

## Chapter 8

# The Reform of Sex Crime Law and the Gender-Neutral Subject

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### Introduction

Reforms of the laws on sexual crimes are taking place both in Sweden and Finland around the turn of the millennium. The Chapter on Sexual Crimes in the Finnish Criminal Code was completely reformed in 1998. In Sweden, a Committee report, proposing important reforms, was presented in 2001 (SOU 2001:14). In addition, the purchase of sex was made a criminal offence in Sweden in 1998.<sup>1</sup> In Finland a working group set up by the Ministry of Justice made a similar proposal in 2003 (OM 2003:5).

While these reform efforts coincide, the discussions in the respective two countries have been quite different. The Finnish reform proposals have a liberal undertone, emphasizing sexual liberalization, non-intervention into sexual mores and freedom of choice. In the Finnish working group memorandum, prostitution and the purchase of sex are, in addition to a liberal freedom of choice discourse, discussed in the context of trafficking as organized crime. To the contrary, the Swedish discussion is permeated by a feminist discourse, exploring the possibilities of improved protection against sexual violations and abuse and setting violence against women into a structural analysis of the power relations between the sexes in society.

These different approaches to sexual crimes cannot be explained by the differences in legal traditions or social policies in these two countries. Due to a shared history (Finland was part of Sweden until 1809)<sup>2</sup> and continuous cooperation in the legal field, the legal systems of Finland and Sweden share common legal principles and many laws resemble the respective laws of the other country. The social policies are also quite similar. Until recently, most social services were provided by state and municipal authorities. The Swedes have more faith in public policies and state intervention as instruments of change than the Finns, but the difference is a matter of degree, not one of kind. For example, the policies against substance abuse have been quite controlling in both countries, including a repressive criminal policy against

drugs, high taxes and a state monopoly on alcohol, social programmes for alcoholics and tardiness in providing medical help for drug users.

Because the legal tradition or social policies do not offer an explanation, the different approaches to sexual crimes might be explained by different understandings of equality between the sexes. While in Finland equality is understood as an already existing state of affairs, the Swedes seem to be much more conscious about the inequalities that exist. Especially the political parties have been active in incorporating equality politics into the programmes and many politicians, including Prime Minister Göran Persson have declared themselves to be feminists.

In this setting, it is interesting to look how different discourses construct the central notions of sex crime law, such as sexuality, subjectivity, force or consent. In this chapter, I will take a constructionist look at the legal regulations and discourses, especially in the official documents about sexual crimes. I think that law plays a crucial role in the construction of social phenomena. Law not only regulates something that exists prior to law, in a pre-law reality, but law itself is also a part of the social construction of that same reality.<sup>3</sup> Actually, law is a particularly powerful tool in the social construction of reality because it is the only discourse that is backed by the legalized use of force. Legal discourse defines what is allowed and what is prohibited. Its definitions are endorsed both by social condemnation and by official sanctions. The most powerful legal discourse is criminal law because it carries with it the threat of the severest legal sanctions. In addition, the discourse of criminal law affects other ethical and moral discourses about right and wrong, as well as social practices that are not of immediate relevance to criminal courts.

Contemporary feminist writing on criminal law has discussed the constructions of female and male sexuality in the context of rape law (Estrich 1987; Lacey 1998, 105; Naffine 1997, 99; Andersson 2001; Lacey, Wells and Meure 1990, 305). But laws on sexual crimes in a broader sense, including laws on statutory rape, sexual abuse, prostitution and sexual harassment, are also important in constructing the sexuality and the gendered subjectivity. Rape has been a serious and heavily punished crime throughout history, but the regulation of other above-mentioned issues has undergone through drastic changes. While the changes in sexual ideology are reflected in rape law and its implementation, the ruptures in the liberal discourse on sex crimes have become even more evident in the changes of regulation of these other issues. Therefore, I will explore the constructions of sexuality and subjectivity in the sex crime law in a broader context than just forcible rape law.

Such constructions are also culturally and historically grounded. History may also make us more alert in recognizing the underlying assumptions of contemporary discourses. I will therefore start this chapter by analyzing the construction of sexuality in the historical development of Finnish sex crime law.

Four phases are distinguished. First, sexual relations are regulated as property and as a means of exchange between the families. In the second phase, illustrated by the Code of 1734, law was a tool for defining chastity and the regulation of patriarchal power. In the next phase, in early 19<sup>th</sup> century liberal society, the protection of

morals took on a new role. Fourth, modern law of 1998. The history of Finnish criminal law elements dating from the 19<sup>th</sup> century in contemporary context with surprising accuracy.

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morals took on a new form in which the patriarchal double standard played a crucial role. Fourth, modern liberal regulation is represented by the new Finnish sex crime law of 1998. The historical periodization in this chapter follows the development of Finnish criminal law and is summarized in Table 2. The laws often include different elements dating from different times and ideologies. It turns out, however, that changes in contemporary conceptions of sexuality are reflected in the respective law with surprising accuracy.

The historical account makes it explicit that law has been a powerful tool in the social construction of sexuality and of female and male subjectivity. Sex crime law not only reflects contemporary constructions of gender and sex, sexuality, sexual crimes, subjectivity and the relation between the body and the mind, but it also participates in the construction of these concepts (Lacey, Wells and Meure 1990).

The contemporary discourses, the liberal and the feminist, are then discussed more thoroughly. These two discourses give quite a different account of the central notions of sex crime law, such as violence or force, sexuality, sex and subjectivity. In this chapter, I will look at the sex crime reforms in both of these countries from a constructionist perspective.

The liberal discourse in the *travaux préparatoires* of the Finnish 1998 reform presupposes specific constructions of sexuality and subjectivity in which the subject of law is assumed as sex neutral and detached. Sexuality is depicted as a liberal exchange between two equal subjects, in the absence of any qualities or power relations.<sup>4</sup> The 'good' that the law is intended to protect is defined as sexual self-determination. In a critical account, however, this liberal discourse turns out to be very problematic when any difficult issue of sexual crimes, such as sexual abuse of minors or prostitution, is discussed. Out of these texts, a counter-discourse of protection emerged whenever sexual encounters between unequals, especially with under-aged persons, was discussed, but it was suppressed by the dominant liberal discourse.

The starting point of the Swedish law drafting in the mid-1990s was quite different. The Women's Peace Committee understood violence against women, as it stands in contemporary society, as a consequence of the power imbalance between women and men. The Committee on sexual crimes recognized this starting point, but was less explicit about it. Nevertheless, this committee was concerned that regulation of rape law had not been successful in bringing about justice for the many victims who did not fulfil the requirements of the law. The aim was an improved protection of victims of sexual crimes. The outcome of this, as I call it, feminist discourse is discussed as a means of incorporating the power imbalances into the legal regulation.

I will explore the possibilities of gaining a new understanding of sexuality as relation, the recognition of power relations in sex crimes and the construction of subjectivity as related and attached. More specifically, I will explore some topics that have been particularly difficult to encompass within a liberal discussion. I will argue that issues, such as consent, the protection of minors and others in a vulnerable position, prostitution and sexual harassment, can be better dealt with when the emphasis in the discussion is shifted from autonomous subjects to relations.



adultery (Magnus Eriksson's (1350) and Kristoffer's land law (1442) the Book of Marriage 11; Utraiainen 1994, 124). For men, adultery was not prohibited by law. In fact, it was rather widely practised, while women with lower social status were nearly unprotected in the face of sexual harassment and abuse by their masters (Aalto 1996, 181).

### The Second Construction: The Church and the Struggle to Define Sexual Morality

The emergence of a central authority, the growing influence of the Church, and the Reformation marked the development in the Kingdom of Sweden and Finland in the 16<sup>th</sup> and 17<sup>th</sup> centuries. The church and the state actively pursued a policy to establish an 'absolute' sexual morality according to which sexual intercourse was reserved for the realm of marriage, which had been blessed by the church. Trials for sexual crimes were transferred to secular courts, away from the jurisdiction of the church and from the control of the peasant community itself. The peasant community, however, was unwilling to change its traditional mores. In fact, a tolerance of practices, such as premarital sexual relations survived a long time, especially in the countryside (Aalto 1996; Nieminen 1951, 76).

