for housewives might be necessary under Article 5a CEDAW on a first consideration, but that this is not really what this provision aims for. Such a measure would damage the interests of those whom the Convention aims to protect.

The obligations of the government arising out of this Article go further than simply abolishing rules and regulations that hamper women. It also requires positive action by government, according to Betten and Westerveld. As an example they point to the Norwegian law that obliges men to take parental leave.

The study into health and healthcare

The study into the meaning of Article 12 CEDAW for Dutch law and policy in the field of health and healthcare does not contain a separate discussion of gender stereotypes.²³ However, at several places in this Report it appears that male and female stereotypes (in both the biological and the social sense) do in fact play a role in regard to access to healthcare and difference in treatment between men and women.²⁴ The researchers emphasise that the Women’s Convention is not aimed at a male norm to which women must adapt if they want to attain equality.²⁵

Article 5a CEDAW as a basis for a different organisation of paid labour and care

The study into the meaning of the Women’s Convention for the fields of motherhood, parenthood and paid labour devotes a good deal of attention to the implications of Article 5 CEDAW.²⁶ As noted above in Chapter 2, the authors of this Report see a connection between parts (a) and (b) of this provision. These parts – in their mutual connection – make it clear that a distinction should be drawn between physical aspects of motherhood and the (culturally determined) role of a mother. “Motherhood needs to be respected, but it ought not to be idealised in such a way that women are forced into the role of mother and are limited in their other faculties.”²⁷ According to Monster, Cremers and Willems Article 5a CEDAW is of great importance for the organisation of the structure of paid labour.

“Article 5a CEDAW poses a requirement to take the care work of both parents into consideration, to establish gender-neutral regulations for paid work and care, and hence create the preconditions for a non-gender related division of labour in which men can also take on the work of caring.”²⁸

23 Holtrust et al. 1996.

24 Holtrust et al. 1996, p. 217.

25 Holtrust et al. 1996, p. 32 and p. 218.

26 Monster et al. 1998, p. 50.

27 Monster et al. 1998, p. 53.

28 Monster et al. 1998, p. 53.

From their conclusions, it would seem that these authors do not see Article 5a CEDAW as a provision that stands on its own; rather, it has ‘supportive’ significance in the sense that it serves as a provision that helps to fill in the content of Article 11 (about paid work and income). It indicates that when implementing this (latter) provision, habits and customs based on gender stereotypes should be eliminated.²⁹

In this regard Monster et. al. indicate at several places in their report that in their view the non-discrimination principle of the Women’s Convention has an additional value when compared to existing (constitutional) norms for equal treatment. While the latter are mainly directed at discrimination as a problem for individual women, the Women’s Convention addresses the structural dimension of such discrimination. “A general, important aspect is that structural discrimination is not effectively combated with the laws [*i.e. equal treatment laws; RH*].”³⁰

Discussion of this report between Cabinet and Parliament

The discussion about this Report – as far as the meaning and impact of Article 5a CEDAW is concerned – concentrated on the content of the paragraph quoted immediately above.³¹ The view of the researchers led to a number of questions.³²

“Does the government acknowledge that the definition [*of discrimination; RH*] in the Women’s Convention is in fact more suitable for realising equal treatment between men and women (...) and is it prepared to accept this definition as its own?”³³

According to the government this difference does not exist.³⁴ The ban on discrimination, as formulated in the Women’s Convention, can also be found in other international Treaties, such as the general Human Right Treaties of the United Nations and EC Directives in the field of sex equality. According to the Dutch government, these instruments establish a more concrete non-discrimination norm than the Women’s Convention.

The relationship between gender stereotypes and violence against women

On the issue of the (supposed) relationship between the existence of negative gender stereotypes about women and violence against women, the Report on the impact of the Women’s Convention on policy and legislation dealing with violence against women pays

²⁹ Monster et al. 1998, p. 343.

³⁰ Monster et al. 1998, p. 95

³¹ There was also some debate on policy to eliminate gender-stereotyped images and on the nature of the concrete measures that the government should take. See TK 1998-1999, 25 893, nr. 6, p. 28.

³² TK 1998-1999, 25 893, nr. 6, questions A11 – A14, B4 and B7.

³³ TK1998-1999, 25 893, nr. 6, question A11.

³⁴ TK1998-1999, 25 893, nr. 6, p. 40.

a great deal of attention to Article 5a CEDAW.³⁵ For Boerefijn, Loenen and Van der Liet, one key consideration is the extent to which the obligation under the Convention is weighed against other constitutional rights, such as freedom of expression and freedom of religion. If it could be established that there is a causal relationship between negative gender stereotypes and sex-based violence, these latter rights should be afforded less protection on the ground of the principle of proportionality.³⁶ The authors conclude that the government does not make sufficient efforts to combat negative gender stereotypes and that more information campaigns are necessary.³⁷ Nothing was said about the meaning of Article 5a CEDAW for this policy area in the subsequent discussion of this study between the Cabinet and Parliament.³⁸

35 Boerefijn et al. 2000, p. 39. The authors point at some reports of the Dutch Emancipation Council (Emancipatieraad) and to some UN-Documents, like the Beijing platform for action, in which this connection is also made. See also General Recommendation 19 of the CEDAW Committee, discussed in Chapter 7 of this book.

36 Boerefijn et al. 2000, p. 39.

37 Boerefijn et al. 2000, e.g. at p. 106, 209 and 266.

38 TK 2002-2003 28 600 XV, nr. 110 and Handelingen Tweede Kamer 2002-2003 nr. 58.

LEGAL LITERATURE ABOUT ARTICLE 5a CEDAW

10.1 The meaning of Article 5a CEDAW according to Dutch legal literature

An instrument to bring about cultural change

In one of the first publications about the Women's Convention in the Netherlands¹ Professor Henc van Maarseveen cites Article 5a CEDAW explicitly in the context of what he considers to be the five principles that underlie the Convention.² Besides protection, non-discrimination, equal treatment and emancipation in his view the *principle of cultural change* is of central importance in achieving real progress on (equal) rights for women. In his view, this constitutes the most novel and radical principle in the Convention.

Van Maarseveen considers that there are several indications that the Convention contains this principle.

“In the existing legal order women need to be protected, women may not be treated differently on unjustified grounds, women need to have equal rights and possibilities as men, and special measures need to be taken to put an end to the *de facto* unequal social position of women. However, these instruments always begin from existing positions and relations. (...) The CEDAW Convention has partly broken with this convention. In the first place, the male norm that in other instruments is incorporated in the expression ‘on the basis of equality with men’ has been replaced by the formula ‘on a basis of equality of men and women’. In the second place, the Preamble expresses the conviction that a change of traditional roles of men and women is necessary, both in society and in the family. And thirdly, there is Article 5a.”³

The renewing and radical potential of this provision lies in the fact that it has opened the way to “(...) a possible feminisation of culture, at least of the culture that is represented

1 Earlier publications, e.g. by Goldschmidt and Brunott in *Nemesis*, the Dutch journal on Women and Law, did not discuss this provision.

2 Van Maarseveen 1987.

3 Van Maarseveen 1987, p. 74-75.

in the legal order.”⁴ How this can or should be achieved is left undetermined by the author. Nevertheless, Van Maarseveen states that official policy can only have a limited impact in this areas. Eradicating traditional roles requires men and women to strive for this outcome in their personal lives.⁵

The under-determination of Article 5a CEDAW

Other authors have also had difficulty in ascertaining the precise meaning and scope of this Article. Liesbeth Lijnzaad states that “Article 5a CEDAW is probably the most difficult provision when it comes to implementation [*of the Convention; RH*].”⁶ In a later publication she repeats this observation, but this time adds that “(...) in a given culture, stereotypes work like carbon paper. It is against these stereotypes that Article 5a CEDAW is directed.”⁷ After having eliminated direct and indirect discrimination, the elimination of gender stereotypes is the final step to an optimal realisation of women’s human rights as the possibility for individuals to make their own choices in life, in a situation free of prejudice, represents the final realisation of the objective of the Convention. Lijnzaad sees Article 5a as the “primal aim of the Convention, the intention behind the whole of the Convention.”⁸

Lijnzaad points out that this provision lacks determinacy as there is no definition of ‘stereotypes’ and of ‘the inferiority or superiority of either sex’.

“What should we make of a beauty contest, the election of Prince Carnival, or the chivalry of keeping the door open for a woman? To me the right answer to this question seems to be a matter of subjectivity – which inevitably detracts a good deal from the usefulness of Article 5a CEDAW as a legal rule.”⁹

Lijnzaad thus questions the legal usefulness of the Article:

“It is not infeasible that the objective of eradicating role models, and thereby enlarging the freedom of choice of women, is an extra-legal objective and that its realisation is outside the scope of the law.”¹⁰

4 Van Maarseveen 1987, p. 75.

5 Van Maarseveen 1987 (b), p. 137

6 Lijnzaad 1991, p. 7.

7 Lijnzaad1994, p. 43.

8 Lijnzaad1994, p. 46.

9 Lijnzaad1994, p. 45 and p. 57.

10 Lijnzaad1994, p. 46.

In her view, the Article can certainly not have direct effect, and will – if it collides with other constitutional rights – almost certainly lose against classical rights such as freedom of religion or freedom of education.¹¹

The importance of Article 5a CEDAW

Despite her warnings not to expect too much, Lijnzaad moves on to argue quite positively about the potential effects of Article 5a CEDAW. Firstly, she identifies that the provision aims to facilitate diversity.¹² Secondly, she terms this Article a ‘hat peg provision’ that is of great importance for a dynamic interpretation of the Convention. This is to say that with the help of this provision new issues can be brought under the scope of the Convention. In order to illustrate this point she discusses General Recommendations number 12 and 19, in which, based on Article 5a CEDAW, the CEDAW Committee constructs a condemnation of violence against women, a subject not expressly covered by the Convention itself. Although, from an international law perspective, this would not win a prize for the most elegant solution “(...) it is a flexible method with which probably more can be achieved than by negotiations over additional protocols to the Convention or a new text of the Convention.”¹³ In her view, the practical importance of this Article for the Dutch situation lies in the fact that it offers a legal basis for measures taken by government to eliminate negative stereotypes, including TV commercials in which girls are summoned up to choose physics and mathematics for their studies and men to iron their own shirts.¹⁴

Testing policies and legislation with the help of Article 5a CEDAW

In an article in which she discusses the payment of overtime rates to part-time workers, Klaartje Wentholt demonstrates that Article 5a CEDAW can be used to test (proposed) legislation.

“The recognition of the fact that part-time workers can also have caring obligations and that overtime means an extra burden to them, breaks with the dominant norm of full-time working. This contests the dominant gender ideology, in conformity with Article 5a CEDAW. It is up to the judge to read this obligation to eliminate this dominant norm into the non-discrimination rule”.¹⁵

11 Lijnzaad 1994, p. 54.

12 Lijnzaad 1994, p. 57.

13 Lijnzaad 1994, p. 47.

14 Lijnzaad 1994, p. 55.

15 Wentholt 1997, p. 202. In the rest of her publication it appears that this can be done by interpreting existing legal norms, such as the norm that one needs to be a ‘good employer’ or the norms of reasonableness and equity in such a way that the norm of Article 5a CEDAW is included in them.

In her view the provision calls for a ‘care friendly’ interpretation of social law. “Rigid assumptions in law must be made visible in order to make room for really taking caring activities into consideration.”¹⁶

In the view of the present author, Article 5a CEDAW is a legal norm with great importance for combating so-called systemic or structural discrimination.¹⁷ On the basis of a close reading of the provision itself and of the documents and literature discussed above I take it that State parties to this Convention are obliged to strive to eliminate negative gender stereotypes. This Article provides a sound legal basis for measures aimed at ending the reproduction of the dominant gender ideology in law and public policies.¹⁸

10.2 Literature in the English language on Article 5a CEDAW

The limited instrumental value of Article 5a CEDAW

Even in feminist legal literature the Women’s Convention is regularly dismissed as a weak and ineffective instrument for guaranteeing women’s human rights. The main reasons given for this viewpoint are that the Convention lacks an adequate system of supervision and that there are ample possibilities for State parties to make reservations.¹⁹ One further argument is that the Convention only requires State parties to take ‘appropriate measures’, and does not impose clearly-defined obligations backed up by effective deterrent sanctions.²⁰ Charlesworth, Chinkin and Wright summarise this critique in the following terms:

“In sum, the Women’s Convention (...) is an ambiguous offer. It recognises discrimination against women as a legal issue but is premised on the notion of progress through good will, education and changing attitudes and does not promise any form of structural, social or economic change for women.”²¹

Other authors recognise that the Convention covers a broad area and that it goes further than the elimination of (formal) discrimination as it also requires the elimination of sex

16 Wentholt 1997, p. 203.

17 See Holtmaat 1997, Holtmaat 1998, Holtmaat 2001 and Holtmaat 2003 (a).

18 Holtmaat 1997, p. 77-78 and Holtmaat 2001, p. 178-179. This research, commissioned by the DCE, provided me with the opportunity to find more substantive evidence for the validity of this interpretation.

19 See Charlesworth & Chinkin 2000, p. 221. See also ook Nyamu 2000, p. 391. The latter author discusses the fact that attempts by human rights activists to find a legal basis for state responsibility for discrimination against women often fail because many (mainly Islamic) states have made reservations to the Articles 2f and 5a of the Convention.

20 See e.g., Felmeth 2000, p. 710 en: Charlesworth, Chinkin & Wright 1991, p. 634.

21 Charlesworth, Chinkin & Wright 1991, p. 634

stereotypes. However, they do not deal with Article 5a CEDAW in any detail.²² Where attention is paid to this provision, is it only descriptive in manner.²³

Noreen Burrows is one of the few authors who makes a substantive comment on this provision.²⁴ Her view is that a correct implementation of the Convention will automatically put an end to stereotyping.

“If a woman, for example is given the right to earn a living, to own property, to chose the number and spacing of her children then the role stereotyping of men and women must eventually be called into question.”²⁵

She is also of the opinion that State parties to the Convention ought to be expected to have an active role in changing both patterns of behaviour as well as certain ideas about women. However, she places a big question mark over this task. The provision is not very concrete about *how* the State parties should do this and to precisely *what* actions or measures they are obliged – in her view, the weakness of this Convention.

The concept of discrimination in the Women’s Convention

Apart from highlighting the limited instrumental value of the Convention, this literature also raises a number of substantive issues. These concern the concept of discrimination that characterises the Convention. It is remarkable that the analysis of the (supposedly) different content of the concept of discrimination in the Women’s Convention in the (early) Dutch literature is not reproduced in the English-language literature cited here. Authors such as Charlesworth and Chinkin take it for granted that the Women’s Convention suffers from the fault that it requires a comparison to be made with a male standard, which means in order to get equal rights women must assimilate to the male norm.²⁶

According to Charlesworth, Chinkin and Wright, the Convention goes further than most legal equal treatment instruments by demanding ‘equality of results’, which means that positive action or affirmative action can be justified and that the Convention provides a basis for prohibiting indirect discrimination. Nevertheless, the Convention is likely to have a limited impact on the situation of women as, in the final analysis, it uses a definition of equality in terms of ‘equal to men’:

22 E.g. Felmeth, 2000, p. 710.

23 E.g. Wadstein 1988, p. 13-14.

24 Burrows 1985, p. 428-429.

25 Burrows 1985, p. 248.

26 Charlesworth, Chinkin & Wright 1991, p. 631.

“Both the notions of equality of opportunity and equality of result accept the general applicability of a male standard (except in special circumstances such as pregnancy) and promise a very limited form of equality: equality is defined as being like a man.”²⁷

The same standpoint can be found in Charlesworth and Chinkin:

“For these reasons, even the comparatively broad definition of discrimination contained in the Women’s Convention may not have much cutting edge against the problems women face worldwide.”²⁸

These authors state that, with the exception of Article 6 about trafficking in women, the prohibition on discrimination based on the Convention is

“(…) confined to accepted human rights and fundamental freedoms. If these rights are defined in a gendered way, access to them will be unlikely to promote any real form of equality.”²⁹

The positive appraisal of the opportunities that the Convention offers to justify positive action programmes and the fact that it also prohibits indirect discrimination are simply ‘written off’.

“The Convention’s endorsement of affirmative action programmes in article 4 similarly assumes that these measures will be temporary techniques to allow women eventually to perform like men.”³⁰

The absence of an analysis of the meaning of Article 5a CEDAW

Charlesworth and Chinkin recognise some other positive aspects of the Women’s Convention, such as the fact that it overcomes the demarcation between classic liberal rights and social rights, and the fact that the dichotomous division between public and private life is partly removed (especially in Article 16).³¹ It therefore seems odd that no attention is paid to Article 5 in this context. This provision is only mentioned in a footnote, at the point where the authors discuss the fact that the Convention covers the domination of women in the private sphere in only a very limited way.

“The male centred view of equality offered in international law is tacitly reinforced by the focus in the Women’s Convention on public life, the economy, the legal system and education, and its only limited recognition that oppression within the private sphere, that of the domestic and family worlds, contributes to women’s inequality (footnote: CEDAW, Preamble and Article 5). It does not,

27 Charlesworth, Chinkin & Wright 1991, p. 631.

28 Charlesworth & Chinkin 2000, p. 230.

29 Charlesworth & Chinkin 2000, p. 230.

30 Charlesworth & Chinkin 2000, p. 230.

31 Charlesworth & Chinkin 2000, p. 217-218.

for example, explicitly prohibit violence against women perhaps because of the conceptual difficulty of compressing a harm characterised as private into the public frame of the Convention, or perhaps because this does not fit directly into the equality model.”³²

Later in their book they admit that in General Recommendation number 19 the CEDAW Committee (with the help of Article 5a CEDAW!) brought the issue of violence within the scope of the Convention, but do not see this as a reason to revise their earlier conclusions.

According to Charlesworth and Chinkin the Convention does not tackle the structural causes of the oppression of women:

“The fundamental problem for women is not simply discriminatory treatment compared with men, although this is a manifestation of a larger problem. Women are in an inferior position because they lack real economic, social or political power in both public and private worlds.”³³

The Convention places too much emphasis on the equal participation of women, especially at the level of decision-making and power. This misjudges the underlying structures and power relations that contribute to the oppression of women:

“While increasing the presence of women is certainly important, it does not of itself transform these structures. We also need to understand and address the gendered aspects of fundamental concepts such as ‘the economy’ ‘work’, ‘democracy’, ‘politics’ and ‘sustainable development’.”³⁴

The authors do not recognise or acknowledge the fact that a progressive interpretation of Article 5a CEDAW would create pressure on State parties to eliminate the gender-stereotyped contents of these concepts and structures.

The relationship between Articles 2f and 5a CEDAW

There are only two contributions in the English-language literature that seem to be on the same line as the Dutch discussions on the meaning and scope of Article 5a CEDAW. The first comes from the Canadian law professor Rebecca J. Cook.³⁵ Under the heading “Customs and Practices” Cook establishes an interesting connection between Articles 5a and 2f of the Convention. Article 2f CEDAW requires that States “(...) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

32 Charlesworth & Chinkin 2000, p. 321

33 Charlesworth & Chinkin 2000, p. 229.

34 Charlesworth & Chinkin 2000, p. 321.

35 Cook 1994 (b). In a recent publication Cook endorses the threefold description of the aims of the Convention as developed by the Dutch Groenman Committee. See Cook 2003, p. 130.

