

LAW AND GENDER

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I. INTRODUCTION

Finland always scores high in gender equality rankings, competing only with other Nordic countries and Canada. The foundations for gender equality are found in the history of the country: Finnish women received the right to vote and to be elected in national elections as early as 1906. Following suffrage for white women in Australia in 1903 and the right to vote but not to be elected in New Zealand in 1893, Finnish women were the first to achieve comprehensive electoral rights.

The number of female parliamentarians is high (43%) and for quite a while the country has had both a female President (Tarja Halonen) and female Prime Minister (Anneli Jäätteenmäki and Mari Kiviniemi). The Finns are very proud of their gender equality – to such an extent that it may make it difficult to acknowledge and discuss possible problems in gender relations.

The law has played a major part in the path towards equality, but sex and gender have not always been explicitly put into foreground in the legislative processes. Rather, the tone of the legislative processes has been gender neutral, even gender blind. The promotion of women has instead been part of the more general policy towards welfare, well-being and social equality than a conscious gender policy.

Therefore international commitments in the field of equality have given important impulses to Finnish equality work and legislation. The international Convention on the Elimination of All Forms of Discrimination against Women (1979, UNTC I-20378) was important for the enactment of the Equality Act (609/1986). In European Union law, legislation against sex discrimination has developed as part of the development of the internal market, alongside of the prohibition against discrimination on the basis of nationality. In European Union law anti-discrimination has become a central principle in the Charter of Fundamental Rights in 2000 and further in the Lisbon Treaty on European Union (2009). In the 2000s, after the Treaty of Amsterdam, the European Union strengthened its equality policy and anti-discrimination legislation on the grounds of race, religion, belief, disability, age and sexual orientation. Also in Finland, the Anti-discrimination Act (21/2004) took up these grounds of discrimination.

In this article I outline the main areas of law that are central from the point of view of gender. Besides equality law, anti-discrimination law concerning other grounds of discrimination is also important for the rights of women, because discrimination on multiple grounds often means that women are discriminate both as women and as members of an ethnic group or because

of their age or inability. Violence against women is a timely issue that has received much attention during the past fifteen years. Finally, I shall describe the Finnish child care system and related equality issues. First I shall present three approaches to gender that can be distinguished in women's studies and gender studies. My particular approach is what these approaches may mean in relation to legal studies on gender.

In gender research different phases of gender politics and studies have been classified into three waves of feminism. The wave metaphor has been used in somewhat different forms as the feminist movement has had somewhat different forms in different countries, but broadly speaking, we can distinguish liberal feminism, standpoint feminism and postmodern feminism. In Finnish gender studies we can correspondingly distinguish liberal feminist, state feminist and postmodern feminist approaches. These phases or waves are not, however, distinct. Even if gender studies are today predominantly preoccupied by postmodern issues of construction of sex and gender, feminist claims for equality and governmental equality policies are still based on liberal and welfare state views on equality.

A few words on terminology: We use today the terms "law and gender" or "gender studies in law". By the term "gender" we refer to gender as a social construction as opposed to a biological category. In a postmodern understanding gender is not limited to the dichotomy of men and women but includes other possible gender identifications as well. In Scandinavian scholarship, the terms "women's studies" and "women and law" were used frequently in the 1990s, which has a connection with the idea of promoting women's rights. Feminist studies and feminist legal studies, the terms used in English-speaking countries in the 1980s and 1990s, have not gained popularity in the Nordic countries. Particularly in Finland the word "feminist" is still often understood as pejorative, in contrast to Sweden where everyone, including present and former Prime Ministers Fredrik Reinfeldt and Göran Persson, has declared him- or herself to be a feminist.

Personally, I find that the term feminism has certain merits. Feminism is a wide concept, covering many different schools of feminist thought (there are plenty of them), and including postmodern pluralist thinking. The ideas that all feminists share are that gender equality is an important social goal which we have not yet reached, and that this state of affairs is in some way or other related to the gendered power structures of society. When this definition is used, most Finnish people are feminists – notwithstanding their gender. This definition of feminism covers a wide range of research topics and a variety of methodological choices, also in the field of law. Usually gender research is also related to political feminism in that it aims at improving women's position and promoting equality.

