Responsible Selves

Women in the Nordic legal culture

Edited by
KEVÄT NOUSIAINEN
ÅSA GUNNARSSON
KARIN LUNDSTRÖM
JOHANNA NIEMI-KIESILÄINEN

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Contributors

Ulrika Andersson, LLM, Researcher, University of Lund. She is preparing a doctoral thesis on the legal treatment of sexual offences. E-mail: *ulrika.andersson@jur.lu.se*

Lisbet Christoffersen, LLM & PhD, Senior Lecturer in Public Law at Institute of Social Sciences, Roskilde University, Denmark. In 1998, she defended her thesis on Danish ecclesiastical law. She has published on law and religion, on social security law in the EU and on the development of the *Rechtsstaat* and the Welfare State. E-mail: *lic@ruc.dk*

Susanne Fransson, LLD, University of Lund, Lecturer in Labour Law at the School of Economics and Commercial Law in Gothenburg. Her doctoral thesis (2001) is on wage discrimination. E-mail: *susanne.fransson@handels.gu.se*

Åsa Gunnarsson, LLD, Senior Lecturer in Tax Law at Umeå University. She is leading a research project on the co-ordination of tax law and social law. E-mail: *asa.gunnarsson@jus.umu.se*

Kirsten Ketscher, Professor of Social Welfare Law and Social Security Law at the Faculty of Law, University of Copenhagen. She is a part-time Professor at the Department of Women's Law at the University of Oslo. E-mail: *kirsten.ketscher@jur.ku.dk*

Karin Lundström, LLD, Lecturer at the Faculty of Law at the University of Lund. Her thesis is entitled "Equality Between Women and Men in EU Law: A Feminist Analysis". E-mail: *karin.lundstrom@jur.lu.se*

Ruth Nielsen, Professor of Law at the Law Department, Copenhagen Business School. Her research interests are labour law, EU law, contract law and legal theory. E-mail: *rn.jur@cbs.dk*

Johanna Niemi-Kiesiläinen, LLD, Acting Professor in Law, University of Helsinki. She has written extensively on bankruptcy law. Currently, she is leading a research project entitled Violence in the Shadow of Equality: Hidden Gender in Legal Discourse. E-mail: *johanna.niemi-kiesilainen@helsinki.fi*

Gudrun Nordborg, LLM, works for the Crime Prevention Council in Umeå, Sweden. Previously, she was a Senior Lecturer at the Department of Law, Umeå University. She has published a number of articles and edited scientific journals and books on women's law, for example, *13 kvinnoperspektiv på rätten.* E-mail: *gudrun.nordborg@brottsoffermyndigheten.se*

Kevät Nousiainen, Professor of Women's Law and Legal Theory at the University of Helsinki and Professor of Comparative Law and Legal Theory at the University of Turku. Her research is concerned with legal theory and gender studies in law. E-mail: *kevat.nousiainen@helsinki.fi*

Anu Pylkkänen, LLD, Docent of Legal History, University of Helsinki. Her research interests are the legal status of Finnish women in the early modern period and the history of Finnish matrimonial legislation from a comparative Nordic perspective. E-mail: *anu.pylkkanen@helsinki.fi*

Minna Ruuskanen, LLM, Researcher, University of Helsinki. She is preparing a doctoral thesis on self-defence claims in cases where a woman has killed her partner. Formerly, she has worked as a public defender in Northern Finland. E-mail: *minna.m.ruuskanen@helsinki.fi*

Eva-Maria Svensson, LLD, Senior Lecturer, University of Göteborg. She has published articles in legal philosophy, gender theory and public law in addition to a doctoral thesis on legal philosophy and gender theory. E-mail: *eva-maria.svensson@law.gu.se*

Lotta Wendel, LLM, Researcher, University of Lund, Sweden. She has published articles on social law, medical law and current feminist issues. She is currently completing her doctoral thesis on the withdrawal of the licences of nurses and doctors. E-mail: *lotta.wendel@genus.lu.se*

Preface

Advanced gender equality and faith in state-regulated social welfare are two hallmarks of the Nordic countries. In a global ranking which takes into account gender in the distribution of welfare, the Nordic countries tend to top the list. While Nordic equality is a well-known concept, detailed knowledge of the gender system in the Nordic countries is mainly available in the Nordic languages only. Moreover, analytical research about the legal structures underpinning gender equality is scarce. The relationship between law and gender equality stands in need of a critical study. With this book we attempt to fill the gap.

The book is a result of a network of Nordic legal scholars, assembled during the years 1997-1999 by Kevät Nousiainen and Anu Pylkkänen at the University of Helsinki. Both established scholars and younger researchers participated in our regular meetings during those three years of networking. This book is a result of this collaboration. The group has been truly intra-Nordic, including researchers from all five Nordic countries, even though authors from only three of the countries take part in this book. The networking increased our consciousness of the many national differences among us, but also of a certain shared "Nordic" quality in our legal and feminist reasoning. This book took shape in the network meetings held in Sörmarka in Norway in 1998 and among the lava fields of Iceland in 1999. We warmly thank our Icelandic and Norwegian colleagues, Brynhildur Flóvenz, Anne Hellum, Sigfridur Stefánsdottir and Elisabeth Vigerust both for their part in the lively discussions and for their provision of the inspirational settings. We would also like to thank our British colleagues, Catherine Barnard, Joanne Conaghan, Clare McGlynn and Sally Sheldon for their encouragement and critical comments of the papers which were originally presented in Iceland.

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Kevät Nousiainen

Åsa Gunnarsson

Karin Lundström

Johanna Niemi-Kiesiläinen

1 Introductory Remarks on Nordic Law and Gender Identities

KEVÄT NOUSIAINEN AND JOHANNA NIEMI-KIESILÄINEN

The Nordic region is rich with myth, both ancient and modern. Since Roman antiquity, the inhabitants of the North were depicted to the outside world as dangerous barbarians and yet, at the same time, also as representatives of liberty and equality in the ancient world. In contemporary discussions, a "Scandinavian aura" sometimes hovers about the Nordic countries. This aura may be defined in different ways, for example, as "peace, equality and naked women" as one American post graduate student did, or as "welfare state, gender equality, and common legal heritage" as we do in this book.

This book consists of several articles by Nordic legal scholars in different areas of law. Each article is based on a research project, either already published in a Nordic language or a work in progress. The articles in the collection make an attempt to combine a critical analysis of the Nordic gender system and an informative explication of its legal setting. The authors discuss different legal themes from a woman's point of view. In this introductory article, we refrain from giving an outline of the articles but, instead, we make an attempt to provide the reader with an account of the shared background of the articles.

Today, foreigners expect equality, especially gender equality, to be a part of the Nordic way of life. The notion of equality, gender equality in particular, is as complicated as it is important. Nordic women today enjoy unprecedented equality in most areas of life. International comparisons on gender equality, carried out by the United Nations, on indicators such as education, position in society and health show that Nordic women are more equal to men in these respects than women in almost any other country. Still, compared to men, even Nordic women are not equal to men in terms of income, power, protection of integrity and value. We even refer to *"the myth of equality"* in this book because we believe that the concept of equality has been used in a manner that simplifies a very ambivalent reality. We think that in the Nordic discourses equality is often misused as a description of an

already existing state of affairs, when the term should be understood as a normative goal yet to be achieved.

Equality in the Nordic context is not necessarily connected to classical liberalism. The title of our book, *Responsible Selves*, points to some specific features in Nordic (gendered) identities. The Nordic societies put more emphasis on mutual solidarity and responsibility than societies with very strong liberal traditions. In the Nordic setting, "rights discourse" easily turns into a discourse on responsibilities (see Kevät Nousiainen).[1] The assumption of equality as a reality achieved has played an important role for Nordic women, for their self-understanding and identity. According to our authors (see Anu Pylkkänen and Karin Lundström), the polarisation of male and female selves, or masculine and feminine identities, is less marked than in other modern cultures. Relatively weak gender polarisation has helped to keep gender issues secondary to other dividing issues such as class. The assumption of gender equality dovetails with an older cultural attitude of considering women as beings that should and do bear the responsibility for important social tasks.

Justice in the modern world is understood in terms of equality. In an era which finds it difficult to agree on any universal values, the only remaining shared value may be the equality of all human beings. Equality is a notion often associated with liberalism, and as such it has been criticised by feminists. The core of the critique is that equality connotes similarity and prevents the emergence of sex difference or any other radical difference. In post-1960s legal discourse, equality has come to mean nondiscrimination. Anti-discrimination laws can be seen as attempts to make the concept of equality more operational and dynamic than the mere principle of equality, which is a standard feature of modern constitutions.

In the Nordic context, the anti-discrimination laws have not played a central role in achieving equality. In our analysis, Nordic gender equality is less the achievement of a resolute equality policy and legal reform than a result of extensive welfare policies, such as collective labour market negotiations and redistributive social and regional policies, aiming at the reduction of differences and social inequalities. While promoting overall equality, gender neutral politics have contributed to the belief of gender equality as something already existing, and made certain forms of discrimination, such as structural discrimination of women in employment, sexual harassment and violence against women, more difficult to recognise and conceptualise. Several articles in this collection explore the difficulties

Nordic lawyers and legal policy makers encounter in recognising discriminatory practices (see articles by Åsa Gunnarsson, Ruth Nielsen, Johanna Niemi-Kiesiläinen, Minna Ruuskanen and Lotta Wendel). They also make an attempt at constructing the framework which may explain this apparent paradox. Some articles explore the difference between the Nordic and the EU gender systems (Lundström and Nielsen).

Nordic societies as welfare states also have an almost mythical dimension. The social protection in the Nordic countries has traditionally aimed at a certain universality. Welfare has been state-bound and, in many ways, a comprehensive welfare state is taken for granted even when sufficient grounds for the belief no longer exists. Social rights have also made these countries a favourite target of liberal critique. After the collapse of the communist world, some neo-liberals have chosen the Nordic countries as examples of tax- and control-ridden, inefficient economies. This picture is, however, as one-sided as the image of equality achieved. To our mind, a more accurate analysis of both is needed. The notion of the Nordic welfare state is, in any case, an important shared background for the understanding of the concept of equality. The welfare state is the assumption, at times implied, in the articles in this collection. Therefore, we start with a brief outline of the Nordic welfare states and the relationships among women, gendered identities and the state in the Nordic countries.

We also find that all articles in this collection rise from the same legal tradition which, however, is not always explicated by the authors. Therefore, we find that at least a basic understanding of the Nordic legal culture is important for the overall understanding of the concept of equality as it is discussed in this book and, in this introduction, we try to give a short overview of the relevant features of Nordic legal culture.

Why Nordic?

We speak about the Nordic countries, instead of the more exclusive Scandinavia, because we want to include all five, Denmark, Finland, Iceland, Norway and Sweden. Even though we only have authors from Denmark, Finland and Sweden, researchers from Iceland and Norway have actively contributed to the workshops and networks that led to this book.

But does it make sense to speak about the Nordic countries or Nordic women *en bloc*? The Nordic countries vary as to geography, history, politics

and language. The eastern part of the Nordic area is solid bedrock while Iceland is today the most volcanic part of the world. Means of livelihood are traditionally quite different. While Iceland and Norway have relied on the ocean in their industry and trade, Finland and Sweden have had the forest as a main source of income. Denmark has long depended on agriculture and also developed market-oriented farming earlier than other Nordic regions. The inhabitants of Denmark, Norway and Sweden can understand each other's languages which, in a linguistic sense, might perhaps be described as dialects. Icelandic has preserved too many of ancient Scandinavian roots to be comprehensible to Scandinavians, and Finnish does not even belong to the Indo-European languages. Politically, three of the Nordic countries are kingdoms, two republics. Today, Denmark, Iceland and Norway belong to NATO, while Finland and Sweden do not. Denmark, Finland and Sweden, on the other hand, belong to the European Union, but neither Iceland nor Norway does. This account indentifies merely a few variations between the countries.

Notwithstanding the differences, the characteristics that form the core of this book justify our treatment of the Nordic countries as a whole. First, the everyday lives of Nordic women are shaped by the existence and structure of the welfare state. Secondly, the Nordic women enjoy a relatively high gender equality, although it can be seen more as the product of more general equality politics connected to the welfare ideology than determinate women's movements. Thirdly, the Nordic countries also share a common legal tradition and culture.

Adhering to the Welfare State

Almost all the articles in this collection refer to the paramount role the welfare state has had on the position of women. The gender neutral welfare state is presented as a mixed blessing from women's point of view. Primarily, the welfare state has promoted women's economic independence and emancipation. On the other hand, however, the welfare state has made certain inequalities more difficult to assess.

Nordic welfare policies have had some characteristics which have been crucial for women. Most benefits are individual, not based on family membership. The welfare system is workfare-oriented and has required work force participation also from women. Especially in Finland and Sweden, even

lone parents have been expected to participate in salaried labour (see Gunnarsson). Since most women work, they have a right to work related pensions and unemployment benefits. Therefore, the neo-liberal description of the Nordic welfare state as a Nanny state, smothering individuality and initiative of its citizens, sounds quite weird to Nordic women, who often bear the double burden of a job and home work. Even though men are expected to share the home work and the average time men use for household work has increased, all studies still show that women bear the main burden of and spend many more hours engaged in household duties than men do.

Basic social security benefits are tax-funded, and many of them have been based on residence, rather than contribution, labour or citizenship. The Nordic welfare state model has been described as universal because many basic benefits used to be available to all. For example, the minimum pension system used to cover everyone. Basic services, *viz.*, education, health care, child care, are extensive, if not quite universal, and they are usually produced by the public sector, not only funded from public sources. During the last twenty years, a public child care system has been established and it has made it possible for women with small children to participate in paid labour (see Lundström). Women have benefited from the free educational system. Altogether, the welfare state has given women a relatively high degree of economic independence.

At the same time, however, women's benefits are relatively lower than men's, especially in the income-based benefit system. Parental leave and other care-based leaves from paid employment have been gender neutral for quite some while (see Lundström). Yet, women not only give birth. They also take care of children. Women's careers become disrupted. Parental leave allows a relatively long absence from work, for example, in Finland, for ten months. Policies regarding longer leave to take care of children vary in the Nordic countries. Longer leave or possibility of part time work is common. In principle, both parents are entitled to these absences. The choice of who is to take the leave is left to the parents. Subsequently, the result is extremely unequal – in almost all cases the mother is absent from paid work.