Since the Middle Ages, the church had imposed a legal ban on sexual relations between unmarried men and women, that is, fornication, and on extramarital sex, that is, adultery. After Reformation, this quest was invigorated through different regulations in the course of the 16<sup>th</sup> and 17<sup>th</sup> centuries, which were finally codified in the Code of 1734.

Instead of maiden's violation, which only punished the seducer, the regulation of fornication made pre-marital sex a criminal act for both parties (Nieminen 1951, 78-81). Yet, the fines for a woman were generally only half of the man's fines (1734 Book on Crimes 53.1). And those fines were costly; poor women often had to suffer some type of humiliating public reprisal for the crime if they could not afford to pay the money to satisfy the judgement (Aalto 1996, 121-123, Telste 1994, 135).

Invocation of the Mosaic law in the mid-16<sup>th</sup> century contributed to a change in the views on adultery. A relation between an unmarried woman and a married man became a serious, even capital, offence (the Code of 1734; see Aalto 1996, 95-97, 103). In practice, the penalties were less severe (Aalto 1996, 99-101). The absolute sexual morality established by the Code of 1734<sup>5</sup> could never be fully implemented in practice and the control of premarital relations by the community persisted into the next century.

Through this development, both the Church and the State tried to shift the regulation and control of sexuality away from families into the public realm. From a woman's point of view, the development was ambivalent. While the former regime had failed to protect lower class women from sexual abuse and to guarantee support for their illegitimate children, the attempt by the Church to rein in such relations and

to settle the issue of support for the children by treating the crime of adultery severely can indeed be seen as a radical and even emancipatory measure.<sup>6</sup>

At the same time, the legal development meant stricter control of women's sexual conduct, which is most obvious in the regulation of fornication. Formerly, it was not considered necessary to punish a woman for an illicit relationship because the very visibility of her pregnancy made the relationship public for her part. In this respect, the crime of infanticide was a way to control women's morality (Pykkänen 1990, 108; Telste 1994, 128). In the new context, a woman was guilty of fornication or, if the man was married, of adultery, a crime with a severe punishment. Consequently, the new regulation meant a harsher treatment of these 'fallen' women (Aalto 1996, 105).

During this period, from the Middle Ages to the early modernity, what I call the traditional regulation of sexuality and sexual crimes was constructed (Table 2). In Sweden and Finland, the regulation was codified in the Code of 1734. Traditional values, protection of sexual morality, marriage, sexuality tied to the status as a wife and patriarchal social structures were protected by the church.

### **The Protection of Sexual Morality and the Construction of a Double Standard**

The Enlightenment produced a lively exchange of ideas which influenced the criminal law of the late 18<sup>th</sup> century Sweden and Finland. Punishments were made more lenient. In particular, capital punishment was systematically mitigated by the Courts of Appeal (Annars 1965, 150). In 1779, Gustav III abolished capital punishment for rape, bigamy and adultery. The criminal policy discussion of this period was concerned with infanticide. Illegitimate births had become more common and they were still condemned by the Church. Capital punishment for infanticide was criticized as too severe a measure for desperate women. Its use was restricted in the 1779 reform but it was not abolished (Annars 1965, 1, 166; Blomstedt 1964).

After Finland became part of the Russian Empire in 1809, legal reform was halted for several decades. The Code of 1734 remained in force almost unchanged until the Criminal Code of 1889 was enacted. The regulation of sexual relations in the 1889 Criminal Code was still based on the principle of absolute sexual morality. The 1889 Criminal Code reflected the same traditional values and conceptions as the Code of 1734, the protection of sexual morality, marriage and patriarchal social structures. Thus, also the 1889 Criminal Code can be characterized as 'traditional' as in Table 2. When we look at the Criminal Code more in detail, we soon notice, however, that besides the official absolute sexual morality, there exists a sexed regulation, which can be conceptualized as the 'double standard'.

In principle, sexual intercourse was still restricted to marriage within which it was the duty of the spouses to procreate. The wife was presumed to have given permanent consent for intercourse with her husband and, therefore, rape in marriage could not be thought of as a criminal act.<sup>7</sup>

Other forms of sexual morality and sodomy were regulated in the same kin were regulated in the Criminal Code. While absolute sexual morality included several categories. In practice, a prodigiously detailed regulation of the level of sanctions, which

The new social circles were reflected in the double standard in the Criminal Code. While absolute sexual morality and the prevalent practices, difficult to enforce in practical life, but both abstention from sexual relations were required of women and the standard bearers of the double standard. In lower classes, the visible sign of the double standard was also did not especially favour prostitution. It was accepted as a fact of life and relations would have been different in those classes meant that women and those who were prostitutes

While this short description seems self-evident, it clearly is not. While later legal research representing this so-called double standard shows that the double standard provisions. Certain legal provisions. The distinction between men. The distinction between men is equally visible in many reform provisions. Different effects on women caused.

This bi-partite division of sexual relations on rape. In early Swedish law, the rape of a woman who had a husband was later abandoned. In the 1889 Code we find an opinion that the punishment affected the punishment to

The double standard of prostitution.<sup>9</sup> Prostitution was excluded by women.<sup>11</sup> Men could lead, tempting or forcing.<sup>12</sup> There was no prohibition, but such sexual act

Other forms of sexuality were forbidden with some degree of subtlety. Homosexuality and sodomy were forbidden. Also, sexual relations between persons of the same kin were regulated in some detail. Likewise, the protection age for minors included several categories. Fornication and adultery were still forbidden and objects of a prodigiously detailed regulation. The ideas of Enlightenment were expressed in the level of sanctions, which was much more lenient than before.

The new social circumstances and sexual practices are reflected, albeit indirectly, in the double standard that can be read from the provisions of the 1889 Criminal Code. While absolute sexual morality was the official ideology of this era, among the prevalent practices, different social norms were applied to male and female sexuality. In practical life, premarital and extramarital relations of men were tolerated, but both abstention from sexual relations prior to marriage and fidelity during marriage were required of women. Most obviously, middle and upper class women were the standard bearers of the sexual morality and their behaviour was most cautiously guarded. In lower classes, mores were more relaxed in the countryside. In cities, a visible sign of the double standard was prostitution in its various forms. Public morals did not especially favour men's patronage of prostitutes but, nevertheless, it was accepted as a fact of life and definitely not condemned the way women's extramarital relations would have been. In practice, the double standard in upper and middle classes meant that women were divided into two kinds: those who were chaste and those who were prostitutes or otherwise fallen (Nieminen 1951, 91).

While this short description of the moral double standard of this period may seem self-evident, it clearly was in contradiction with the publicly promoted morality. While later legal research has characterized the legal regulation of the period as representing this so-called absolute sexual morality, my reading of the criminal law shows that the double standard, if not explicit, is at least distinguishable in many provisions. Certain legal provisions set explicitly different standards for women and men. The distinction between good and bad, or deserving and undeserving, women is equally visible in many regulations. Furthermore, many sex-neutral provisions had different effects on women and men depending upon the social position of the accused.

This bi-partite division of women is discernible in the interpretation of the provisions on rape. In early Swedish jurisprudence, a view had been expressed that the rape of a woman who had already lost her virtue could not be punished as rape. This view was later abandoned by the jurisprudence, but as late as the early 20<sup>th</sup> century, we find an opinion that the quality of the woman who had been raped 'naturally' affected the punishment to be meted out (Forsman I 1917, 121-122, 124).<sup>8</sup>

The double standard practically required an institutionalized system of prostitution.<sup>9</sup> Prostitution was explicitly forbidden.<sup>10</sup> What was punishable was prostitution by women.<sup>11</sup> Men could be punished for a number of activities that included leading, tempting or forcing a woman into prostitution or into comparable depravity.<sup>12</sup> There was no prohibition in the Criminal Code against the patronage of prostitution, but such sexual activity was, as a matter of fact, a criminal deed either as

fornication or as adultery. In practice, clients were not punished (Häkkinen 1995, 101-103).