Therefore, it is natural to see the present shift towards gender studies as a continuum of feminist studies. Gender studies also cover other manifestations of sex and gender, such as gay, lesbian, bisexual and transgender individuals, often covered with the term queer studies. Queer studies is a theoretical term that has a wide implications on traditional feminist studies as well, as I shall

show later in this article. In recent masculinities research the position of men and the male sex is also made visible. Contemporary men's studies or masculinity studies share with feminism a critical analysis of the gender system.

2. GENDER NEUTRALITY AND EQUALITY

Universal suffrage in 1906 was remarkable as such but it was made more noteworthy by the fact that Finland was not an independent country but a Grand Duchy and part of the Russian Empire. Thus suffrage was gained as part of the political struggle for national rights and independence. By the time of universal suffrage in 1906, women had already achieved some degree of rights. Unmarried women of legal age were no longer under male guardianship, and even married women were allowed to keep the money they earned. In the first elections some twenty women were elected as parliamentarians. They started to pursue issues that were of importance to women, including maternity leave, the position of single mothers, the fight against prostitution and protection against sexual violence. Progress in these issues was modest, however.

The reform pursuits were more successful in the fields of family law and labour law. The right to inheritance on an equal footing was achieved by the late 19th century. Equal rights in marriage and to matrimonial property were realized with the Marriage Act of 1929. The right to work and labour rights were also gradually achieved. In 1889 even a married woman had a right to her own salary and in 1926 women gained access to state office. During the Second World War women participated in national defence and took up duties on the home front and, unlike in some other countries, they stayed in employment after the war. After the war, labour protection regulations were introduced, including some discriminatory measures, such as protection against night shifts. This regulation illustrates the problems related to gendered protection: it kept women out of well-paid jobs in factories but never excluded them from low-paid jobs in hospitals.

Today, practically all gender-specific laws have been abolished. It has not been a simple matter, however. As late as in the early 1980s the Finnish Parliament was unable to agree on a woman's right to keep her own last name upon marriage, and the government had to withdraw a Bill to that effect. This law was finally passed in 1986, though, following the ratification of the 1979 CEDAW Convention in 1986. The right of women to become priests in the Lutheran church, to which 85 per cent of the population belong, was also passed in 1986 to great outcry. Still today some male priests find it difficult to work with women. There are still a few sex-specific regulations, such as conscription to the army and maternity leave, but by and large the liberal goal of gender-neutral laws and formally equal rights to all has been achieved.

3. STATE FEMINISM AND WOMEN'S LAW

The promotion of women's rights in the Nordic countries has been an essential part of general welfare policies. General social, health and educational policies have enormously benefited women. Of specific importance for women have been child care policies, which however, may in part have reinforced traditional gender roles.

Two issues of legal relevance are of key importance; the universal and individual nature of rights. Basic social and educational rights belong universally to every individual, instead of being left to the discretion of the families or local communities. The educational system, starting with the introduction of compulsory basic education in 1922 and encompassing free school meals after the Second World War, has been the key to the social ladder for both men and women. Free university education and the expansion of the university system in the 1960s and 1970s gave women access to the highest levels of education, an opportunity that women have taken full advantage of. Today over half of university graduates and half of new doctors are women. Equally, access to health care has benefited women. Free prenatal care, which is combined with cash benefits, has secured the health of mothers and babies. These reforms have been part of the general welfare state project, instead of being specifically women's rights. The social security contributions, both residual level and earned benefits, are organized as individual rights, not on a family basis, and this has promoted women's roles as working mothers both in marriage and as single parents.