To increase men's participation in child rearing, Norway and Sweden have introduced a "dad's month" (*pappamånad*) *viz.*, a month's leave available for the father after a baby is born and not transferable to the mother. Also, the majority of men take a short leave from work when a child is born. This pattern was broadcast widely in the spring 2000 when Finnish Prime Minister Paavo Lipponen took a leave of one week to care for a newborn

baby. At the same time, the birth of a baby to British Prime Minister Tony Blair gave rise to a wide discussion about father's leave in Britain. As we know, Blair decided not to take leave. One week or a month, however, does little to change the overall pattern.

The universal and gender-neutral nature of the benefits has disguised the discriminatory effects which sometimes arise in connection with EC law. The EC Directive on Parental Leave, for example, is, in principle, based on an equal sharing of the leave by the parents. Its implications for the Nordic parental leave regulations have not so far been investigated.

Since the 1980s, cuts in expenditures have changed the system and brought it closer to the German type of contribution-based model. Cuts in welfare spending have made the system less universal and the residence-based nature of basic social security has been removed. The system still remains tax-based to a greater extent than in most countries. Tax-funded social protection and solidarity have found support in the Nordic countries more easily than in more heterogeneous societies. Reports by economists on Nordic societies often consider extensive education and health care as assets even in the economic sense, but warn Nordic governments against excessive public spending. To the Nordic mentality, the two go hand in hand.

The overall spending on social welfare in the Nordic countries today is not exceptionally high and it varies among the different Nordic countries. The universality and individuality of the Nordic welfare systems have diminished lately. For example, married women are often denied minimum unemployment benefits because their spouses earn too much. Both legal changes and cuts in expenditures have, on the one side, decreased minimum benefits and, on the other side, made benefits and services either unavailable or unfeasible for the middle class. These kind of changes carry the risk that the willingness of the middle class to fund the system through taxes may diminish. It may well be that solutions in European social welfare laws are becoming more alike.

Still, there is a strong expectation that the state is the primary means of creating social welfare in the Nordic area and there is still a strong political rhetoric of levelling of income through taxation and transfers leading to a more equal sharing of resources and of shared social responsibility (see Gunnarsson). Abundant research shows that people appreciate public welfare services and are unwilling to trade them for tax reductions. In general, women support welfare services more than men and women are also more critical towards liberalisation and privatisation (on attitudes toward liberal tax

reforms see Gunnarsson). The state and municipalities may not be considered as allies by every woman, but after a period of deregulation, privatisation and budget cuts, they perhaps seem friendlier than market forces. Women also have more influence in politics at both local and national level than they have in the private market and, thus, tend to react more positively to social welfare than men do.

Legal Effects of the Welfare State

The welfare state is sometimes depicted by its critics as a bureaucracy interfering in the private lives of its citizens without appropriate legal checks. Lisbeth Christoffersson discusses the position of the individual in Danish administrative law, and contributes to the discussion about the tendency to treat the individuals as clients or objects of welfare policies, instead of participants in administrative decision making. In the Nordic countries, the state bureaucracy was historically preceded and is even today complemented by a strong local administration. Especially at the local level, the interface between citizens and administration has been shaped by an expectation of mutual participation. Recently, the legal position of an individual has been influenced by human rights discourse and an increased consciousness of legal rights.

There has been a tradition of gender studies in law in the Nordic countries which has tried to point out the interconnections among administrative social welfare law, labour law and family law. Kirsten Ketscher takes up issues of care work, paid work and financial support in her article which carries on the tradition of the Nordic or, more specifically, Norwegian legal feminism. Åsa Gunnarsson explores the different assumptions about equality, care, welfare and gender in welfare law and tax law and the consequences of the liberal tax reform of the 1990s for women.

The mediated, secondary impacts of the welfare state on many areas of law are important in themselves. The belief in a functioning welfare state, however mistaken it may be today, continues to influence law in general. The welfare state has had consequences in many areas of law besides the most obvious ones, such as labour law, social welfare law and tax laws. The belief in the existence of the welfare state has certainly influenced family law reforms. In the *travaux préparatoires* of family legislation, the welfare state has been depicted as the means of securing the maintenance of a divorced

spouse in case she is not able to support herself. Accordingly, marriage as a source of maintenance has been declared outdated. Private maintenance between divorced spouses has been considered as humiliating and unnecessary since mid-twentieth century, at least in Finland and Sweden. Independence, self-determination and choice have been important values for marriage law reformers. Kevät Nousiainen contrasts the development of Nordic family law with a trend in market-oriented law of contracts. In the Nordic setting, there is a rhetoric of common values and obligations in classical market-oriented law. There seems to exist a specific type of communitarianism in the Nordic countries consisting of an emphasis on a mutual solidarity that should be shown in the primary political association, the state (see also Anu Pylkkänen).

The contributions in the last part of the volume approach the relationship between welfare and the criminal law from a new perspective. Nordic criminal law lawyers often speak about the development of "humane welfare state criminal law" which has been a conscious attempt to minimise the use of criminal law. Criminal law lawyers and criminologists condemn the use of "moral crusades" in criminal law that according to the dominant view is often used as an alternative to appropriate social welfare, education and other positive means. Punishments tend to be more lenient than in most parts of the Western world. Yet, it has been considered important to keep the demarcation line between criminal law and social welfare clear, so that punishments are not confused with treatment (see Niemi-Kiesiläinen). Accordingly, there has been much emphasis on the legality principle as a limitation on penal law. While the authors consider the Nordic criminal policy as generally successful, they point out that it has been gender-blind and reluctant to recognise violence against women (see contributions by Ulrika Andersson and Minna Ruuskanen). Sometimes the legal profession has even used the legality principle as an obstacle against legal policy reform to combat violence against women as happened in the Swedish woman's peace reform, discussed by Gudrun Nordborg and Johanna Niemi-Kiesiläinen.

Gender at Work

The growth of the public social welfare sector has helped to create a deeper gender differentiation of the labour market than exists in countries where care work is done in private. The public social welfare services employ women

with lower salaries than professions employing mainly men, making equal pay for work of equal value difficult to achieve. Collective agreements, while helping to reduce income inequality in general, have been less effective in closing the wage gap between women and men.

In the Nordic countries, the state is typically the provider of labour-intensive services, such as child and health care. In Denmark, a relatively strong private day care system for children is funded by public means. In the other Nordic countries, the services tend to be organised by municipalities. The welfare state relieves women from many traditional private tasks by making them into public ones. Nurses, teachers and day-care personnel are mainly women. The public sector is consequently a big employer of women.

The strong emphasis on collective agreements as the basis for regulation of labour relations has perhaps made it difficult to dissolve the gendered structures of the labour market. The sex equality norms of the European Union stand in an interesting contrast to the mechanisms producing equality on the Nordic labour market. The labour market organisations, or "social partners" in EC language, have a strong position in all Nordic states. Trade union membership is more common than elsewhere and women have a higher level of organisation than men do in many branches. A tradition of centralised collective agreements is often bound up with governmental agreements about the level of taxation and social benefits. Such a framework allows a discourse on equality which encompasses the most important conditions for welfare. Perhaps even more importantly, it is a discourse on equality of outcome, not of opportunity.

When compared to other countries, the system has produced a relatively even distribution of income from paid work. Yet, a marked wage gap remains: male occupations are better paid than female ones. As Ruth Nielsen points out in her article, the organisations participating in the social partners process are predominantly male. They have men in leadership positions and represent male values, even though the majority of membership may be women. Nielsen shows that there is a tension between the EC anti-discrimination law and the tradition of collective bargaining typical of the Nordic countries. Bringing up issues of sex equality in the Nordic circumstances has been difficult. Susanne Fransson gives an overview of the problems encountered by equality legislation in the Swedish labour market. Lotta Wendel gives an example about how the assumption of gender roles determines the right to practise in a profession for doctors and nurses. The contributions show that the Nordic labour market-based system is not very

sensitive to discrimination, especially sex discrimination. In any case, the paradox of the Nordic labour market seems to be that the processes that produce equality in general are not well suited to bringing about gender equality. Perhaps, the income gap between men and women is narrower in the Nordic countries, not because there have been efficient sex equality politics, but because there is little tolerance to big income gaps in general.

Responsible Selves

The welfare state support and labour market participation are crucial for the relation of the individual to her society. But to understand how the Nordic women construct their subjectivity and gender identity, we have to look at the history, too, as Anu Pylkkänen does in her article on the construction of subjectivity.

During the twentieth century, the Nordic countries developed from economically backward countries with rather archaic societal structures into hi-tech societies, belonging to the ranks of the richest countries of the world. Some of the values of the agrarian society have been transferred to present day society. Especially, the Nordic rural society was relatively egalitarian when compared to most other societies of that period. Where agricultural and fishing communities consisted of small farms, or other household based ways of maintenance, there was no strict division into the public and the private sphere. Ideas about the separate spheres for men and women were not pronounced in the same way as in bourgeois societies. Women were expected to do their part in the household and they were appreciated for their ability to work. Especially in survival economies everyone's labour was needed. The point is very evident in Finnish and Icelandic traditions. There was little room for feminine fragility and, thus, polarity between male strength and female weakness was downplayed.

The peasant traditions were utilised by the nationalist movement. The peasantry often held in nineteenth century Nordic political discourse the place of "people" that in other European cultures was given to the bourgeoisie. Those Nordic countries that gained independence relatively late – Finland, Iceland and Norway – had an active and popular movement for a nation state. Nationalism in Finland went hand in hand with democratisation because the political supremacy of Russia introduced an external conservative power. The Icelandic and Norwegian nationalism also had a democratic edge. Similar

processes have later been known in connection with the decolonisation outside Europe. The development was somewhat different in the long-established nation states of Europe, where patriotic enthusiasm was often a part of conservative politics. Identification with the nation was by no means limited to men. As Anu Pylkkänen tells us, women were expected to take part in the nationalistic project which led to a strong identification with national aims.

Participation in the agricultural labour, working ethos for both sexes and identification with the national project were conducive to putting women's issues aside. They may also be the basis of another myth that some writers in this book refer to, namely the myth of a strong Nordic woman, perhaps not so well known outside the Nordic countries. Salka Valka, the heroine of Island's Nobel Prize winning author Haldor Laxness, is a perfect illustration of this myth. Against all odds, a poor village orphan, Salka Valka, manages to grow into an independent, fairly well-educated, economically self-sufficient young woman, mature enough to take on responsibility when men are not there to rely upon.

Today, the myth of a strong woman lives on in the double burden of a paid job and unpaid care work at home which most Nordic women undertake, seemingly almost without complaint. The myth can also be distinguished in the discourses on, for example, violence against women, where women are depicted as anything but tender, fragile creatures. Women are often seen as the stronger party in a marriage or partnership, and certainly as the partner responsible for the events which take place in the relationship (see Ruuskanen).

Many Nordic feminists have had difficulties in situating themselves in the contemporary debate about gender identities that is based on the assumption of a strong polarisation. Anu Pylkkänen argues in her article that a deeply dualistic theory of gender difference has never had a strong effect on gender roles in Finland, a country where the bourgoisie was a tiny segment of the population and even bourgeois women engaged in public life as educators and political activists. In the Nordic countries, we find a discourse based on the existence of the nuclear family, the dualism of masculine and feminine identities and the separation of the male public and female private spheres. The Nordic discourse, however, does not seem to have quite the same significance as the debate has in most other Western countries. Perhaps, the difference in the discourses explains why psychoanalysis, to take an example

relevant to feminist research, has never had the practical importance that it has had elsewhere.

The welfare state promotes positive freedom, rights to goods and participation rather than freedom from constraints. Social, cultural and economic rights are central. For Nordic women, positive freedom perhaps appears in the form of social mothering. The very practical content of social welfare is the responsibility for the bodily needs of children, the elderly and others in need of care. It is assumed that such care is available at the communal or societal levels (Ketscher). This assumption decreases dependence on family members. In this sense, as Kevät Nousiainen argues, there is more room for liberal individualism in families, at least for women, while care responsibilities are anticipated in other contexts. The image of care is no longer exclusively bound to the intimate institution of the family and the boundary between the private and the public also changes. Consequently, the identities and images of women are deprivatised.

A weak recognition of discrimination and violations of integrity speaks about a denial of self. It is not within our capacity to present strong conclusions about how the Nordic gender identities are to be understood. Hopefully, the texts in this volume can give some means of assessing the issue.

Superimposing State, Society and Community

A specific identification with the state as a community may explain the fact that the texts in this collection seem to have scant interest in diversity and difference among women. This lack of interest may be surprising because Denmark, Iceland, Sweden and Norway have been among the first to decriminalise same sex relationships and to enact laws on same sex partnerships. To our own surprise, there has not been much legal research in this field and, therefore, no article on the relationships among law, sexual orientation and identity is included in this collection.

In other respects, the lack of diversification is a result of our methodological attempt to emphasise the differences between Nordic and other Western perspectives on gender. Therefore, many intra-Nordic differences are left out of the picture. The vague interest in diversity may also be due to the universality of certain welfare state and legal structures, however. As long as benefits are given to all, differences lose their meaning. For example, if all

children receive the same social benefit (a right to municipal day care, for example), notwithstanding the relationships of their parents, the distinction between single mothers and married women is not crucial. Of course, this emphasis on similarities decreases the sensitivity to real differences between those two groups of women.

A third reason for lack of diversity is, however, that Nordic societies are homogeneous, and more importantly, that there exists little or no traditions for the analysis of difference(s). There are several factors behind this attitude. All Nordic states are small, with populations from Iceland's 300,000 to Sweden's almost nine million. Even after the increasing immigration of the last decades, the Nordic populations are relatively homogeneous as to ethnicity, race and religion. In absolute figures, even the biggest minorities are small. Ethnic minorities, the Romany, the Sami in Finland, Norway and Sweden, and Inuit in Greenland are small in number, even if culturally important. Only Sweden and Denmark have sizable immigrant populations. Still, all Nordic countries are clearly nation states, with citizenship based on a strong identification with the nation. In the European context, the identification as a small nation or as a small region, such as Scandinavia, is also in a sense a minority identification, in which the membership in a community overrides diversities.

In Sweden, national unity has somewhat different forms than in the smaller Nordic states. Sweden, one of the early modern states of Europe and with a history as a European super-power of the seventeenth century, held for a long time a dominating position in the Nordic setting. Today, Sweden is the only multicultural society among the Nordic countries. Yet, even Sweden is a nation state. In Sweden, nationalism has since the 1930s been bound with a social-democratic vision of a state turned into a nurturing, protective "home for the people", *folkhem*. This vision included many features later identified with the Nordic welfare state, such as universal network of social benefits, based on a solidarity of citizens and mutual rights and responsibilities.