According to Cook, these Articles combined mean that State parties are obliged to

“(…) reform personal status laws and to confront practices, for instance of religious institutions, that, while claiming to regard the sexes as different but equal, in effect preclude women from senior levels of authority and influence. These articles strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against women rest not on law as such but on legally tolerated customs and practices of national institutions.”³⁶

Cook mentions different examples of provisions in the Convention that should be interpreted with the help of these two Articles. For example, Articles 13, 14 and 16 should be read in such a way that they oblige State parties to put an end to traditional practices. In her view, Articles 2f and 5a CEDAW also play an important role in preventing and combating violence against women.

Finally, Cooks pays attention to the question of whether the implementation of these Articles could collide with other constitutional rights, especially the right to freedom of religion. At this point she arrives at the conclusion that State parties, for example, have the freedom and duty to deny tax privileges to institutions that do not conform to the Convention’s norms.³⁷

“State parties’ duties of due diligence to take all appropriate measures to prohibit all forms of discrimination against women, and state liability for omissions to enforce human rights nondiscrimination provisions may require that they treat religious institutions whose practices do not conform to international human rights standards as secular, non-charitable organisations.”³⁸

Towards equality as transformation

A second contribution with interesting arguments on the significance of the Women’s Convention is Sandra Fredman’s discussion of the Convention in relation to the problem of how to legally justify positive action.³⁹ Fredman mentions three possible ways to overcome the (dominant) legal approach of formal legal equality in which equality is defined as ‘treating likes alike’.

First, there is the concept of equality of opportunity, which recognises that identical treatment can in practice reinforce inequality because of past or ongoing discrimination and which allows a policy that aims for equal starting points. This approach seems to overlook actual barriers to the achievement of such positions. Second, there is the approach of equality of result, which aims at an equal representation of women in all spheres.

36 Cook 1994 (b), pp 239-240.

37 Cook 1994 (b), p. 241.

38 Cook 1994 (b), p. 241.

39 Fredman 2003.

However, this approach also overlooks structural barriers to attaining this goal. Equality of opportunity and equality of results are the two concepts that are predominantly used in (feminist) legal theory to denominate a (more) substantive approach to equality, one which aims not at a formal but at *de facto* equality for women.⁴⁰ To this Fredman adds a new concept. This third approach, termed ‘equality as transformation’, specifically aims to transform society in such a way that the barriers within existing structures that prevent factual equality are eradicated. In this connection, Fredman mentions Article 5 CEDAW as a provision that “(...) requires a modification of social and cultural patterns of conduct. Articles 2, 3 and 5 also make it mandatory for States to take positive steps to achieve the desired goal.”⁴¹

40 See Loenen 1995.

41 Fredman 2003, p. 116.

CONCLUSIONS OF PART II

11.1 The significance of Article 5a CEDAW

A dynamic interpretation of the Convention

This concluding Chapter first sets out to answer the question as to whether the assumption of the Groenman Committee – that Article 5a CEDAW is of particular significance – is sufficiently based on what official documents and the legal literature have to say about this provision. It is apparent that the meaning of this Article is not fixed once and for all but is changing quite markedly (as illustrated in the *Travaux Préparatoires* of the Convention or the history of the Dutch Ratification Act). This observation accords with the general idea that the Convention is a living instrument that requires a dynamic interpretation and implementation.¹

From awareness raising to structural change

The original meaning of Article 5a CEDAW mainly appears to aim at information campaigns and education, and the influencing or correcting of the media and advertising. Over the course of time the CEDAW Committee developed a sense for the structural effects of the (continued) existence of negative and damaging images and ideas about women. The Committee has connected this ‘evil’ to almost all forms of structural subordination of women, especially in connection with paid labour, health and healthcare, family law and violence against women. The Committee not only considers that education, information and a change of mentality are important, but increasingly has moved to urge State parties to do something about the structural unequal payment of women, segregation in the labour market, the lack of scope for women to work full time and to be economically independent, the disadvantaged position of women in family law, and so on.

¹ Cook 1994 (b), p. 234, who states that the Committee can give autonomous interpretations of the meaning of the Convention’s provisions. See also Groenman Committee 1997, p. 9 and 31.

The position of the Dutch government has moved in a similar way. In the beginning, emphasis was placed on changing culturally and religiously inspired ideas, opinions and attitudes held by individual persons about women. As early as during the ratification procedure, the government acknowledged that gender stereotypes can also be reflected in social structures and institutions, including law, and that Article 5a CEDAW is (also) directed at this phenomenon.

From equality as sameness to equality as transformation

The shift from stereotypes as a problem of mentality to stereotypes as a source of structural discrimination is especially evident in the legal literature and in-depth studies carried out in the Netherlands on the meaning and scope of the Women's Convention.² It seems that from early on in the history of the Convention, this provision has been interpreted so to imply a pressure for 'cultural change'. In the Dutch legal literature the conclusion is that Article 5a CEDAW adds something to the current interpretation of the non-discrimination principle. Since this provision has such an important place in the Women's Convention, it is assumed that the prohibition of discrimination in this Convention not only seeks to offer individual women legal protection against discrimination, but also demands that attention be paid to the structural causes of this discrimination. The State parties are held to be obliged to eradicate all instances of gender bias and gender presumptions in legislation and public policy.

In the English-language legal literature this idea can be found in the work of Rebecca Cook, who grounds this obligation on a combined reading of Articles 2f and 5a CEDAW. It can also be found in the work of Sandra Fredman, who sees this Article as an expression of the (acknowledged) need for a transformation of society so that that structural barriers which stand in the way of 'real' equality are overcome.

With this the Women's Convention indeed does contain a norm that goes further than most existing legislation in the field of equal treatment of men and women.³ Such legislation is directed at offering individuals protection against discrimination, and offers scarcely any remedy against the structural causes of the persistent exclusion or disadvantaging of women. Equal treatment legislation looks backward towards instances of discrimination that already have occurred. In contrast, the Convention expressly is directed at bringing

2 It should be noted that in the same period there was a lot of attention for '*beeldvorming*' (the construction of gender stereotyped images) in the Dutch emancipation policy and in feminist studies, and that the instrument of Gender Impact Assessment was developed. These texts undoubtedly have influenced the legal discussions about the meaning of the Convention. See about this policy and these studies chapter 14 of this book.

3 In the case law of the European Court of Justice there are some indications that the Court is developing a better understanding of the systemic nature of discrimination against women. See the literature of Burri and Rust, discussed in Chapter 4.

about structural change, and hence at preventing future discrimination. In Article 5a the Convention not only expresses the principle of equality, but also the principle of diversity or freedom. That is, the possibility for individuals to make their own choices about what it means to be a man or a woman without being confined by social institutions or organisation to a traditional understanding of masculinity or femininity. The significance of Article 5a CEDAW can be summarised very briefly in the proposition that it is an expression of *equality as transformation*. The Convention not only requires the *same* or *identical* rights for women but also the development of *different* law and public policy.

Article 5a CEDAW as the pillar under the third sub-aim of the Convention

The far-reaching importance attached to Article 5a CEDAW (as the pillar of the third sub-aim of the Convention) by the Groenman Committee is supported by the available documents and studies, and as such allows the provision to be read in this way – as of the present. This conclusion is supported by the statement of the CEDAW Committee that it appreciates the way in which in the Netherlands the aims of the Convention are analysed and described in three distinct sub-aims. One strong argument in favour of this conclusion can also be derived from the importance that the Committee attached to the third objective in its recent General Recommendation number 25.

The Dutch government is at least ambivalent in this regard. Despite the fact that it recognises that Article 5a CEDAW is the pillar for the third objective of the Convention, the discussions about the fourth in-depth study suggest that the government is unwilling to recognise that the Convention therefore entails a non-discrimination norm that is different to and more far-reaching than other existing norms in national and international law. The recent Cabinet response to the second National Report on the Convention also allows the conclusion that there has been a fading of interest in the Convention's third objective.

That the CEDAW Committee perhaps holds the conviction that the Convention does add something to existing equal treatment legislation can – with some with caution – be derived from a number of recent Concluding Comments in which it states, with some emphasis, that the State parties should not only look at European Community law in the field of equal treatment of women, but should devote as much attention to the Women's Convention and that they should encourage wider knowledge of the Convention on the part of lawyers.⁴

⁴ Slovenia (2003), A/58/38, CEDAW/C/SR, 620 and 621, para. 217, 218 and 219 and Germany (2004), A/59/38, CEDAW/C/SR, 640 and 641, para. 26 and 27.

11.2 The nature and scope of obligations under Article 5a CEDAW

The instrumental value of Article 5a CEDAW

The legal literature contains a great deal of discussion about the nature of the obligations arising under the Women's Convention in general. It can often be read that the Convention only contains so-called 'instruction norms' which cannot provide any enforceable legal rights available to women in individual litigation. Although in general it is *not* the case that this Convention does not entail any such rights,⁵ it seems to be true that this particular provision is indeed phrased such that it is hard to assume that (at this point in history) it could have direct effect, in the sense that an individual woman could rely on it in legal proceedings. The wording of the Article is not sufficiently clear and precise to have this direct effect. This means that the nature of this provision is indeed that it is primarily an instruction norm, directed at the State parties. (What it instructs them to do is discussed below.)

However, this should not be taken to mean that Article 5a CEDAW cannot play any role at all in individual sex discrimination cases. The prohibition of gender stereotypes is an important norm when assessing whether there is a case of 'equal or comparable situations' or whether there is 'unequal treatment'.

It would have made a significant difference if the European Court of Justice, when considering the question as to whether part-time workers (predominantly women) had the right to overtime supplements, would have taken cognisance of the fact that existing regulations assumed that only people with full-time jobs have a 'full' day – that is, their time is more or less wholly accounted for – and therefore 'deserve' to be paid extra for extra hours. Working extra hours is no less inconvenient for part-time workers as it is for full-time employees, one reason being that part timers often need to make special arrangements to accommodate caring or other activities.⁶

In other words, Article 5a CEDAW could play an important role as an interpretative framework to be applied in all sex discrimination cases. The use of this norm could help prevent the assimilating effect of equal treatment legislation as it exists now.

In the context of legislation and policy-making Article 5a CEDAW can be used as a yardstick against which to gauge whether laws and policies are free of stereotyped views about gender relations.⁷ I return to this particular role below.

In addition, Article 5a CEDAW can also be used as a 'hat peg provision': that is, an interpretative framework on the basis of which the scope of the Convention might be

5 Heringa, Hes & Lijnzaad 1994.

6 A lot of them are students who need to work beside their insufficient grant. See the case of Angelika Helmig: ECJ 15 dec. 1994, in joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, Angelika Helmig and others vs Stadt Lengerig as discussed in Holtmaat 1995, 1996 and 1999.

7 Wentholt 1997.

extended, as in the case of violence against women.⁸ In future other issues might be considered as discrimination in the same manner, based on such a reading of the Women's Convention. Article 5a CEDAW therefore plays an important role in a dynamic interpretation of the Convention and helps render it into a living instrument.

Finally, the instrumental value of this provision also lies in the fact that it can serve as a legitimate ground for action by government to combat negative and damaging stereotypes that are expressed in or distributed across society.⁹

The scope of the obligations under Article 5a CEDAW

On the basis of the legal literature and the General Recommendations made by the CEDAW Committee, the Groenman Committee accepted the view that the Women's Convention can have an impact both on the relationships between government and citizens (vertical relationships) as well as between citizens themselves (horizontal relationships).¹⁰ In the latter case relationships between citizens in the public sphere (when engaging with others, for example in paid labour, healthcare, education or banking) are distinguished from relationships in the intimate, private sphere. Should the government – on the basis of the CEDAW Convention – issue anti-discrimination legislation that effects this intimate or private sphere it runs the risk of breaching the constitutionally-protected right of privacy of the home or of family life. In general the Groenman Committee did not exclude the possibility that a State party might take measures based on this Convention that would directly interfere in the intimate, private sphere. Is this also the case with Article 5a CEDAW?

None of the documents and legal literature examined for this research contain such a suggestion. In my view it is quite obvious from the wording of this provision that it is directed in the first instance at the sphere of (open or covert) expressions of negative and damaging stereotypes about the roles of men and women in public, both in vertical and horizontal relationships. Indirectly, measures undertaken by government or employers, healthcare institutions or schools¹¹ to combat such expressions can (and hopefully will!) have an impact on the private or intimate relationships between people.

Relationship to other constitutional or civil rights

Even if a State party, in taking all appropriate measures to eliminate gender stereotypes, limits itself to the public sphere, the question may arise as to how far other constitutionally-guaranteed human rights or civil rights (such as freedom of speech or freedom of religion) may be curtailed. Although many commentators discuss this issue and urge caution, these

⁸ Lijnzaad 1994, discussed in Chapter 10 of this book.

⁹ Lijnzaad 1994.

¹⁰ Groenman Committee 1997, p. 28.

¹¹ These organisations and institutions can take such measures on their own accord or instigated by the government on the basis of the Convention.

discussions would not warrant the proposition that such freedoms could prevent the application or implementation of Article 5a CEDAW altogether. As the Ethiopian Member of the Preparatory Committee stated: freedoms are not unlimited.¹² In theory and practice they can be limited by other rights, such as the not to be discriminated against on grounds of sex.¹³

This means that a government that wants to put an end to this type of discrimination and takes measures to that effect, can cite Article 5a CEDAW as a legal basis for such measures. That is to say, if certain measures are contested as representing an encroachment on certain civil rights, it could be argued that this is justifiable on the ground that Article 5a CEDAW requires such measures to be taken.¹⁴ State parties are under all circumstances required to implement the Convention's obligations loyally, in due diligence, in a timely fashion and in good faith.¹⁵ This is also the case with this provision. What they have to do in order to meet this duty is discussed below.

11.3 The content of the obligations under Article 5a CEDAW

The final question for consideration here is what precisely the content of Article 5a CEDAW is. In other words, what must a State that is party to the Women's Convention do – in the year 2004 – to implement this provision loyally, with due diligence, in a timely fashion and in good faith? What are the 'appropriate measures' that State parties should take? Two kinds of measures are suggested by the research undertaken for this study.

The duty to banish negative gender stereotypes from social and cultural life

Based on Article 5a CEDAW, State parties have a duty to intervene in those social relations and institutions in which negative stereotyped images and views about women are expressed and/or used. This would embrace (re)presentations (that is: the image and presence or non-presence) of men and women in the media and in commercial advertising; and (re)presentations of female and male roles in pornography and negative images that inspire to violence against women. The CEDAW Committee does not leave any room for discussion that State parties are indeed obliged to develop and implement active policies in this field.

In the light of the many deliberations of the Committee on the obligation to undertake information campaigns and limit the damaging impact of stereotypes in advertisements or in teaching materials, Article 5a CEDAW does indeed set very concrete standards as to

12 Rehof, 1993, p. 80.

13 Cook 1994 (b), p. 241.

14 Provided that they are proportional to this aim and appropriate and necessary to reach that aim.

15 Cook 1994 (b)

the kind of activities that a government should undertake. Various instruments are deemed to be suitable, such as information campaigns, adjustment of schoolbooks, advertisements, financial support for institutions that are engaged in this field, general regulations (for example, a complaints procedure in the field of commercial advertising) or establishing criteria for subsidising the media. Even making a criminal offence of certain kinds of expressions that are particularly damaging for women (such as certain kinds of pornography) can be an appropriate measure.

However, the scope for government to bring about real change at the level of individual gender awareness or gender identity and on the symbolic level are limited.¹⁶ This is a good enough reason to pay particular attention to the second level at which the construction of gender stereotypes takes place: the level of social structures and institutions.

The duty to eliminate gender stereotypes in law and public policy

In the second place, Article 5a CEDAW (in combination with Article 2f CEDAW) implies that State parties have the duty to take all appropriate measures to track down and eliminate gender stereotypes that are at the basis of law and public policy. The government itself is possibly culpable in terms of breaching the Convention's norms, and it is government itself that has the responsibility to put an end to this situation.

However, opinions differ widely about how far-reaching this duty is. At one side of the spectrum there are authors who, at present, derive no concrete obligation from Article 5a CEDAW. At the other, there is the view that this provision obliges State parties to take very rigorous measures, such as abolishing all breadwinner provisions in the social security system. These latter measures, however, should be taken with regard to the second objective of the Convention: the improvement of the *de facto* position of women. That is to say that any measure undertaken on the basis of Article 5a CEDAW should be tested against the criterion of whether they have a genuinely positive effect on the conditions of life and the human rights of women.

Moreover, there are arguments which contend that this provision of the Convention not only contains a negative obligation to eliminate all instances of damaging sex stereotypes in practice and in law, but also a positive obligation to take measures to enable men and women to take on different (than traditional or stereotyped) roles. One example cited is the design of a system of parental leave that encourages or even requires fathers to take on caring activities.

16 Among others on the ground of civil liberties that are guaranteed by national constitutions and in International Human Rights Conventions. See above.

The duty to ban gender stereotypes from law and public policies can be rephrased as the duty to ban systemic or structural gender discrimination.

From the analysis of the Concluding Comments of the CEDAW Committee it is apparent that the Committee does not have a clear view of how far-reaching these obligations are at this point. The statement that there is no such obligation is untenable in the view of the many concrete directions issued by the Committee. For example, the Committee frequently indicates that legislation should be cleared of gender bias and constructions, be it in constitutional provisions, family law, tax law, social security or labour law.

11.4 The enforceability of cultural change

The obligations that are incumbent on State parties arising from Article 5a CEDAW are, admittedly, not easily enforced. The CEDAW Committee's remit is very limited, and in fact it is only a supervisory body.¹⁷ It cannot impose any sanctions, even when there is an outright breach of the Convention's provisions. This means that only constant pressure on the part of human rights organisations and the women's movement might possibly have some impact in the long run. In that respect the process of 'naming' and 'shaming' of State parties is important: the continuous revealing of violations of the Convention's norms in the international arena. The effect of this process can be that State parties begin to change their behaviour, in the sense that they make a start to the process of actively combating the discrimination of women, including those forms of discrimination embedded in national law and policy, and in culture and customs.¹⁸

11.5 The danger of cultural hegemony

The central aim of Article 5a CEDAW is to eliminate or abolish all traditional customs and practices, including those laid down in law or religious injunctions that are damaging for the fulfilment of all the human rights of women. This so-called 'abolitionist' method has been severely criticised in the legal literature. The non-discrimination norms included in international law are held to be too one-sided and unsuitable for the abolition of all forms of discrimination against women. In addition, this approach is said to deny the fact that women may have rights which are important for them as a result of some cultural and customary practices.

17 Notwithstanding the fact that its powers have been extended on the ground of the Optional Protocol of October 6, 1999, which makes individual complaints possible. See: A/RES/54/4, *Optional Protocol on the Elimination of all forms of Discrimination Against Women*. The text of the Protocol is included in an Annex to this Resolution.