Nordic women have actively contributed to the development of the welfare state. In addition to high political participation, Finnish women have been active in formulating welfare policies as civil servants in the health care and social sector. The incorporation of women's interest in the welfare state project is known as state feminism. In the Nordic countries most feminists see the state as an ally for women and as a forum for realizing women-friendly policies, as opposed to more critical approaches towards the state in, for example, German and American feminism. As in the European Union, equality policy is the responsibility of the Ministry of Social Affairs, thus underlining the connection of women's rights as a dimension of the welfare state project.

The relationship between feminists and the state is not free of frictions, however. Feminists have long campaigned for more active state policies in issues of violence against women, for example. Issues concerning women's embodiment seem to be particularly difficult to deal with within the general welfare regime. I shall take up an example from health policy, which in many ways has been very beneficial for women. My example is the regulation of abortion, which illustrates how women's reproductive rights are regulated and debated, or rather, not debated.

According to the text of law, Finland is not one of those countries that allows a woman to decide about her own body concerning the termination of pregnancy. This decision is delegated to the authorities of the welfare state, who also perform the abortions. The decision is made by two doctors, even during

the first three months of pregnancy, and the circumstances in which abortion is allowed are given in the Abortion Act (239/1970). The list of grounds is quite specific at the outset but, in practice, most abortions are made according to so-called "social indication", that is, when the birth and upbringing of a child would be a substantial burden on the woman and her family. An affidavit of the social services or a midwife is needed to justify the social indication. One would expect this somewhat degrading procedure and the denial of a woman's self-determination over her own body to be the subject of fierce criticism from the feminist movement. But this is not the case. We have heard practically no debate over abortion rights over the forty years that the abortion law has been in force. The reason is a practical one. Abortion is granted in virtually every case in which it is asked for due to a very liberal interpretation of social indication. More important, the number of abortions has remained relatively low and illegal abortions are practically non-existent. Thus, this is an example of how Finnish women have valued the benefits of the welfare state over formal self-determination over their own bodies.

Probably the most important welfare state reform for women has been the establishment of the child care system in the 1970s and 1980s. The question about a subjective right to day care turned out to be a paramount issue in this development. In the late 1970s and 1980s the demand of municipal child care facilities increased. Day care became a threshold for women's participation in the labour force and middle class women started to enroll their children into the municipal day care centres, which had earlier mostly served single mothers. The law reforms in the 1970s and 1980s gave a right to day care for parents and children and a duty to municipalities to provide it. The nature of this right was contested in the courts, which confirmed that it is a subjective right, giving a right to monetary compensation if the municipality is unable to provide day care to a child.

Women's rights have been central in the establishment of the child care system. The goal has been to give women the same opportunities as men in the labour market. Thus, the function of the system is to increase the labour force as much as it is to promote the rights of women. In any case, the norm is that of a male worker and women's rights and interests are understood as the right to participation in the labour force under the same conditions as men.

The proximity between the welfare state project and women's interests is also seen in the research on women's rights in the 1970s and 1980s. The early studies on women's rights focused on labour law and social law. Women's economic and social rights have been analysed in the triangle of three support systems: market (women's employment), state (welfare state) and family.

The combination of work and child care has interested feminist legal scholars in the Nordic countries, very often from the point of view of social security benefits and child care. Women's rights to benefits, the possible discriminatory effects of regulation, and access to child care have been typical areas of research. A goal of the research has been to make visible and articulate legally situations that are typical for women and argue for interpretations and legal reforms that take women's interests into account.

4. EQUALITY LAW

Both gender neutral legislation and the welfare state have promoted women's rights in many ways. Nevertheless, equality was not achieved and the differences in the positions of women and men persisted in many areas of social and private life, to the detriment of women. Pay gaps have diminished but women's salaries remain at 80–85 per cent of those of men, and this can be only partly explained by factors other than gender. When women and men with the same education and same type of occupation are compared, the gender pay gap is circa ten per cent. Gender pay gap increases when well-educated women and men are compared. At higher levels of the labour hierarchy we find very few women. Women tend to rise to a certain level but not to the highest levels, the so-called glass ceiling effect. The labour market is heavily segregated along gender lines. Women tend to work in health care and social services and in the public sector, while men work in manufacturing and private businesses. Young women work more often than men on fixed term contracts. Women still bear the main responsibility for child care and household work, both during and after marriage, and even when both parents work full time, which is the usual pattern in Finland. In political decision making women do relatively well, but in non-elected bodies we tend to have more men than women.