In contrast to many other Western countries, the Nordic people relate community and responsibility for each other with the state. It is symptomatic of the Nordic circumstances that the words "state", "society" and even "community" tend to be superimposed. When a Nordic citizens says that "society or community should take care of this matter", he or she seldom refers to associations, charities, or other actors of the civil society. Rather, she thinks that state or local municipality should take responsibility. No doubt, it is usually a positive connotation.

In these circumstances, it is not so surprising that women, and feminists, are oriented towards the state. Women have been politically active in the traditional sense: in political elections, competing for and getting positions in political parties, parliaments and municipal bodies. Women achieved political rights early – the Finnish women in 1906 as the first in Europe, and other Nordic women some years later. The presence of women in the political field has intensified since 1970s. During the last decades of the twentieth century, the number of women in the Nordic parliaments has been more than one third, but less than half of all representatives. Relevant political posts have been held by Nordic women. Iceland and Finland have elected a female president, the Norwegians have had a female prime minister. Today, Nordic governments have to have a reasonable amount of female ministers to be considered legitimate. There has been a women's party or a women's list in elections in Iceland, Norway and Sweden, and in Sweden the women within the social democratic party have occasionally driven politics of their own.

The relationship between feminists and state is often described by the term "state feminism" and the Nordic states are described as woman-friendly welfare states. The presence of women in traditional parties is often considered sufficient, even by women. Women have also organised specific women's parties or campaigns, or used women's sections of the parties to promote women's issues, sometimes in a manner not acceptable to the party. Women are often employed by the government and public sector and, even if men tend to hold the top positions, women have had a strong influence on the formulation of health, social and cultural policies. The influence of independent feminist movements has been smaller and more occasional. This way, women's issues have been incorporated to the state politics sometimes in a very effective way. On the other hand, feminist movements, which focus on specific women's problems and discriminatory practices, have been more difficult to mobilise than in most Western countries. This contradiction is perhaps most evident in the regulation of reproduction and sexuality.

Sexuality and Self-Determination

Issues of sexual and domestic violence have not gained the same attention and importance in the feminist movement in the Nordic countries as in many other Western countries. Nor have issues of women's right to self-determination and protection against violence been central in the criminal

policy making, as Johanna Niemi-Kiesiläinen shows. Articles by Minna Ruuskanen and Ulrika Andersson in this volume show that the courts have not been able to recognise gendered patterns of interpretation in cases concerning rape or women who have killed their abusive partners. That gendered behaviour expectations exist has been clearly demonstrated by recent research.

At the same time, however, we can argue that the indirect impact of the welfare state on women's ability to control their bodies in a wider sense has been notable. Many welfare state reforms promoting women's control of their bodies and procreation have been realised as part of general welfare policies, often in the name of the interest of the children. Pro-natalism, with emphasis on the reproductive health especially of mothers and efficient check ups of children's health, gained a strong foothold in the Nordic countries in early twentieth century (see Eva-Maria Svensson). Motherhood and infant health have remained a priority in the development of comprehensive health care services. Even though single motherhood and divorce are still accompanied by a decrease in income for women, the welfare state has alleviated the economic consequences. The high rate of illegitimate births in Scandinavia does not signify a high number of young single mothers. Most of these babies are born to cohabiting couples. Teenage motherhood is very exceptional.

Since 1960s, Nordic sexual politics have been quite liberal. Attitudes toward pre-marital sex are permissive. Marriage has lost some of its importance to the code of sexual behaviour, but partnership still is crucial. Even though women have formally the same rights as men, the informal codes of behaviour are still gendered. Young women in particular are expected to control their sexuality and the sexuality of their male peers. Ulrika Andersson describes in her article how the issue of consent is a part of the Swedish rape law, in spite of the gender-neutral wording and the absence of the requisite element of consent in valid law, still making women's behaviour central focus in the evaluation of evidence in a rape case.

None of the texts included in this collection address the issue of abortion. Nordic abortion laws do not allow for unlimited right of abortion by request. The abortion issue has evoked very little public discussion and it has never had the same symbolic value it has had especially in US. This lack of interest can be explained, in part, by the success of the health care measures relating to prevention and procreative health. An abortion has been available free of charge in the public health care system. Information about procreation and prevention has been easily accessible. Young women have had the

opportunity to consult with a doctor about birth control, pregnancy and abortion without parental consent. The policy has been successful in the sense that the Nordic countries have had very low abortion rates. Lately, however, many municipalities have discontinued school education on procreation and sex for economic rather than ideological reasons. Many feminists are very worried about this development which has already led to a slight increase in the abortion rate, at least in Finland.

These examples show that even in matters of bodily integrity, both positive rights and negative freedom are crucial – a right to something is considered as important as freedom from interference. No doubt, these policies have also influenced the identities of women. Responsibility for reproductive health is very much part of feminine identity. It is still true that gendered codes of sexual behaviour and reproduction put more responsibility on women than on men. The welfare state measures, however, have widened women's choice, and given them more control in connection with reproduction. Maybe it is no wonder then why Nordic women tend to see the welfare state as a partner, rather than a paternalistic control mechanism. The price can be a certain take-over by health care or social welfare professionals. These professionals are usually female, however. The situation could perhaps be described as professional mothering, rather than revival of patriarchal power.

Common Foundations for Law and Legal Tradition

The relationship between the welfare state law and women's rights is still largely an unexplored area in Nordic law. The main argument in our book is that general welfare reforms and politics tend to improve women's position and give a basis for emancipation, but, at the same time, they do not prioritise women's issues and may even make discriminatory practices more difficult to recognise. Discrimination is a legal issue. The Nordic legal systems have not been particularly sensitive to discrimination. The articles in this book tackle this issue from different perspectives and in different legal contexts. In many articles, however, we may distinguish patterns in which the universal character of the law or the comprehensive labour market regulations seem to override interests that are considered gender-specific. It seems to us that the Nordic law is structured in a way that makes it not sensitive to difference. In

the following, we make an attempt to look at the Nordic legal systems from the point of view of recognising difference.

Each Nordic country has its own legislation. The Nordic legal systems share many important features, however. General principles guiding both legislative work and legal interpretation often rise from a shared culture. Legal harmonisation has taken place over a long period of time. Historically, Nordic legal culture is a product of common tradition, co-operation and the voluntary sharing of ideas. Political boundaries in the Nordic area have previously connected some of the present nation states under the same rule, creating one more layer of shared legal order. The dissolution of political unions, such as between Denmark and Norway (until 1814), Sweden and Finland (until 1809), Denmark and Iceland (until 1918), or Sweden and Norway (1814-1905), did not severe the legal tradition, even if some distance to the previous order was taken. After a long period of Swedish rule, Finland was annexed to Russia for more than a century (1809-1917). During that time, there was an obstinate conservation of already outdated Swedish laws, and a reluctance to adopt Russian legislation even when the latter had been reformed to meet European standards. Self-government introduced to Finland at the annexation to Russia was strictly adhered to, as the customs, religion and legal culture differed widely from the practices of Russia.

During the twentieth century, harmonisation of laws of the independent Nordic states has been regular. Without any legislative body with the competence to legislate at the Nordic level, legal harmonisation has taken place on a voluntary basis, and through the means of political and expert co-ordination. As a result, the Nordic legal orders resemble each other, in some issues perhaps even more than laws of some federal states. The inter-Nordic labour market was introduced after the Second World War, long before the EC labour market. In the Nordic labour market, passport control and work permit requirements were removed already in the 1950s and 1960s. Because the social welfare systems of all the Nordic countries were predominantly residence-based, a Nordic agreement on welfare rights on the basis of a simple registration as a resident for those moving within the Nordic area could be made. Some political rights are also residence-based. This arrangement means that a citizen of a Nordic country moving to another Nordic country is entitled to certain rights as yet unknown within the EU. The inter-Nordic labour market has not had a very profound impact on the economy in terms of investments or economic exchange, however. The small Nordic

economies are too dependent on the exchange with a wider market for such a development.

Nordic Legal Culture

Law, lawyers and jurisprudence tend to be conservative in many societies. We have been led to think that a static structure in the Nordic law works against political attempts to change gender relations. As Eva-Maria Svensson argues, the legal response stands often in contrast to the political one. We can only try to point to some features of Nordic law that might play a part in this contrast between the legal and the political discourses. A foreign reader may also find some orientation in Nordic legal culture helpful for understanding the texts in our collection.

The Nordic idea of law is Continental in the sense that written laws are considered to be the primary legal material. Medieval Nordic laws were made into collections of texts. New codes of what was considered "general" law – a mixture of medieval European inheritance, local norms, and modern legal principles – were prepared in seventeenth century in Denmark, Norway and Sweden. Legal unity of the realm could be enhanced by a code and therefore kings favoured them. The Estates participated in the legislative work, as in most realms of *ancien régime* Europe. It is exceptional, however, that the peasants in the North formed a Fourth Estate and also partook in that power. The Swedish code of year 1734, the last of Nordic early modern codes, was followed in Finland, then a part of the Swedish kingdom, and remained in force even after Finland was annexed to Russia. The Nordic codes served to strengthen Nordic understanding of rule of law, based on written rules. The formulation of the codes was concrete, and not very sophisticated in the professional legal sense.

The idea that law is a system, organised around basic principles and concepts that organise the various legal materials into a harmonious whole, was adopted mainly from German jurisprudence. Both late eighteenth century textbooks and post-Kantian legal doctrine influenced Nordic jurisprudence. German as well as Nordic lawyers often refer to the discipline of law as legal dogmatics. This concept is to be understood in the sense used by Immanuel Kant to whom the term denoted uncritical knowledge – uncritical in the sense that a consideration of the validity of the basic principles underlying such knowledge has no part in the epistemological project. It would be false to say

that Nordic legal dogmatics are totally devoid of a critical attitude to law. Any foundational study about the legal system is not considered necessary, however.

Law as a discipline requires educated lawyers. The legal field for a long time remained rather non-professional in the Nordic area, however. Lay judges par-ticipated in decision-making, and formal qualifications were not demanded from the professional judges until relatively late. Still today, the parties in a law suit are not always represented by a professional lawyer. In these circumstances, it has been impossible to introduce a very specialised legal discourse.

Written law has gained ground also in traditional common law countries. The relationship between legislation and case law is still quite different in written law jurisdictions, such as the Nordic countries, and in common law countries. In Nordic jurisprudence, both legal science and case law are predominantly seen as tools of interpretation with the aim of upholding a coherent legal system. The primary aim of jurisprudence is often described as interpretation and systematisation of law. Systematisation consists of finding a place within the system for every legal regulation in a manner which removes inherent contradictions. Interpretation requires that each rule is seen as a part of a harmonious system.

The difference between legal systems based on common law and written law is clearest in case law. While a common law lawyer seeks to find a precedent that he or she can build the present case on, case law for a written law lawyer is merely a complement to what is written in parliamentary acts. Cases are tools for systematic and coherent interpretation of acts, both for a practical lawyer and a researcher doing legal dogmatics. A common law lawyer attempts to distinguish a case from other cases, while a written law lawyer tries to find an interpretation that would fit in the system consisting of relevant acts, previous cases, and the conceptual framework developed by legal science. Obviously, a case is seldom decided against a literary interpretation of law. In criminal law, in particular, the principle of legality limits interpretation of a specific criminal law norm. Legal principles such as the legality principle are held to restrict the power of the legislator as to what may be enacted as a criminal offence (see the discussion about woman's peace reform in Nordborg and Niemi-Kiesiläinen).

According to the dominant Nordic legal discourse, a systematic and coherent argumentation should justify the interpretation of law. The ultimate legitimacy of an interpretation of a hard case cannot always be based on intra-

legal arguments, or be found in law understood as a sphere separate from moral and political considerations. The quest for the "ultimate" key of interpretation has been solved in different ways by different Nordic systems. Swedish jurisprudence was in early twentieth century strongly influenced by a group of philosophers trying to distinguish empirically grounded knowledge from statements with a moral content. Legal scientists known as Scandinavian realists took the tenets of this group – the Uppsala School – as the basis of their legal science. According to the realists, moral statements cannot be the object of scientific inquiry. In order to remain within the scope of science, a legal scholar should give up attempts to arrive at a correct interpretation of law. According to Alf Ross, a scholar should make a prediction on how a judge will decide a case. It can be claimed that the approach which detaches values from statements about the content of law is well-suited to social engineering, and maybe even legal reforms to increase welfare.

The functional approach to law has been a central tenet in the discussion of the Scandinavian realism. One of its central figures, Karl Olivercrona, made an attempt to absolve law from metaphysical considerations, such as the will of the legislator. In the Nordic courts, the role of the preparatory works, *viz., travaux préparatoires,* has been quite central in the interpretation of the laws. The preparatory works have been rich in statements about the functional aims of the acts and often also about how the acts should be interpreted. Because both judges and legal scholars are expected to be familiar with these texts, one can expect that a prediction about how a case should be decided corresponds to the aims presented in the preparatory works. In this way, the Scandinavian realism has been well-adopted for loyalty towards the legislator.

On the other hand, however, the functions that the laws are intended to have are not always found in the preparatory works. In such cases, it becomes the task for the jurisprudence to reconstruct the function, and then use this as the basis of interpretation. The most well-known authority on procedural law in the Nordic countries, P.O. Ekelöf, initiated a lively discussion on the functions that the legal procedure has according to Swedish procedural law. Functions that are constructed in the legal science are often institutional in character, such as protection of credit as an institution. The emphasis on function of law objectifies the interpretation, and introduces a certain teleology in Scandinavian legal theory. Both functional approaches, emphasis on *travaux préparatoires* and constructed functions, tend to be resistant

towards a critical assessment of law. In Scandinavia, political events have not forced lawyers to question the legitimacy of the "law in force".

Norwegian legal realism developed into a re-conceptualisation of what the German tradition describes as "sources of law". Early modern jurisprudence in Germany tried to purge legal arguments from moral or political ones by defining what qualifies as a source of valid arguments, and included written law, customary law, case law and legal doctrine among valid sources. Theorising about "sources of law" has become quite a comprehensive preoccupation in the Nordic jurisprudence.