In the 19<sup>th</sup> century, prostitution was an essential feature of the sexual culture in towns. Prostitution in its various forms, such as brothels, streetwalkers and kept women, was common. Men in different social classes, especially students and upper class men, had experiences of patronage (Häkkinen 1995, 78-85). Prostitution was controlled through administrative orders. From the mid-19<sup>th</sup> century on, its practitioners were required to have a license and to undergo regular medical check-ups (Häkkinen 1995, 163-166; Järvinen 1990, 71). The control measures were directed at prostitutes, their clients were hardly ever targeted. The purpose was to prevent the transmission of venereal diseases and, therefore, the regulation was oriented more towards the protection of health and sanitation than the maintenance of public morality (Forsman II 73; Häkkinen 1995, 166; Järvinen 1990, 72).

The double standard setting different standards for deserving and undeserving women is also reflected in the provisions relating to the ages of consent. The regulation of ages of consent was a novelty. In earlier times, sexual intercourse with a person under twelve was punishable as rape.<sup>13</sup> The absolute age of consent under the Criminal Code of 1889 continued to be twelve. In addition, two new ages of consent were introduced: fifteen and seventeen. These age restrictions were applied to protect girls who had no experience of sexual intercourse.<sup>14</sup> If a girl had a sexual experience and had thereby stepped off the path of chastity, her morality could no longer be protected. Instead, she could be held accountable for prostitution, which, in this situation, might prove to be the only way to earn a living.

Legislation relating to fornication (pre-marital sex) and adultery (extra-marital sex) had both symbolic and actual importance for the control of the sexuality of middle class women. The regulation was sex-neutral. Because the social norms for pre-marital and extra-marital sex were gendered, these regulations did little to prevent men of the same social standing from visiting brothels or mistresses. Public control was weakened when an indictment for adultery was made dependent upon the wish of the aggrieved party.<sup>15</sup> If the adultery had led to divorce, the prosecutor, however, was obliged to file charges. In a society where economic rights were in the hands of men, this regulation reinforced the control of wives who risked not only losing their status within the marriage but also risked gaining public condemnation for adultery.

The requirement of chastity for middle and upper class women is illustrated by the discussion on the abolishment of any punishment for fornication by women. An one-sided decriminalization had been enacted in Sweden in 1810 because the often visible pregnancy put the responsibility on women clearly enough. On somewhat contradictory grounds, decriminalization was not considered possible in Finland. On one hand, decriminalization was thought to refute the idea that a woman had a will of her own. On the other hand, however, it was essential to preserve a free choice for her because the respectability of the family depended on the woman and the welfare of society depended on the family (Forsman II 1917, 50). Consequently, the woman

was seen as having a free choice so in the interests of the state.

The protection of public morality through control women's sexuality, prostitution, fornication and adultery, indicated by the Criminal Code, and by excluding women from fornication and adultery, double standards, a different set of standards were of two kinds for women. Women who received protection through the Criminal Code against seduction equal to men in 1889<sup>16</sup> – whereas fallen women were not protected by law. Instead, they might be held accountable for prostitution.

The female subject has been protected women, but the law. Their responsibility. On the other hand, we have the double standard for the marital sex, be it paid or not, and the risk of ever having to take a double standard.

### **The Liberal Construct**

The Finnish reforms of the 19<sup>th</sup> century project. As I will argue in this article, the basic assumptions of the project were the individualization of action, the autonomous subject, neutrality as deliberate and control. Even if some of these assumptions were their most powerful effect, they were not mentioned and taken for granted. It is important to deconstruct these assumptions.

The most explicit control or guide to sexual morality was enacted in 1997, 163-164; Rautio 1997, 163-164; Rautio 1997, 163-164. The general sexual morality, the relation to different expressions of sexuality and the determination of each person's sexual choices was used to underline the



shed (Häkkinen 1995, of the sexual culture in streetwalkers and kept illegally students and upper classes (1-85). Prostitution was a century on, its practical medical check-ups and measures were directed to prevent the woman was oriented more towards the maintenance of public morality.

was seen as having a free will, which she had the right to exercise as long as she did so in the interests of the family and society. The protection of public sexual morality turned out to be a system by which to control women's sexuality through the legislation relating to ages of consent, prostitution, fornication and adultery. Either there was no willingness to control men's sexuality, indicated by the lack of willingness to make the patronage of prostitution criminal and by excluding them from the ages of consent, or the provisions, such as fornication and adultery, were not applied to men. The system was based on two double standards, a different standard on men and women and the idea that women were of two kinds for whom two different standards existed. Honourable women received protection through marriage or as eligible daughters – actually, a provision against seduction equal to maiden violation was retained in the Criminal Code of 1889<sup>16</sup> – whereas fallen women could hardly expect protection from the criminal law. Instead, they might be charged with prostitution.

The female subjectivity we encounter here is divided. On the one hand, we have protected women, with few rights, but also with little responsibility in the face of the law. Their responsibility is to refrain from adulterous relationships. On the other hand, we have the women with no rights at all, but full responsibility for extra-marital sex, be it paid or not. And then we have men, with all rights and very little risk of ever having to take responsibility for their sexual activities.

### The Liberal Construction of Sexual Self-Determination

The Finnish reforms of sex crimes law during the 20<sup>th</sup> century have been a liberal project. As I will argue in the following text, the reforms have been guided by certain basic assumptions of the liberal political ideology. At the core of liberalism is the individualization of actions and moral choices. Accordingly, the conception of the autonomous subject, neutrality towards moral convictions and the conception of sexuality as deliberate and distinct acts have been the undercurrent of the reform projects. Even if some of these assumptions have been explicit in the *travaux préparatoires*, their most powerful effect on the reform work derives from the presence – unquestioned and taken for granted – of the liberal ideas in contemporary thinking. Thus, it is important to deconstruct the liberal thinking in the formulations of sex crime law.

The most explicit aim of the reforms has been not to use criminal law as a control or guide to sexual morals any more (Government Bills 52/1970, 1 and 6/1997, 163-164; Rautio 1999, 383). While the old regulation was designed to protect general sexual morality, an important goal of the reform was to attain neutrality in relation to different expressions of sexuality and to ensure the right of sexual self-determination of each person. The law should be neutral regarding different expressions of sexuality and different relations. In the 1998 reform,<sup>17</sup> sex-neutral language was used to underline the law's neutrality. The neutrality towards moral convictions

is reflected by the change of the Chapter's title from the value-laden, 'Crimes against Chastity' to the neutral-sounding, 'Sexual Offences'.

In many ways, the 1998 total reform of Chapter 20 of the Criminal Code completed a reform project that had been under way for several decades. Several provisions of the 1889 Criminal Code, such as the prohibition of fornication, adultery and prostitution, had been repealed early on.<sup>18</sup> The struggle over the 'sexual revolution' was reflected in the Finnish Parliament in 1970 when, in a close vote in the Parliamentary Committee, the Parliament decided that rape in marriage should remain unpunished to protect the sanctity of marriage.<sup>19</sup> Thus, neutrality concerning sexual partners did not go as far as including married women as autonomous subjects with a right to sexual self-determination. The liberalization project regarding homosexuals was more successful with the reform of 1970, while homosexuality between consenting adults was legalized, but the age of consent was higher than the age of consent for heterosexuals and a specific ban on spreading information about homosexuality was stipulated, in the form of a prohibition against instigation to homosexual deeds (Hiltunen 1998).