These problems were acknowledged when the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (1979) came on the political agenda. The Convention is based on a strong notion of material, real-life equality. The Convention requires active measures and policies to achieve equality by state governments and other actors. The Convention prohibits both direct and indirect discrimination, in law and in practice. It also obliges states to promulgate active measures and policies to ensure equality of the sexes and to promote women by guaranteeing them the exercise of their human rights on an equal standing with men.

The ratification of the Convention was important to Finns, who are proud of their equality standards. It turned out, however, that several important changes in the law were needed, the most important being the enactment of the law on equality between the sexes (the Equality Act). The Act came into force in 1986. The legislative process was accompanied by a number of changes in different laws. The Act is based on the idea that gender neutrality of the law does not guarantee real life equality but also active measures to promote equality are needed. This idea has been reflected in Finnish politics since the 1990s as each government has included in their program measures that promote equality.

The purpose of the Equality Act is to promote the position of women, with the focus on working life. With the exception of the programmatic first paragraph, the Act is gender-neutrally written. After changes made in 2005, the law prohibits both direct and indirect discrimination. Indirect discrimination is defined along the same lines as in CEDAW and European Union anti-discrimination directives, meaning all measures and policies that de facto lead to differential treatment of the sexes. Sexual harassment is specifically mentioned as a form of unlawful discrimination.

The law also includes a positive duty for authorities and employers to promote equality. Equality plans, which each employer with more than 30 employees and institutions of higher education are obliged to draw up, are central tools for the promotion of equality. According to surveys, many employers have made equality plans since the duty was upgraded in 2005. In practice, however, the planning processes are not yet well rooted in the relationships between employers and employees. A specific issue that was subject to debate already in the legislative reform in 2005 is the transparency of the mapping of the pay difference between the sexes.

The Act mentions quotas as a specific measure to promote equality. At least 40 per cent of the members of appointed state and municipal bodies should be of each sex. In the beginning this rule was met with serious reservations in the municipalities. It was argued that it is impossible to find competent women for the municipal boards dealing with, for example, public works. In practice, however, the municipalities have been successful in fulfilling the quotas with qualified women and men. However, in state government we can still find committees, boards and working groups that do not have the required quota of women.

Specific measures to promote equality are not considered discriminatory even if they, at least for a while, include differential treatment of employees on the grounds of sex. This provision gives the possibility of promoting the underrepresented sex in access to employment, promotion and other situations if these measures are regulated in the equality plan. This kind of affirmative action is not commonly included in the plans and even when it is, it is seldom, used to promote women.

The Equality Act has been influenced both by the CEDAW and by European Union equality directives. It is interesting to note that even Finland, a country that is proud of its equality standards and history, has gained a great deal from international standards. The strong belief in existing equality has led to self-sufficiency, which has made it difficult to see existing issues and problems in equality in our society. The need for active measures to promote equality that in many other societies around the world is quite obvious has also in Finland helped citizens understand that active equality monitoring and policies are absolutely necessary.

5. GENDER DIFFERENCE AND VIOLENCE AGAINST WOMEN

Both liberal and welfare state approaches to equality can be and have been critiqued for setting men as the norm. Women have the right to equality if and when they behave like men. The same criticism can be directed at equality legislation, even if active measures to promote equality and the recognition of indirect discrimination to some extent acknowledge differences between the sexes. The goal, however, is to achieve equality on the standards of men, and it is against that standard that gender inequality is compared.