Finnish jurisprudence never really adopted the Scandinavian realism. The Finnish approach followed German nineteenth century "conceptual" tradition of *Begriffsjurisprudenz* until after the World War II, and since that time, has borrowed from German hermeneutics, philosophical trends based on Ludwig Wittgenstein and Anglo-American legal theory. A separation of legal from moral and political issues has been rather strict, however. During the last decades, there has been a reintroduction of what in the older German jurisprudence was called "general doctrines", *allgemeine Lehren*. The nineteenth century German jurisprudence collected general principles and notions into *allgemeine Lehren*, since a separation of philosophy and law had made "metaphysical" considerations in law obsolete. When considering, for example, on what grounds contracts should be considered valid, or punishment justified, a Finnish legal scholar often resorts to 'general doctrines'. They perhaps leave a slightly wider space for a scholarly interpretation and inclusion of moral arguments than the tradition of Scandinavian realism does. In practice, however, moral principles have seldom been properly discussed in the mainstream jurisprudence.

Feminist Jurisprudence in the Nordic Realm

Despite some differences, the Nordic legal theory in general shares the pursuit towards a universal, systematic and coherent legal system. It is, therefore, suited for the articulation of universal principles. In this context, women's issues have been best served when they have been articulated as universal and gender neutral interests, often as welfare reforms. In legal reform, women's issues have been articulated as enhancements of certain policies rather than as issues of rights or discrimination. Policies have been most effective in promoting women's position, when they have been

articulated as individual and universal rights, such as the right to be absent from work and the right to compensation for parents. The inclination of the Nordic feminists to see legislation as a tool for change, rather than seeking change through case law, seems quite natural in this light.

As a discipline, feminist jurisprudence or women's law, appeared on to the scene in Nordic faculties of law in the 1970s and early 1980s. The research first addressed legal issues in areas of life which were of specific relevance to women. Tove Stang Dahl, as the first professor of women's law in Scandinavia, together with her students, did research on such topics as birth law, the rights of a housewife and the regulation of private care work. In this issue, Kirsten Ketscher develops this tradition in her discussion of care work. In Finland, Sweden and, perhaps even Denmark, early studies in women's law focused on equality law, which is especially concerned about working life. Issues of bodily integrity and violence against women have not been central in the early studies of women's law in the same way as in some other Western countries. Some research on these themes was published quite early, but violence has become a major issue only recently.

Lately, the nature of the research has changed. Eva Maria Svensson describes the development as a shift from women's law to feminist legal theory. Feminist researchers have become interested in a variety of new issues of economic interests, criminal law, human rights and so on. Also, a more theoretical approach toward legal concepts, such as discrimination, sex and gender, subjectivity and legal structures is appearing in the Nordic context.

Note

1 All references in this introduction are to articles in this collection.

PART I
CONSTRUCTING EQUALITY AND IDENTITY

15 Women's Peace:
A Criminal Law Reform in Sweden

GUDRUN NORDBORG AND JOHANNA NIEMI-KIESILÄINEN

In most societies, violent crimes against women are punished less severely than similar crimes against men. Because violent crime against women usually takes place within the family and other intimate relationships, it is considered a private matter, difficult to investigate or prove. Authorities often express their inability to intervene in cases of violence against women. Research has revealed the continuous and serious nature of typical forms of violence against women (Dobash and Dobash, 1979; Kelly, 1987; Skjørten, 1988 and 1994). Feminists have claimed that the response from the criminal justice system should be equally serious regardless of where the violence takes place. Some have even argued that violence in an intimate relationship or at home, in a place of trust and peace, should be considered a more serious crime than violence elsewhere.

In the 1990s, the Swedish government undertook a bold initiative to tackle this problem. It commissioned a review of the legislation concerning violence against women. The Commission on Violence Against Women made several proposals, the most famous of which was the enactment of a new category of crime: *breach of a woman's peace.*

The new crime forms part of a wider process in the Swedish discourses on equality. A series of studies in the early 1990s reviewed the division of power in Swedish society. One of these studies concerned power relations between men and women (SOU 1990:44).[1] Despite the relatively equal status of Swedish women, women were underrepresented according to all measures. Theoretically, historian Yvonne Hirdman has conceptualised the power relations in a societal gender system where women were attributed as having less value than men (Svensson). Later, the government initiated several projects to promote equality, for example, in university education and the legal system. The initiative has also led to a more systematic evaluation of the effects of legislation on the relative positions of women and men.

During the 1995 United Nations' Conference on Women held in Beijing, Sweden was celebrated as the nation with the highest rate of equality in the

world and Sweden has actively promoted women's human rights as a part of its developmental policy and aid. The earlier women's conferences had understood violence against women as the most obvious expression of the power imbalance between the sexes. The Beijing Declaration and Platform of Action (1995) also urged concrete action to eliminate these forms of violence. The Swedish initiatives were seen as a part of this international movement to make visible and to eradicate violence against women (SOU 1995:60, 61).

These views were reflected in the government directive to the Commission on Violence Against Women. The government directed it to work from the women's perspective (Directive 1993:88).[2] More specifically, violence against women was seen as an expression of an imbalance in the distribution of power between men and women.

In 1995, the Commission on Violence Against Women published an extensive report entitled "Woman's Peace" (*Kvinnofrid*, SOU 1995:60) after its most important reform proposal. The Commission proposed that a new crime "breach of woman's peace" be included in the Penal Code. This new crime was primarily aimed at violence and other abuse directed at a woman in an intimate relationship with a man. The government presented a Bill for the introduction of the new crime and several other reforms concerning violence against women in 1997 (Prop. 1997/98:55). The new law came into force on July 1st, 1998.

The new crime is radical within the legal system in at least two ways. First, it is an attempt to focus more on the process created by the multiple effects of different acts than on the specific acts included. Secondly, the new crime can be defined as sex-specific in a strongly sex-neutral legal context. Both aspects challenge traditional legal principles.

The proposal was extensively discussed both in the legal community and in society at large. More than a hundred institutions, organisations and authorities gave their views on the Commission's report. The reactions differed widely.[3] While the women's organisations and, for example, the Equal Opportunities Ombudsman welcomed the proposal, we can distinguish a systematic reluctance towards it from the judicial community (Bjelle, 2000). Some lawyers have questioned the need for the new law[4] despite the usual reluctance of the profession to take a stand on political preferences. Practising lawyers and advocates, who of all lawyers should have the closest contact with both the perpetrators and the victims of crime, bluntly opposed the new crime.[5] Sweden's Judges Association, by contrast, was conscious of the need for legal protection against such forms of outrages as described in the report.

The Association, however, advocated sex-neutral language and criticised the proposals for being too difficult to implement and including risks to individual legal rights.[6] While the tone of the legal authorities was clear, they took up many important legal issues that were also discussed at length both in the Commission report and the subsequent government proposal.

The legal critique led to a careful reconsideration of the Commission's proposals by the government. The Bill presented to Parliament in 1997 had reconsidered the wording of the proposed newly-defined crime, "serious violation of a woman's peace", or, according to a later official translation, "gross violation of integrity". The new proposal was far less ambitious, reducing the new crime from an ambitious attempt to capture the abuse of power in domestic violence in criminal law terms to an increase of penalties. Even so, we consider the new law an important acknowledgment of the gendered, serious, continuous and damaging nature of violence against women.

In this article, we shall describe the new crime and its drafting process. We shall also discuss how this process brings to light issues about the gendered nature of legal principles and the limits of legal change.

The Legal Background

Swedish sex or gender equality has been achieved through gender-neutral legislation. Historically, sex-specific laws excluding women from access to labour and power have been changed (Nordborg and Dahlberg, 1997). Gender neutrality has also been an important goal in the reforms of criminal law since a husband's right to chastise his wife was abolished by the 1864 Penal Code. Thus, wives were given formal protection against battery. However, up until 1982, the prosecution of a battery charge required that a request be made by the wife.

The Penal Code of 1965 made rape within marriage a crime. This reform was accepted after intense discussion and a close vote in Parliament. Interestingly, the power relation between a couple was a central theme in the discussions: it was feared that the wife would be given too much power through the reform.

The sexual revolution in the 1960s led to the enactment of the no-fault divorce in 1973. According to the Marriage Act, claiming damages for violence or other behaviour that has caused the breakdown of the marriage is

no longer possible. The sexual revolution also accounts for the high rate of cohabiting couples.[7] Both the sexual revolution and liberal sexual mores have been recently critically assessed by feminist researchers (Nordborg, 1995), arguing that sexuality is still defined by men and from a male perspective (Bergenheim, 1992).

Among the reforms of the criminal law, gender neutrality is still an important reform goal. For example, in 1984, rape law was made sex-neutral. Instead of the former male perpetrator / female victim terminology, the law now speaks about "a person who by violence or threat which involves, or appears to the threatened person to involve an imminent danger, forces another person to have intercourse or to engage in a comparable sexual act...". The main reason for the change was to give homosexuals the same legal protection as heterosexuals. After the change, a woman may become guilty of rape too, and the newspapers widely reported one such case in the summer of 1998. According to the statistics, however, women as perpetrators are next to nil, even if accomplices are included.

In the 1970s, *Kvinnojour*, a new force within the feminist movement, was formed. Local groups organised women's shelters in almost every city during the 1980s. They formed a national organisation, the Swedish Association of Women's Shelters (*Riksorganisationen för kvinnojourer i Sverige, ROKS*) and created informal networks with female politicians at both local and national level. This movement and the researchers connected with it started to take up themes of power and the distinction between the public and the private (Gustafsson, et al., 1997).

This coalition pushed for the legal reform of 1982, which made the prosecution of assault and battery independent of the victim's wishes. Even though the reform was formally sex-neutral, the main arguments in its favour were the protection against domestic violence and the abuse of women and, also, the need for an official condemnation of domestic violence. The reform helped to publicise that domestic violence is not only a private problem, but also, a more pervasive public and social problem in Swedish society (Snare, 1983).

In 1988, victims of a sexual crime or other serious crime were given the right to a lawyer paid for by the state. A specific law on protection orders was enacted in the same year. These reforms, too, were gender-neutral, but argued for in sex-specific terms.

The Doctrine of Criminal Law and Violence Against Women

Despite several legal reforms related to violence against women, criminal law itself had remained intact. There seems to be an incompatible gap between the gender-neutral principles of criminal law and the gendered nature of violence against women that makes futile any attempts to acknowledge the special severity of these crimes.

In criminal law, as in all branches of law, we can distinguish different levels of regulation. Basically, Scandinavian criminal law is legislated law enacted by Parliament. While case law may be important in the interpretation of parliamentary acts, it is subject to the legality principle, requiring that the prerequisite of criminal law has to be precisely determined by parliamentary acts. Despite the strong emphasis on written law and the legality principle, criminal law is anchored in deeper structures of the legal system.

At a deeper level, legal decision-making is guided by legal concepts, general principles of law and methods generally accepted by the legal community (Tuori, 1999). When a basic legal construct has been accepted and internalised to such an extent that it is not, and maybe even cannot be, questioned, we can talk about doctrines (Nousiainen, 1999). In criminal law, important elements, essential for establishing liability, are not found in written law, but, instead, are constructed as general doctrines. Nousiainen has used the word *dogma* to characterise such central concepts as guilt, intent, act and the legal subject (Nousiainen, 1999). A dogmatic structure is elaborated upon in the case law and in legal research. However, certain structures of the legal system are often implicitly assumed without questioning or even recognising them.

Feminist research has now started to look at the central concepts and dogmas of criminal law and to ask how and from what perspectives they have been constructed (Naffine, 1995; O'Donovan, 1997; Leander-Elliott, 1997). No doubt criminal law has been, and still is, dominated by male judges and professors. More importantly, though, the focus of criminal law is necessarily on the perpetrator, whose liability is assessed, and the perpetrators tend to be male actors.

At the same time, we know that men and women live different lives and have different experiences. Feminist research has shown how the two sexes are constructed to have different perceptions of personality, relations, responsibility and ethics (Benhabib, 1992; Benhabib and Butler et al., 1995; Chodorow, 1989; Gilligan, 1983). We can reasonably ask whether the basic

concepts of criminal law are guided by gendered perceptions of personality, action, body, power and relations between persons.

In the construction of legal doctrine, the assumed subject is the rational, featureless individual. In the doctrine of criminal law, the context of violent crime is an encounter between two such individuals who have no relevant relation to each other before or after the crime. When context is considered, it is usually to the detriment of the woman, whose consent to the deed is derived from the context (O'Donovan, 1997, 53-54). While the criminal process aims at determining guilt, the victim is not the subject, but rather the object of inquiry and evidence (Hunter and Mack, 1997). Furthermore, the concept of a criminal act is decisive in the determination of the guilt and the sanctions. The criminal act is defined in time and space as an isolated incident, all elements of which are found in the corresponding legal definition of the crime (Nousiainen, 1999; Norrie, 1993; Kelman, 1981).

Not surprisingly, the assumptions of criminal law seem not to fit in with domestic violence, nor with many other forms of violence against women. The persons involved are related to each other. Their relationship is understood to be of relevance in the context.[8] The violent crime is not an isolated act but often just one incident in a long history of violence, which happens to come to the knowledge of the criminal justice system. The personal qualities of the perpetrator and the victim are of relevance because the former usually uses his physical strength to gain control over the woman (Skjørten, 1988 and 1994). Furthermore, the power relations between the two reflect the relationship between the sexes today in society. This societal context makes possible a situation in which the perpetrator uses violence and psychological abuse to gain control over the woman (Dobash and Dobash, 1979; SOU 1995:60, 106). Thus, instead of isolated violent acts, the relevant harm and violation are achieved by a process consisting of continuous psychological abuse and physical violence (SOU 1995:60, 102).

The recognition of domestic violence and other forms of violence against women as processes that have a lasting and damaging effect on the victim's integrity and personality was the background to the proposals of the Commission on Violence Against Women (SOU 1995:60, 22). With the new crime "gross violation of integrity" the law drafters and the Parliament aimed at a more effective criminalisation of the typical forms of violence against women and, primarily, of the violence and other abuses directed at a woman in a close relationship with a man.

The Woman's Peace Report

The report of the Commission on Violence Against Women included several other important proposals. Some of them were semantic. The language in the Penal Code consequently refers to the crime victim as "he". It was suggested that this terminology was an expression of a male norm and that it should be replaced by some sex-neutral expressions, *viz.* "he or she" and " him or her". Also, it was proposed that the specific crime, "the circumcision of women", be reworded to define the crime more appropriately as female genital mutilation. It was proposed that the definition of rape be widened to include other acts of forceful sexual exploitation than intercourse and that the protection of children in sexual crime law be strengthened. The report included a review of the criminal process and the services available for victims of sexual and domestic crime. Several proposals to improve their working practices were made. Also, the need to promote increased awareness of violence against women was emphasised. More specifically, issues of violence against women would be included in relevant educational curricula.