According to the *travaux préparatoires* of the 1998 reform, the key purpose of the law is the protection of sexual self-determination (Government Bill 6/1997, 2, 161, 170). The *travaux préparatoires* also explicitly relinquished the protection of sexual morality as an aim of the sex crime law. It was no longer necessary to influence the contents of individuals' sexuality and sexual orientation through legislation relating to sexual crimes because these matters should be assigned to the sphere of an individual's sexual self-determination (Government Bill 6/1997, 163-164). The purpose of the law is to protect 'the right to self determine one's sexual conduct' (Government Bill 6/1997, 161), irrespective of the concrete contents of the manifestation of sexuality, as long as it does not violate the right of other people to sexual self-determination. In an enlightened spirit, the above-mentioned provisions concerning homosexuals were abolished. By introducing sex neutral language, homosexual and heterosexual rape are to be treated in the same way.

The choice of sexual self-determination as the basic protected good of sex crime law seems to be connected to a specific construction of other basic concepts of criminal law, most notably the concepts of autonomous subject, sexuality and the private/public dichotomy. Obviously, sexual self-determination is an important dimension of an individual's autonomy, a central premise of the concept of the human subject both in the modern social theory and in the modern legal systems. And no doubt, the protection of physical safety, guaranteed by the State, is an essential requirement for the existence of an autonomous subject and for the freedom to exercise self-determination in any field of life.

The central position of self-determination in modern liberal criminal law is bound up with the concept of the autonomous subject, which is one of the basic concepts that form the foundation of modern law (Tuori 1997, 321). The modern subject is conceived as a self-governing, independent, detached and rational entity, capable of autonomous decision-making. It has no characteristics, such as sex, age,

(other than legal majority) (Svensson 1997). The legal right of ownership, the right of her or his labour contribution, and the right to express them, and the right to

When the law on section as its point of departure relationship between the women's right to self-determination, domestic crimes against women, violent interference. Rather when it comes to the rescuement (Niemi-Kiesiläinen) tization of rape law, which a crime against liberty or feminist discourse on rape a sexual crime (Estrich 19

The concept of subjectibility for criminal acts is caused on the perpetrator is cussed. Since the perpetrator dominant also in criminal cussed as subjects but, re crime law assumes two at its focus of protection is a middle-class, white, econ

As I will try to show assumptions necessarily lie in which the victims do not many victims of sexual crime indicated or otherwise in sorrow on the perpetrator because for other reasons. Sex crime some of these victims. The law, it is important to analyze the fringes of sex crime law are less obvious.

Before going on to connected to the concepts of a *travaux préparatoires* of the new exchange between two equal entities. Furthermore, the crime being an act defined by tir

(other than legal majority) colour or ethnicity (Davies 1994, 182; Naffine 1990, 100; Svensson 1997). The legal entity has the rights guaranteed by the legal system: the right of ownership, the right to enter into contracts, the right to decide on the use of her or his labour contribution, the right to opinions and convictions and the right to express them, and the right to sexual expression and self-determination.

When the law on sexual crimes takes the protection of sexual self-determination as its point of departure, it also assumes the above-described subject of law. The relationship between the protection of women from violence and the protection of women's right to self-determination has been ambiguous all along, however. In domestic crimes against women, the concern has not been to protect women against violent interference. Rather, women's self-determination has been acknowledged only when it comes to the rescue of the domestic perpetrator from prosecution and punishment (Niemi-Kiesiläinen 2001). The ambivalence is also illustrated by the systematization of rape law, which has been classified at different times as violent crime, as a crime against liberty or as a sexual crime. The ambivalence is also present in the feminist discourse on rape law, with its debate on whether rape is a violent crime or a sexual crime (Estrich 1987).

The concept of subject is particularly powerful in criminal law, where responsibility for criminal acts is allocated. Thus, criminal law discourse is necessarily focused on the perpetrator and it is the perpetrator whose autonomy and will are discussed. Since the perpetrators are most often men, the male perspective has been dominant also in criminal law theory (Naffine 1997). Victims have seldom been discussed as subjects but, rather, as objects of crimes in criminal law. When the sex crime law assumes two autonomous subjects as representatives of sexual normality, its focus of protection is on autonomous, self-determining women, that is, on adult, middle-class, white, economically self-supporting women.

As I will try to show with the following examples, a discussion involving these assumptions necessarily leads to trouble when it encounters situations of sexual abuse in which the victims do not correspond to the subjectivity described above. Clearly, many victims of sexual crime are minors, mentally or physically handicapped, intoxicated or otherwise in some kind of vulnerable situation. Often, they are dependent on the perpetrator because of family ties, employment or institutional affiliation or for other reasons. Sex crime law includes a number of specific provisions to protect some of these victims. Thus, in the analysis the underlying assumptions of sex crime law, it is important to analyze such other forms of sexual abuse than rape that are on the fringes of sex crime law and where concepts of subject, agency, and victimization are less obvious.

Before going on to concrete examples, the construction of the sexuality connected to the concepts of autonomy and subjectivity has to be examined. In the *travaux préparatoires* of the new sex crime act, normal sexuality was depicted as a liberal exchange between two equal subjects, in the absence of any qualities or power relations. Furthermore, the construction of sexuality in the new law is act-centred, sex being an act defined by time and place. The new legal definitions of the most impor-

tant elements of crime – sexual intercourse and sexual act<sup>20</sup> – reflect both the act-centred construction of sexuality and the perpetrator's perspective. The most serious crime, rape, requires an element of sexual intercourse, which is defined as a penetration of the body.<sup>21</sup> Other forms of sexual violations do not constitute rape, notwithstanding the amount of violence or sexual content of the acts or the depth of the violation of integrity. These other acts of sexual nature may be punished as sexual abuse<sup>22</sup> or as coercion into a sexual deed.<sup>23</sup> A sexual deed is defined from a perpetrator's perspective as an act of an essentially sexual nature by which one is seeking sexual arousal or satisfaction (sic!).

In the following text, the new Finnish sex crime law is used as an example to examine the limits of liberal discussion. With its one-sided emphasis on self-determination and its rather enlightened spirit, the law gives plenty of examples of how the liberal discourse on most crucial legal issues is necessarily simplified and distorted.

### Critical Examples of the Use of Sexual Self-Determination

#### *Degrees of rape*

In rape, the sexual self-determination of the victim is basically denied by the use of force. The denial of self-determination is reflected in the construction of the elements of rape. The crime of rape is divided into three categories according to the severity of the violence and using similar criteria as in earlier reforms of the Criminal Code for other crimes, such as assault and robbery. The focus of the act is on violence, whereas consent is not mentioned as an element of rape. An essential substantive amendment was that the use of coercion other than violence to force a person into sexual intercourse became explicitly punishable as a lesser grade of rape.

The differentiation of rape into different degrees was justified by the seriousness of the violation of sexual self-determination (Government Bill 6/1997, 164). The most important element in qualifying a rape as aggravated is the amount of violence used. Most of us agree that this differentiation is a sound policy, but can it logically be justified by arguments concerning the degree of the violation of self-determination? We probably agree upon that a case where a person is forced into sexual intercourse with a knife on her throat is more serious than a case where she is forced to have sex under threat of losing her job. The former case is punishable as an aggravated rape, carrying a maximum punishment of ten years imprisonment, and the latter case as a coercion into sexual intercourse with the maximum of three years.<sup>24</sup> Both are repugnant acts and making a comparison of their respective gravity may be experienced as a rather strange and uncomfortable exercise. But seen from the perspective of sexual self-determination, the outcome is almost the same. In one way, the violation of sexual self-determination implicit in the threat of the loss of a job may be even more serious than in violent rape because such a threat may be repeated

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and the threat may restrict sexual self-determination continuously – unless the victim resigns from the job. From the point of the protection of physical integrity, the matter is less complicated: severe violence violates physical integrity more seriously than do acts constituting the crime of coercion into sexual intercourse.

#### *Age of consent*

The Government Bill recognized the problems from the point of sexual self-determination related to ages of consent (Government Bill 6/1997, 167). The age of consent, paradoxically, restricts young people's opportunities of having sexual relationships and, thereby, indirectly their right to self-determination, even though the threat of punishment is directed at the adult party, not at the child.