In cultural feminism the sameness of the sexes has been challenged and sexual difference has been taken as the starting point. In legal studies cultural

feminism has not gained much popularity. It is easy to understand that female values and cultural practices have been invisible in the scholarship and there is room for making the women's history, experiences and values visible in the historical, social and cultural sciences but gender difference is not easily adapted in the legal standards. Rather, female lawyers and scholars have often noted that differential treatment is a double-edged sword. It may protect some women but it is easily directed against some of those it should have protected. An illustrative example mentioned above was the prohibition for women to do night work after the Second World War.

In some ways, the gender difference has been used as a methodological tool in feminist legal studies. Norwegian scholars in the 1980s took as a starting point for legal analysis issues that concern mostly women. Issues related to child birth and pregnancy, a homemaker's right to money, time and support were analysed using standard legal methods. We can call this approach the women's perspective.

In issues of violence it is difficult to maintain the position that sameness is the norm of equality. Violence is clearly gendered: while men and women are, roughly, equally often victimized by violence, the circumstances of victimization are gendered. While the most dangerous place for men is the street and, especially in Finland, the company of other intoxicated and socially marginalized men, the most dangerous place for women is the home. The perpetrators are in both cases predominantly men. Sexual violence is directed mostly towards women and children of both sexes. Perpetrators are, again, predominantly (adult) males.

The ideology of equality was one of the factors that delayed the "detection" of domestic violence and other forms of violence against women in Finland. Political discussion and serious research around gendered forms of violence started in the late 1990s when the Government took up violence against women as an equality issue and the Academy of Finland directed funds for research into this issue. Two prevalence studies showed that violence against women, though much more prevalent than expected, was not more common than in any other country and rather on the safe side in a global comparison. What was more worrisome, though, was that more women die as a consequence of domestic violence than, for example, in neighbouring Sweden.

The research project *Violence in the Shadow of Equality* (1998–2004) undertook to analyse whether the legislation and/or the reactions of the criminal justice system could be improved. The gendered features of law and legal practices could not, however, be straightforwardly seen. Therefore, the project started to analyse how violence was spoken about in legal texts. Law texts, preparatory works, court cases and police protocols were analysed as texts that construct central concepts of law and legally relevant practices, such as violence, gender, self-defence, consent, aggravated circumstances and so on. In the eyes of the legal system, real violence was violence between two males, whereas violence at home was often constructed as a disturbance, quarrel or dispute. Violence could be downgraded or ignored, for example, in child custody cases, in rape case and in domestic violence. In cases in which a woman had killed her partner

and tried to mention self-defence, evidence of violence by the male partner was often dismissed. The project concluded that legal texts, documents and practices are powerful discourses in constructing the concept of violence.

6. GENDER AS A SOCIAL CONSTRUCTION

Second wave feminism has been critiqued for taking the woman in the women's perspective for granted. The critique has come from many fronts. Women of ethnic minorities have raised their voices and asked "Ain't I a woman?", to quote the famous anti-slavery campaigner Sojourner Truth, as well as Third World women and lesbian women. The core of the critique was that white, middle class women have hijacked feminism and simply replaced white, middleclass men with their own self-image.

The theoretical issue at stake has been the concept of "woman". Liberal feminism, arguing for similar rights, emphasizes the universal similarity of human beings and, thus, the sameness of the sexes. The Nordic welfare state was also based on promoting similarity and the idea that equality meant the same rights for everyone. Second wave feminism acknowledged that women's position is not the same as men's but it made a distinction between sex, as the biological and static sex, and gender, as the social organization of the roles of men and women. The welfare state proposals for change were often based on the belief that societal obstacles to equality could be removed and equality as sameness achieved.

The idea of the sameness of the sexes was questioned in many ways. Research on violence against women, while arguing strongly that violence has a social context, made obvious the gendered nature of violence and its sexualized dimensions. But gender difference was a difficult issue for feminists as it has been historically used to marginalize women and their rights. Thus, the idea of gender as socially constructed has been welcomed by feminist researchers. When gender is understood as constructed in social practices or, to use Judith Butler's theoretical concept, as performed by different women and men, the differences among women are not an obstacle to theoretical understandings of gender. Gender theory has also opened up new opportunities for acknowledging women's agency to achieve change in gender roles and gendered patterns, without abandoning the understanding of gender as an existing fact and even as a societal structure.