Most of the proposals were included in the subsequent government Bill, also called, "Woman's Peace" (*Kvinnofrid*, Prop. 1997/98:55). The reform of sexual crimes was referred for further review.

The Bill went further than the Commission's report in two respects. It proposed that buying sex from a prostitute be constituted a criminal offence. A previous commission had proposed that both the buying of and the selling sex of should be criminalised (SOU 1995:15) but, in the Bill, the criminalisation was limited to the customer. Moreover, the proposal included a definition of sexual harassment to be added to the Act on Equality between Men and Women and provisions aimed at improving protection from sexual harassment.[9] The proposals were accepted by Parliament in Spring 1998. The reforms came into force on 1 July 1998.

Some proposals, however, had been changed during the drafting procedure. In particular, the new crime, "breach of a woman's peace", acquired a different nature and intent, adequately reflected in its new translation, "gross violation of integrity".

The Crime "Gross Violation of Integrity"

The Continuum of Violence

The central aim of the new law has been to develop a new and more appropriate approach to the continuum of violence so often encountered within domestic and other violence against women. By the concept of continuum of violence, Liz Kelly refers to a process of violence in which individual acts and their effects are seen in the context of power, domination and psychological abuse of which they are a part.

The crime, "gross violation of integrity", is an attempt to capture this process in the criminal law and to sanction it according to the serious nature and consequences of these acts and processes. This approach makes the reform radical and unique.

The Commission on Violence Against Women considered it important that the new crime would include acts which were not offences according to the criminal law but which effectively contributed to the mental processes of abuse, violence and mental terror. As the Commission noted, the abused woman has often been subjected to behaviour for which no sanctions currently apply; for example, the man may have hidden joint possessions, such as the telephone or keys, may have forbidden her to meet friends and relatives, or may have insulted and defamed her (SOU 1995:60, 102, 300, 305). Thus, her vulnerable situation is not primarily characterised by specific acts of physical abuse. Of course, acts already deemed criminal, such as assaults and unlawful threats, would be included in the crime of breach of a woman's peace (SOU 1995:60, 22, 304). The Commission's proposal was as follows:

> "[a] man, who uses violence or the threat of violence against a woman with whom he has or has had a close relationship or subjects her to other physical or psychological influence, which seriously violates her integrity and has the quality of seriously damaging her self-respect, shall be convicted for *a serious breach of a woman's peace* to imprisonment for not less than one year and not more than six years.
>
> If a man acts as described in the first paragraph against another man, or if a woman acts so against another woman or against a man, he or she shall be convicted for a *serious breach of peace* to the same punishment".[10]

The formulation of the proposed law text by the Commission mentioned, besides violence and the threat of violence, other physical and psychological influences, aimed at a lasting violation of the woman's integrity and damage to her self-respect. Interestingly, precisely the formulation of this part of the article met with vehement criticism from the judicial community and was consequently changed. For example, the Faculty of Law of Uppsala University, one of three law faculties in Sweden, was resolutely opposed to the new crime:

"The examples of crimes can hardly create sympathy towards the proposal (the so-called prohibition of meeting friends, hiding the telephone, some patterns of controlling behaviour). Reciprocal accusations of crime are likely to be very frequent in connection with divorces fraught with conflict. It is hard not to get an impression that the Commission's proposal will partly increase the problems it seeks to militate against.... Nor is it excluded that the proposed new crime will be counterproductive and generate violence: the perpetrator might as well use violence if he (she) anyhow risks being sentenced to a harsher punishment than for assault and battery. Furthermore, some very troublesome problems may well be caused by the vague construction of the time frame in the crime ("a continuous process"), and, among other problems, how should the provision on self-defence be made applicable".[11]

Also the Government pointed out several legal problems connected to the Commission's proposal. In particular, the construction of the new crime as a process or a continuous crime, in which acts not previously defined as crimes would be included, was not accepted.

The legal critique used the principle of legality as its starting point. The legality principle, or the human and constitutional rights principle that all criminal offences shall be defined by law, is usually understood in Scandinavian countries as requiring that the prerequisite of criminal liability is precisely defined in the law text. The Commission's proposal was found to be too vague, that is, it did not define the acts that cause liability precisely enough. Consequently, a prosecutor would be unable to define the charges in a detailed way, the presentation of evidence would be problematic and, finally, *res judicata*, (*viz.*, the extent to which a conviction would cover acts perpetrated during a certain period and bar subsequent prosecution), would not be precisely defined.

A further legal argument against the Commission's construction was that it was incompatible with the prevailing doctrine of self-defence (see Ruus-

kanen). According to the Government proposal, "it could be argued that the woman would have the right to self-defence during the whole period covered by the prosecution" (Prop. 1997/98:55, 78). This interpretation is far from self-evident, but, in the Government's statement, we can distinguish a concern that the new crime could give battered women too broad a right to self-defence and, thus, even turn out to be risky for men.

The Government decided to reformulate the proposal. In the Government Bill, the new crime consisted of acts which, according to the Penal Code, are already criminal acts. Included are violent crimes, crimes against peace and sex crimes. Technically, the law refers to these crimes in Chapters Three, Four, and Six of the Penal Code.

According to the Bill, the newly-defined crime "serious gross violation of integrity" would be used as the basis for the conviction of a series of criminal acts. If each of these acts were to be prosecuted alone, each would be considered rather harmless. When the crime is seen in context of a series of attacks, it constitutes a serious and continuing attack on a woman's integrity. Therefore, the crime can be punished more severely.

The Impact of Continuing Violence

Both the Commission and the Government stated that domestic violence against women is specifically harmful because of the continuous pressure on and the violation of the woman's self-respect.[12]

Both the Commission on Violence Against Women and the Government paid considerable attention to the effects of continuing violence on the mental state and well-being of the woman. The Commission elaborated on the process through which the perpetrator gains control over the woman. A common factor in these processes was, according to the Commission, that they affect the woman's integrity and self-respect over a long period of time. The Commission spoke about a process of normalising the violence, in which the woman learns to live with and accept the violence, power and domination as a normal situation, the change of which is beyond her control (SOU 1995:60, 103, 143; Prop. 1997/98:55, 75, 79).

The effect of violence is reflected in the formulation of the new crime, emphasising that the violence in this context is an intentional act and that the use of it violates the mental state, the integrity and the self-respect of the woman.

Sex neutrality

The sex neutrality of the law was discussed repeatedly during the legislative process. The Commission report defined the crime, "serious violation of a woman's peace" as a crime committed by a man against a woman with whom he has or has had an intimate relationship. In the second paragraph, the crime, "serious violation of peace", was defined concerning other relationships.

The Commission argued that the new crime should reflect the reality and the fact that these crimes are frequently perpetrated by men against women they consider to be "theirs" (SOU 1995:60, 306). Furthermore, the Commission stressed that these crimes were caused by sex/gender relations and grounded on the apprehension of a woman having less value than a man.

The government proposal argues, first, that "rewriting the law from such a perspective would be almost impossible" (Prop. 1997/98:55, 83). Even if in most of the cases a man violates a woman, this argument is not strong enough to break the principle of sex neutrality in the Penal Code. Also, a sex-neutral construction makes it possible to include children (Prop. 1997/98:55, 83).

The Government was willing to allow an exception to the sex neutrality principle, but only in so far as the sex-specific formulation was used as a pedagogical example of the special harm that the crimes against a woman in an intimate relationship represent (Prop. 1997/98:55, 83; JuU 13 1997/98,17). Consequently, the article was reorganised; the gender-neutral formulation was lifted from the second paragraph to the first and the sex-specific crime inserted in the second paragraph. Even this breach of the sex neutrality principle was criticised by the most respected body of lawyers, the Law Commission (*lagrådet*), a body representing the Supreme Court Judges.[13]

The change is reflected in the English translation even more than in the Swedish text. The Commission had referred to the medieval and early modern crimes against women by giving the crime the name "breach of woman's peace" (*Kvinnofridskränkning*) (SOU 1995:60, 433). The terminology was sustained in the Swedish law text, but the official English translation is not a "breach of peace" which the Commission had used. Instead, the translation is *gross violation of integrity*.

One may argue that the change was not legally significant, but we cannot deny its political message. Instead of expressing explicitly the goal of the reform, to protect women from intimate and other continuing violence, women are only mentioned as one protected group. The final text of Chapter 4, Article 4a of the Penal Code is as follows:

> "[a] person who commits criminal acts as defined in Chapters 3, 4 or 6 against another person having, or having had, a close relationship to the perpetrator shall, if the acts form a part of an element in a repeated violation of that person's integrity and suited to severely damage that person's self-confidence, shall be sentenced for *gross violation of integrity* to imprisonment for at least six months and at most six years.
>
> If the acts described in the first paragraph were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for *gross violation of a woman's integrity* to the same punishment. (Law 1998:393)"

Which Crimes are Included?

A gross violation of integrity may consist of violent crimes, such as assault and battery, of sexual crimes, and of crimes against peace as defined in Chapter 4 of Penal Code, for example, unlawful duress, unlawful threat, molestation and the violation of the privacy of the home.

Psychological maltreatment may be included as far as it is considered to be an assault according to the Penal Code, Chapter 3. To be considered an assault, psychological maltreatment has to cause damage, illness, pain, disability or unconsciousness (JuU 13 1997/98, 16). One could say that one reason for the attempt to define a new crime has been the difficulty of legally showing the causal relationship between psychological maltreatment and its consequences. When the new crime was reduced to cover only traditional criminal acts, the possibility of using it to show this causality was reduced. However, the new law widens the scope for the prosecution of assaults perpetrated by psychological maltreatment as well. It remains to be seen whether prosecuters will take advantage of this new resource.

Verbal harassment is an important weapon in creating the psychological pressure and tension often connected with domestic violence. In this context, verbal harassment usually consists of continuous name calling and berating referring to the sexual reputation and manners of the woman. In addition, insulting and demeaning comments on her housekeeping, looks and competence are made. Typically, some of these insults are crimes of defamation and slander according to Chapter 5 of the Penal Code.

These crimes, however, may not be included in the new crime, "gross violation of integrity". According to the Government Bill, the practical need to include these crimes is in doubt because, according to the law, they are, as a basic rule, prosecuted by the victim, not by the prosecutor (Penal Code 5:5). In this connection, it has also been argued that only crimes that directly harm the integrity of the victim should be included in the new crime (Prop. 1997/98:55, 79-80). The logic of this argumentation may become clearer if we compare it with the argumentation the Government used in the context of another proposal by the Commission relating to verbal harassment.

The Commission proposed that the law concerning the prosecution for defamation of a person's sexuality be changed. Presently, only the victim may make a charge on the grounds of such a defamation according to Swedish law. The prosecutor may bring charges for defamation of homosexuality. The Commission proposed that the prosecutor should be free to prosecute for other sexually defamatory insults if the victim reports the crime and prosecution is warranted by public interest (SOU 1995:60, 293). This proposal was rejected by the Government. Unlike the defamation relating to race, colour, nationality, ethnicity and religion, for which the prosecutor does have such a duty, prosecution for defamation on the ground of sexuality would protect most of the population and, therefore, would risk losing its meaning (Prop. 1997/98:55, 86). With the exception of homosexuals, no need for protection specifically on the grounds of sex or sexuality was acknowledged (Prop. 1997/98:55, 87). The logic here seems to be that if too many people, maybe even a majority, need protection, there is not enough public interest in protection (Hunter and Mack 1997, 177). Fortunately, Sweden has not used this logic regarding majorities which are discriminated against in other countries, for instance South Africa. It seems to be much more difficult to recognise discriminatory practices, such as systematic defamatory language, against women than against, for example, racial majorities.

Because the Penal Code prescribes for serious crimes, such as aggravated assault and battery, rape and kidnapping, a more severe punishment than for gross violation of integrity, these crimes are not included in the new criminal category (Prop. 1997/98:55, 131-134). According to the Code of Procedure, they may be prosecuted and convicted at the same trial. The most serious crime determines the level of the sentencing.

The practical effect of the new law is that a series of crimes is convicted as a single, more serious crime. Thus, it becomes decisive, how many crimes are necessary to constitute a new crime. The government proposal could not say anything definite about the number of acts, but emphasised that, in addition to the amount, the character of the acts is important.

The Punishment for a gross violation of integrity is at least six months and no more than six years in prison. The Commission had proposed a minimum of one year, but the government found six months sufficient (Prop. 1997/98:55, 82). It is important, of course, that the prescribed sentence is imprisonment. Many of the crimes, that are usually included under a gross violation of integrity, seldom lead to a prison sentence if they are handled in isolation from other crimes in the same context.

Evidence

During the legislative process, evidentiary problems were frequently referred to. One aim of the proposal has been a certain simplification of proof (SOU 1995:60, 304). It was stressed that domestic violence has often been going on for a long time before it comes to the attention of the judicial authorities. The victim may have difficulties in identifing individual acts of violence and in defining them by date and place.

Earlier, in the case of several batteries and rapes of a cohabiting woman (NJA 1991 s 83), the Supreme Court had adapted the position that specifications of date and place of each individual act was unnecessary in a long chain of acts. For many incidents, the victim's statement was the only evidence. According to Judge Inger Nyström's concurrent opinion, the victim's credibility regarding those incidents for which no other evidence was obtainable was supported by the consistency of those unspecified incidents with incidents for which full evidence was available. Other factors were also taken into account in the evaluation of the evidence, *viz.*, the relationship between the perpetrator and the victim, the usual tendency to keep things secret and the continuous and repetitive nature of the violence.

Because the Commission proposed a continuous crime, one consisting of different kinds of violent and psychological maltreatment, evidence in a case would have to be presented to show the process-like nature and combined effect of the incidents (SOU 1995:60, 305-306). As the nature of the crime changed, the issues of evidence changed their nature. Instead of showing the nature of the process, the evidence of the combined effect of the specified crimes on the victim's integrity and self-respect became relevant. The Law Commission had resolutely opposed both the inclusion of previously uncriminalised acts in the new crime and the allowance of evidence of any acts other than those included in the charge of gross violation of integrity.

The Law Commission stated that there should be no doubt about the effects of such repeated offences.[14]

The Government, however, wanted to accept additional evidence of the nature of the crimes, but, eventually acquiesced in the Law Commission's position that evidence of something that is not a crime in itself should not be allowed. Consequently, the Government Bill argued that previous convictions or crimes previously reported to the police should also be accepted as evidence of the nature of the crime (Prop. 1997/98:55, 133).

The Law in Practice

The law concerning the gross violation of integrity has been in force since 1 July 1998. The first cases were decided in September 1998. By the end of 1999, about 70 cases had been decided by the courts.