18 See for a detailed discussion of the problem of State accountability under the Convention Cook 1994 (b).

“Some critics have pointed out that these abolitionist responses create the impression that women’s rights do not exist in custom or local practice, and that the solution therefore lies in substituting custom and local practice with alternatives offered by national legislation or the international human rights regime. Furthermore, the abolitionist approach does not encourage a holistic understanding of the context in which these practices are embedded, and as a result, prevents comprehensive solutions. The abolitionist approach has also suffered counter-accusations of cultural imperialism from interested Third World states.”¹⁹

The present author fully acknowledges that this danger does indeed exist and therefore subscribes to the importance of the alternative method of so-called cross-cultural dialogue.²⁰ This means that, for the purpose of guaranteeing all human rights of women, it cannot be assumed that the non-discrimination (or equal treatment) standards enshrined in national or international legal instruments are better or more suitable than norms that can be found in a number of cultures and customs. In particular, if the right to equal treatment of women is understood in a formal sense (of treating likes alike) there is certainly no guarantee that this will have a positive effect on their actual situation. In Western countries the application of such a formal right to equal treatment of men and women has often led to a worsening of the position of women.²¹ It is important to remember that the Women’s Convention also demands that the position of women is improved. This means that instead of simply applying an abstract and general equal treatment norm and the radical elimination of customs and traditions, much attention must be paid to the concrete daily circumstances in which women need to realise their human rights. What is necessary in that respect is expressed by Nyamu in the following passage of her important article.

“The non-abolitionist approach, therefore, calls for a non-hegemonic human rights practice that incorporates the two simultaneous processes of internal discourse and cross-cultural dialogue, in order to find legitimacy for human rights principles within all cultures.”²²

11.6 Final remark

The assumption of the Groenman Committee that Article 5a CEDAW has a special and far-reaching meaning appears to be confirmed by this research. Two concrete obligations can be derived from this provision in the Convention: State parties are under a duty to actively combat gender stereotypes (among others in education and in the media) and to ban systemic or structural discrimination in law and public policy. As a consequence, the Women’s Convention entails the concept of equality as transformation.

19 Nyamu 2000, p. 393. At this place she refers to works of Thandabantu Nhlapo, Daniel A. Bell and Katha Pollit.

20 See Holtmaat 2002, p. 132.

21 In Chapter 15, I give the example of the treacherous effect of applying equality standards in family law.

22 Nyamu 2000, p. 393. At this point she refers to the work of Abdullahi An-Na’im.

This research has established, with retroactive effect, a legitimate ground for Dutch emancipation policy in the field of ‘erasing traditional role models’ and ‘combating stereotyped images of masculinity and femininity’. According to many commentators, such a policy should have two sides in order to be effective: an active role on the part of government to change the role of gender in society; and scrutiny of the role that government itself plays in maintaining and (re)producing the power of gender.²³

How the State parties can implement the Women’s Convention with regard to this second obligation – in other word, how they can carry out this specific instruction – is discussed in the third part of this study.

23 Schaapman 1995, p. 61. See the policy and the studies that I discuss in Chapter 14.

PART III

TOWARDS A METHOD TO REVEAL STRUCTURAL GENDER DISCRIMINATION IN LAW AND PUBLIC POLICY

INTRODUCTION TO PART III

At the end of the previous Chapter, it was concluded that under Article 5a CEDAW State parties are obliged, amongst other things, to eliminate gender stereotypes that underlie law and public policy and maintain a situation of structural discrimination. Part III of the study focuses solely on this duty.

Tracking down structural gender discrimination is not an easy task, precisely because it concerns self-evident ‘truths’ about the biological sex of males and females, and about the relationships between the sexes that are constitutive of prevailing social, cultural and institutional arrangements. As a consequence, in the Dutch context, the Department for the Co-ordination of Emancipation Policy at the Ministry of Social Affairs and Employment has commissioned the development of a method to undertake this task. This research method will be described in Chapter 16.

Because the concepts of gender and gender discrimination have a central place in the research method, Chapter 13 examines the content that these concepts have been given in women’s studies and the analytical role they can play in screening law and public policy. Chapter 14 discusses Dutch policy and studies undertaken in the field of gender stereotyping and the design of the instrument for a Gender Impact Assessment (GIA). These studies provide important indications about the way in which a method to reveal gender discrimination can be constructed. In Chapter 15 a number of methodological directions and starting-points will be presented, which follow from the studies discussed in Chapter 13 and 14. The method, presented in Chapter 16, is based on these materials. It can be used for research into the nature and impact of structural gender discrimination in law and public policy. Together with the instrument of the GIA, this method can serve as a tool in the policy of mainstreaming gender issues.

GENDER AND STRUCTURAL GENDER DISCRIMINATION

13.1 Gender

Gender: a construction of masculinity and femininity that differs in time and place

Contrary to the biological category of sex, gender is an indication of the social, cultural and institutional construction of masculinity and femininity.

“The term ‘gender’ here refers to the social construction of differences between women and men and ideas of ‘femininity’ and ‘masculinity’ – the excess cultural baggage associated with biological sex.”¹

In a document published by the *United Nations* the concept of gender is described in the following manner:

“Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.”²

The dynamic character of gender

That the categories of ‘men’ and ‘women’ are not only defined by nature but are also (perhaps mainly!) social and cultural constructions, means that these are not static categories

¹ Charlesworth 1999, p. 379.

² 1999 *World Survey on the Role of Women in Development*, United Nations, New York, 1999, page ix, as cited in footnote 2 in CEDAW General Recommendation nr 25.

but are given substance depending on the time and place where and when they exist. As a consequence, gender and gender relations are always in motion and can only be understood against the background of the specific context in which they play a role at a given time.

Men and women in the year 1954 were not the same as they are in 2004. What it means to be a man in India differs widely from the situation of a Swedish man. An older, poorly-educated childless housewife in the Netherlands, living in a closed Christian community in the so-called *bible belt*, is confronted with different limitations as a result of gender stereotypes than a 20 year old female student of art history who lives in Amsterdam and has been raised in a secular environment. A medical doctor with young children who is a refugee from Iran and who tries to find a place on the Dutch labour market again encounters other difficulties and limitations. Not only their own gender identity is of great importance, but also how they are seen as a ‘woman’ within their social environment – and again, how the legislator or a policy-maker defines their situation.

Gender as an analytical category

Within women’s studies gender often is seen as an analytical concept which can be used to reveal how the social, cultural and institutional construction of masculinity and femininity, operates. Such studies have tended to delve deeper and deeper:

“In this sense, feminist explorations can be likened to an archaeological dig. There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level.”³

An elaborated definition of gender, which is suitable for an analytical usage in law, has been provided by Joan Wallach Scott. 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.”⁴

I will now demonstrate what content has been given to these two elements of gender in theories about the role of gender in law and policy.

3 Charlesworth 1999, p. 381.

4 Scott 1989, p. 94.

The role of gender in the construction of social relations

According to Scott, four factors simultaneously play a role in the construction of social relationships between the sexes. These also play a role in the construction of law and public policy.⁵

- (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;
- (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.

By way of illustration: the construction of social insurance and social welfare

The way in which in the Netherlands – as in most Western countries – a division has been created between social insurance and social welfare can serve as an example of how these four factors operate in law.⁶

On the symbolic level in this construction a clear ranking has been made between a ‘hard’ sector (social insurance, which grants independent individual rights to benefits) and a ‘soft’ sector (social welfare, which uses means testing and which stipulates interdependence between people).

In constructing the differences between these two parts of the social security system two pairs of concepts are systematically opposed to each other. Social welfare is typified by concepts such as family cohesion, solidarity, distributive justice, and immediate need while at the other end, social insurance is characterised by concepts such as individual autonomy, performance-based rights (e.g. work related rights, rights based on contributions to social insurance funds), equivalent justice and the use of ‘objective’ criteria. While the one deals with a real person in her/his concrete circumstances, the other postulates an abstract subject of the law (citizen). In these two groups of concepts, care (social welfare) and rights (social insurance) are symbolically opposed to each other, as two mutually exclusive systems of concepts. This symbolic order closely connects to what in our culture is associated with femininity and masculinity.

In the construction of this twofold system normative concepts also play an important role. An example is the concept of an ‘insurable social risk’. This concept is defined in such a way that it covers those risks which are linked to those ways of earning an income

⁵ Scott 1989, pp. 94-95.

⁶ See Holtmaat 1992, Holtmaat 1994 and Holtmaat 1997.

traditionally primarily performed by men (full-time salaried work) and excludes those risks which, given the traditional relationships between the sexes, particularly affect women (such as loss of income from income-sharing within a marriage). The loss of support and care in the private sphere is not covered under social insurance schemes in the same way as the loss of paid labour. Widowers do not get compensation for work ‘in the home’ when their (house)wives die. However, housewives get a pension when the breadwinner dies.⁷

In the third place, an important role in this construction is played by a rigid idea of what are considered to be private life and private responsibilities, and what is held to be the public domain. Again this division reflects traditional gender relations in which women’s lives are seen as private and men’s lives as public.

Finally, especially in welfare law and policy, a construction of subjective gender identities takes place in the form of the ‘welfare mother’ or the ‘welfare woman’.⁸ The position of this particular category of welfare beneficiary has been the object of a political and social struggle extending over decades. In this struggle the question is whether such women – who often are head of a single parent household – can be required to perform paid labour or whether they should be compelled to require maintenance from their ex-partner or ex-husband. The unequal relationship between the sexes is reflected in the construction of the ‘welfare woman’. Welfare law does not contain an equivalent term ‘welfare man’. On the contrary, social insurance language only knows neutral (in the male form) concepts such as ‘the unemployed’, ‘invalids’ or ‘claimants’.

The role of gender in the construction of power differences between the sexes

In the second place the analytical concept of gender can be used to expose the ideological power of gender.⁹ This means that this concept is used to analyse the power processes that maintain the unequal relationships between the sexes.

“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”¹⁰

The ideological power of gender means that ideas and unspecified or unspoken ‘self-evident facts’ in relation to the differences between the sexes are presented as compelling, necessary

7 This was the situation in the Netherlands until recently.

8 Smart 1992, p. 37 gives the example of the category of the ‘bad mother’ in UK criminal law.

9 Smart 1989

10 Fegan 1996, pp. 180-181, emphasis in original.

and unchangeable ‘truths’. In that process the biological and the social categories of men and women are presented as one and the same thing and ‘real’ or ‘essential’ differences between men and women are presented as ‘natural’. Should a biological difference be found, this often serves to legitimate social and economic difference (in power). Women give birth to children, therefore it is only ‘natural’ that they depend on a male breadwinner.

In law this ideological power of gender can play a role in three different ways: in legal norms, in legal principles and in the (ideological) format of law.¹¹ The latter means the way in which rights are constructed and have been given a place in a wider legal framework.

By way of illustration: the power of gender in matrimonial property law

Matrimonial property law contains a number of legal norms in which (traditional) gender relations are reflected.¹² For example, until recently there was the norm that there can be only ‘one captain on the (matrimonial) ship’. On this ground the law stipulated that the person who had contributed a certain good or asset to the community (mostly the man) had the power to dispose over it. This reflected the idea that the man is the head of the household, although this provision was abolished a long time ago.

In the same field of law there still is – at the level of legal principles – an important place for the principle of protection of a party who is deemed to be weak and needs to be supported by the law. This principle is used to construct the duties of the breadwinner with respect to the ‘non-earning’ partner (mostly the woman). Being a woman is associated with weakness, being a man with being the patron. Already, the use of the term ‘non-earning’ is revealing because with that term the value of the input of this person in the field of care and education is reduced to zero.

Finally, gender relations also play an evident role at the level of the legal format of matrimonial property rights. Matrimonial property law is part of (civil) family law, not social or public law. As such, it is subject to the general principles that govern this area of law as far as the allocation of rights and duties is concerned.

13.2 Structural gender discrimination

Chapter 2 explained that within the Women’s Convention the aim of combating the dominant gender ideology exists alongside the aims of eliminating (direct and indirect) discrimination against women and improving the position of women. Although – also

¹¹ Holtmaat 2001 and the literature that is discussed at this article.

¹² This example is described more fully in Holtmaat and De Hond 2001

according to the Groenman Commission and the CEDAW Committee – there is an important connection between the three sub-aims of the Convention, the obligations under Article 5a CEDAW differ from the other obligations under this Convention. These differences are briefly described here, especially in as far as the first and the third sub-aims are concerned.¹³

The difference with the concept of sex discrimination

The concept of structural gender discrimination refers to those forms of discrimination that are a consequence of the fact that the structure or organisation of society is based on gender stereotypes which serve to sustain the existing unequal power relations between the sexes. Stereotyped, often traditional and implicit ideas, symbols and structures, lead to the subordination and exclusion of women and of femininity. This concept exists alongside the legal concept of sex discrimination that refers directly to differential treatment on the basis of the biological male and female sex. Structural gender discrimination describes a situation in which women or the female perspective are systematically disadvantaged or excluded, but where such disadvantage or exclusion is not covered by legal definitions of direct and indirect sex discrimination.¹⁴

The differences between sex discrimination and structural gender discrimination can be summarised in three points.

Firstly, in sex discrimination legislation biological sex differences play a central role. No differences in treatment are allowed on the basis of the mere fact that somebody is male or female. Gender discrimination is primarily about the social, cultural and institutional construction of being a male or a female subject.

Secondly, in the case of sex discrimination an assessment needs to be made as to whether there indeed was a difference in treatment between an individual man and a woman. Sex discrimination law offers individuals a legal remedy, provided they bring cases to court. Combating sex discrimination through this route requires a high degree of acuity and courage on the part of individual women. In contrast, in the case of structural gender discrimination, responsibility lies with government to tackle the underlying structural causes of discrimination.

Thirdly, the prohibition of discrimination on grounds of sex has a tendency to culminate in assimilation to the dominant male standard or norm. Combating structural gender discrimination entails a fundamental re-appraisal of such norms. When combating gender stereotypes that are at the basis of law and public policy the issue is not to create a situation of sameness or identity between the two positions, but of creating space for perspectives

13 The second objective: to improve the position of women, poses special obligations in the sense that appropriate measures (among other temporary special measures on the ground of Article 4(1) should be taken) to achieve this.

14 Holtmaat 1996, p. 12 and Holtmaat 2000, p. 261. Feminist legal theory has highlighted the danger that sex discrimination law in itself reproduces gender ideology. See Chapter 4.

and positions other than the dominant (male) position. Instead of focusing on equality or sameness the accent lies on diversity.

The difference with the concept of indirect discrimination

Indirect sex discrimination occurs when an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.¹⁵ Legal doctrine on indirect discrimination demands that the person who complains that they have suffered a detriment must prove the disparate impact (for example, by means of statistical proof). Indirect discrimination can be objectively justifiable if it can be established that the aim of the provision, criterion or practice is legitimate and important and that the means (the neutral rule) is appropriate and necessary to reach that aim.

Many forms of indirect discrimination are based on stereotyped assumptions about the separate roles of men and women. One example is the different (and poorer) treatment of part-time workers with regard to working conditions and payment on the basis of the assumption that such workers do this work 'on the side' (that is, besides being a housewife) and that they do not really 'need' the job.

The concept of structural gender discrimination is broader than the concept of indirect discrimination in the sense that, under the former concept, it allows assumptions and constructions to be tackled that do not fit into the narrow legal definition of the latter. Structural gender discrimination is about the effect of existing structures and systems on stereotyped role models and role expectations for both men and women, irrespective of which of the two sexes mainly suffers from such stereotypes.

15 See the definition in Article 2(2) of Directive 2002/73/EG. The literature on this topic is abundant. See e.g. Loenen 1999 and Voogsgeerd 2000.

PUBLIC POLICY AND RESEARCH IN THE FIELD OF GENDER STEREOTYPED IMAGES

14.1 Dutch policy in the field of gender stereotyped images

For almost thirty years combating gender-stereotyped images has been an important part of the emancipation policy of the Dutch government. Objectives that have played an important role over the years in this context are “removing role limitations of men and women”, “the promotion of a (positive) value for characteristics traditionally are attached to femaleness”¹ and “the promotion of structural change as a result of which sex difference is no longer a pillar for the structuring of society.”² The objective of “*het doorbreken van beeldvorming in termen van mannelijkheid en vrouwelijkheid*” has become increasingly important over the years.³ It is particularly difficult to translate this phrase. *Beelvorming* (literally: ‘the construction of an image’) carries the meaning of ‘the social and cultural construction of images and perceptions’. In this book I have chosen to translate the whole phrase as ‘combating stereotyped images of masculinity and femininity’ or, more concisely: ‘to combat gender stereotyped images’.

As a consequence of this policy, in the early-1990s a dedicated working party – the *Projectgroep Beeldvorming* – was established, consisting of civil servants from a number of Ministries. It submitted a final report in 1996.⁴ When the group was first established the following definition of the term ‘*beeldvorming*’ was given:

“The explicit or implicit, conscious or unconscious making of a subordinating difference between men and women, by means of attributing different qualities to them, to their behaviour, to their ideas, feelings, values and expectations.”⁵

1 TK 1976-1977, 14 496 nr. 2, p. 10.

2 Min. SZW 1984, p. 13.

3 Min. SZW 1984, p. 13 and Min. SZW 1992 (a), p. 30.

4 Projectgroep Beeldvorming 1996.

5 Mission statement of the *Projectgroep Beeldvorming*, included in Min. SZW 1992 (a), p. 145.

In its final report the group indicated that government has two separate responsibilities in this field. First, it should engage with and counter negative and dominant gender stereotypes in society. And secondly, government should ensure that it no longer employs gender stereotypes in its own policy.

“Important elements of policy-making – the definition of the problem at hand, the (quantitative) data that are used and the choice of central concepts – contribute to the reproduction of unequal social relations between men and women (...).”⁶

According to this working group, this means that government should eliminate “the reproduction of these differences in symbols, language and norms, in institutions and structures, and in concrete acts.”⁷

In 2000 the objective of ‘combating gender stereotyped images’ was replaced by “the necessity to modernise the ‘social contract’ between men and women.”⁸

“With this approach the government refers to the explicit and implicit arrangements that exist in society about the different rights and duties of male and female citizens. This ‘contract’ also includes how rules and institutions support the rights and duties of men and women. The current ‘social contract’ is based upon a division of roles of men and women that has now undergone important change.”⁹

The obligation under Article 5a CEDAW to eliminate structural gender discrimination can be seen as part of this policy framework.¹⁰ As part of this policy, three studies have been conducted into the nature of gender stereotypes and the role that they play in the process of policy-making, under the guidance of the working party. The studies have yielded a rich source of material that can be used in developing a research method to reveal structural gender discrimination. This is a good reason to review them briefly below.

14.2 Scientific research into gender stereotyped images

From individual gender-identity towards gender as a mechanism for constructing social relations

In the first study, Mossink and Nederland make a distinction between explicit and indirect gender stereotyped images.