When the prohibition against the sexual abuse of children is induced from the protection of sexual self-determination, the protected 'good' is actually their right to sound development towards sexual and other self-determination. This construction, however, requires a great deal of developmental psychology and knowledge that certain acts are harmful to children's development. Logically, Section 20(6) of the Criminal Code states that, in order to be punishable as the sexual abuse of a child, an act must be conducive to harming the development of the child. But how do we judge such harm? Should not an act which violates the sexual integrity of a child be punishable irrespective of its effects? The purpose of the Code's language has not been to let acts concerning very young children go unpunished just because we may have insufficient knowledge about the harm such acts cause.

#### *Protection of persons in vulnerable situations*

The provisions aimed at protecting persons who are in dependent or vulnerable positions or in need of special protection are similarly problematic from the perspective of sexual self-determination. The special provisions protect students under eighteen, inmates in hospitals and at institutions and persons in other especially dependent positions from sexual relations with the persons upon whom they are dependent. In addition, protection is afforded to young, immature persons under eighteen against sexual abuse.<sup>25</sup> Again, there are good grounds to provide special protection to these groups, but it is difficult to justify these provisions by the protection of sexual self-determination. A romantic and sexual relationship with a teacher, for example, may be exactly what a student aims at and wants. To prohibit such a relationship indirectly restricts the student's self-determination, even though it is the teacher who is punished and not the student. The justification for the prohibition is that, by virtue of his or her position of authority, the teacher has the opportunity and means to subject the student to repercussions, if things do not go the way the teacher wishes. The student is not capable of envisioning such a situation, while the teacher is aware of such risks. For these reasons, the special provisions are justified, despite their patronising element and the restriction of self-determination.

The focus on sexual self-determination has led to certain limitations of liability that will make the implementation of the provisions difficult and, most likely, considerably restrict the protection offered by the provisions. The act at issue has to be qualified as an abuse of position and it also has to include an element of persuasion. The purpose of these qualifications is to allow for the possibility of normal sexual relations even for persons in such hierarchical relationships (Government Bill 6/1997, 178). Even if one believes that such normal sexual relations are possible, one has to ask whether they have to be protected at the cost of making a very important protective regulation almost impossible to implement.

#### Prostitution

The greatest problems for a liberal thinker lie in the provisions relating to prostitution (Svensson 2000). Prostitution has not been a crime in Finland since 1936 and its patronage has never been defined a crime as such.<sup>26</sup> In the 1998 reform, a prohibition to buy sex from persons under eighteen was enacted.<sup>27</sup> The Government Bill addresses the legal regulation of prostitution from the perspective of self-determination (Government Bill 6/1997, 168). When prostitution is examined as a financial transaction between two adults exercising their sexual self-determination, it is difficult to see in it anything that deserves criticism (Träskman 1998). However, a prostitute's limited opportunity in choosing her clients is considered a typical feature of prostitution (Järvinen 1990, 96). In other words, a prostitute's sexual self-determination is *de facto* restricted.<sup>28</sup> This *de facto* restriction may be the one of the reasons why the treatment of sexuality as a commodity is so offensive to many people.

The mere fact that the human body is regarded as a commodity can be seen as a degradation of human dignity. In addition, sexuality contains a particular dimension of personal integrity. This important element of sexuality is violated by the use of the human body as a commodity, despite the fact that such a violation is difficult to conceptualize. Prostitution is not a popular profession, and its practitioners are recruited from the most vulnerable and economically and socially excluded members of society (Häkkinen 1995, 210) and for whom, according to Järvinen, all the safety nets of society have failed (Järvinen 1990, 52). The sex trade is also deeply entangled with organized crime, drug abuse, extortion, and violence, with all their concomitant risks.

The liberal and sex-neutral discourse of the Finnish *travaux préparatoires* omitted one important argument against the criminalization of prostitution, viz., that previous experiences of defining prostitution as a crime and the prosecution of prostitutes were directed at women prostitutes, who were socially excluded to start with. This criminalization had led to the repressive control of persons who also were otherwise exploited and abused.

The *travaux préparatoires* diligently discussed the negative effects of the criminalization of prostitution. The discussion was sex-neutral and did not assess the effects separately for each party. The negative consequences of criminalization, such

as any increases in the prevalence of sexually transmitted diseases, were quite obvious if a prostitute is treated as a prostitute. In Sweden, the patronage of prostitutes, and the above-

The example shows the sex specific reality and neutrality, only the control no intention to restrict mer law's premise been to strengthen economically excluded women

In Sweden, for example those who prostitute themselves for equality (SOU 1995:15). Finding a prostitute was emphasized as a violation of the inequality

#### Sexual harassment

The last example, which it was inappropriate to use as a violation of sexual self-determination (Government Bill 6/1997, 168) as a violation of sexual self-determination who touches his or her body in a sexually coloured and intimate manner concerning equality in the labour market and combating sexual harassment

It is a matter of defining a violation of sexual self-determination to show women their place in society and their freedom of sexual self-determination. This function operates at a micro level in actions taken. Most often such as touching, patting, calling. However, there seem to be no cases of this kind of behaviour *per se*. For women, I think, would say that sexual self-determination, even if they are not, is a serious violation

as any increases in the power of a procurer, in the level of violence and in the prevalence of sexually transmitted diseases, were carefully enumerated.<sup>29</sup> These risks seem quite obvious if a prostitute's acts are made into crimes. It is less obvious, however, that the same risks are connected with the criminalization of the acts of the client. In Sweden, the patronage of prostitutes was made a crime in 1999, but not the actions of prostitutes, and the above-mentioned risks have not realized.<sup>30</sup>

The example shows that liberal and sex neutral language may be used to hide the sex specific reality and consequences of a legal regulation. Under the pretext of neutrality, only the control of women was actually discussed. Obviously, there was no intention to restrict men's sexual self-determination over purchased sex. Had the law's premise been to strengthen the sexual self-determination of socially and economically excluded women, the discussion would have taken on a different tone.

In Sweden, for example, the discussion has focused on the harm caused to those who prostitute themselves and to the whole society, including the effect on equality (SOU 1995:15). Especially, the role of the clients in the process of becoming a prostitute was emphasized. In a broader view, prostitution was seen as a manifestation of the inequality between the sexes.

#### *Sexual harassment*

The last example, which will be discussed further below, is the explicit position that it was inappropriate to use the Criminal Code to protect women against sexual harassment (Government Bill 6/1997, 162). The Bill also discussed sexual harassment as a violation of sexual self-determination. Everyone should have the right to decide who touches his or her body and where, as well as the right not to be addressed in sexually coloured and intimidating language. Other measures, especially those concerning equality in the labour market were considered more appropriate means of combating sexual harassment.

It is a matter of definition, however, whether this kind of sexual harassment is a violation of sexual self-determination. No doubt, a function of sexual harassment is to show women their place and role as objects of male sexual desire and, thus, restrict their freedom of sexual expression and their exercise of self-determination. While this function operates at a structural level, it is more difficult to assess at the level of actions taken. Most often women experience violations of their physical integrity, such as touching, patting, groping, or violations of sexual integrity, such as name-calling. However, there seems to be a danger of victimizing women when we say that this kind of behaviour *per se* is a violation of sexual self-determination. Most Finnish women, I think, would say that they are fully capable of retaining their sexual self-determination, even if they find that being called a 'whore' and other like communications are serious violations of integrity.

### New Constructions: Sexuality as a Relationship and Integrity as the Protected Good

These examples from the new Finnish sex crime law suggest that if we choose sexual self-determination as the point of departure in the discussion of sex crime law, we do not get very far. It limits the way we can conceptualize subjectivity and sexuality and, thus, it limits the way we can discuss a variety of sexual violations directed at differently situated women, children and men. We need to reconsider the protected good of sexual crimes.