The first case in the Swedish Supreme Court was decided on 19 March 1999 (NJA 1999 s 102). In this case, the perpetrator, who had been previously twice convicted of battering the same woman, was prosecuted for a gross violation of integrity consisting of four instances of batteries, one of them committed before the law came into force. Both the District Court and the Court of Appeal convicted for gross violation of integrity.

By a majority of four to one, the Supreme Court dismissed the charge of gross violation of integrity and convicted him to eight months imprisonment for four incidents of batteries. The majority argued that the formulation of the law made it necessary that, in addition to the act for which the person was prosecuted, there had to be evidence of at least one additional harmful action. The act of additional harm could be a previous conviction, a police report that had led to fines or a decision by the prosecutor not to charge. In this case, however, the previous convictions could not be used as evidence of additional harm because the acts were committed before the new law came into force.

One can read a very strong interpretation of the legality principle in this reasoning. The additional requirement of a conviction or of at least a reported crime may turn out to be problematic from another legal angle, however. The principle of *ne bis in idem* effectively forbids double prosecution for a crime.

The four justices in the majority were not unanimous in their elaborations. Two of them gave concurrent separate opinions. Chief Justice Torkel Gregow wanted to consider former acts, committed before the new law came into force, as evidence of the nature of the acts. Yet, even if the three actual

acts of battering were rather severe and there were the four former instances of batteries, "[i]t has not been such a systematic and qualified offence by [the man] that these acts can be seen as a part of a repeated insult on [the woman's] integrity. These acts therefore shall, in my opinion, even if they have been aimed to seriously harm [the woman's] self-respect be judged as battery".[15] One can only wonder what would constitute such a systematic and qualified offence that Chief Justice Gregow would convict for gross violation of integrity.

The dissenting judge, Torgny Håstad, would have convicted on the basis of the new crime. According to him, the instances of battery that took place before 1 July 1998 showed that later acts were part of a process that violated the woman's integrity: "[t]he three cases of battery in July and September 1998, none of which is less serious, must be seen as aimed at seriously violating [the woman's] self-respect. For these acts therefore the accused shall be convicted for gross violation of integrity".[16]

The decision of the Supreme Court decelerated the flow of these cases in the judicial system. During the first year and a half, 1,000 police reports on gross violations against integrity were made. Reports came in at a rate of 120 per month between November 1998 and February 1999. Since March 1999, when the decision was handed down, the rate has been approximately 50 per month.

About one-tenth of the reports led to prosecution for gross violation of integrity. Another 10 per cent for other crimes, such as battery and assault. Either the police or the prosecutor had discontinued investigation in approximately 40 per cent of the reported cases, mostly for a lack of evidence. Another 40 per cent of the cases were still under investigation at the end of 1999.[17]

Also, the number of convictions slowed down after the Supreme Court decision. Only twelve convictions were passed after the decision. Convictions for the gross violation of integrity included, on average, four crimes. In many cases, the defendant was also convicted for other crimes, such as aggravated assault, at the same trial. The most common crime included in convictions for gross violation of integrity was battery. About 80 per cent of defendants were sentenced to prison. The length of the sentence on average was 14 months.[18] All perpetrators were men. There were no known cases where the victims were children.

After intense discussion, the decision of the Supreme Court led to a semantic change in the law that should also make it possible to consider a series of criminal acts to be gross violations of integrity, without evidence of additional harmful acts.[19] According to the preliminary reports following the change of law, the number of reports to the police seems to be on the up.

Conclusion

The Swedish legal reform no doubt is a unique and ambitious attempt to capture the process-like nature of domestic violence in criminal law terms. The number of police reports which came immediately after the law became effective shows that women have a need for this new form of protection.

The new crime, "gross violation of integrity", is part of a larger project, the ultimate aim of which is to work against and even eliminate violence against women. To achieve these aims, discussion about and an increase in the general consciousness of violence is essential. The new law and the resultant discussion have already remarkably increased the knowledge of violence against women in the Swedish legal community.

The contribution to the enactment of the law by the lawyer community was ambiguous. Pressure to start a review of the violence against women came from Parliament. In 1992, the Government decided to nominate a committee to review existing legislation. The members of the Committee were appointed by the Ministry of Health and Social Affairs. Obviously, it was not easy to ensure the cooperation of the legal profession because it took almost one year before the two Ministries, the Ministry of Health and Social Affairs and the Ministry of Justice, could agree on the members of the Committee. In the end, however, the legal profession was well-represented on the Committee, whereas, for example, the women's organisations were not. It was important to select impartial experts for the Committee to ensure a balanced and credible report (Bjelle, 2000).

The lawyer community, however, did not consider the report to be balanced and credible. Indeed, the legal community vehemently opposed the original proposal by the Commission. They did not, however, endeavour to write detailed and well-argued legal opinions for inclusion into the report. Rather, the opinions we have referred to were short and prejudicial. The Faculty of Law in Uppsala found the report of four hundred pages plus two hundred pages of annexes worth only four pages of commentary. The Association of Judges wrote two pages and the Bar Association five lines. But they did change the proposal and, as we have seen, the law differs

notably from the first proposal made by the Commission on Violence Against Women.

No doubt, the concern expressed by the legal community about the legality and accuracy of the proposed wording was warranted. The consequences of this critique are interesting, however. Why did the critique lead to the abandonment of the attempt to include the process-like nature of violence against women in the new crime? Why did the criticism not lead to elaborations on the wording and to a discussion about how this process could be included so that the requirements of legality would be fulfilled?

As the law now stands, the new crime prescribes more severe sanctions for crimes that have already been sanctioned according to the Swedish Penal Code. As feminists, we may ask whether this result is what we really wanted. This question is particularly striking in the Scandinavian context, where a liberal criminal policy has generally been successful. Severe sanctions have hardly ever been the political goals of the feminist movement. Rather, women have demanded that laws be enforced with the same rigour when the victims are women as when the victims are men.

The first convictions for gross violation of integrity have included rather serious crimes, mostly batteries. In the absence of the new crime, most of these serious crimes would have been handled by the criminal justice system as batteries. The number of police reports for batteries even decreased to some extent after the new law came into force. The sentences for gross violation of integrity have not been higher than sentences for repeated batteries generally are.[20]

The most important contribution of the new gross violation of integrity crime might be, thus, that it brings the serious nature of violence against women to light. Crimes that otherwise would not be taken seriously by the police, prosecutors or the courts because they are harmless or private[21] now are seen in their context. The serious nature of violence is revealed.

Notes

1 In Chapter 3 of the report, *Våld och makt*, Yvonne Hirdman discussed the division of power between men and women.

2 According to the government directive on equality 1994 (Dir 1994:124), all legislative commissions should reflect and describe the effects of their proposals on men and women, respectively. In practice, many commissions have dismissed this directive.

3 A summary of the written opinions is published as Ds 1996:28.

4 For example, the Law Faculty at Uppsala University first questioned the importance of the Commission's proposals as compared to other societal problems. Needless to say, it is quite exceptional that a law faculty takes a position concerning political priorities. The Faculty of Law, Uppsala University 1995-11-24, Dnr 5039/95.

5 *Sveriges Advokatsamfund*, representing solicitors and barristers, Act R 674/1995, 1995-12-01.

6 Sweden's Judges Association *(Sveriges Domareförbund)* 1995-11-17.

7 It is estimated that about one-quarter of couples are cohabiting, Trost, 1993.

8 According to a study by Victoria Nourse (1996), the courts are inclined to consider the relationship between a male perpetrator and a female victim as relevant notwithstanding the nature of the relationship. Whenever the perpetrators defined the women as "theirs" (ex-girlfriends, girlfriends etc.), the courts were inclined to allow themselves to be swayed by the use of the possessive attribute.

9 The Commission had discussed sexual harassment but proposed a special study on the subject.

10 Translation GN and JNK.

11 Supra note 4. Translation GN.

12 The legislation had so far made it possible to take some of these circumstances into account in the gradation of the crimes, "assault and battery" as aggravated (JuU 13 1997/98, 15).

13 The opinion of the Law Commission (*Lagrådets yttrande*) 19.1.1998 published in Prop. 1997/98:55, 205. At the time the Law Commission had three members, two Supreme Court Judges and one Judge of the Supreme Administrative Court. Two of the members were women.

14 Law Commission (see, *supra*, note 13) in Prop. 1997/98:55, 207-208.

15 NJA 1999 s.102 p. 110 Translation GN.

16 NJA 1999 s. 102 p. 112. Translation GN.

17 BRÅ-raport 2000:11, 22.

18 BRÅ-raport 2000:11, 30, Brottsförebyggande Rådet, May 27, 1999.

19 Prop. 1998/1999:145, Law SFS 1999:845, effective 1 January 2000.

20 BRÅ-raport 2000:11, 41.

21 At the same time the Accountants of the Parliament presented a darker picture (Report 1998/99:9). In general the quality of investigations of criminal cases was criticised; bad inquiries and negligent investigation meant that many persons who should have been convicted were free of sentence and that many cases were unnecessarily delayed. An essay in the journal Nordic Social Work reporting research on the police is following a critical line concerning violence against women specifically, which is marked in its title "Get there quick and then get away as fast as hell" (Lundberg, 1999).

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12 Criminal Law or Social Policy as Protection Against Violence

JOHANNA NIEMI-KIESILÄINEN

Andrea Dworkin writes in her recent book: "[t]he problem of battery can't be solved if we don't understand that a woman in this society actually does have a right to have a home" (Dworkin, 1997, 163). Sadly enough, this article deals with the fact that it is not even enough to provide a home. The Nordic welfare states have not succeeded in abolishing domestic violence nor other forms of violence against women. While the social policies of the Nordic welfare states have promoted women's emancipation and have enabled some women to leave violent partners, these policies have proved to be inadequate to deal with many violent situations.

Feminist research has pointed out that the Nordic countries have not been eager to react to violence against women (Elman, 1996). While sexual and domestic violence had become central concerns of the feminist movement in many other western countries in the 1970s (Brownmiller, 1974; Dobash and Dobash, 1979; Pizzey, 1974; Martin, 1981), the approach in the Nordic countries has remained more subdued. Both sexual and domestic violence were recognised as social problems in the late 1970s in all the Nordic countries (Germain et al., 1978), and important programmes against violence were initiated during that period. Shelters were founded and healthcare workers were trained to diagnose and counsel victims of domestic violence and rape. Domestic violence was made a crime for public prosecution in Sweden, Norway and Denmark. Compared to other western countries, however, the extent and degree of specialisation of the services in these Nordic States has been inadequate. Many services are still offered by general healthcare and social workers, not by specialist agencies. Moreover, the phenomenon of violence against women failed to become a central tenet either in the feminist movement or in the political arena more generally.

Amy Elman has analysed this discrepancy in time in the political contexts of two countries – Sweden and the United States. According to Elman, the lower level of interest shown towards violence against women by

the feminist movement in Sweden as compared to the United States can be understood by reference to the political contexts of these two countries.

Women's representation in the political systems of these countries took different forms and partly determined which women's issues became politically noteworthy. In Sweden, women gained a place in political decision-making. The number of women members of Parliament has been relatively high; women have been active in the political parties. Recently, even the top positions in the parties have opened up to women. Women have been employed by the welfare state. They have been appointed to positions in policymaking offices and bodies, especially in the health and social welfare sector. Women's issues have been pursued through both political decision-making and administrative structures.

Success of this kind has had its price, however. According to Elman, the corporate political structure in Sweden has incorporated women's issues in general welfare policies. Attention has been paid to women's issues when they need special protection, as in the case of maternity and child care. It has been pointed out that, besides women's rights, these reforms seek to facilitate women's participation in the labour force (supply of labour) or in the advancement of children's well being. As Elman puts it, the welfare state has promoted women's rights as workers and mothers, while women as women have been invisible. The Nordic welfare states have been slow to react to rights and violations that concern women as such, independent of the roles of workers and mothers. According to Elman's study, Sweden has addressed such issues as domestic violence, sexual crimes, and sexual harassment at a later point than other western countries.

In comparison, Elman finds that, in the US, women have not found access to political parties and legislatures easy. Women's issues have been articulated by an independent feminist movement. In a political culture where a myriad of interest groups lobby their claims to the political parties and to the courts, the feminist movement has made its voice heard. Feminists have been able to pursue their interests concerning violence both through the judicial system and the political parties. Domestic violence, rape, and sexual harassment have all been recognised as important political and legal issues and the feminists have been able to press through important legal reforms and to win resources for activities for the prevention of violence against women (Dobash and Dobash, 1992).

As persuasive as I find Elman's analysis, it does appear to simplify the complex relationship between the Nordic welfare state and women's bodily

rights. I argue that welfare state structures have supported women in their efforts to gain sexual self-determination and control over their physical well-being. To focus only on specific programmes to confront violence against women leaves this important aspect out of the picture.

One point of departure for this article was the difference in approaches towards domestic violence in a Nordic welfare state, Finland, as compared to the United States and the State of Wisconsin, in particular. When I started my research on domestic violence and the criminal trial in the mid-1990s, Finland was rapidly developing more effective policies to combat domestic violence as a part of comprehensive social policies. In Wisconsin, where I had the opportunity to discover a different approach, domestic violence was confronted predominantly within the criminal justice system.

I believe that an attempt to understand this difference in approach is important for the development of effective policies to combat violence against women. The different approaches reflect a more profound difference in understanding the role of law in confronting social problems. Obviously, my two examples represent two different legal regimes: a Nordic welfare state and a liberal jurisdiction. And these regimes also offer two distinct examples of how social problems are conceptualised and regulated. I will explore the ways in which the legal regime is decisive in processes of constructing a perception of domestic violence and violence against women as a social problem, what policies are chosen to confront it and what are the deficiencies of each approach.

The distinction between liberal and welfare state forms (Esping-Andersen, 1990; Giddens, 1998) or civil, political and social citizenship (Marshall, 1950) have been employed by several sociological theorists of this century. Analysing the different role of law in regulating violence against women in a welfare state and a liberal state, I find the Habermasian paradigms of legal rationality and legal systems of particular interest. According to Habermas, the legal paradigms consist of the implicit knowledge of society, social actors, and legal institutions (Habermas, 1992, 473-475). While the implicit knowledge of judges has a special status, the legal paradigm encompasses the implicit knowledge of all actors, citizens, clients, the legislature, justice and administration.