6 Projectgroep Beeldvorming 1996, p. 11.

7 Projectgroep Beeldvorming 1996, p. 12.

8 Min. SZW 2000 (b), p. 35 e.v.

9 Min. SZW 2000 (b), p. 35.

10 TK 1997-1998, 25 893, nr 2, p. 8

“The ‘imagination / construction’ of femininity and masculinity happens, in the first place, when explicit statements are made about the position of men and women. From this ideas can be distilled about characteristics and patterns of conduct that are attributed to women and men. In the second place, it is necessary to reveal the indirect gender stereotyped images, the invisible area of the self-evident ideas about men and women in policy-documents.”¹¹

In this report, the emphasis still lies on the symbolic representation of masculinity and femininity or male and female behaviour. However, according to Schaapman, who carried out the second research project, gender-stereotyped images play a role at (at least) three levels: the symbolic-cultural level, the structural level and the individual level.¹²

Schaapman devotes a good deal of attention to the assumptions about a male and a female way of life that are ‘baked’ into the structure and content of legislation.¹³ The scope for government intervention at the individual and symbolic levels is limited. For Schaapman this is an additional reason to concentrate on the level of social structures and institutions. These structures and institutions (legislation included) are themselves gender biased. In other words: government itself is part of the problem.¹⁴

Gender stereotyped images and the difference in power between men and women

According to Schaapman the consequence is that eradicating negative gender stereotypes of women is not simply a matter of education or a change in mentality, but entails a change in power.¹⁵ Schaapman is quite critical of Dutch emancipation policy which, she argues, merely addresses the equal social position of men and women rather than uncovering and combating (structural) and institutionalised gender differences:

“Regardless of the theoretical starting-points of this policy, emancipation policy time and again is being transformed into a strategy for fitting women into an existing order, in which the position of men is the norm for the equality that is striven for. The policy is not aimed at changing this order nor at men.”¹⁶

Interpreting equality as ‘identical to men’ leaves no scope for realising the policy aim of ‘increasing diversity’.¹⁷

Schaapman draws the conclusion that in order to combat gender-stereotyped images it is necessary to use a concept of power which researchers can use to reveal how images and meanings are (re)produced. This concept of power needs to be filled out with the concept

11 Mossink & Nederland, 1993, pp. 3-4. In this quote it is clear that these researchers emphasise the first aspect of the definition of gender derived from Joan W. Scott.

12 Schaapman 1995, p. 22 and 24.

13 Schaapman 1995, p. 58.

14 Schaapman 1995, p. 59.

15 Schaapman 1995, p. 3 and 9.

16 Schaapman 1995, p. 14.

17 Schaapman 1995, p. 11 and 15.

of gender in order to make it possible to explore the processes of construction of gender-related images and meanings.¹⁸ According to Schaapman, eliminating negative stereotyped images should not be a separate aim of emancipation policy, but rather constitutes a problem-oriented approach which needs to pervade all policy fields.¹⁹

Research into the construction of masculinity as ‘normality’

The researchers Brouns and Scholten argue that – as far as combating discrimination against women is concerned – a choice always needs to be made between a policy that ignores the specific position of women (that is, is neutral) and a policy that takes this position as a starting point (that is, is specific).²⁰ The first approach runs the risk of assimilation to the male norm, the second that the categories ‘female’ and ‘femininity’ simply end up by being reproduced. These researchers, therefore, wish to shift the focus to the construction of males and masculinity.²¹

This study again devotes a great deal of attention to the structural aspects of gender-specific *beeldvorming*. The authors argue that for a long period, Dutch society has been built on the classic ‘sex-contract’ in which a separation between private and public is coupled to a division of labour between the sexes. It is precisely this sex-contract that has been placed under pressure because of changes in personal and social relations between the sexes. However, law and public policy are still based on outdated presuppositions. This leads to tensions and frictions. The aim of their research is to develop a model that can be used to reveal these presuppositions.²²

14.3 Gender Impact Assessments

The development of GIA

Over this same period a research model for a so-called *Emancipatie-effectrapportage* (Gender Impact Assessment, or GIA) was developed in the Netherlands. Again, this work was closely connected to the insights into the phenomenon of gender gained from women’s studies.²³

18 Schaapman 1995, p. 16.

19 Schaapman 1995, p. 24. With this she describes what later on has been called ‘gender mainstreaming’.

20 Brouns & Scholten 1997, p. 4. This dilemma parallels the (endless) debate in feminist legal studies as to whether women should have equal rights or special rights. See e. g. Williams 1982, Wolgast 1980 and Scott 1988.

21 Brouns & Scholten 1997, p. 5.

22 This model is discussed in Chapter 15.

23 Verloo & Roggeband 1994, p. 6. Examples of the application of this instrument has been described in Plantenga 2000, Verloo & Roggeband 1996 and Ruberay & Fagan 2000. A description of the Dutch GIA-instrument can be found in Verloo & Roggeband 1996.

According to Verloo and Roggeband, who laid the theoretical foundation for the GIA instrument, three levels need to be distinguished at which the construction of gender takes place: structures, processes and (normative) criteria. The most important structures are the organisation of paid labour and of intimate life. As far as processes are concerned, they distinguish between the operation of power relations in the division of resources and the functioning of rules and regulations. The criteria that they deem important are equality and autonomy. In all this, attention needs to be paid to how gender rules are effective. With this they mean the following:

“At the individual level gender rules can be found in ideas and attitudes of human beings and in their behaviour. At the structural level gender rules can be found in formal regulations and in presuppositions that lie at the basis of organisations.”²⁴

Based on this, the Ministry of Social Affairs and Employment has published a manual explaining the aim and structure of the GIA. The Ministry of Education, Culture and Science has also published its own GIA instrument.²⁵ In both models the accent lies on estimating the effects of policy and (proposed) law on the concrete social and economic position of women.

The GIA of changes in matrimonial property law

The Clara Wichmann Institute developed a somewhat different GIA approach in the context of research into (proposed) changes to Dutch matrimonial property law.²⁶ In this, a distinction is drawn between three different frameworks for reviewing the legislation: standards set by law, standards set in (existing) government emancipation policy, and theoretical (analytical) standards. The first two frameworks led to a series of questions with regard to the lawfulness or desirability of the proposed changes in Dutch matrimonial property law from the perspective of national and international legal norms, as well as from ‘emancipation aims’ expressed in policy documents. As far as the legal norms are concerned the CEDAW Convention played an important role. For the theoretical (analytical) framework a connection was made with the work of Joan W. Scott (discussed in Chapter 13). This led to scrutiny of the content of central concepts and presuppositions in the existing and proposed law.²⁷

²⁴ Verloo & Roggeband 1994, p. 14.

²⁵ Min. SZW 2001(a) and Min. OC&W 1995. The GIA model of the Ministry of Social Affairs and Employment is currently under reconstruction.

²⁶ Clara Wichmann Instituut 2001 and Holtmaat & De Hondt 2001..

²⁷ See also Chapter 13, where I used examples from this study.

METHODOLOGICAL DIRECTIONS AND STARTING-POINTS FOR THE STUDY OF STRUCTURAL GENDER DISCRIMINATION

15.1 Introduction

It is impossible to design one general ‘checklist’ that can be used in all cases to establish whether damaging or negative gender stereotypes lie at the basis of a particular policy or area of law. The reason is that structural gender discrimination is about the hidden power-effects of gender, and because the context in which gender relations are being constructed has a strong influence on the outcome.¹ The studies discussed in the two previous Chapters allow a number of methodological directions and starting-points to be distilled. These will be presented here in a summary form,² beginning at a general and abstract level and concluding with some more concrete points.

At the end of this Chapter I discuss the ways in which this approach differs from the GIA approach, and how it fits into the (adopted) policy on gender mainstreaming.

15.2 Gender operates at different levels

Within women’s studies, the construction of gender and gender relations takes place at three different levels: individual consciousness, the symbolic order and the structure and organisation of society.³

Although research into the existence of structural gender discrimination primarily focuses on the latter level, it should not be forgotten that the first two levels are also of great importance. Civil servants and legislators are human beings who work with a certain language (symbolic representation) and who hold personal views and attitudes about relations between the sexes. Policy makers and legislators select, organise, and interpret those parts of the reality to which future policies or legislation are aimed. From this mental framework (framing) they denominate the problem to which the policy or law should be

1 Mossink & Nederland 1993, p. 5.

2 This means that I cannot enter into the nuances and refinements that the researchers made.

3 Sevenhuysen 1998, pp. 79-82.

directed (naming). In this process of naming and framing the civil servant or the legislator creates a certain image of the problem at hand and connects this to possible solutions.⁴ In this process certain mental frameworks often (unconsciously) play an important role. Gender is part of such mental frameworks.

15.3 The level of the analysis

While public policy making and law constantly respond to changes in society (and therefore have to be dynamic), they also exhibit rigidities: “While definitions of problems, aims of programmes and measures change, the norms that underlie public policy hardly change.”⁵ The dogged persistence of existing mental frameworks that are coloured by gender become explicable when the presuppositions that underlie policy- and/or law-making are divided into presuppositions of a first and a second order.

The first order is about the concrete context in which a civil servant or legislator has to act (discussed below at the end of this Chapter). The second order is about the social structure in which policy and law is constructed and the contribution that policy or law makes to the functioning of this structure.⁶ Civil servants are inclined to define problems from their own perspective. This is a matter of the power of definition: “(...) the more powerful we are, the less able we are to see how our own perspective and the current structure of our world coincide.”⁷

This means that research into how gender stereotypes become operative in policy and law should mainly be directed at this second level.

“In each step of the process of policy-making (the definition of the problem, the formulation of aims, the selection of means and the implementation) presuppositions at the second order level are at stake and this (...) is the most intractable element steering the process of policy-making.”⁸

It is precisely at this second level that processes such as the power of law, the effect of a system of classifications, and the presentation of men and women as fixed (biological) categories play a role. Anyone who wants to uncover structural gender discrimination needs to be very aware of these processes – which are briefly explained below.

4 Brouns & Scholten 1997, p. 76.

5 Brouns & Scholten 1997, p. 79.

6 Brouns & Scholten 1997, p. 76-77 and 80.

7 Shaw 2001.

8 Brouns & Scholten 1997, p. 80.

15.4 The power of law

When defining problems the legal framework in which one wants to or needs to find a solution structures the field in advance.⁹ In recent decades, for example, problems between parents (or ex-partners) with regard to the upbringing and caring of their children have been located within the framework of the principle of formal legal equality and the right to family life. This meant that the solution to these problems had to meet certain criteria, and other approaches ceased to be conceivable or possible. For women this has meant that the provision of daily care for children is no longer the basis for the attribution of custody rights or the right to see a child regularly, but that fathers' claims – based on the principle of the formal (equal) right to have a family life with their children – is now decisive.¹⁰ Men who did not, and do not, participate in caring tasks have made use of this 'rule' to claim legal custody.

In other words, law 'translates' social problems in such a way that they can be defined and solved within the framework of the existing legal system. For instance, the right to equal treatment, as laid down in EC Directives and the Dutch Equal Treatment Act, requires a comparison to be made between men and women.

"This process forces you into stereotyping and generalizing. So, in our case, Angelika Helmig and her associates were forced to present their problem (...), namely the fact that part-timers did not get overtime supplements, as a problem of sex discrimination, which, in turn, forced them to categorise part-time work as women's work."¹¹

As a consequence, the existing

"(...) social reality (the statistical 'fact' that more women than men engage in part-time work) is transferred into a sexualised or gendered category."¹²

This mechanism seems to be to high decree responsible for the fact that the enforcement of the right to equal treatment has re-established rather than eradicated gender stereotypes.¹³

9 Smart 1989 and Smart 1992.

10 See e.g. Loenen 1997, Smart 1992, Moller Okin 1989 and Fineman 1995.

11 Holtmaat 1999, p. 429.

12 Holtmaat 1999, p. 429.

13 See Van den Brink 2000 (discussed in Chapter 4 of this book.) However, these cases can reveal a lot about gender stereotypes that are active in society. Why should a female postwoman be allowed to wear skirts and a male postman be prohibited to wear shorts? Why should a woman in a fitness centre be allowed to wear a sleeveless top and a man be obliged to wear a T-shirt? See the judgements of the Dutch Equal Treatment Commission, numbers 1999-56 and 2002-130.

In legal theory this power of definition¹⁴ is known as the self-referential or autopoietic operation of law.¹⁵ Researchers engaged in tracking down the extent to which structural gender discrimination occurs in law need to be alert to this mechanism.

15.5 The apparent neutrality of law and policy

One of the ways in which law wields power is by presenting the norms and constructions that are deemed to be valid in the legal framework as general or neutral. This generality or neutrality of law as well as policy conceals the fact that in reality they mostly reflect dominant values and norms. This means that gender relations can also be hidden under this flag.¹⁶

According to Brouns and Scholten, who have conducted a study about the construction of masculinity in policy making, this is accomplished in two ways. First, masculinity can function as *generality*, that is to say that the policy is presented as general, while in fact it deals about men. And secondly, masculinity can function as *normality*. That is to say, the reality of men implicitly serves as the starting-point for the policy, as a result of which women and femininity, but also other or alternative meanings of masculinity (such as homosexuality), appear to be deviant or a problem.¹⁷

A third way of concealing masculinity as the dominant norm is by not mentioning or regulating certain issues or problems at all. According to Hilary Charlesworth, the silences in law should be revealed. “All systems of knowledge depend on deeming certain issues as irrelevant or of little significance.”¹⁸

Law has an almost impenetrable appearance of gender-neutrality, certainly since most vestiges of open and/or direct discrimination have now been removed from it. However, this does not mean that the struggle against sex discrimination can be called off. Or, as Nicola Lacey puts it: feminist approaches to law reject

“(…) the idea of law as an autonomous structure generating claims to truth which are insulated from political critique. Feminism (...) will always be concerned to undermine, to expose as false, law’s pretended autonomy, objectivity and neutrality.”¹⁹

14 E.g. Van Maarseveen 1990, Pessers 1991 and Smart 1992.

15 Teubner 1984.

16 Fegan 1996, p. 186 and Holtmaat 2001. See also Lünneeman, Loenen and Veldman 1999, in which a number of examples are presented of what they call the ‘invisible standard of the law’.

17 Brouns and Scholten 1997, p. 67. They point at the study by Mossink and Nederland, who came to the conclusion that women and girls are explicitly mentioned in policy documents (as a category that suffers from arrears) and boys and men are not. Thereby implicitly the male norm is seen as the standard.

18 Charlesworth 1999, p. 381.

19 Lacey 1998, p. 186.

Therefore, one of the central aims of (Western) feminist legal studies in recent 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 largely unassailed.²⁰ This could go some way to explain the persistence of many forms of institutional or systematic gender discrimination.²¹ Those engaged in revealing and combating this therefore always need to ask whether neutral really is neutral and whether 'general' does not, in fact, mean 'men'.

15.6 The development of a matrix of standards

In order to facilitate the task of uncovering implicit norms with respect to maleness or masculinity in general policy, Brouns and Scholten have developed a 'matrix of standards' (*raster van ijkpunten*).²² This is to say, a listing of 'suspect' characterisations or expressions that traditionally refer to masculinity or femininity. There is an indication that such is the case when a set of two mutual exclusive or hierarchically placed terms or concepts is being used. The researchers cite a set of five indications of masculinity: 'public activity', 'crossing borders', 'breadwinning', 'powerful body', and 'emotional control'. Conversely, there are a set of 'female' notions: 'private sphere and inactivity', 'social cohesion, social responsibility and care', 'dependence and thankfulness', 'the vulnerable body that needs attention and care' and 'emotions'.²³

The researchers assume that the characteristics of masculinity lie at the basis of policy-making as a self-evident, but implicit 'normativity'. In order to test this they have developed a so-called N-test, against which policy documents can be screened. In this test N stands for normativity in terms of masculinity.²⁴ "The N-test tries to reveal the way in which the dominant contents of the concept of masculinity are operative within policy."²⁵

Every policy area or field of law has central concepts that are constitutive for that area or field. The content of these should be clarified with the help of the matrix of standards. The standards mentioned here are indications for the researcher that there may be structural gender discrimination in a particular field. Whether this is indeed the case also depends on whether the use of these concepts and structures fixes and reaffirms traditional stereotyped roles of men and women and hence has an exclusionary and disadvantaging effect on women.

20 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 196, p. 186.

21 Holtmaat 2001.

22 Brouns & Scholten 1997, p. 6.

23 Brouns & Scholten 1997, pp 65-66.

24 Brouns & Scholten 1997, p. 71

25 Brouns & Scholten 1997, p. 73.

15.7 Law and policy as a system of classifications

Every policy and every law classifies, assigning rights and obligations to certain groups of citizens and excluding others from these. For the construction of these categories and classifications – certainly since direct discrimination against women is legally prohibited in most countries – sex neutral terms are used, such as ‘employee’, ‘unemployed people’, ‘citizens’, ‘immigrants’ or ‘parents’. Research needs to address how these classifications came about and in what manner those terms that are used to draw boundaries between those people with and those without rights are defined.²⁶ One example is the concept of an employee, which in Dutch social law was long held to mean a full-time working breadwinner.²⁷

Any researcher engaged in the search for instances of structural gender discrimination constantly needs to ask her self the question as to whether seemingly neutral and general categories, such as ‘the’ citizen, or ‘the’ beneficiary of social security, do indeed refer to both sexes in the same manner, or whether such categories *de facto* refer to only one sex or to a gender-stereotyped division of roles between the sexes. The adjectives necessary to describe a given situation in more detail can be quite revealing in this context. A strong example is the expression ‘working mother’, which expresses the idea that mothers are not working when they are in the home! There is no comparable expression ‘working fathers’.

15.8 The dynamics of gender

In the description of the meaning of the concept of gender, as developed in women’s studies, it is stressed that those attributes or characteristics seen as ‘typically male’ or ‘typically female’ differ according to time and place. That is to say, gender is not about a collection of fixed images of masculinity and femininity, but about a process in which ‘difference’ between men and women is repeatedly constructed and legitimised.²⁸

As far as law is concerned, one can sometimes read the statement that law is male. That is, it is constructed by biological males and serves only their interests. The body of law is said to embody mainly masculine values.²⁹ This approach runs the risk of once again fixing gendered categories. According to Carol Smart, we should rather argue that law

26 Mossink & Nederland 1993, p. 5. Verloo & Roggeband 1994 and 1996 mention rules (that is to say: interpretations, definitions and norms) as one of the two important structures that are responsible for the reproduction of differences in power between men and women.

27 Holtmaat 1989.

28 Mossink & Nederland 1993, p. 7.

29 E.g. MacKinnon 1991.

(and policy) is gendered. The advantage of this approach is that the content and working of 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.”³⁰ 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.”

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”.³¹

The fact that gender is not a static category has two consequences for the development of a research method for revealing structural gender discrimination in law and policy. In the first place it means that the researcher cannot start from the perspective that men and women are two separate categories, for which certain equal or different rules could or should apply.³² And secondly, attention needs to be paid to the question as to whether men and women are presented as two unambiguous and separate categories in policy or in law, or whether there is room for ‘fusion’ and diversity.³³ Where the first is the case this could be an indication that certain stereotyped gender relations lie at the basis of this policy or law.³⁴

15.9 The context in which policy or law is being developed

An assessment of the way gender operates and of the existence of structural gender discrimination cannot be undertaken without addressing the concrete context in which policy-makers or the legislator has to act. (This is the first order level of the research, mentioned above.) This means that the researcher needs to be acquainted with the basic structure of the particular policy field or field of legislation and the way this field interacts with the wider society and politics. This presupposes a good knowledge of the historically-determined features of this field and the forces that play (or have played) a role in it.