Nicola Lacey (1998, 112) has argued that the problem with sexual autonomy, as the protected good of sexual crimes, is that it presupposes a dichotomy between the mind and the body and, in fact, posits the mind over the body. In this context, both the harm of the sexual crimes, as a violation of a person's authority over the access to his or her own body and the wrong committed, understood as a failure to control one's own body, reflect a hierarchical relationship between the mind and the body (Lacey 1998, 113). Therefore, sexual autonomy or self-determination as the protected good of sex crimes necessarily encompasses the harm caused by these crimes in a narrow way. It may not even wholly encompass the physical harm done, but it is especially unable to grasp the psychological component involved.

Today, we have plenty of research on the psychological trauma caused by rape, incest and other sexual abuse. Consequences are often serious and sometimes long-lasting. There may even be a component of the violation that is difficult to describe in diagnostic terms. Describing the effect of sexual violence, Sari Näre writes that it '...threatens the realm of fantasies and images, hopes and expectations, in which one's identity is vulnerable, and the transitional state of the mind...' (Näre 2000, 3). The discussion of the legal regulation of sexual crimes leaves something unsaid if it fails to reach out for the elusive: to examine how the provisions can be used to protect sexual integrity, understood as both physical and psychological inviolability.

As Nicola Lacey does, I also suggest a shift in the discussion about the protected good of sex crimes law towards protection of integrity. This shift is not radical at all. In fact, it might be even called reactionary. The protection against violence and sexual inviolability has been the protected good of sexual crimes law throughout the history. I believe, however, that, by trying to include the psychological component of harm, we will reach a deeper understanding of the violation of sexual integrity.

The concepts of sexual self-determination and physical and psychological integrity are not mutually exclusive. Rather, sexual self-determination may be understood as one facet of integrity. Nevertheless, my argument is that a different focus is significant for the content and interpretation of the law. At the theoretical level, when the emphasis is shifted towards the protection of integrity, we have the chance of reconsidering the concepts of legal subject and sexuality, both concepts paramount in sex crime law.

While the concept of self-determination excludes the relational aspects of subjecthood from the analysis, the concept of integrity allows us to recognize that the

subject is always in a relation entity. Instead, it is continuous.

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subject is always in a relation with the other. The subjectivity is not a pre-existing entity. Instead, it is continuously constituted in interaction with the other.

The modern concept of subject is the construction of the social and political theory of the 19<sup>th</sup> century. While it disregards the relational aspects of human life, it is also blind to its own gendered quality. In the 19<sup>th</sup> century political theory, political and civil rights belonged to a male subject in the public sphere (Møller Okin 1979, 278). The public sphere, however, assumed a private sphere for reproduction and maintenance and a private female subject with no similar rights, not even any rights relating to her own body. From an historical perspective, gender may also be understood as a relationship instead of as a preconceived category (O'Donovan 1997, 62; Hirdman 1990; Heinämaa 1996; Svensson 1997). Thus, the focus on integrity and gender as relation may be helpful when we want to view the victim as a subject.

In the Finnish liberal discussion, the parties of a sexual exchange are considered autonomous and equal. In violent rape, the agency of the victim is all but denied, making violent rape an easy case for a liberal thinker. Other forms of sexual abuse are more complex because they include victims who are able to express their views or to resist to some extent, though not fully. The focus on sexual self-determination easily leads to logic according to which the victims of sexual crime are expected either to be fully able to protect themselves or completely incapable to express their views.

This problem has been discussed in the context of domestic violence. Both empirical and theoretical studies on domestic violence have challenged the ambiguous requirement that the female victim either has to leave the relationship altogether or accept the role of a passive object of crime (Mahoney 1991; Gordon 1987; Naffine 1997; Ruuskanen 2001). Most women, even if they stay in their relationships, use several tactics to avoid danger, to protect and defend themselves and their kin and to mitigate the consequences (Fischer, Vidmar & Ellis 1993). In a similar vein, the victims of sexual crimes should be seen as actors and yet worthy of protection when their sexual self-determination is constrained.

Furthermore, while a focus on self-determination is bound up with a certain view on sexuality, the shift towards the protection of integrity opens up to a more relational view on sexuality. The shift of perspective from autonomous subjects to the relations between subjects seems logical since sexuality is naturally inter-subjective. Sexuality as a phenomenon, separated and isolated from other people, can cover only a small portion of what can be understood to as sexuality.

A lawyer with a feminist approach may instinctively be suspicious of a conception of sexuality as a relationship for the very reason that any relationship between the victim and the perpetrator has so often been a reason to minimize the gravity of the sexual crime. For example, the marital relationship has served to remove the punishment of the act; any interaction between victim and perpetrator before the act has been used to induce guilt feelings in the victim and to minimize the act, and so on. The explanatory note to the new Finnish law on sexual crimes is not without similar references. Although it states that '...the relationship between the perpetrator

and the victim should not be mentioned as an extenuating circumstance...', a little later, it makes a full turn, stating that '...interaction between perpetrator and victim prior to the act together with other circumstances of the act...' could be an extenuating circumstance (Government Bill 6/1997, 175). A fine line is drawn here between relationship and interaction. For me, it is quite difficult to see the difference. According to the same text, marriage is a relationship and, thus, not considered an extenuating circumstance. But being married necessarily includes interaction. To confuse matters even more, marriage is a fact that is specifically mentioned as a reason for which the victim may withdraw a complaint and for the prosecutor to drop the charges (Government Bill 6/1997). In the worst case scenario, the mention of interaction in this context carries with it the serious danger of widening the scope of mitigating circumstances to different kinds of interactions between a boyfriend and a girlfriend, between two acquaintances, between ex-spouses, between ex-girl/boyfriends and so on.<sup>31</sup>

Reference to relation, therefore, should necessarily include an analysis of the power relations between the parties and within the gender system of the society. In violent rape, the abuse of physical force always means imposing one's power on the victim (MacKinnon 1987, 50, 88). In other sexual crimes, the abuse of power is structural and contextual. Thus, provisions concerning the special protection of dependent or helpless persons refer to structural power between generations, in the family and in social institutions. The suggested shift in analysis will open up the discussion to include differences among the victims and their positions of dependency, capacities and cultural circumstance.

In light of contemporary knowledge, the consequences of sexual abuse seem to be opposite to that of common knowledge, according to which the most dangerous

**Table 2. Law on Sexual Crimes: Background Ideology and Object of Protection**

	Archaic	Traditional	Modern	Postmodern
Ideology	Family/ Clan	Patriarchal	Liberal individualism	Sense of community, Feminist
Protected good	Property	Sexual morality	Sexual self- determination	Integrity
Subject/ Sexuality	Family/Man Property	Man Status	Perpetrator Act	Perpetrator, victim Relationship
Context	Relations between families	Marriage	Freedom of individual	Abuse of power

sex crime is an attack by a stronger the emotional bond violation of the relationship seem to be (Näre 2000, 6). Relationship from the perpetrator's been interpreted as less serious sex with the victim, be it a

To admit that power is a feminist flavour, it also goes like in the 19<sup>th</sup> century discursive sexual acts, but rather the existing inequality between patient and staff, gender between the sexes. In any case, tensions.

### Sexual Crimes Revisited

In the following text, I will self-determination to the personality sexuality as a relation, and relationship would change the context to the new Finnish law, I will crimes published in 2001. The critique presented above, self-determination as the protected good (108). Vis-à-vis sexual abuse the only protected good should

Other than this emphasis in its theoretical or ideological or concerned with a woman was appointed as a committee Against Women. This Commission a power imbalance between Kiesiläinen 2001). The institution narrow view on equality. It men and women are treated an openly articulated feminist allows from a series of rape scholarly discussion during child and two other cases the all the cases was whether the

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	Perpetrator, victim Relationship
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sex crime is an attack by a stranger in an isolated place. According to Sari Näre, the stronger the emotional bond between perpetrator and victim and the more serious the violation of the relationship of trust, the greater the consequences of sexual violence seem to be (Näre 2000, 6). This result is opposite to the understanding of the relationship from the perpetrator’s perspective, according to which the sexual violation has been interpreted as less serious if the perpetrator believes that he has a right to have sex with the victim, be it a spouse, a partner, a date from a restaurant or a prostitute.