My two case studies, Finland and the US (Wisconsin) give examples of what the paradigms may mean at the practical levels of legislation and policies. The United States customarily represents a liberal, if not libertarian jurisdiction. Even if Wisconsin is often considered a more progressive and

more welfare-oriented state than many other US states, it went through a Republican political era during the 1990s. The vestiges of this period can be seen both in the hardening of criminal policies which has led to an evergrowing number of prisoners and in the reforms of social policies in which Wisconsin has been a pioneering state in making social benefits dependent on the recipient's availability for the labour market. Wisconsin is one of those states which, during the past fifteen years, has developed a comprehensive policy against domestic violence (Task Force, 1991; Commission on Violence, 1997). Also, issues of sexual violence have gained considerable attention and most colleges, for example, have their own policies against sexual violence on campus.

Finland is a Nordic welfare state which has relied on the state as a provider of welfare services (Esping-Andersen, 1990). Finland has been quite late in reacting to violence against women. But in the late 1990s, Finland finally started a national programme to abolish violence against women. This programme still puts more emphasis on the social and health care services for the victims and the perpetrators than on the criminal justice measures as such.

In its approach, Finland differs from other Nordic states. The tardiness in the recognition of the problem, the focus on social and health policies, the development of state and communal policies instead of promoting feminist initiatives and the image of a strong victim have all been more pronounced in Finland than in other Nordic countries. The different role of feminist politics is particularly noteworthy. The feminist movement has pressed for reforms in Norway and feminists have been influential in formulating programmes. Also, the shelter movement and national coalition for women's emergency lines (*Kvinnojourer i Sverige*; ROKS) in Sweden are feminist in orientation. Therefore, the analysis in this chapter does not quite take into account the developments in other Nordic countries. Yet I think that my observations on the welfare state, general criminal policy, women's safety and women's role(s) as victims have some bearing on the developments in the whole Nordic area. The focus of this article is not the level of welfare and services, but rather how the role of law is conceived in each type of jurisdiction; where the Nordic countries share a common heritage (see Svensson and Introduction).

The Criminal Justice Approach to Domestic Violence

In the liberal paradigm, private law regulates the organisation of nonpolitical economic actors that operate in a sphere disconnected from the state. The equality concept and equality ideal of the liberal state are formal and legal. As an economic actor, the individual's positive legal status as a subject is protected by law (Habermas, 1992, 477-478). Habermas discusses the legal paradigms in the context of private law which is the dominant legal sphere in a liberal state. While the liberal state avoids state intervention, welfare regulation is residual and needs based (Esping-Andersen, 1990). Often welfare regulation is also combined with a control of the recipients, and, in my example, Wisconsin, the control increased during the 1990s because the benefits were made dependent on the availability of the recipient for the labour market. Often control focused on single mothers on welfare because these women's access to the (lowpaid) labour market is more complicated than the access to the same market of men and women with no children to take care of. The feminist critique of the welfare state, well taken by Habermas, discusses the specific control the welfare state imposes on women's lives (Nousiainen). It is no wonder then that American feminists seldom consider the welfare state as an ally in their work against domestic violence. Instead, in their plight, American feminists have turned to criminal law.

In modern criminal law, the justification for punishment of crimes against persons and property is the protection of autonomy, self-determination and physical and mental integrity. At the same time, criminal law is fundamentally public law and an expression of a common policy. Criminal law sets the ultimate rules that everyone has to follow to make common life possible. The rules are established with a common policy, rather than with the wishes of an individual victim, in mind.

Local activists and consciousness groups were an important force in the feminist movement in the 1970s when violence against women became a central concern (Dobash and Dobash, 1992). Many activists were divorced women themselves and some of them had had experiences of domestic violence (Pleck, 1987, 187). In the US, the feminist movement was able to employ legal means against domestic violence. Two class action law suits against police officers and police departments in California and New York and the *Thurman* case in Connecticut[1] successfully argued that the police and the court officials took complaints of domestic violence less seriously than

other cases of violence. In these cases, judicial arguments of discrimination and negligence in the office were used. It was argued that victims of domestic violence were discriminated against because their complaints were taken less seriously at all stages of the criminal process than other, equally serious cases of violence. These cases, together with feminist lobbying, have led to a comprehensive reform of criminal laws, laws of procedure, police practices and decisions to prosecute in most states in the US (Buzawa and Buzawa, 1992; McHardy, 1992; Crowe, Wack and Schaefer, 1996).

Since the 1970s, the criminal law has been utilised to realise specific policy goals for combatting and preventing domestic violence. Several states have nominated a task force to evaluate their laws and police, prosecution and court practices concerning violence against women (Task Force, 1991). The evaluations of these task forces have almost always been critical and led to changes in policies. In some cases, these policies are defined by law. Many states have, during the past decade, adopted "mandatory arrest" laws, which require a police officer to make an arrest when the officer has reasonable grounds to believe that domestic violence has taken place (Hanna, 1996; Hart, 1997). In many cases, the policy change has been implemented by new policy guidelines for the police or the prosecutors. Some police departments have adopted preferred arrest policies, according to which arrest is a preferred intervention in cases of domestic violence (Cohn and Sherman, 1987). Prosecution offices have developed their policies of charging in cases of domestic violence. Most progressive policies are known as "no drop prosecution" because these policies aim at prosecution even in cases in which the victim does not cooperate with the prosecutor (Gwinn and O'Dell, 1993).

Among the new programmes, services for the victims play an important role. New shelters have been established and have become the focus of the activist movement, sometimes called the shelter movement, providing for additional services to the victims (Dobash and Dobash, 1992, 63-70). Often, the shelter volunteers or staff accompany the victims to court. With the professionalisation of services, many communities have started specific victim advocacy programmes to help the victims with court formalities, to accompany them to court and to advise them of legal alternatives (Rebovich, 1996, 198; McHardy, 1992, 33; Commission on Violence, 1997).

In 1994, violence against women was recognised as a national problem when the Federal Violence Against Women Act[2] was passed. Among other things, the Act makes provision for funds for new services for victims.

As a consequence of the new policies, more cases than ever before are being processed through the court system. While imprisonment is not considered a preferred punishment except in serious cases and where repeat offenders are involved, new sentencing alternatives are being developed. The perpetrators are required to participate in treatment programmes, often as a condition of probation or a referred prosecution. The conditions of probation often include different kinds of restrictions for the perpetrator. He is not allowed to be in contact with the victim or is only allowed contact in certain situations. In addition to the perpetrators' programme, he is often obliged to undergo substance abuse treatment. After the federal Violence against Women Act (1994), the possession of guns is not allowed after a conviction for a domestic crime (concerning programmes, see Crowe, Wack and Schaefer, 1996).

Besides the criminal process, the lives of the victims and perpetrators are regulated by civil law restraining orders. Restraining orders are usually given in cases in which the perpetrator and the victim do not live together, but, it is also possible to issue a restraining order in cases where the victim and the perpetrator live together. Often restraining orders are given in situations where some contact between them is still necessary and the conditions for contact are spelt out in the order.

With these sanctions and measures, the courts have powers to regulate the perpetrator's, and often the victim's life, in a detailed manner. In the cases I observed in 1998 in the Dane County Court in Madison, Wisconsin, regulation of people's lives did take place. In plea bargains, the prosecutor and the perpetrator seldom discussed the criminal punishment (fines or probation) in the strict sense. Instead, they talked about the restrictions on the perpetrator's life that would ensue, the possession of guns, the contents of the perpetrators' programmes and their price, contact (or lack of it) with the victim, etc. In the civil law restraining order hearings, the judge had a regulatory role. The judge set the conditions for the restraining order and the procedures to be followed along with visiting rights. The judges I observed took their task seriously and often dispensed paternal advice to the parties.

As this description shows, the criminal justice system in the United States has the task of regulating people's lives. In cases of domestic violence, the punishment of the crime is only one of the tasks of the criminal justice system. In addition, the courts and prosecutors regulate the lives of the parties in a number of ways.

As far as I know, this functional change has not been discussed in terms of criminal law theory or the functions of criminal procedure. The change in the tasks of the criminal justice system has taken place during a period of conservative and harsh criminal policy. It may be true, as Elizabeth Pleck argues, that this kind of change in the approach to domestic violence requires a combination of feminist forces and conservative criminal policy (Pleck, 1987, 10). The harsh sentencing policy, however, seems to play a subordinate role in processing the bulk of cases. Instead, the emphasis is on the regulation of people's everyday lives.

Under the circumstances, the regulatory approach seems sensible as an alternative to hard sentences. The regulatory approach may be a logical consequence of a policy choice to confront domestic violence mainly within the criminal justice system. On the other hand, it is difficult to avoid the question as to whether far-reaching regulation of people's lives by the courts is sensible. Has the criminal justice approach decreased the level of violence? The statistical information is hardly convincing. Contemporary research has produced ambiguous results concerning the effects of different interventions, such as arrest, protection orders, and counselling on the perpetrators (Sherman et al., 1992; Buzawa and Buzawa, 1996; Crowe, Wack and Schaefer, 1996, 247-248; Ford, Reichard, Goldsmith and Regoli, 1996, 260; Stark, 1996). Victim surveys show that the US has the highest rate of violent crime in the Western world, and the rate of domestic violence is also high.

The Role of Criminal Law in a Welfare State

The Welfare State and the Emancipation of Women

The idea of the state or community pursuing certain political goals is inherent in the concept of the welfare state. According to Habermas, common to theories about social or welfare state is an implied image of society that gives perspective to the legislature, to the practical implementation of laws and to citizens (Habermas, 1992, 472). If the liberal state is characterised by its adherence to formal justice, the welfare state seeks to realise material justice. The concept of equality among people is understood to include, besides formal equality, also a material aspect.

The concept of material equality justifies many welfare state policies, and often the welfare state is conceived of as simply dealing with

redistribution. The welfare state, however, has effects on other aspects of life as well. Here, I am interested in the effects of welfare policies on women's physical safety and bodily rights. Violence against women has only recently become a specific issue of welfare state policies. But, also traditional welfare policies have had important consequences for women's rights to their own bodies and to safety.

Indirectly, the right to education, the individual's right to social security, public housing policies, and the right to childcare have promoted women's economic independence, which has given many women the opportunity to leave an abusive husband. More directly, the free health care, including virtually cost-free abortion and other services related to prevention and reproductive health, have promoted a woman's choices regarding her body. While voluntary single motherhood seems to be quite an unpopular alternative in Finland, economic support for single mothers and child care options have made divorce an option for women in all social classes (Siim, 1993, 36).

A surprisingly high rate of domestic violence experienced by divorced women suggests that divorce is also used by women as a solution to violence. According to a recent survey, more than half of the divorced and separated women had experienced violence from their ex-partners (Heiskanen and Piispa, 1998). Like surveys in other countries, the Finnish survey shows that violence is more prevalent among cohabiting couples than among married couples (27 per cent and 21 per cent respectively during the course of their relationships). It is quite possible that cohabitation is a deliberate choice for women in strained relationships, a means to emphasise their independent position.

Criminal Policy in a Welfare State

Criminal policy has played hardly any role in countering domestic violence in Finland. In this respect, Finland differs from other Nordic countries. But a certain reluctance to resort to criminal law can be distinguished also, for example, in Sweden. This reluctance is not surprising in light of the general tendencies in criminal policy. The criminal law has had a relatively low-key role in the welfare states. Nils Jareborg, the leading Swedish criminal law scholar, defines criminal policy as encompassing all discussions and decisions that concern criminality in any sector of the society. According to him, educational, traffic, social, and housing policies, just to name a few, all

have a criminal policy aspect (Jareborg, 1995, 19-20). When social problems are encountered, general social policies should have priority and the criminal law should only be used in the last resort (Jareborg, 1995, 22-24).

The Nordic criminal law policy in the narrow sense has become known as Scandinavian neoclassicism. It has been described as rational, just, humane, and efficient by the Finnish scholars Anttila, Törnudd (1992, 13) and Lahti (1991, 261), and as defensive by Jareborg (1995, 18). Characteristically, the Scandinavian neoclassicism is sceptical of both the deprivation of liberty as a penalty and the possibility of treating offenders. The neoclassical criminology first gained recognition as a critique of the treatment ideology, which held sway in Sweden until the 1970s (Tham, 1995). Treatment ideology was never equally strong in Finland. Instead, the Finnish criminal justice system was criticised for its high incarceration rates and disproportionately hard sentences for property crimes as compared with violent crimes.

Neoclassical ideology stresses the predictability of sanctions and the proportionality between the seriousness of the crime and the punishment (Snare, 1995, 9; Törnudd, 1995, 45; Anttila and Törnudd, 1992, 13 and 15; Lappi-Seppälä, 1992, 7). Treatment has been separated from punishment and delegated to other agencies dealing with mental health, offender adjustment and social welfare (Lappi-Seppälä, 1992, 39). The justification of the criminal justice system is found in general prevention, as opposed to deterrence and individual prevention (Anttila and Törnudd, 1992, 13). It is to be achieved indirectly by the legitimate and reasonably effective criminal justice system (Törnudd, 1995, 46; Lappi-Seppälä, 1992, 7) which ultimately communicates social values (Jareborg, 1995, 18) and aims at controlling human behaviour (Anttila and Törnudd, 1992, 13).

At first sight, there seems to be a contradiction between the role of criminal law in controlling behaviour and scepticism towards the efficacy of punishment. Jareborg, however, makes distinctions between the various functions of the different levels of the criminal law system. The effect of general prevention is only attributed to criminalisation, that is, to the acts of the legislator in declaring certain acts punishable as crimes. The two other levels, conviction and sentencing by the courts and the execution of punishments are not, and may not be, justified by the effect of prevention (Jareborg, 1995, 18-19; Victor, 1995, 78-79).

Welfare State Criminal Law and Violence Against Women

The split between abstract criminal law and its practical application might explain why the criminal policymakers in Finland have shown relatively little interest in prosecution for domestic and sexual crime. Up until the mid-1990s, the prosecution for an assault in a private place, which, in practice, meant domestic violence, was dependent on the victim's report and request for prosecution. Until 1999, a prosecution for rape needed the request of the victim to go forward. Consequently, these provisions made the prosecution of cases of rape and domestic violence rare and, at best, occasional. Whether or not this lack of prosecution weakened the general preventive effect on assault and rape was not discussed. If general prevention follows from the fact that assault and rape are forbidden in the Criminal Code and that the criminal justice system is generally (regarding other crimes) effective, logically, it does not matter if certain types of violent acts are rarely prosecuted and seldom result in convictions.