For example, in assessing public policy on childcare or parental leave in the Netherlands, and the way in which these social arrangements are structured, it is crucial to have a good insight into the relationships of power between government and the social partners, the role of advisory committees in policy-making, and the structures of existing systems of social services into which these specific arrangements must fit. Again, as in law, there

30 Smart 1992, p. 34.

31 Gherardi 1994.

32 Charlesworth 1999, pp 383 and 384.

33 That is to say: does one speak of ‘men’ and ‘women’ or is it acknowledged that actual men and women can be in a great variety of positions. See Mossink & Nederland 1993, p. 5.

34 Mossink & Nederland 1993, p. 7.

are powerful pressures towards conformity to a pre-given set of norms and standards: once childcare is viewed as a policy area that belongs to the domain of the Ministry of Health (as is the case in the Netherlands) it is extremely difficult to make norms that primarily ‘belong’ to the domain of the Ministry of Social Affairs or the Ministry of Education apply in the field of childcare. If a Minister of Justice wants to change the divorce laws he or she – besides political differences of opinion – has to take into account the opinions of the judges, advocates, and notaries, and the existence of pressure groups of divorced fathers, the organisation of welfare mothers, and so on.

In all this one should constantly be aware of the fact that policy and law always come about on the basis of compromise, in which a concession for one side is counterbalanced by a victory for the other.

15.10 The context of unequal power relations between the sexes

The GIA approach recommended by the Ministry of Social Affairs and Employment expressly states that researchers who conduct such an assessment must acknowledge the structural difference in power between men and women that still exists in our society. These unequal power relations lie at the basis of the inequality that manifests itself in various areas of society.

In the same way, research into the existence of structural gender discrimination needs to address the social inequality of the sexes. This inequality is reflected in the construction of gender, in the sense that the concepts of masculinity and femininity are not equivalent but almost always express a difference in valuation, in which the male part of the pair of concepts is valued higher or better than the female part. For good reasons, the wording of Article 5a CEDAW acknowledges that gender stereotypes often express an unequal estimation of attitudes, expressions and so on of one of the sexes.

15.11 Why a specific research model to reveal structural gender discrimination?

The question that still remains to be answered is why a specific research model is needed for the implementation of Article 5a CEDAW. Why is the existing GIA approach not sufficient, or possibly useable with some small modifications?

There are several reasons why a specific method is needed. In the first place, a GIA aims at an *ex ante* estimation of the effects of a certain policy or law. Research into gender stereotypes that are constitutive for laws and public policy also needs to consider laws and policies that are already operative, and in some cases over a long period.

Secondly, in a GIA the concrete position of women is the key issue. The notion of ‘position’ implies a set of social and economic standards. In order to assess whether an

improvement or worsening of this position will occur a so-called ‘zero measurement’ must be undertaken. That is, an assessment of the current position and the effects that can be expected from the proposed measure or rule. Such an estimation is not really possible in the context of Article 5a CEDAW as the policy or law that is the object of research is already in use. To this it should be added that the GIA model takes sex differences as a starting point and not the multi-layered concept of gender: that is, it counts how many men and women will either gain or be disadvantaged by the proposed rule or measure.

And thirdly, the GIA approach, in terms of Schaapman’s first- and second-order analysis, is mainly directed at the first level: the concrete circumstances under which gender is reproduced. In contrast, as well as considering the first level the research model needed to implement Article 5a CEDAW needs to be directed explicitly at a second-order analysis – the level at which structural gender discrimination occurs.

One final reason why the existing GIA model cannot be used in this case is that research conducted in the framework of implementing the obligations under the Women’s Convention must always address all three sub-objectives of the Convention. Although the third objective is central in this research, this means that it also needs to be ascertained that the policy or law in question does not otherwise infringe the norms of the Convention. Part of the inquiry should, therefore, be whether a particular policy or law entails direct or indirect discrimination against women and whether it is really aimed at the second objective: improving the position of women. In this regard the Convention’s Articles and the General Recommendations of the CEDAW Committee provide concrete directions for each field as to what needs to be done to combat discrimination against women. Within the framework of the Dutch GIA model the test of whether the proposed policy or law is in conformity with national and international non-discrimination standards is only a minor aspect of the research.³⁵

15.12 The function of this research method in the execution of a policy of gender mainstreaming

Like the GIA model, the research method presented in this study can serve as an instrument in the execution of a policy of gender mainstreaming. Since the mid-1990s, the national and international policy-making arena has seen a shift in policy in the field of sex equality. Until that time the main policy was to combat discrimination and promote sex equality by means of so-called specific instruments. Since then it has been recognised that the problem of sex discrimination needs to be tackled in a much broader way. Policy makers

³⁵ In the GIA model this aspect is dealt with in the question as to whether the policy is in conformity with the criterion of equality between the sexes. In 2004 a new model of the GIA will be published in which more attention is given to legal standards.

now, therefore, speak of a double-track approach, in which gender mainstreaming constitutes the new, second track.

The Dutch government defines gender mainstreaming as taking relevant differences between men and women into account, in order to reach a qualitative better policy. The government expects not only better quality but also more efficiency.³⁶ In 2001 it announced in Parliament that gender mainstreaming is now officially part of government's policy.

Within the European Union gender mainstreaming became part of the EU's policy following the adoption of Article 2(3) of the Treaty of Amsterdam. According to the European Commission, gender mainstreaming

“involves not restricting efforts to promote equality to the implementation of specific measures to help women, but *mobilising all generally policies and measures specifically for the purpose of achieving equality* by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (*gender perspective*)”.³⁷ (Emphasis in original).

Pollack and Hafner-Burton term gender mainstreaming an “extraordinarily demanding concept which requires the adoption of a gender perspective by all the central actors in the policy process (...)”.³⁸ No wonder that the results have been described by commentators as weak or very meagre.³⁹

In comments and critiques on the model of gender mainstreaming that have appeared in recent years, it is recognised that gender mainstreaming can develop in two different ways.

“The first of these approaches, which Jahan labels ‘integrationist’, essentially introduces a gender perspective into existing policy processes, but does not challenge existing policy paradigms. By contrast, a second and more radical approach, which Jahan calls ‘agenda setting’, involves a fundamental rethinking, not simply of the means or procedures of policymaking, but of the ends or goals of policy from a gender perspective. In this approach, ‘Women not only become part of the mainstream, they also reorient the nature of the mainstream’ (Jahan 1995: 13).”⁴⁰

The first approach is the dominant one, according to Pollack and Hafner-Burton, who researched the effects of European Union policy on gender mainstreaming.

“As appealing as the latter approach may seem, we would agree with Rees (1998) that the European Union has generally adopted an integrationist approach to gender mainstreaming, integrating women

36 Min. SZW 2001 (b), appendix, p. 11

37 Commission of the European Communities 1996, p. 2

38 Pollack & Hafner-Burton 2000, p. 5.

39 See Shaw 2001, Beveridge, Nott & Stephe 2000, Verloo 2000 and Pollack & Hafner-Burton 2000.

40 Pollack & Hafner-Burton 2000, p. 34.

and gender issues into specific policies rather than rethinking the fundamental aims of the European Union from a gender perspective.”⁴¹

Mindful of the general objective and purpose of the CEDAW Convention and the specific meaning that – according to this research – must be attached to Article 5a CEDAW, there is an undeniably close link between CEDAW and the second approach of gender mainstreaming mentioned in the quotation above. The research method presented here aims at providing a suitable instrument for pursuing this approach. It should be kept in mind that this instrument is not developed for use by public officials in their daily practice of policymaking, but as a tool that researchers and legal scholars can use in undertaking in-depth studies into the existence of gender stereotypes in law and public policy.

In turn, the results of such studies can be used by public officials or the legislator to design different policy and law.⁴²

41 Pollack & Hafner-Burton 2000, p. 26.

42 Holtmaat 1989.

A RESEARCH MODEL TO ESTABLISH THE EXISTENCE OF STRUCTURAL GENDER DISCRIMINATION

16.1 Introduction

In the introduction to the previous Chapter, it was noted that it is impossible to design a general checklist that could be used in all fields to ascertain the existence of negative gender stereotypes that cause structural gender discrimination. Researchers need to develop their own specific approach, taking into account the methodological directions and starting-points discussed in Chapter 15.

As a consequence, the model presented in this final Chapter should not be understood as a ready-made research model. Rather, it is intended simply as a guideline for research, on the basis of which the specific research questions that need to be posed in a certain part of the law or field of policymaking can be adduced.

To make the model less abstract, I illustrate it with series of questions that could be posed when screening Dutch policy and legislation with regard to the ‘*inburgering*’ (which can be translated into: becoming acquainted with the Dutch society) of asylum seekers and immigrants. *Inburgering* became obligatory in 1998 when the *Wet Inburgering Nieuwkomers* (*WIN*) was adopted.¹ It means (among other things) that asylum seekers and immigrants can be obliged to learn the Dutch language and follow courses in which they become acquainted with the norms and values that are prevalent in current Dutch society. Knowledge of this is deemed to be necessary with a view to social integration and participation in the labour market. Failure to pass the *inburgering-exam* is sanctioned by administrative fines. The Act has been formulated in strictly sex neutral terms: that is, nowhere is there an explicit difference in rights and duties between men and women.²

1 Act of 9 April 1998, Official Bulletin of Acts, Orders and Decrees 1998, 261: Law on the Integration of Newcomers. E-Quality, an expert centre for gender and diversity, has published a fact sheet on the position of women in the process of *inburgering*. See E-Quality 2003.

2 I constructed the following questionnaire after a quick scan of this Act. Since I am not a specialist in this field of law, it is quite feasible that experts would have posed different questions or given different examples.

16.2 The central question and the design of the research

On the basis of the outcome of the research into the meaning of Article 5a CEDAW the *central question* of the research project has been phrased as follows:

In how far and in what way does the legal obligation to inburgering of newcomers, as laid down in the Law on the Inburgering of Newcomers (WIN), suffer from systemic discrimination or structural gender discrimination?

The researcher should give their own clear *definition* of systemic discrimination or structural gender discrimination. Chapter 13 of this book provides materials to do this. This definition needs to be designed in such a way that it includes yardsticks or standards with which the central question can be answered at the end of the research.

Sources that should be used in this research about the WIN are:

- The written documents about the WIN Bill, including earlier proposals and the Advice of the Council of State.
- Invited and uninvited advice of organisations in and outside government submitted before and during the procedure of adoption of the WIN.
- The report of the written and oral debates about the WIN in both Chambers of Parliament.
- Commentaries on the Bill from the political and legal side (in journals, newspapers, legal journals or at conferences) from some years before the design of the Bill until passing the Act in Parliament.
- Comments on the actual functioning of the WIN since adoption, official evaluations of the WIN in practice and possibly proposals to make amendments or changes in the Act.
- Possibly written and oral interviews with civil servants and politicians who were deeply involved in the process of writing the Bill and the adaptations or amendments necessary as a result of the debates in Parliament between the Cabinet and MPs.
- Possibly written and oral interviews with civil servants at local level who are responsible for implementing the WIN.
- Sociological, cultural-anthropological and economic studies of the position of women and men in immigrant communities in the Netherlands.

The research should be divided into a first order analysis, that concentrates on the concrete context in which the drafters (executors) of the WIN had (have) to act, and a second order analysis that concentrates on the assumptions that played a role during the process of law making.

16.3 The first order analysis

- What has been formulated as the central aim of the WIN? What problems did the government want to solve with this law? Which interests were to be served? (For example, raising labour market participation, or decreasing social tensions in neighborhoods.)
- To which policy field does the WIN belong? (Which Department or Ministry is primarily responsible for the design of the Bill and for implementing and enforcing the Act?) What other Ministries were and are involved in the process of legislation?
- Who are the main advisors of the Ministries that were involved in the process of designing the WIN? (Advisory boards, lobby groups?)
- What is the social and political context in which the WIN was designed and adopted? Which actors have brought forward views about the analysis of the problem that needed to be solved, about solutions to these problems, et cetera? How and where are these standpoints expressed? In what way can these opinions be traced in the Bill or the debates that took place in Parliament?
- Has any attention been given to the actual differences in the position of (subgroups of) male and female newcomers in the definition of the problem, the formulation of aims and the choice of means? If so, which words are used to describe these differences? Does the accent lie on (assumed) social, economic or cultural differences between men and women?
- Which empirical materials or data are used to make these statements about (assumed) differences? Is the data reliable, complete and recent?
- Which consequences in terms of different rights and duties for men and women are attached to these assumed differences?
- Has any attention been given in the definition of the problem, the formulation of aims and the choice of means to the possible different consequences of the legal obligation to *inburgering* in the WIN, in terms of a change in power relations between men and women? If this is the case: what arguments are brought forward to state that these effects will occur? In other words: has a Gender Impact Assessment been done before it was decided to present this Bill? If so, what were the outcomes of this GIA? Did these influence the structure or content of the WIN?

16.4 The second order analysis

- Which of the problems known from literature about the position of men and women within the population of immigrants and asylum seekers were, and were not, discussed in the Explanatory Memorandum to the Bill and during the process of adopting the WIN in Parliament?
- If attention is being given to the different positions of men and women, are these two categories presented as static (fixed) categories or as changeable categories? Is there sensitivity for differences within the categories of males and females?

- When the duty to *inburgering* is presented as a general or neutral duty, can this nevertheless be qualified as containing a male standard when applying the matrix of standards or the N-test?
- In how far and in what way do characteristics of masculinity appear to be ‘normal’ (or standard) and does femininity thereby implicitly appear as ‘deviant’ or as the problem?
- Which categories does the WIN use or create with regard to:
 - Designation of the persons who, on the basis of this law, are obliged to participate in the process of *inburgering*? (The personal scope of the law.) (The WIN appears to make a distinction between people who have been in the Netherlands for a number of years and those who are now entering it, and between persons who are and who are not eligible under the social security system.)
 - Exceptions to the norm (persons or groups excluded from the WIN or for whom different regulations are made.) (Does this law apply only to certain categories of aliens or for everyone who is new in the Country?)
 - Designation of the areas in which the WIN is applicable (the material scope of the law). (It is possible that the duty to participate in *inburgeringsprogramma's* only applies in the field of paid labour or political participation.)
- To what extent are these categories implicitly or explicitly based on the assumed equal or different needs of men and women in certain circumstances?
- In which legal framework has the duty to *inburgering* been constructed? Is it an administrative law, a civil law or a criminal law?
- Which are the central legal principles that underlie this framework? (For example, in employment law the principle of the correction of unequal power relationships between employers and employees is important for the construction and interpretation of concrete norms.) To what extent do these principles (or the way in which they are phrased) refer to gender? Did they have an influence on content or structure of this particular law?
- Which are the constitutive (central) concepts in the WIN? (For example, citizenship, language ability, knowledge of the Dutch history and culture.)
- What do these concepts say about:
 - The material scope of the law (for example, only ‘workers’ are covered and are eligible for language courses free of charge).
 - The content of the rights and duties on the ground of the WIN.
- Which sanctions can be imposed on grounds of the WIN? Can these sanctions have different consequences for men and women?
- Which organs or organisations are involved in the enforcement of the WIN? What standards of conduct are dominant in these organizations? (For example, some welfare agencies are known to accept that mothers with young children do not apply for paid work.)

16.5 Evaluation / Conclusions

This study should be concluded with an evaluation of the materials that have been considered, together with a clear answer to the central question posed. This evaluation should also be seen against the background of the general aim of the Women's Convention. This means that separate attention should be paid to the three sub-aims of the Convention.

This *test* should contain at least the following questions:

- Is it established that the WIN directly or indirectly reflects or consolidates traditional and stereotyped views about 'proper' roles of men and women or about masculinity and femininity and thereby hampers individual freedom of choice as to how to be a man or a woman? Does this act to sustain the dominant gender ideology? In other words: is there a breach of Articles 2f and 5a of the Convention?
- Does the WIN directly or indirectly hamper the realisation of women's human rights or the right to equal treatment in the sense of the Articles 1 and 2 of the Convention? Which of the Convention's Articles are specifically at stake? (For example, the right to a free choice of spouse.) Does this amount to direct or indirect discrimination (as defined, for example, in EC sex equality law or in other legal systems)?
- Does the WIN directly or indirectly hamper the realisation of the second aim of the Convention: to improve the position of women? (See Articles 3, 4 and 24 of the Convention and General Recommendation 25.)

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APPENDIX

REPORT OF THE REPORT COMMITTEE ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*

* This is a translation of Chapter 1 (partly) and 2 of the first Dutch National Report on the CEDAW Convention. The report was written by an independant Report Committee. Members of this Committee were L.S. Groenman (Chairperson), C.E van Vleuten (member), R. Holtmaat (member) and T.E. van Dijk (secretary/member). J.H. de Wildt participated as an advisor on behalf of the Ministry of Social Affairs and Employment. The Report was published in 1997: *Het Vrouwenverdrag in Nederland anno 1997*. Den Haag: Ministerie van SZW. Translation: Charles Frink. Additional notes: R. Holtmaat.

THE UN WOMEN'S CONVENTION IN THE NETHERLANDS
IN 1997

TABLE OF CONTENTS

1	INTRODUCTION	133
1.1	Brief background	133
1.2	Remit	134
1.3	The Report Committee's interpretation of its remit	134
1.4	Method and experiences	135
1.5	The structure of the report	135
2	THE MEANING OF THE WOMEN'S CONVENTION	137
2.1	Aim and scope of the Convention	137
2.1.1	Background	137
2.1.2	The aim of the Convention	139
2.1.3	The scope of the Convention	144
2.1.4	The Convention and the changing society	147
2.2	Obligations for the government	149
2.2.1	All appropriate measures	149
2.2.2	Effort and result	151
2.2.3	Gradual implementation	152
2.2.4	The relationship with EU law; the example of positive action and affirmative action	153
2.2.5	Which level of government is responsible?	154
2.3	Effect in the legal system	155
2.3.1	Direct effect	155
2.3.2	Horizontal effect	156
2.3.3	The influence of the Convention norms on Dutch law	157
2.3.4	Enforcement and compliance	157
	LITERATURE REFERENCES TO THE REPORT	161

INTRODUCTION

1.1 Brief background

The UN-Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was concluded on 18 December 1979, and it was signed by the Netherlands at the Second World Conference on Women in Copenhagen in 1980. There was a considerable period between the signing and the final ratification in August 1991, by which the Netherlands became an actual party to the Convention. The draft Ratification Bill was submitted in April 1985; it was accepted by the house of Representative of Parliament in July 1990, and by the Senate in July 1991. The primary reason for the long delay was the difficult realisation progress of the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, AWGB). The parliamentary debate on the draft Ratification Bill opted for a gradual process in the realisation of the obligations under the Convention, rather than for a deadline. The focus was on a dynamic interpretation, “because”, as the government said, “interpretations of the content of the obligations under the Convention could change with time and would then demand a contemporary implementation.”

A Human Rights Convention requires periodic reports be made to the relevant Convention committee. In the case of the Women’s Convention, it is the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW). It emerged during the parliamentary discussion on the Convention in 1990 that the House of Representatives did not simply want to take note of the reports to CEDAW but also wanted to remain involved in the implementation of the Convention itself. In Article 3 of the 1991 Ratification Act,¹ an amendment by members of the House of Representatives Kalsbeek-Jasperse, Groenman and Wiesglas laid down that a report on the implementation of the Convention should be submitted to the General Assembly every four years. The House asked for a national report of this kind with a view to influencing the Country Reports of the Netherlands to the CEDAW Committee. The explanation of the amendment stated that the national report

¹ Kingdom Act of 3 July 1991 for the Ratification of the CEDAW Convention (New York, 18 December 1979), Official Bulletin of Acts, Orders and Decrees 1991, 355.