To admit that power relations are gendered not only imbues the discussion with a feminist flavour, it also gives a new content to the morality of the regulation. Unlike in the 19<sup>th</sup> century discussion, the issue is not the moral character of the individual sex acts, but rather the ethical dimension connected to the exploitation of the existing inequality between the parties. The inequality may be institutional as between patient and staff, generational as among family members or structural as between the sexes. In any case, the protection has both individual and structural dimensions.

**Sexual Crimes Revisited**

In the following text, I will explore how the shift of the focus from the protection of self-determination to the protection of integrity, from sexuality as an exchange to sexuality as a relation, and from sex as category to sex and gender as a power relationship would change the discourse on selected issues of sex crime law. In addition to the new Finnish law, I will also use examples from a new Swedish report on sexual crimes published in 2001. The vantage point of this report seems to correspond to the critique presented above, since the report defines sexual integrity and sexual self-determination as the protected goods of the proposed legal reform (SOU 2001:14, 108). *Vis-à-vis* sexual abuse, even sexual self-determination is held irrelevant and the only protected good should be the sexual integrity of the child (ibid. 110).

Other than this emphasis on sexual integrity, the Committee was not very explicit in its theoretical or ideological foundations. It is definitely not openly feminist or concerned with a woman’s perspective, which is surprising because the Committee was appointed as a consequence of the work of the Commission on Violence Against Women. This Commission worked from a woman’s perspective and recognized a power imbalance between the sexes (SOU 1995:60; Nordborg & Niemi-Kiesiläinen 2001). The instructions to the Committee on Sex Crimes had a more narrow view on equality. It was instructed to research whether sexual crimes against men and women are treated the same in the court practice (Dir 1998:48). Instead of an openly articulated feminist perspective, the victim’s perspective in the report follows from a series of rape cases that had evoked considerable public outrage and scholarly discussion during the 1990s. Two of the cases concerned the abuse of a child and two other cases the gang rape of a young intoxicated girl. The core issue in all the cases was whether the element of force in the rape law had been met. The

public discussion was concerned about the insufficient protection that rape law afforded to victims.

The Swedish and Finnish provisions on rape do not mention the concept of consent as an independent element of rape. The crucial element is violence or threat of violence (Andersson 2001). It is argued that the focus of the crime, thus, is placed on the actions of the perpetrator instead of on the behaviour of the victim as easily happens if the central element of the crime is consent. In any case, consent takes away the coercive element of the crime, thus requiring that the victim manifest her non-consent or resistance to the perpetrator(s). Besides violence and the threat of violence, rape can be committed by causing the victim to be unconscious or otherwise unable to protect herself. Other sexual abuse of intoxicated or disabled persons is punishable as the lesser crime of sexual abuse.

The most problematic cases in the application of these provisions are the ones where no violence or explicit threat of violence has occurred. In two infamous Swedish cases,<sup>32</sup> the perpetrators, a group of young men in each case who had sexual intercourse with a young intoxicated girl were convicted of sexual abuse. The implicit threat in the situation was insufficient to fulfil the elements of rape but, on the other hand, it was asked whether the helplessness required for the sexual abuse of an adult – the girls were not under legal age (which is 15 in Sweden) – was present since each girl was clearly able to understand the situation. The concept of subjectivity these provisions and cases require is something a victim either has fully or has not at all. It is an on/off switch. Yet, in many cases fear, intoxication, mental disease, exhaustion, and so on, impair the ability to defend oneself rather than eliminate it, and this impairment makes exploitation possible.

The Swedish Commission proposes that the crime of rape should include situations in which the perpetrator coerces another person into a sexual act by abusing her intoxication or similar incapacitation. Thus, the requirement that the perpetrator himself has caused the intoxication of the victim should be omitted from the definitional element of rape. The purpose is to eradicate the distinctive elements in rape respective to sexual abuse.

According to the new Finnish law, rape can be accomplished by causing in the other person unconsciousness, fear or another state of mind in which she is unable to defend herself. In contrast to the former law, it is no longer required that the victim defend herself with every conceivable means.<sup>33</sup> This difference is a welcome acknowledgement of the realities of such situations as described above and it allows for the interpretation of such situation from a standard that recognizes the victim's fear, despair and bewilderment. However, the wording of the law is: the inability to defend herself. Similarly, the provisions relating to sexual exploitation of persons with mental disease or in a self-induced state of intoxication<sup>34</sup> place the focus on the requirement that the victim be unable to defend herself or to express her will. With these wordings, the distinction between full autonomy and no autonomy at all (as a full control over the body) seems to be reinforced.

Moreover, these provisions according to which a woman advances by physical means posed to nor required to makes force used by the interpretation should focus on the victim. But suddenly, law victims either full ability

Is such perception should inquire about the radical? As Kevät Nousiö on rape, the extent to which consent was not even dressed if we think that who are in a vulnerable

Both the Finnish and the protection of minors. The definition the more protective approach of consent. The ages of consent intercourse and sexual activity in Finland, the relationship between consenting young involved in such relationship the ages or in the degrees regulation is logical from of a violation of integrity, relationship between an harm the latter – whether

A number of feminist analyses of the distribution of analyses, rape is regarded (Brownmiller 1974; Mac sex equality, the radical feminism made, some cultural practices manifestations of male power. Even in the Nordic context to name-calling, touching type of sexual harassment Honkatukia, young girls and boys can engage in this kind

Studies by Sari Näränen on Finnish sexual culture. Young people's sexual interaction. How

Moreover, these provisions seem to reveal an underlying idea of sexuality according to which a woman is supposed to defend herself against sexual assault and advances by physical means. According to this idea, the male perpetrator is not supposed to nor required to understand any other language. As the definition of rape makes force used by the perpetrator the decisive criteria, instead of consent, the legal interpretation should focus on the actions of the perpetrator, not on the actions of the victim. But suddenly, law and practice seem to turn this upside down by requiring the victims either full ability to self-determination or no ability defend herself at all.

Is such perception of sexuality that before embarking on a sexual act everyone should inquire about the other person's consent and ability to give consent much too radical? As Kevät Nousiainen comments, in the legislative process to reform the law on rape, the extent to which the parties should be required to ascertain each other's consent was not even discussed (Nousiainen 1999, 20). This issue has to be addressed if we think that one of the most important tasks of the law is to protect those who are in a vulnerable position.

Both the Finnish and the Swedish reforms aim at the improvement of the protection of minors. The difference between the liberal ideology in the Finnish law and the more protective approach of the Swedish law is evident in the regulation of ages of consent. The ages of consent are sixteen in Finland and fifteen in Sweden; sexual intercourse and sexual acts with persons under those ages are punishable. Significantly in Finland, the restrictions which age limits impose on sexual relations between consenting young persons are seriously discussed. Since no abuse of power is involved in such relations, the act is not punishable, if there is no great difference in the ages or in the degrees of psychological and physical maturity of the parties.<sup>35</sup> The regulation is logical from the perspective of self-determination. From the perspective of a violation of integrity, the immaturity of the adult does not suffice as an excuse. A relationship between an immature adult and an immature young person is likely to harm the latter – whether they are on the same level or not.

A number of feminists have relied on Foucault's concept of power, adding to it analyses of the distribution of power in society between the sexes. In some feminist analyses, rape is regarded as the manifestation and regenerator of that distribution (Brownmiller 1974; MacKinnon 1987, 50). While, from the Nordic perspective of sex equality, the radical feminist analysis appears to ignore the progress that has been made, some cultural practices supporting sexual violence may, indeed, be seen as manifestations of male power. Sexual harassment may be understood as such a practice. Even in the Nordic countries, more than half of the women have been subjected to name-calling, touching, comments about the female parts of their body, and other type of sexual harassment (Heiskanen & Piispa 1998, 54) and, according to Päivi Honkatukia, young girls also experience it continually (Honkatukia 1998). Men and boys can engage in this kind behaviour without any social sanctions.