At the same time it has become clear that the dichotomy man/woman is not sufficient to encompass gender differences in postmodern societies. The study on and concept of gender has to cover also gays and lesbians, bisexuals and persons who have a transgender identity or who go through sex change. Alongside of feminist studies, queer studies have questioned the binary gender structure using the concept of heteronormativity. Queer studies argue that societies are structured around the idea of two sexes and two gender roles, excluding other expressions of sexuality and other forms of organizing private and social lives.

As feminist studies have turned into gender studies and become more theoretical, the close connections between feminist studies and feminism as a political movement seem to have thinned out. This may be an illusion and legal studies in particular are still relevant for the feminist claims of equal rights and better protection. Legal arguments of non-discrimination and equality are frequently used, for example, to argue for gay and lesbian rights. Men's rights have also entered into the discourses but a simple juxtaposition of women's rights versus men's rights leads nowhere. There is a need to analyse the legal system and legal practices as gendering practices. I shall take up two examples.

First, the issue of prostitution is a gendered one. There have been different regulations at different times but all regulations have aimed at controlling the female prostitute. The inevitable pattern of prostitution and the frustration over controlling are often encapsulated in the phrase "the world's oldest profession". According to the normal structure of legal (criminal justice) system intervention, the social practice (prostitution) is an empirical fact, and the law is a social norm that is implemented upon facts. In a social constructionist view, both prostitution and the norms controlling it are social practices that construct gender and gender relations in society. The insight that both are harmful to the equality of the sexes was the starting point for women's peace legislation in Sweden in the 1990s. The women's peace project had the aim of promoting equality, recognizing, for example, that the male sex of the sex buyers had been made invisible in most discussions on prostitution. The conclusion was the prohibition of the purchase of sex in Sweden in 1999. Finland has been more cautious and in 2006 prohibited buying from a person who has been trafficked or procured. The European Union has come to the same conclusion and recommended this type of prohibition in 2011. The novelty is that the (often female) prostitute's behaviour is not criminalized, only the buyer's, their unequal position then being acknowledged.

Second, the construction of gender roles is most obvious in the regulations that concern child care and parental leave. Parental leave in Finland is generous: up to ten months of paid leave (70% of salary) is complemented by a choice between home care allowance (relatively low), a place in a municipal child care centre, or support for private care until the child is three years old. The main equality problem is conceptualized in the low participation rate of fathers, that is, less than seven per cent of the total. A constructionist approach to the regulation would ask what kind of parent does the system assume. Indeed, the model is based on a model of parents that are either working full time or are full-time child carers. Some flexibility has been added to the system as fathers have shown interest in spending time with their children. But still the model is one of a full-time worker, in which it is very difficult to adjust to be a parent of small children. At the same time, the life of young people has changed. Full-time, permanent employment is not available to everyone. Many want to have families but find it difficult when they have to cope in the prevailing job market. A different legal construction of a young parent would lead to different legal arrangements of work and care and more sustainable solutions for families.

7. CONCLUSION

We have seen an enormous growth and development in gender research during the past decades. From liberal conceptions of formal equality and the simple idea of equality as sameness, we have moved to welfare state goals of promoting gender equality and women's position as a part of the general policy of promoting social equality. Today gender studies have a broad scope on gender, including gay, lesbian, bisexual and transgender rights. Yet gender studies, including men's studies or studies in masculinity, build firmly on the basis of feminist studies of the last century.

Besides presenting Finnish and other Nordic law on gender, the purpose of this chapter has been to show that gender research has relevance to the study of law. Liberal notions of equality are still important for the regulation of civil, criminal and distributive rights. Gender perspective as an empirical and analytical approach is important in the implementation of rights and in the monitoring of how rights are realized. Finally, I argue that the emancipatory potential of law can only be understood when we start to see the legal system and legal discourses as constitutive of sex, gender and other identities.

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