“should give a true summary of the state of affairs regarding the equal treatment of women in all conceivable areas.”

As the further parliamentary discussion shows, the national report was to have a mainly legal character, directed to the issue of equal treatment. This distinguishes this report from the CEDAW report, which is aimed more at the international community. The Country Report to the CEDAW Committee has to give an insight into all measures taken in respect of all the obligations under the Convention, as well as the progress achieved. The First Netherlands Report to the UN-Committee for the Elimination of all forms of Discrimination Against Women² was published in November 1992; the second report is to be sent to the Committee in the course of 1997 and will then be published.

(...)

1.2 Remit

The Report Committee’s remit was to write a report “outlining the present state of affairs regarding the implementation of the Convention in the Netherlands”. It was also requested to take responsibility for the official report to Parliament and a report on the views of non-governmental organisations. The legal study of the meaning of the Convention for the Dutch legal system was completed in August 1996.⁶ A specific study about the significance of the Convention in the field of healthcare appeared in June 1996.⁷ (...)

1.3 The Report Committee’s interpretation of its remit

The Women’s Convention does not provide a blueprint of an ideal ‘emancipated’ society, but it lays down a large number of measures for eliminating all forms of discrimination against women. The Convention and the associated international development of ideas are to form a guideline for national emancipation policy, and at the same time they can serve as a source of inspiration. However, this demands a clear and coherent view on the significance of the Convention. If this is lacking, then so is the framework to check that the Dutch government is complying with its obligations under the Convention. As the Committee was entering unknown territory with this first national report, it was able to take the opportunity of linking the legal discussion on the meaning of various Convention obligations to the general discussion on the consequences of various forms of Dutch policy to women, including emancipation policy. (...)

2 Ministerie SZW 1992.

6 Hes & Van Vleuten 1996.

7 Holtust et al. 1996.

The Report Committee saw it as its task to continue building on the report *The Women's Convention in the Dutch Legal System*.⁹ The introduction to that explanatory report states that one round is not sufficient to provide a coherent vision of the Convention's significance for the Dutch legal system owing to the large number of views and disciplines involved. Because more than eleven years have passed between the adoption of the Convention (in 1979) and its ratification by the Netherlands, the Report Committee has taken the view that there is now a major need for an authoritative contemporary view of the Convention. This is all the more important because the report *The Women's Convention in the Dutch Legal System* has provided evidence of major legal developments at the international level. During the ratification process, too little account could be taken of this.

The Report Committee has interpreted its task to be twofold. On the one hand, it has clarified the main thrusts of the Convention, and on the other hand it has provided illustrations from a number of policy areas where legislation or policy is still not (or not yet) in line with the Convention's obligations. Where further study or policy is desirable, this is indicated in the conclusions and recommendations. While the decision was made from the start (...) to illustrate the significance of the Convention, the Committee has used a relatively large amount of time and energy in bringing unity into the variety of legal points of view. This legal framework can be taken as a given in future reports, so that they can deal in more detail with actual compliance to the Convention in practice. (...)

1.4 Method and experiences

(...)

1.5 The structure of the report

Chapter 2 discusses the meaning of the Convention according to the most recent understandings. It deals with its objectives and scope, the obligations it imposes on State parties and the operation of the Convention in the Dutch legal system. The possibilities for inspection and compliance and the need for dissemination of the text of the Convention and information on it are also dealt with. This Chapter explains the Convention's main aim in three sub-aims that, taken together, should result in the elimination of all forms of discrimination against women. Chapter 3 and 4 discuss the Convention's consequences for the policy that must be applied to achieve its central aim. Chapter 3 discusses the general part of such an emancipation policy on the basis of the three sub-aims. The Chapter also deals with the organisation of that policy as a precondition for its effectiveness. Chapter 4 considers the policy that should be applied in various policy areas. By agreement

9 Hes & Van Vleuten 1996.

with the Co-ordinating Minister, the Report Committee restricted itself to a number of relevant areas. In this Chapter the Committee has been able to draw on materials sent by the Non Governmental Organisations. The Report concludes in Chapter 5 with general conclusions and a series of recommendations.

THE MEANING OF THE WOMEN'S CONVENTION

In this Chapter, the Report Committee intends to provide insight into the aims and scope of the Convention (Section 2.1). After this, the obligations resting on the government will be clarified (Section 2.2) as will the way in which the Convention affects the legal system in the Netherlands, including monitoring compliance with the Convention (Section 2.3).

Because the statements about these topics in government documents and parliamentary discussions concerning the Bill for the Ratification of the Convention have been largely superseded by insights from recent studies and by the General Recommendations of the CEDAW Committee, a fairly extensive treatment is appropriate here.¹ In the present Chapter, the Report Committee will present clear standpoints in these areas in the hope that this report will, in part, provide guidance for a continuing judicial and political discussion about the content of the Women's Convention.²

2.1 Aim and scope of the Convention

2.1.1 *Background*

The documents relating to the Act for the Ratification of the Convention do not go into much detail concerning the aim and scope of the Convention. For example, the fact that the Convention relates only to discrimination against women was hardly discussed. In the Explanatory Memorandum to the Bill for the Ratification, the government states that eliminating discrimination on the basis of sex was "not yet feasible" within the United Nations.

This interpretation is contrary to the Convention's genesis, which is dominated by the view that the aim of this Convention is to put an end to the inferior position of *women*.

1 General Recommendations of the CEDAW Committee are authoritative interpretations of the Convention, which are discussed in this report in relation to the Convention provisions.

2 In this chapter the Report Committee has relied primarily on scientific analyses, such as the reports of Hes & Van Vleuten 1996, Holtrust et al. 1996, Heringa, Hes & Lijnzaad 1994, Emancipatieraad 1996 and Cook 1994.

The prohibition of discrimination in Article 1 of the Convention should therefore be regarded instead as a more detailed definition than the general prohibitions of discrimination on the basis of sex that are found in other international Human Rights Conventions.³

The government regarded full equality before the law and anti-discrimination legislation as important objectives of the Convention. Ratification of the Convention has taken a long time because the Dutch legislators struggled with the implications of the anti-discrimination provisions in international law, especially the EC Equal Treatment Directives and Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

In the mid-1980s, when the rulings of national and international courts showed that the Netherlands was in default regarding equal and independent social security rights of women, there were even calls to withdraw ratification of the ICCPR.

The ratification of the Convention was long deemed dependent on the adoption of a general Equal Treatment Act (ETA). However, preparations for this Act proceeded slowly due to the extensive discussion of the conflict between the principle of non-discrimination and the right to freedom of religion and education. (Note RH: this was due to the fact that the ETA also covered discrimination on the ground of sexual orientation; however schools wanted to keep the right not to hire homosexuals.) Although implementing a policy of equality before the law was mandatory, this was more difficult than was assumed. As far back as the 1980s, the Netherlands ran up against the international, constitutional and socio-economic context of inequality. The implications of the principle of non-discrimination went much further than had initially been anticipated.

During the discussion in Parliament of the Bill for the Ratification of the Convention, the government emphasised that the Convention concerns not only the legislative branch of government, but also the executive and administrative branches.⁴ The Report Committee endorses this interpretation. The actions the government subsequently took in this regard were limited. Instead of detailing the obligations arising under the Convention, the government referred to its existing emancipation policy. The government measured its actions according to its own intentions and previously-chosen objectives, not according to the general object and purpose of the Convention or the specific significance of its individual provisions.

The object and purpose of the Convention was explicitly used as a basic principle in the Act for the Ratification of the Convention on only a single point: the exclusion of women from military conscription. Because the general aim of the Convention is to improve the position of women, the government considered it superfluous to enter a reservation on this point.

3 Such as the bans on discrimination in Art. 14 ECHR and Art. 26 ICCPR. A description of the discussion about limiting this ban to cover only discrimination against women can be found in Rehof 1993, pp. 42-49.

4 The entire set of administrative instruments can be used to implement Article 5, according to the *Memorie van Antwoord aan de Eerste Kamer* (Explanatory Memorandum to the First Chamber of Parliament). EK, 1990-1991, 18 950 (R1281), no. 72a p. 4.

2.1.2 *The aim of the Convention*

The general aim of the Convention is to eliminate all forms of discrimination against women. This is a mandate to act. Moreover, the Convention does not provide a blueprint for the ideal, emancipated society, but instead prescribes an extensive programme of requirements.

As its point of departure, the Preamble presupposes a situation where there is widespread discrimination against women, which is related in part to the traditional roles of men and women in society and the family. The Preamble assumes that discrimination against women is an infringement of the principles of equal treatment and human dignity, and is an obstacle to improving the welfare of society and the family.

Unlike the prevailing international law that bans discrimination on the grounds of sex, the Convention acknowledges the structurally subordinate position of women compared to men, and deliberately gives protection only to women.⁵

To get a better idea of the substance of the obligations that the Convention entails, it is desirable to split its general aim into three sub-aims. These sub-aims can be derived from Articles 2, 3 and 5. They are

1. Achieving full equality before the law and in public administration.
2. Improving the position of women.
3. Combating the dominant gender ideology.

The three sub-aims are to be understood as follows:

Re 1 Equality before the law and in public administration

The Convention prescribes that State parties should eliminate discrimination against women in all its forms (Article 2 a): their constitutions and other legislation must ensure that women will not be treated differently from men in a negative sense, either directly or indirectly. Direct discrimination is defined as making a distinction with direct reference to an individual's sex or to characteristics that are inextricably linked to an individual's sex.

The legal doctrine on discrimination generally endorses the fact that no exceptions to the prohibition on direct distinction on the basis of a person's sex are allowed, except for the cases explicitly specified in the law or in the Convention. This system can be traced back to the EC Directives and the provisions in the Dutch ETA. In these cases, no objective grounds for an exception can be put forward other than those already specified in the law. If the text of a Convention does not explicitly refer to certain allowable exceptions, any appeal for an exception must be assessed very strictly. Some forms of discrimination

5 In the relevant literature this is sometimes defined as an asymmetrical implementation of the judicial principle of equality; the principle is not applied in a strictly formal sense to all cases, but only offers protection to those groups/individuals who have a structurally disadvantaged position. In this context see especially Loenen 1992, and Loenen 1994. See also: Van Maarseveen, Pessers, Gunning (ed.) 1987.

according to sex are expressly excluded from the Convention's general prohibition on direct discrimination. For example, the Convention requires measures to be taken in the area of prenatal and postnatal care. After all, due to their biological characteristics, special measures for women may be required in order to achieve equality.

An exception of a completely different order concerns taking positive action or pursuing a policy of preferential treatment for women (Article 4 (1) CEDAW). To the extent that rights are exclusively assigned to women in legislation or regulations on these grounds, they are permitted under certain conditions. (See re 2).⁶

Because the Convention aims to improve the position of women, it cannot readily be assumed that it is permissible to achieve equality before the law by lowering general (or male) standards to the disadvantageous position of women (levelling down).

Due to existing social differences between men and women, a sex-neutral legal rule may have a disproportionately adverse effect on women. This is defined as indirect discrimination, unless objective grounds can be provided to justify it. Objective grounds can exist only if (1) the aim of the relevant regulation is not in itself discriminatory and the interests served by the arrangement are sufficiently important and (2) the means chosen are appropriate and necessary for the purpose of actually achieving the aim. It is undisputed that the prohibition of discrimination in the Convention also concerns indirect discrimination.

The government's obligation to implement equal treatment is not limited to legislative activities alone. This sub-aim also includes the elimination of direct and indirect discrimination arising due to actions by the government or government decisions focusing on an individual case.

Re 2 Improving the position of women

The Convention prescribes that the government is responsible for actually realising the social, civil, economic, cultural and political human rights of women (Article 3).⁷

The Convention's non-discrimination principle is more than a guarantee that women will be treated equally in legislation, public administration and legal procedures (the classical component of the principle of equality). It also signifies that the government will do everything possible to put an end to discrimination in society and to the de facto inequalities between men and women (the social component of the principle of equality).⁸

6 Positive action can take the form of a statutory regulation and that of policy measures. As such, it is important in connection with the first two sub-aims of the Convention.

7 As used in this report, the term government also includes local governments. See Section 2.2.5.

8 These two components can be found in many human rights. For example, the right to education implies that the government guarantees that there will not be any unjustified interference with education, but also - and especially - that everyone can actually take part in education. See Coomans 1992. Vlemminx 1996 makes a three part distinction: freedom, protection in horizontal relationships and positive measures. In the relevant literature, the principle of non-discrimination is frequently split up into striving for formal equality and striving for substantive equality, where the delineation between the two concepts is drawn differently. The Report Committee therefore did not want to use these concepts in its discussion of the aims of the Convention.

This means that in a number of policy areas, which are defined in the Convention in great detail, the government must actively promote a situation in which women can exercise these rights in freedom. This policy to improve the position of women can be given shape in two ways.

Firstly, the government must ban all forms of discrimination in society and ensure compliance with this prohibition (Article 2 b and c). In the Netherlands, this has been done, for example, by incorporating anti-discrimination provisions in criminal law, in legislation in the area of equal treatment in employment and by means of the ETA. In this way, the government has imposed the norm of equal treatment and non-discrimination on society in a binding fashion; as a result, the Convention has also made itself felt in relations between citizens.

Secondly, the government must encourage necessary and desirable developments.⁹ Among other things, this means developing emancipation policies, establishing and maintaining a support structure and a ‘national machinery’ (see Section 3.3.3.3), and using the instrument of Gender Impact Assessments (see Chapter 3).

If this sub-aim results in measures that exclusively place women in a favourable (or more favourable) position, such as an affirmative action policy for women in government posts, the reasons for the measures must be explained in detail.¹⁰ Article 4 of the Convention provides guidelines for taking affirmative treatment or positive action measures. Such measures must always be temporary and have the aim of advancing the actual equality of women. General Recommendation 4 of the CEDAW Committee mentions affirmative treatment, positive action and quota systems.

The Convention does not limit affirmative treatment to aims that mirror the presence of males and females in the relevant group. Nor does it exclude regulations where only women are selected. The Convention therefore permits more than is customary in the Netherlands.¹¹

Re 3 Combating the dominant gender ideology

The current gender ideology distinguishes between men and women by attributing different values and qualities to their behaviour, ideas, feelings, value judgements and expecta-

9 This often is called ‘emancipation policy’. This term can also refer to all three sub-aims of the Convention at the same time. When we use the word emancipation policy in this report we refer to this latter meaning.

10 The Report Committee wishes to emphasise that it is incorrect to label all measures under the second sub-aim as positive action for women. See Loenen 1993.

11 Policy in which quotas or target figures are limited to a reflection of the male/female ratio in the professional group is therefore on the cautious side. A regulation such as that on the level of the Kalanke Judgement (ECJ 17 October 1995, No. C450/93) is admissible from the viewpoint of the Convention. See also Section 2.2.4. (Not of the translator: See for a recent interpretation of Article 4(1) CEDAW General Recommendation 25 of January 2004.

tions.¹² This ideology must be exposed, and the exclusion mechanisms to which it gives rise must be combated effectively.¹³

This third sub-aim can be derived from the Preamble and from Articles 5a and 10c. Article 5b also draws attention to the social function of motherhood and the joint responsibility of men and women in bringing up their children.

This obligation is new. Never before in a legal document that focuses on combating discrimination against women has there been so much emphasis on the need to change existing ideas and ideologies, where women are assigned an unequal, subordinate or 'other' role in human life in all its facets (in both the public and private sphere). In this way, the Convention recognises that the unequal position of women is a stubborn phenomenon and that it can only be improved if essential changes take place at the level of gender ideology.

Established or dominant ideas about the role of women, and about what is (or should be) typically male and typically female, permeate the entirety of people's social, economic, cultural, political and personal lives. These ideas define not only the identity of individuals, but also shape virtually all society's structures and institutions.¹⁴ The gender-based structuring of human life is sometimes described with the terms structural discrimination, institutional discrimination or systematic discrimination

One example is the organisation of paid labour. This is organised not only in accordance with a gender-defined gap between paid and unpaid labour, but the way in which paid labour is structured is also based largely on the needs and possibilities of the traditional male role of the full time breadwinner without any care tasks. The structure and length of the workday, the normal working hours per day and per week (where part-time work is viewed as an aberration), the locations where work can take place, the rights and obligations of the employers and employees, all these aspects appear to have a sex-specific character. Paid work is still an area that is totally separate from the care needs of society.

In the report *Ongezien onderscheid naar sekse* (Invisible sex discrimination), the task of the government in this area is described as follows. "For the government this means that it must attempt to break out of the reproduction of these differences in symbols, languages and norms, in institutions and structures, and in behaviours." In the Explanatory

12 *Rapport Interdepartementale Projectgroep Beeldvorming* (Report of the Interdepartmental Project Group on Gender Image Formation) 1996, p. 5. The Project Group uses the term 'traditional gender ideology'; the Report Committee prefers the concept of 'dominant gender ideology'.

13 The concept of sex is frequently replaced by the concept of gender in women's studies and emancipation policy documents. The concept of gender refers not only to biological differences, but also to the social and culturally construed differences between men and women. According to Sevenhuijsen, gender is a 'layered concept', i.e. it has a powerful effect on multiple levels. It operates on the symbolic level, the level of the collective and individual identities and at the level of social structures. See Sevenhuijsen 1996, p. 64 and p.103.

14 This is acknowledged in various documents by the Dutch government. The Report Committee refers here only to the establishment of the Project Group on Gender Image Formation in 1993 and its report published in 1996 (Ministry of Social Affairs and Employment, 1996). In the *Beleidsbrief Emancipatiebeleid 1997* (Policy Paper on Emancipation, published in 1996), the government emphasised the importance of this topic (p. 19). TK 1996-1997, 25 006, no. 1.

Memorandum to the recently approved Equal Treatment (Working Hours) Act, the Dutch government itself indicates that new terminology is appropriate: employees with varying working hours have replaced the distinction between full time and part-time workers. The full time worker must no longer be used as the point of reference.¹⁵

The relationship between Articles 2, 3 and 5

The relevant literature regularly discusses the programmatic structure of the Convention. The Report Committee believes that the programme of the Convention is comprised of the further development and realisation of the sub-aims discussed above.

Aside from their individual significance, Articles 2, 3 and 5 will have an optimal effect due especially to their mutual relationship. After all, achieving complete equality before the law and implementing a policy to improve the position of women cannot contribute effectively to eliminating all forms of discrimination against women if ideologies about masculinity and femininity that oppress and exclude women are not subjected to discussion. If this sub-aim is neglected, the exclusion mechanisms affecting women will continue to exist.

On the other hand, few results can be expected from the attention focused on gender stereotypes or image if this is not supported by concrete measures. Such measures may include implementing strict rules for the male/female ratio in advisory bodies, or providing financial support for women's health care with the aim of integrating insights from this endeavour into regular care.