A rather different set of considerations emerged in 1994 when rape within marriage was made a crime. The matter had already been the subject of lively debate in Parliament in the early 1970s. While several members of Parliament supported criminalisation, the majority opposed it. It was argued, for example, that prohibition was not needed because these acts were rare. It would be difficult to prove that no consent was given. The accusation could be misused for extortion. Further, criminal law was not an appropriate means for regulating the spousal relationship (Pohjonen, 1993, 50; Reg.Prop, 365/1994). Thus, the need for general prevention was not even recognised and, even if it were, it would not be effective because of difficulties in implementation.

The reliance on the preventive effect of abstract criminal law has not been consistent, however. In discussing drug offences and traffic violations, considerable attention has been paid to the detection and prosecution of these crimes. It has also been pointed out that more and more offences are committed by causing an abstract hazard, which entails no specific harm. These endangerment crimes have become common in new areas of regulation, such as environmental crime, traffic violations, general safety and drug crime (Takala, 1995, 56-57). The doctrine has pointed out that this type of criminal law aims at controlling risks (Frände, 1992, 351). These criminalisations, however, have no preventive effect if they are not enforced. Their enforcement requires control and supervision (Takala, 1995, 56-57).

Whether the criminal law is applied in practice depends on how criminal procedure is organised. Finnish law on criminal procedure has preserved its basic structure for almost three centuries, from the 1734 Code, up to a total reform in 1997.[3] If we consider the present-day Finnish criminal procedure, attention is drawn to the central position of the victim. Unlike in many other jurisdictions, the victim is treated as a party in the trial (Robberstad, 1999). The victim may present claims, demand sanctions other than those demanded by the prosecutor, present her claims for compensation, present evidence and appeal the verdict. The victim may present the claims herself or use a legal counsel. If the prosecutor drops the charges, the victim has a right to continue or initiate a trial on her own.

The 1997 reform of criminal procedure changed the victim's position. The trial became more adversarial in nature, with the prosecutor and the defendant as the contesting parties. Consequently, the victim lost some of her status as a party. For example, the victim is not automatically invited to each hearing. On the other hand, the victim still has the aforementioned rights to pursue her claims and has even gained certain considerable improvements in her position. The prosecutor may now present the victim's claim for compensation and the victim is relieved from taking care of it herself. In sexual crimes and cases involving serious domestic violence, the victim has a right to counsel which is paid for by the state. In other crimes, this benefit may be granted to victims with low incomes.

The Finnish criminal procedure was reformed much later than in other western countries. Like elsewhere, criminal law is understood to be a branch of public policy. For some reason, however, the rights of the victim were not reduced in favour of the prosecutor in the late nineteenth century as happened in many other countries (Robberstad, 1999). When the reform in criminal procedure was finally made in 1997, the victims' rights movements had already made the victims' voice heard and the feminist movement had taken up the position of women as victims. Consequently, the reform sustained most of the victim's rights and even brought some improvements.

This procedural setting favours victims who want to pursue their claims. Many victims of sexual crimes and domestic violence, however, lack the courage or will to charge the perpetrators. But in such crimes, the prosecutors give weight to the victim's opinion. When, in 1995 and 1999 respectively, the prosecution of assault in a private place and rape were made crimes in which the prosecutor may charge notwithstanding the victim's report and request,[4] Parliament wanted to give the victim a special dispensation to ask the prosecutor to drop the charges. This feature was motivated exactly by the need of a spouse as a victim to prevent a trial.[5] In practice, the prosecutors often drop the charges in domestic cases because the victim does not wish to prosecute.

In Sweden, the prosecution of rape has been the responsibility of the prosecutor since the enactment of the Criminal Code in 1965 and the prosecution of domestic assault since 1982. The Swedish law contains no special provision according to which the prosecutor should or could pay attention to the victim's wishes when the prosecutor makes a decision to prosecute in a domestic or sexual crime. Yet, in practice only 40 per cent of cases in which a police report of domestic violence against a woman is made are prosecuted. Of reported rapes, less than one-third lead to prosecution. The most common reason for failure to prosecute was lack of evidence (SOU 1995:60 B, 75-76). When the prosecutors and police officers were interviewed, it turned out that the prosecution decision, in reality, was dependent on the victim's willingness to cooperate with the criminal justice system (Eriksson, 1995). The Swedish report on violence against women (SOU 1995:60) discusses at length how the victim's willingness to stand behind her statement and leave the abuser could be supported and changed. We find here the same paradox as Minna Ruuskanen finds in the cases of women who have killed their abusive partners: had the victim been a real victim, she would have left the abuser long ago.

The relatively equal position of Nordic women is backed by cultural images of strong women. In the context of the trial, the myth appears as the image of a strong victim who can and may make decisions herself. The myth of a strong victim is contradictory, however. The ideal victim is weak, respectable, dutiful, and unknown to the offender. This picture of the ideal victim was reflected in the interviews with Swedish prosecutors and police officers. According to them, prosecution was always warranted if the victim decided to withdraw her report for fear of the perpetrator (Eriksson, 1995, 142). They also felt compassion for those victims who were dependent on the man, isolated, and scared to speak about the violence (Eriksson, 1995, 132). Paradoxically, the prosecution requires the victim's willingness to cooperate but the withdrawal of the cooperation indicates that the victim is frightened and that the case should indeed be prosecuted.

Reforms

Given the potential for political popularity that the demand for harsh sentences easily generates, the Scandinavian criminal policy has been relatively uncontroversial over the years. A rational and humane criminal policy has largely been the creation of experts: researchers, law drafting government officials, and experts in various organisations. Few of these participants have been women, and they have shared a scepticism towards criminal sanctions as a tool of social policy. Therefore, the interests of women in crime control have not gained attention (Nousiainen, 1999, 16-17).

The broad acceptance of welfare politics and a relatively low crime rate have only occasionally left room for a popular demand for harsher sentences. The politicians have usually taken the middle ground on issues of criminal policy (Victor, 1995, 18). Together with progressive social policies, neo-classical criminal policy has been quite successful in creating a safe society in which one can walk the streets of any Nordic city without fear. Until recently, organised crime has been a minor problem. The increase of traffic in and use of drugs have increased crimes against property but, for example, armed robberies are still rare. To an American observer, the sanctions may look ridiculously low. Instead of harsh sanctions, the rational and humane criminal policy has relied on a high clearance rate and high probability of sanctions as a deterrence.

Somethat surprisingly, Finland was pressed to pay attention to violence against women by the international human rights discourse. Like other Nordic countries, Finland has been proud of its human rights record. Lately, Finland has joined other Nordic countries in the pursuit of human rights in its foreign policy. In the Finnish discourse, human rights are easily understood as something 'out there', the concern of foreign policy or refugee admission (Human Rights and Finland's Foreign Policy, 1998).

Violence against women has become an issue of international law during the past ten years in a process that has taken place in the CEDAW committee, UN women's conferences and in the Vienna Conference on Human Rights in 1993. The process culminated in the Women's Conference in Peking (1995) accepting a Plan of Action for the eradication of violence against women. In addition to condemning these practices, the Plan of Action requires states to take concrete action. In Finland, the impact has been notable. Soon after the conference, the government accepted an equality plan which, for the first time, included provisions concerning violence against women.

Within the social sector, a national project to eliminate violence against women was set up. The programme is intended to add to general knowledge about domestic violence and to develop services and treatment for both the victims and the perpetrators. A few successful men's programmes have been set up. The services within the health care and social sector have been evaluated and development projects instigated.

As a legal policy measure, a law on restraining orders was finally passed in 1998. According to the law, the police or the victim of violence or the threat of violence may seek a restraining order from the court.[6] Full proof of prior violence is not necessary but the applicant has to show probable cause. In the first year (1999), more than 500 orders were sought.

The success of any policy against domestic violence is difficult to measure because better protection often only makes the scale of the problem more visible. As a part of the national plan against violence towards women, a targeted victim survey was made, which showed that about one quarter of married or cohabiting women had been victims of violence by their spouses or cohabiting partners during the relationship and one-tenth of them had been victims during the last year (Heiskanen and Piispa, 1998). This result does not radically differ from results that have been obtained in, for example, Canada (Johnson, 1996) and is a few percentage points lower than the one reported for the US (Straus, Gelles and Steinmetz, 1980).

According to the study, the Finnish women were not eager to seek help for their victimisation. Only one quarter of the victims had sought help in any agency, such as a health care centre, police, church, or shelter. Help was sought more seldom than, for example, in Canada or Wisconsin.[7] In several cases violence had been ongoing for a long time. One quarter of those victimised during the last year had been victims of domestic violence for ten years (Heiskanen and Piispa, 1998). It is clear that these women cannot be helped unless a more active criminal policy against domestic violence is developed.

Conclusion

In this article, I have described two approaches to violence against women. In a liberal legal regime, violence against women was approached almost entirely within the criminal justice system. This approach boldly confronted domestic violence and, within it, a number of intervention techniques were

developed. Disillusioned with the ability of the penal sanctions to eradicate domestic violence, the criminal justice system seemed to regulate people's lives in many ways, without knowing if it makes a difference.

The welfare state approach was found to be loath to recognise the problem of domestic violence. When it finally did, victims and perpetrators were offered treatment, not a message of right and wrong. On the other hand, the welfare state was found to support women's emancipation and opportunities to leave a violent relationship.

Neither approach can boast of any success in eradicating violence against women. Therefore, it is worth considering new approaches.

If we think that violence against women is a consequence of women's relative lack of power in society, emancipation of women is a necessary condition for an effective approach. Women need education, work, own money, home, social security, health care and child care so as not to become dependent upon violent men. But, these changes alone are not enough. Whenever violence occurs, it has to be stopped, the woman's safety has to be taken seriously and the perpetrator has to take the responsibility for his actions. With regard to the woman's safety, police intervention is often necessary, and it is important to develop services for the victims. It is also necessary to make clear that violence is not accepted by society, notwithstanding the wishes of an individual victim. It is very hard for me to think of any other means than the criminal justice system to make this message clear. I am not, however, convinced that the criminal justice system in the US that processes thousands of cases all the time is the most effective in making the message clear. Rather, criminal sanctions might be more efficient when they are rarely applied and when they are truly shaming.

Braithwaite and Daly have proposed a new community-based approach to confront domestic violence. According to their proposal, integrative shaming is produced in a process in which people important to the perpetrator and the victim are brought together to acknowledge the problem and participate in the follow-up. Their new concept of community is disconnected from the local neighbourhood and consists instead of people who care about the victim or the perpetrator.

With their new community concept, Braithwaite and Daly avoid some of the criticism levelled against attempts to solve social problems by sending them to the community at large. Still, I find it problematic. Even the new concept of community presupposes that the participants share common values, act in good faith and are prepared to intervene. If some of the

participants fail to act in good faith, the leader of the process should be able to make a judgment of their lack of good faith. In real cases of domestic violence, one sees far too often people who cheat, threaten, act strategically, have control over witnesses, fear speak up the truth or protect the perpetrator for other reasons. It is very difficult to see how these problems could be confronted in the new community approach where "important" people would be partial by definition.

From a Nordic point of view, the concept of community needs some elaboration. In one sense, the Nordic countries are communitarian. People share many common values and have a strong sense of solidarity. On the other hand, these societies do not much rely on private initiative in communal life. Instead, most societal functions are organised by the state and institutional communal structures. Therefore, a proposal to rely on private persons in matters involving criminal acts would be somewhat unfamiliar.

In my opinion, however, Braithwaite and Daly's proposal is welcome in that it combines communitarian structures with the workings of a criminal justice system. The starting point in dealing with crimes has to be within the criminal justice system, which is responsible for the safety of the victims and places the responsibility on the perpetrators. Criminal sanctions need to be used, but, it is equally important to pay attention to the integrative functions and to the future safety of the victims. Therefore, programmes, treatments and follow-up are needed, and, naturally, the responsibility for organising these aspects falls on the social sector. At the same time, social work can help the victim with housing, social security, employment, problems with children, etc. It is important, however, that batterer's programmes and follow-up are connected to the criminal justice system. Also, the new community should and can indeed come to the help of the parties. In Finland, the perpetrator's programmes sometimes require that any agreement between the victim and the perpetrator is also signed by two other people, one close relative or friend from each side. Other forms of integrative shaming and community control can be found. They cannot, however, replace welfare or criminal justice, but rather offer the kind of sophisticated cooperation that is called for.

Notes

1 Cases in Oakland, CA, (*Scott* v. *Hart* 1977) and New York (*Bruno, et al.* v. *Codd, et al.* 396 *N.Y. 2d Supp.* 974, 1977) ended in settlements. The decisions findin[illegible] these claims

admissible were highly critical of the police practices described in the testimonies of battered wives.

The most influential case was *Thurman* v. *City of Torrington* (595 *F. Supp.* 1521 D. Conn. 1984) in which the jury awarded the plaintiff over two million dollars in damages for flagrant negligence in police actions that failed to protect Mrs. Thurman from the violence of her ex-husband.

2 Crime Control and Law Enforcement Act, Publ.L. No 103-322, 108 Stat. 1796.

3 Code of Criminal Procedure (Lag om rättegång i brottmål) 11.7.1997/689.

4 Amendments of Criminal Code (19.12.1889) Chapter 21 Crimes Against Life and Health 21.4.1995/578 and Chapter 20 Sexual Crimes 24.7.1998/563.

5 This view is expressed in the reform Bill for the sexual crimes in 1997. Reg.Prop. 6/1997, 162.

When crimes against life and health were reformed in 1995, the Government Bill proposed that the victim's opinion would not be decisive in the prosecution of the assaults and batteries. Reg.Prop. 94/1993, 100. The Parliament, however, did not accept this. Committee of the Parliament LaVM 22/1994, 14.

6 In the United States, the term "protection order" usually refers to an order given in criminal proceedings, prohibiting the accused from contact with the victim. An order prohibiting or restricting contact may be issued in civil proceedings. Civil restraining orders are usually called injunctions or restriction orders.

The Finnish and Swedish protection orders are sought according to the laws on criminal procedure and the evidence in support of such orders is collected by the police. The order may, however, be granted notwithstanding any criminal procedure aimed at the punishment of the alleged battery or assault.

7 In Finland, the police register over 2,000 cases of domestic violence a year. In Wisconsin, the authorities record over 30,000 cases a year (Yearbook of Justice Statistics 1998, Domestic Violence Incidence Report 1998). These two jurisdictions have about the same population: five million. In Sweden, a country with a population of nine million, the police received 10,500 complaints in 1992. It is impossible to say how much, if any, of this difference is due to a real difference in the level of violence. It is quite possible that different intervention policies account for much of the disparities.

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