The significance of Article 5

By discussing the three sub-aims separately, the Report Committee wants to emphasise that Article 5 of the Convention, in addition to Articles 2 and 3, has independent significance.¹⁶

According to Article 5, the government cannot stop after completing the first two sub-aims. A fundamental change of society is essential, i.e. a change in ideas, values and structures based on the female perspective. Article 5 can be read as an exhortation to determine the exact content and scope of concepts and assumptions that are used in law and policy. If this does not happen, the implementation of full equality before the law and a policy to improve the position of women could sometimes have contrary effects. The concepts and assumptions that are currently being used are often coloured by gender stereotypical relationships and expectations. If these concepts and assumptions are included

15 TK, 1995-1996, 24 498, no. 3 p. 2. For that matter, this was not lived up to in the regulation for overtime work supplements. According to the law, part-time workers do not have to be paid an overtime supplement if they work less than 40 hours. For a more extensive discussion on this issue, see Holtmaat 1996.

16 The Convention begins with the obligation to provide equality before the law as an established fundamental rights principle. After this, the obligation to implement an active policy to improve the position of women is elaborated. It is only then that combating the dominant gender ideology is discussed. The Report Committee believes that no order or priorities were established in this process.

unchanged in new legislation or new policy, this will lead to unwitting and unintentional reproduction of gender differences.¹⁷

The same danger threatens when policy directed at improving the position of women is not carefully and deliberately included in general policy ('mainstreaming').

The implementation of full equality before the law or of measures to improve the position of women must not lead to a disregard of biological differences or to women only being given the opportunity to reach the same position as men. This negates the experiences and needs of women who cannot be fitted into the male model of life that has been dominant until now. Article 5 offers an outstanding opportunity to place pluriformity or diversity at the core of the policy to improve the position of women.¹⁸

The Article does not provide standards which men and women must satisfy – with the exception of breaking through the traditional role division. As a result, it creates the possibility that dominant male norms are not assumed to be self-evident. In a number of areas, this can mean that it is not equal rights or equal opportunities that must have priority, but that different (or other) rights must be developed or different opportunities must be offered.

2.1.3 The scope of the Convention

Article 1 defines discrimination as making a distinction as a result of which women's human rights or their rights in any other area are impaired or nullified. Seen in this way, the Convention has a very broad scope. This implies that discrimination against women is regarded as a 'total phenomenon' which occurs as a complex and structural problem in all aspects of human existence. The Convention intervenes in not only the relationships between government and citizens (the vertical relationships), but also the relationships between citizens themselves (the horizontal relationships).

The literature on women's emancipation¹⁹ and on the CEDAW Convention²⁰ argues that the Convention also covers the private lives of individuals.²¹ The Report Committee agrees. It follows from this that the government's interpretation at the time the Bill for the Ratification of the Convention was debated in the First Chamber of Parliament, i.e. that the Convention does not concern the private sphere, was incorrect.²²

17 See Holtmaat 1988.

18 See Lijnzaad 1994. Since 1985, pluriformity has been the aim of the emancipation policy of the national government. See also the *Beleidsbrief Emancipatiebeleid 1997*.

19 See notes 6 and 7 in Chapter 1, and the literature references in these books. (I.e.: Hes & Van Vleuten 1996 and Holtrust et al. 1996.)

20 In General Recommendation 19, violence against women within the family is cited as one of the most treacherous forms of violence against women. General Recommendation 21 states explicitly that family life is covered by the Convention; statutory rights, responsibilities and actual relationships in family life must be safeguarded against discrimination against women in the broad sense of the Convention.

21 In the following, the terms private sphere and private life are used interchangeably.

22 EK, 1990-1991, 18950 (R 1281), no. 72a p. 9.

There is a great deal of confusion about the concept of the private sphere or the private lives of individuals, and about the question of the extent to which the government is allowed to, or should, intervene on the grounds of Convention obligations and fundamental rights. The distinction between a public and a private sphere can be applied in two different ways.²³

Firstly, the distinction can be used to denote the difference and the boundary between the state sphere and civil society. This distinction concerns the difference between governmental actors and nongovernmental actors. Secondly, the distinction can be used to denote the difference and the boundary between the market and the family. The market is defined as public productive life, or the world of paid labour and commerce. The family stands for the private affective lives of individuals, the home environment or the personal sphere.²⁴

By applying the principle of non-discrimination not only to the government itself, but also to horizontal relationships,²⁵ the Convention undoubtedly aims at non-governmental actors as well. Without question, various articles in the Convention and several General Recommendations of the CEDAW Committee concern the relationships and responsibilities within the family.

The discussion on this topic concerns the extent to which the government, while implementing the Convention, can intervene in the 'private affective lives' of its subjects. In other words, can the Dutch government carry out these Convention norms without coming into conflict with the constitutional protection of private life?

The Dutch government has an increasing influence on the private lives of its citizens by means of all kinds of legislation and facilities. Parental visiting rights, the regulation of working hours in employment legislation, the Social Assistance Act and compulsory education are a few examples of how the government can deeply affect the family lives of individuals.²⁶

The boundaries that limit where the government can and cannot interfere have been frequently drawn in the past on ideological grounds. This often amounted to the interests of men in particular being spared in the patriarchal society.

In recent decades, the women's movement has brought these boundaries up for discussion. For example, by discussing violence and rape in the family and the consequences of the economic independence of women and children, relationships within the family have become a public matter. The growth of childcare, the increasing political interest in unpaid

23 See Van den Brink & Loenen 1996, p. 25.

24 Van den Brink & Loenen 1996 (p. 25) derived this distinction in turn from the American feminist legal scholar Francis Olson (Olson 1993).

25 For an example, see Article 2: States parties ... agree ...(e) to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; ...

26 Bussemaker 1995.

care tasks and the current legal discourse on this topic show that major shifts have occurred in the thinking about the boundaries between the public and private spheres.²⁷

The way in which these boundaries were, and are, established, has to do (among other things) with the degree with which a specific problem can be seen as a 'natural' factor. As a result, it would appear that the government could not have any influence on such problems. The biological gender as a determinant of human behaviour is one of the 'natural' factors that should lie outside the sphere of influence of the government. According to this point of view, the government should not attempt to influence how male and female individuals behave.²⁸

It is especially important in relation to the third sub-aim that the government acknowledge that there are no 'natural' factors in this regard, and that the boundaries between what is (or what should be) private or public are socially and culturally determined. By means of the norms in Article 5, the Convention places a weighty mandate on the government to continuously bring these boundaries up for discussion.

The Convention refers to various policy areas that can influence the way in which people relate, or come to relate, to each other in their personal relationships (see Section 4.5). The interest that migrant women and girls have in equal opportunities in education, for instance by maintaining compulsory education, can serve as an example of such a policy area. Although compulsory education erodes paternal power and the parental freedom – based on religious or cultural grounds – to prevent girls from participating in education, few people in the Netherlands would consider this measure as an unjustified violation of the private sphere.²⁹

The boundaries of government interference in private life are established in the classical civil rights.³⁰ These civil rights have their origin in protection against the power of the government to prevent misuse of power and excessive influence on the choices and lifestyles of individuals. The social civil rights have added an extra dimension to the protective and restrained role of the government, i.e. that of supporting the individual during his or her own development.

27 The Emancipation Council has recently focused a great deal of attention on this topic. The Council intends to publish a report on this topic in the spring of 1997. See the theme issue of the periodical *Nemesis*, 1996 no. 3 concerning the legal discourse in family law on unpaid care tasks.

28 Van den Brink & Loenen 1996 (pp. 27 and 28) cite the example of parental leave: the government should not exert any influence on whether or not men actually take this leave, or whether or not parents maintain the stereotypical role division. However, by choosing a specific form of parental leave (i.e. a short-term and unpaid leave), the government does indeed influence the way in which roles in the so-called private sphere are divided between men and women. For that matter, the government as an employer has chosen long-term paid (or partially paid) parental leave.

29 See Mulder 1995, p. 68: "Cultural customs, norms and values and institutions that are diametrically opposed to the principle of equal treatment of these women, or which obstruct their free development, must therefore be categorically rejected."

30 The private lives of citizens are protected by, among other things, Articles 10-13 of the Dutch Constitution and Article 8 of the European Convention on Human Rights (ECHR).

Because the classical and social civil rights are becoming increasingly interwoven, the contrast between the public sphere and the private sphere has become much less well-defined.³¹ However, this does not mean that the civil right of ‘protection of private life’, with its classical meaning of protection against government interference, is no longer assigned any significance.³²

Implementing a policy to improve the position of women and carrying out anti-discrimination legislation – also if this establishes norms that intervene in the private lives of people – does not in itself have to come into conflict with this constitutional protection. It is only when the government exceeds certain boundaries as part of its monitoring activities that there can be a conflict.

Another boundary to government interference in private life has to do with the fundamental discussion about the desirability or undesirability of the continually more far-reaching legal discourse on human social interaction. This discussion is also taking place in the women’s movement. There appears to be a consensus that the shift of the boundary between public and private life must not go so far that public norms and public expectations determine the entire personal lives of individuals. The norms that apply to social transactions cannot be made equivalent to norms that apply to the most personal relations between people.³³

An example of a situation in which this friction is felt quite sharply is the obligation to seek paid employment which has been imposed by social assistance legislation on single parents with young children.

2.1.4 The Convention and the changing society

The Convention requires governments to implement equality before the law, to work on improving the position of women and to break through the culture that is based on traditional role patterns and prejudices. The central point is to create the freedom to make one’s own choices, to strive for a society with behaviour alternatives for women and men.

The State parties obligate themselves to contribute continuously to this dynamic process of change. The Convention may be gradually implemented on a part-by-part basis. After all, with the passing of time, new analyses and measures are continuously necessary.

The change process is even more dynamic because individuals and groups in society are structuring their lives in different ways. They do this at differing rates and following different paths. Generation differences, ethnic differences, differences in social environment, education and access to the labour market all affect the starting positions and possibilities

31 Cook 1994 gives the example of a positive government obligation to protect family life: a divorce must be attainable with government-financed legal assistance in the case of an alcoholic spouse (European Court of Human Rights: *Airey versus Ireland*, decision based on Article 8 ECHR).

32 Rights such as the inviolability of the home and the protection of the confidentiality of the mail have not lost any of their value.

33 Van Asperen 1991.

for change. A dynamic situation is also created by changes in technological and economic conditions.

There must be good channels between society and government to ensure that the position, needs and viewpoints of all women are taken into account in policy. Moreover, research and international exchange remain important instruments to understand the change process, which has a world-wide dimension, and to conceive of adequate government interventions.

The complexity of the context in which the Convention will be implemented is not, however, a licence for a type of implementation that would be limited to creating minimal conditions and a minimal rate of change. But it does require permanent attention to the process of change in society.

An example of the above is the increasing attention that has been paid in recent years by the women's movement and the government to the development of a policy for increasing behaviour alternatives for men. This includes the implementation of parental leave and other career interruptions, and the right to part-time work. Based on a dynamic interpretation of the Convention, such a shift of attention could lead to new types of implementation measures. A pre-condition for carrying out such a policy that also focuses on men is – in the light of the Convention – that an improvement in the position of women is also intended.

The so-called 1990 Measure is an example of a differentiated policy concerning the position of women, which takes account of the possibilities of the various generations. The same applies to the intended elimination of breadwinner's provisions in tax legislation.³⁴

This type of measure theoretically reduces the financial support for the traditional, care-giving role of the woman and, in the light of the Convention, is therefore acceptable only if it does not result in a worsening of the position of women. This is only the case when the measure links up with the changes in behaviour of men and women and with concrete changes in society that have already taken place.

In the example of the 1990 Measure, this means that there must be actual equal opportunities on the labour market. In the other example, this means that the care needs of society must be adequately provided for without this continuing to lead to the economic dependence of the caregiver on a partner.³⁵

In recent decades, age criteria in legislation and policy have been increasingly applied in the Netherlands. A study of the relevant literature shows that there is a relationship between age as a structuring principle and the position of women in society. The use of

34 The discussion took place as a result of the Member's Bill of De Korte and Van Rey (Members of Parliament), TK 1992-1993, 23 231. (Note RH: The 1990-measure entails a gradual abolishment of breadwinner provisions in social security for generations of people who are born after 1990.)

35 The Women's Alliance, other women's organisations and the Emancipation Council are therefore critical of these types of measures.

age criteria can have various effects on men and women, so that the use of these criteria can result in indirect discrimination against women.³⁶

In the anthology *Zwarte, migranten- en vluchtelingenvrouwen en het VN-Vrouwenverdrag* (Black, migrant and refugee women and the UN Women's Convention), the emancipation of women from non-dominant population groups is placed in the collective framework of the Race Convention and the Women's Convention. Human dignity is the basic principle of both Conventions. A consequence of this notion of human dignity is the fundamental right to the formation of one's own identity. The identity formation of every individual begins with one's own cultural heritage and takes place in relation to the entire society within which one moves.³⁷

The cultural background of individuals will partly determine the way in which they use the new freedoms in the changing society. The cultural background of black, migrant and refugee women is much less known and is much less understood than that of the traditionally existing communities in a country. The creation of a multicultural society, as a significant aspect of the context of Convention implementation, means that the immigrant cultural communities – in addition to the native ones – will be acknowledged and taken seriously.³⁸

2.2 Obligations for the government

During the ratification procedure, the government suggested that State parties must eliminate discrimination with all means available to them.³⁹ However, no concept of the means to be used can be derived from the explanation in the Bill for the Ratification of the Convention. The government describes applicable legislation, bills, policy and planned policy based on the Convention Articles. Sometimes a situation of inequality is ascertained without any policy plans concerning the matter being suggested, such as the lesser opportunities for women to obtain bank loans, mortgages and other forms of financial credit.⁴⁰

2.2.1 All appropriate measures

The way in which the aims of the Convention should be achieved has been worked out in a series of Convention articles that concern one or several related policy areas such as labour, healthcare and education. Every article states that all appropriate measures must be taken in the relevant area. Some of the articles then list concrete measures, which have

³⁶ See Emancipatieraad 1995.

³⁷ Mulder 1997.

³⁸ The government acknowledges the great importance of the fact that we live in a pluriform and multicultural society. See the *Beleidsbrief Emancipatiebeleid* 1997.

³⁹ TK 1984-1985, 18950, *Memorie van Toelichting* p.3.

⁴⁰ TK 1984-1985, 18950 *Memorie van Toelichting* p. 26, elaborated in: TK 1995-1996, 24 406 no.2, Section 3 under b. Recently, policy has been made on this point. See Ministry of Economic Affairs 1996.

been worked out in a series of General Recommendations of the CEDAW Committee. The Convention does not provide an exhaustive account of measures.

From the repeated phrase, “all appropriate measures must be taken”, it follows that first an optimal effort is demanded, and second that there must be measures which result in the intended effect.

A broad range of means can be used for this purpose; these include economic instruments such as subsidies and tariffs, the instrument of legislation and regulation (including enforcement) and the instrument of information transfer, which includes all activities focusing on communication.

This means that they must be used in any case as soon as it is plausible that they are essential for an optimal result.

The suggestions from the CEDAW Committee are very important for answering the question: which measures can be considered to be appropriate? The Committee's ideas are clearly visible in the discussion from the first (or initial) Dutch Country Report on the Convention. At that time, the CEDAW Committee proposed in its Concluding Comments that the Dutch government should aim for more result-oriented measures concerning the employment of women. Such measures included positive action, equal pay and childcare. The Netherlands was then supposed to report the results of such measures to the Committee.⁴¹ The Report, *Het Vrouwenverdrag in de Nederlandse rechtsorde* (The Women's Convention in the Dutch legal system) ascertained, based on the discussion concerning the first Country Report on the Netherlands, that the appropriate measures had to be based on a solid analysis of the position of women and that data about the effectiveness of the measures taken must be made available.

Regarding general government policy, the effect of this policy on the position of women must be acknowledged. In General Recommendation 6, the CEDAW Committee proposed establishing and strengthening a ‘national machinery’, institutions and procedures to provide advice about the expected effects. With the term national machinery, the Committee means infrastructural facilities within the governmental apparatus for the development of policy to improve the position of women. To benefit such an effective, advisory ‘national machinery’

- there must be intensive monitoring of the position of women,
- all causes of discrimination must be ascertained and
- all institutions must be supported when developing strategies and measures to eliminate discrimination.

The concept of ‘appropriate’ therefore implies a permanent investment in very specific pre-policy research, evaluations and advisory services (Gender Impact Assessments) and monitoring and evaluating the results of measures. Target figures are one outstanding means to operate in a result-oriented fashion. Another important means is an open link and mutual

41 See Appendix to TK 1993-1994, 18950 (R 1281), no. 14.

interaction between the women's movement and the government with the aim of promoting the necessary policy input and innovation.

The influence of the women's movement can increase the effectiveness of the policy and therefore must be part of the preparations to determine all appropriate measures; this was a conclusion in the first Dutch Country Report to the CEDAW Committee.

2.2.2 *Effort and result*

The aim to eliminate all forms of discrimination against women entails an obligation to take concrete action. This means much more than an obligation to exert effort. The Convention focuses on bringing about concrete results, i.e. actually improving the position of women.

During the parliamentary discussion of the Bill for the Ratification of the Convention, there was an incorrect impression that the realisation of the Convention, both as a whole and regarding the individual obligations, would largely be left to the policy freedom of the State parties.⁴² This idea urgently requires correction on both the government side and the parliamentary side. The Convention comprises a larger number of more concrete obligations than had been assumed during the parliamentary discussion of the Bill for the Ratification of the Convention.

The interpretation of individual articles and parts of articles must be in agreement with what is called the 'object and purpose' of the Convention.

It is striking that no distinction is made between civil/political rights and social, cultural and economic rights; in the Convention these rights flow into each other and supplement each other. This is related to the fact that the rights are described from the position of women for whom this distinction is much less relevant.⁴³ For the interpretation, one can refer to the Convention text itself, which first formulates the Convention obligations in general terms (Articles 1 through 5) and then in thematic terms and for individual policy areas.

In the relevant legal literature, specific obligations have meanwhile taken concrete form, and the CEDAW Committee has also more precisely defined several Convention obligations in its General Recommendations.⁴⁴ The Convention offers limited policy freedom, which varies from provision to provision and which depends on the tangibility of the provision in question. The more precise and concrete the formulation, the less policy freedom the government has during implementation, and the greater the judicial enforceability.

42 This misconception arose from the idea that the Convention would contain only instruction norms that would serve as a guideline for government policy, where the government would be given maximum policy freedom.

43 There is a reference to a general 'Bill of Rights' of women that is contrary to the classical categories of human rights into two separate categories of rights. The enforceability is therefore unrelated to the category to which the relevant right belongs.

44 Refer to the literature cited in note 2 from this chapter. In addition, two working documents in the report from Hes & Van Vleuten 1996 are important: Ascher-Vonk 1994 and Betten & Westerveld 1994.

For example, the provisions on participation (Article 7) and parts of the provisions on education (Article 10) and employment (Article 11) are formulated in such a concrete fashion that they do not allow any space to the government. At the same time, this means that these provisions are judicially enforceable.

2.2.3 *Gradual implementation*

The State parties are under the duty to achieve demonstrable progress when implementing the Convention; the CEDAW Convention requires a periodic report about whether or not there has been progress. The evaluation is relative; more policy and different policy is expected from a developed country than a developing country. As far as the Convention is concerned, the developed countries must apply mutual 'standards of comparison'. In other words, the position of women in the Netherlands should be compared with other developed countries such as the Scandinavian countries, England, Germany and France, but not with South American or Asian countries.⁴⁵

Because the legislator was aware of the dynamic character of the developments that the Convention aims for, no final deadline for approval was named. On the other hand, the time that a State party is allowed to meet its Convention obligations in good faith can not be arbitrarily extended by appealing to this dynamic character. The principle of 'good faith interpretation' is opposed to such arbitrary extensions. The possibility of implementation must be evaluated for each Convention provision and with an eye to the mutual coherence of the Convention obligations. Of course, some difference in insight is possible, but in general the Convention contains clear political tasks that must be commenced with appropriate care and appropriate speed.

In any case, it is essential that implementation is begun. The government should have taken the initial steps on the way to implementing the various Convention obligations. Moreover, the minimum norm, which is at the heart of the individual provisions, must be assured from the beginning. Both of these requirements can be tested in court, and the State of the Netherlands can be held accountable in an international forum, such as the Human Rights Committee of the United Nations or the CEDAW Committee.

In concrete terms this means that the obligation to include bans on discrimination in legislation must be followed in any case. Legislative activities that intend to eliminate direct or indirect discrimination in legislation cannot be delayed. Such activities include the completion of the legislative operation *Anders geregeld* ('Different regulations'; i.e. different for men and women) and the modification of legislation with an indirect discriminatory character.

In addition, an immediate beginning must be made with the implementation of those parts of the Convention that are formulated in such a clear and precise fashion that no one can doubt their meaning. Such measures include establishing a network of childcare

⁴⁵ In this regard, the Convention links up with the practice of the European Social Charter. See Hes & Van Vleuten 1996, p. 191.

facilities (Article 12c) and creating an adequate ‘national machinery’ (General Recommendation 6).

Following the accession to the Convention, an appeal to scarce means to delay or avoid the realisation of specific obligations will no longer be possible. A State party can be held responsible for the measures that it should have taken in view of its economic position. It is clear that measures which in practice mean a worsening of the position of women are in conflict with the Convention.⁴⁶

The degree of equality allowed by the Convention is essentially tested on a substantive basis. A great deal depends on the nature of the wording of the provision and on the framework within which the provision is implemented. This means that the courts will be able to test the policy or the lack of policy under specific conditions. In any case, the term within which gradual realisation is possible must be reasonable. When making a judgement, it is plausible that the courts will take into consideration the fact that the Netherlands has spent more than 10 years in the ratification procedure.⁴⁷

2.2.4 *The relationship with EU law; the example of positive action and affirmative action*

The Women’s Convention contains a flexibly formulated possibility to institute affirmative action (Article 4). Although the Convention does not generally obligate State parties to institute affirmative action, under certain conditions this measure is part of the package of ‘all appropriate measures’ that may be essential in a specific policy area or specific sector. At the same time it is important to not allow the more flexible possibilities of the Women’s Convention, and also the current painstaking Dutch policy, to be excessively limited by a formal legal approach to equality. The current debate in the European Union about a possible amendment to the second EC Directive concerning the equal treatment of men and women – resulting from the decision of the Court of Justice of the European Communities in the case *Kalanke-Bremen* – shows that this danger is not imaginary.⁴⁸ The Dutch government, represented by Minister Melkert of the Ministry of Social Affairs and Employment, stated that it attaches great value to the enforcement, or the possibility of enforcement, of Dutch policy. A *Cabinet Memorandum* on this matter was approved by the Second Chamber of Parliament.⁴⁹ The Report Committee supports the position of the Dutch Government in the European discussion, although we believe it could be some-

46 See Coomans 1992, pp. 42-43 and “Limburg Principles”, UN Doc. E/CN 4/1987/17 published in *Human Rights Quarterly* 9 (1987).

47 A role has been played in this long approval process by the fact that the Parliament wanted to realise as many Convention obligations as possible before actually approving the Convention. Member of Parliament Kalsbeek in *Handelingen II*, 26 June 1990, TK, p. 4620. *Goedkeuringswet*: TK 1986-1987, 18 9050 (R 1281).

48 Court of Justice of the European Communities, 17 October 1995: *Kalanke-Bremen*, C-450/93.

49 Letter dated 21 December 1995 from the Minister of Social Affairs and Employment and others to the Chair of the Second Chamber of Parliament, TK 1995-1996, 24564, no. 1.

what more assertive.⁵⁰ In this context, the Committee quotes with permission from the written contribution of the Equal Treatment Commission to its inquiry about the implementation of the Convention:

“The developments in the area of equal treatment appear at the Community level to have stagnated somewhat. A recent study has shown that actual enforcement of equal treatment norms in the Member States has resulted in many problems. The Netherlands could, partly in view of the obligations resulting from the Women's Convention, also make efforts at this level to bring about change. This obligation to take action can also be satisfied by providing a Dutch contribution to the development of case law by the European Court of Justice concerning cases pending before the Court; strikingly little use has been made of this possibility to intervene. (Note RH: by way of sending an opinion on behalf of the government.) By making such a contribution, the Netherlands could participate in an interpretation of Community law that is in accordance with the CEDAW Convention by involving the Convention in the interpretation.”

The Report Committee concurs with the above recommendation. An active approach within the EC is compatible with the obligation from the Women's Convention to achieve optimal regulations for equal treatment and to take all appropriate measures that can lead to the elimination of discrimination, including horizontal discrimination.⁵¹

2.2.5 Which level of government is responsible?

It has emerged from the literature on international law that the government as a whole, with all its institutions and agencies, is responsible and can be held responsible. The national government can give shape to its concern for the implementation of the Convention in many ways, such as by having concrete aspects of Convention obligations be implemented by local governments or government agencies.

This does not take away from the fact that the national government is primarily responsible, and remains primarily responsible, because it acts on behalf of the Netherlands as one of the State parties to the Convention. In this way the national government must monitor progress under all conditions, maintain an infrastructure for appropriate implementation, must administer and coordinate, and must report to the CEDAW Committee

During the discussion of the Bill for the Ratification of the Convention, the government was of the opinion that it was scarcely responsible for the emancipation content of the policy of local governments. It rejected a proposal from D66 (the Liberal Democratic party)

50 See the *Verslag van de Sociale Raad*, 2 December 1996, enclosed with the letter dated 13 December 1996 sent to the Chair of the Second Chamber of Parliament. TK 1996-1997, 21501-18, no. 60, Section 4: *Richtlijn Kalanke* (equal treatment of men and women concerning access to the labour market).

51 From this perspective the Report Committee urged that the coordinating Minister for Emancipation Policy ensure that the Netherlands in March/April 1997 provide an oral contribution to the hearing of the Court of Justice of the European Communities of the Marschall case, in which, as a sequel to the Kalanke case, a preliminary decision with respect to the application of affirmative treatment of women must be made.

to negotiate with local governments about its obligations under the Convention. The Report Committee believes the government was too restrained on this point.

2.3 Effect in the legal system

After the ratification procedure in the 1980s and the Act for Ratification of the Convention came into force in 1991, there has been a significant shift in ideas among international law experts and in the practice of law about the way in which the Convention or individual Convention provisions affect the Dutch legal system. In the Explanatory Memorandum to the Bill for Ratification of the Convention, the government still held the opinion that there could scarcely be any direct effect in view of the fact that the Convention requires a gradual realisation of its aims. At the present time, fewer restrictions are assigned to the possibility to have direct effect.⁵² A significant consensus has been attained in recent decades on the issue of the extent to which the Convention aims to affect horizontal relations.

2.3.1 *Direct effect*

Will it be possible in the future, or near future, to have the courts compel the Dutch government to provide sufficient childcare on the basis of the Convention?⁵³

Such a question reaches deeply into the issue of the direct effect of the Convention. Whether or not there is a direct effect is in the end entirely up to the judgement of the courts. The courts tend to apply fundamental Convention norms directly or to not enforce Dutch legislation if there is a conflict with Convention rights – especially if more time has passed since the signing or the date the document went into force.⁵⁴ An analysis of the relevant jurisprudence shows that Dutch courts have developed various routes along which they can assign a broad application to Articles 93 and 94 of the Dutch Constitution.⁵⁵ The courts derive their instructions from the jurisprudence of the Supreme Court of the Netherlands and from interpretations developed by international courts or supervisory bodies (like the CEDAW Committee). The courts also use insights that have been developed

52 See the comments on the individual Convention articles in Heringa, Hes & Lijnzaad 1994.

53 Dierx 1996.

54 Compare the developments concerning Article 26 of the ICCPR, which initially also did not have a direct effect, but which gradually acquired this due to court judgements.

55 See Heringa 1990.

Article 93 of the Constitution: Provisions of conventions or treaties and of decrees of international law organisations, the substance of which is obligatory to all parties, have a binding force as soon as they are officially announced.

Article 94 of the Constitution: Statutory provisions that are valid in the Kingdom of the Netherlands are not enforceable if this enforcement is not compatible with all binding provisions of conventions and decrees of international law organisations.

in the literature on international law concerning various types of norms in international Human Rights Conventions and their implications for national legal systems.

The instructions from the Supreme Court are very generally formulated and in themselves do not prevent assigning a direct effect of the Women's Convention or individual articles from the Convention. The court review can vary from a marginal review, where a large degree of policy freedom for the government implementing the Convention is accepted, to a very strict review, where virtually no deviation from the Convention's norms is allowed.

Because it is generally accepted that the Women's Convention comprises obligations to attain results, a strict court review appears obvious, also in areas where policy freedom concerning the choice of means to implement the Convention is assumed.

According to the degree the government is in default concerning the implementation of Convention provisions, or the longer it remains in default, it can be held increasingly responsible by the courts for this default. In the meantime, experts in international law have made an estimate for various Convention provisions of the probability that these provisions can or will be directly applied if they are invoked during judicial procedures.⁵⁶

According to expectations, in the near future more and more case law will be elicited on the basis of which the magnitude of the government's responsibilities can be mapped out more clearly.

2.3.2 *Horizontal effect*

The possibility of there being a direct effect of specific Convention provisions is usually emphasised when the vertical relation between government and citizens is addressed. This is significantly more difficult concerning the horizontal relations between citizens themselves. With respect to norms, after all, the majority of Convention provisions are directed at the government.

However, Article 2 of the Convention stipulates that the duty rests on the government to actively ensure that the principle of non-discrimination is followed, also in the mutual relations between citizens. As a result, the national government is required, where possible, to assign a horizontal effect to the Convention. To the extent the principle of non-discrimination is directly threatened, a direct effect must be derived from the norms of the Convention, also between citizens themselves (see Section 2.1.3 on the scope of the Convention).

56 See the comments on the individual articles of the Convention in Heringa, Hes & Lijnzaad 1994.

2.3.3 *The influence of the Convention norms on Dutch law*

The Convention norms may also affect national law directly or indirectly.⁵⁷ This can happen because the courts, when supplementing concepts in Dutch law, take account of the Convention norms and ‘read them in’, as it were, into national law. A faithful Convention implementation requires this openness from the Dutch legal system for the interpretation of its own law in accordance with the Convention. It is especially the so-called open concepts in law, such as reasonableness and fairness, or good employment practice, that can serve as a vehicle with which the Convention is brought into force in legal practice. For example, the norm derived from Article 11, which states that women have the right to special protection against hazardous work during pregnancy (Article 11, 2, d), could stipulate that an employer who neglects to take adequate measures in this regard does not satisfy the norm of ‘good employment practice’ from the Civil Code.

A concrete example of the effect of applying the instrument of interpretation in conformance with the Convention is the Dekker-VJV judgement of the European Court of Justice. In this judgement it became clear that Dutch law with respect to tort is substantively determined by the ban on discrimination from the second EC Directive on the equal treatment of men and women.⁵⁸

This form of ‘interpretation in accordance with the Convention’ can play a role in both vertical and horizontal relations. If this mechanism is to maintain its optimal effect, then the courts must be well informed about the norms established by the Convention. This requires that the courts be adequately informed about such aspects as the content of the new General Recommendations of the CEDAW Committee.

2.3.4 *Enforcement and compliance*

Various instruments are important for enforcing the Convention: reviews of legislation and policy, progress reports, court reviews and information provision.

Reviews of legislation and policy

The Convention is directed initially at the State parties. This means that enforcement is primarily in the hands of the government itself, which can continuously include a review of legislation and policy as it is formed to assure that it is in accordance with the Convention. The legal literature is clear on this point; the principle of equality, which is worked out by the Convention with respect to discrimination against women, weighs so heavily that every deviation from this principle in legislation or regulations (proposed or in force)

57 In the relevant literature it is assumed that the same can happen with respect to international law. This mechanism (the inclusion of provisions in another treaty or convention) plays a role, for example, with respect to Article 26 of the ICCPR; this general, non-discrimination provision can acquire more substance afterwards due to the much more detailed provisions in the Women’s Convention.

58 HvJ van de EG, Dekker-VJV Centrum, 8 Nov. 1990, RN 1991, no. 132 and HR Dekker-VJV Centrum, 24 June 1988, NJ 1988, 1002, as well as HR 13 Sept. 1991, RvdW 1991, 193.

must be explained in the explanatory memorandum attached to such legislation or regulations.⁵⁹ The explanation and/or justification of a distinction that is made to the disadvantage of groups or individuals who are systematically being discriminated against, and partly as a result are even more vulnerable, must meet more rigorous demands than the explanation and/or justification of a distinction that is to the disadvantage of dominant groups (Caucasians, men, heterosexuals).⁶⁰ The courts are authorised to review legislation and regulations on this point. By not providing an explanation, or by providing an inadequate explanation, the legislator runs a certain risk:

“If an inadequate explanation of unequal treatment cannot be found in the judicial history and is not put forward in the court procedure, and if the court, moreover, rules that such an explanation ‘cannot be indicated’ (see HR 30-9-1992, AB 1993, 2), then the court can decide to not enforce the relevant provision (...).”⁶¹

This also applies to deviations from the Convention. Therefore the Explanatory Memorandum for every Bill for which this is relevant must contain a section that explains why the proposed legislation is in agreement with the principle of legal certainty, the principle of equality and other constitutional or civil rights.⁶² This obligation to provide an explanation could be included in Chapter 4 of the *Aanwijzingen voor de regelgeving* (a handbook for government officials about how to draft legislation). Regarding the Women's Convention, there could be a reference to the checklist that is included in the conclusion of the Report *The Women's Convention in the Dutch Legal System*.⁶³ For that matter, if government legislative officials are expected to conduct this review, it is important that familiarity with the content and scope of the Convention is promoted within the national government.

During the review, which according to the *Aanwijzingen voor de regelgeving* must be conducted beforehand concerning the question of whether or not government regulations are desirable (and if so, how desirable), the necessity or desirability of making a Gender Impact Assessment (in advance) can be brought up for discussion in several places in the Explanatory Memorandum to a Bill.

Finally, during the development of monitoring as a policy instrument, it is important that the obligations from the Convention are emphatically converted into points of reference and elements of the framework for legal review.⁶⁴

59 See Waaldijk 1994, p. 157 and p. 345. See also Hes & Van Vleuten 1996, p. 116.

60 Waaldijk 1994, p. 347.

61 Waaldijk 1994, p. 355.

62 Waaldijk 1994, p. 382.

63 Hes & Van Vleuten, pp. 238-239. It is also important to explicitly name the Women's Convention as part of the explanation of *Aanwijzing 18*.

64 See *Beleidsbrief Emancipatiebeleid 1997*, Section 1.3.

Progress reports

At the international level, compliance with the Women's Convention is promoted by the obligation to submit a Country Report every four years to the supervisory committee of the CEDAW (= CEDAW Committee). This obligation is included in Article 18 of the Convention. The report to the CEDAW Committee must indicate which legislative, judicial, administrative or other measures have been taken to implement the Convention and what progress has been made with respect to the previous Report. The Netherlands produced its first (initial) Country Report in 1992.

From the Concluding Comments on the Country Reports, it appears that the CEDAW Committee expects a concrete summary of legislation and policy with the accompanying information (in figures) concerning progress and effects. The Committee requests countries, if there is inadequate insight provided in one or more areas, to provide more information in a subsequent Report.

In the Netherlands, as proposed by the Second Chamber of Parliament, the obligation has been included in the Act for the Ratification of the Convention to report to the Parliament one year before every Country Report is sent to the CEDAW Committee. The Second Chamber of Parliament wished to remain involved with the implementation of the Convention and wanted to have the possibility to exert influence on the reporting to the CEDAW Committee (see Chapter 1).

Court reviews

During the enforcement of the Women's Convention, national courts play an important role. The Convention prescribes that the principle of equal treatment and protection against discrimination should be achieved in part through the authorised national courts. Moreover, the national courts can review legislation and policy, and norms from the Convention can be gradually included in the practice of law.

In the relevant literature, there are strong arguments for an individual right of complaint, as this exists with many United Nations Conventions. For example, violations of the International Covenant on Civil and Political Rights can be brought by individual citizens before the Human Rights Committee.

A similar right of complaint to a United Nations Committee with respect to the Women's Convention can strengthen international monitoring of compliance with the Convention and contribute to the continuing interpretation of the Convention provisions. Decisions resulting from such a complaint procedure can then be applied directly by the national courts. Individuals, groups and organisations must be able to file complaints about violations of the Convention. The complaint procedure must concern all provisions of the Convention.

In the Spring of 1996, a separate working group developed a draft version for an Optional Protocol concerning a right of complaint during the annual meeting of the Com-

mission on the Status of Women of the United Nations. The Netherlands was in favour of such an Optional Protocol.⁶⁵

Information provision

The implementation of the Convention will stand or fall based on knowledge of the Convention obligations. Proper familiarity with the Convention among legislators, policy makers, practising lawyers and the general public is also a vital part of the enforcement process.

In General Recommendation 10, the CEDAW Committee, as part of the 10 year anniversary of the Convention, requests that familiarity with the Convention be increased by holding conferences, seminars, publicity campaigns and distributing relevant documents in the national language of the State parties. NGOs must be encouraged to distribute information about the Convention and its implementation.

Until now the Netherlands has not taken any steps to increase the familiarity of the general public with the Convention.

⁶⁵ According to the report of the Dutch delegation to the 40th session of the Commission on the Status of Women from 11 to 21 March 1996, there is, in principle, broad support for a complaint procedure that comprises all provisions of the Convention. Problems can be expected with respect to the review procedure proposed by the CEDAW Committee, which would also be included in the Optional Protocol. (Translator's note: the Optional Protocol to the Women's Convention was adopted by the General Assembly of the UN on 15 October 1999. The Netherlands have acceded to it on 22 May 2002.)

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In 2000 she contributed materials about sexual harassment to the fourth in-depth study on the impact of the Convention on Dutch law and policy in the field of violence against women. In 2001 she acted as an expert for OSCE, in the process of implementation of the Women's Convention in several Eastern European and Central Asian countries. In 2001-2002 she edited a book, published by E-Quality, on the meaning of the Women's Convention in the context of a multicultural society. Together with the universities of Maastricht and Utrecht she organised an expert conference in 2002 on Article 4(1) CEDAW about positive action or affirmative action. The CEDAW-Committee used the outcomes of this expert meeting to draft General Recommendation number 25, which was adopted in January 2004.

Further details about the activities and a list of publications of dr. Rikki Holtmaat can be found at: www.rikkiholtmaat.nl