Studies by Sari Näre and Päivi Honkatukia revealed the positive sides of Finnish sexual culture. Young women felt that they were capable of negotiating the terms of sexual interaction. Honkatukia found, however, that this feeling was attached to

the fact that at a very early age girls are socialized to assume responsibility for handling harassment by boys and men as quietly as possible. Young women are supposed to maintain the gender system. Unless they do so, they are considered deviants and risk being ostracized and called names (Honkatukia 1998).

If the discourse is concerned with self-determination and individual acts, sexual harassment is obviously not a matter for criminal law. Individual acts may be slight, and imposing sanctions for such acts might lead to an unwanted expansion of control. An individual act imposes a negligible violation on another person's self-determination. It is only when examined in context – repetition, work, school or institutional setting, difference in the structural power of the parties – that the real meaning of the harassment is revealed. During the Finnish legislative process, the view was adopted that disturbing, sexually-loaded behaviour is an offence against the public peace and safety (Government Bill 6/76, 162) and is punishable when it happens in a public place.<sup>36</sup> This view overlooks the fact that harassment is mostly done by individual men to individual women and it rarely takes place in public places. In general, the acts are not exactly indecent (as is exhibitionism), but they may be fairly ordinary, such as patting and speaking with sexual innuendo.

While the violation of sexual autonomy may be ambiguous, the violation on sexual integrity is often obvious. To conceptualize it, however, we need to abandon an act-centred view of sexuality and understand the context in which the actions are taken, context here meaning the relative power between the parties. This restructuring is not designed to downplay the problems of contextualization. Alain Norrie has pointed out that criminal acts are always interpreted in a context and that the relevant contextualization is the key issue in imposing responsibility. One of the tasks of feminist legal research is to make women's experiences part of a relevant context. In Sweden, the new law on crimes against a woman's peace addresses contextuality – the continuous, often aggravating and culturally-rooted nature – of domestic violence (Nordborg and Niemi-Kiesiläinen 2001). Sexual harassment can hardly be discussed without taking into account the context of individual acts, the relationship between the parties and the continuous violation of the integrity of the victim.

### Conclusion

Law is a powerful tool in defining and constructing sexuality. The historical account provided in this article was both unexpected and yet familiar. Not surprisingly, the different phases of regulation – sexuality as property, the absolute sexual morality, double standard sexual morality and liberalization – were distinguished in the history of Finnish sex crime law. What I did not expect to find, however, was how well the law corresponded to the sexual ideologies of the respective periods, and especially how much the double standard of the 19<sup>th</sup> century was reflected in the law.

In the late 20<sup>th</sup> century Finnish sex crime law, we encounter a completed liberal project. Sexual crimes are made sex-neutral and neutral in relation to expressions of

sexuality. The aim of the liberal *travaux préparatoires* featureless, detached and determination in their self-determination of force or the threat of feminist studies of rape and sexuality in which the male striving and the female (1997; Lacey 1998; Anderson) of self-determination of when the subject would tion.

With its aim of protecting those persons whose capacity that is, of an adult, empowered and cry rape, you will get found to be insufficiently aware, impaired capacity, although was suggested that the foundation of integrity as the protection and subjectivity in relation

The liberal project in the 1970s. While the emancipation we have to admit that in the sexual abuse and exploitation power, which a liberal discourse inevitable.

### Notes

- 1 Law on the prohibition of
- 2 Although Finland was under Finnish legal tradition still taken both official and in
- 3 I owe thanks to a number of Special thanks for the contribution in the research project VI Finnish Legal Discourse
- 4 I have developed these theories the sex neutrality of the law sexuality (ibid. 2000).
- 5 The Code of 1734 was a Sweden and Finland. Finland
- 6 Finland, as part of the Kingdom, and in many other wars of

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sexuality. The aim of the sex crime law is to protect sexual self-determination. In the liberal *travaux préparatoires*, we find a discourse about the sexuality between two featureless, detached and equal individuals, fully capable of exercising their self-determination in their sexual relations. In rape, this ideal is broken down by the use of force or the threat of force. This depiction is different than we have found in feminist studies of rape law, which have revealed constructions of female and male sexuality in which the male sexuality has been depicted as the active, initiating and striving and the female sexuality as responsive, passive and submissive (Naffine 1997; Lacey 1998; Andersson 2001). The new law seemed to require a high standard of self-determination of its subjects and, thus, drew my interest to those situations when the subject would fall short of attaining this high standard of self-determination.

With its aim of protecting sexual self-determination, the law takes the side of those persons whose capabilities of exercising self-determination are not questioned, that is, of an adult, empowered, middle-class, white woman. If you can define a rape and cry rape, you will get protection. But the vantage point of self-determination was found to be insufficient when any hard issues of sex crime law, such as consent, legal age, impaired capacity, abuse of dependency or sexual harassment were discussed. It was suggested that the focus of the discussion should be shifted towards the conception of integrity as the protected good of sex crime law and understanding sex, sexuality and subjectivity in relational terms in a context of a structural gendered system.

The liberal project is derived from the era of sexual liberation in the 1960s and 1970s. While the emancipatory power of sexual liberation should not be abandoned, we have to admit that in the beginning of the 21<sup>st</sup> century, we know a lot more about sexual abuse and exploitation. This exploitation includes elements of the abuse of power, which a liberal discourse can hardly reach. Therefore, a shift in discourse is inevitable.

#### Notes

- 1 Law on the prohibition of purchase of sexual services 1998:408.
- 2 Although Finland was under Russian rule (1809–1917) before independence, the Swedish-Finnish legal tradition survived during this period. After 1917, judicial cooperation has taken both official and informal forms.
- 3 I owe thanks to a number of people who have commented on various drafts of this article. Special thanks for the constructionist understanding of law are addressed to my colleagues in the research project VISE: Violence in the Shadow of Equality: Gendered Structures in Finnish Legal Discourse and Päivi Honkatukia, PhD, in particular as our tutor.
- 4 I have developed these themes in two articles, written in Finnish, in which I first challenge the sex neutrality of the language (Niemi-Kiesiläinen 1998) and then the liberal notion of sexuality (*ibid.* 2000).
- 5 The Code of 1734 was a comprehensive codification of the Swedish law, covering both Sweden and Finland. Finland was a province of the Kingdom of Sweden until 1809.
- 6 Finland, as part of the Kingdom of Sweden, took part in the 30-year war of the 17th century and in many other wars of the 18th century. The wars apparently added to the large-scale

- problem of illicit births. Generally, the fathers of these children were married and were of higher social standing than the unmarried mothers (Aalto 1996).
- 7 The law did not explicitly mention marriage. It prohibited illegal intercourse, which, of course, did not refer to marital intercourse.
  - 8 Apparently, a lot of rape went undetected. Therefore, it might have been rather an academic question how the rape of a 'fallen' woman should be punished. In this undetected crime, the victims of sexual offences were usually women from social classes lower than the social class of the perpetrators. For example, crimes against servant girls on farms by owners and relatives did not, as a rule, lead to criminal proceedings (Aalto 1998).
  - 9 See Häkkinen 1995, 226, who links prostitution with strict norms of sexual morality.
  - 10 Criminal Code of 1889, Chapter 20, Section 9.
  - 11 Presumably, such activity by men was beyond anyone's imagination at the time.
  - 12 Criminal Code of 1889, Chapter 20, Sections 10 and 11, Chapter 25, Sections 7 and 8.
  - 13 The Code of 1734, Chapter XXII, Section 1(1).
  - 14 Criminal Code of 1889, Chapter 20, Section 7.
  - 15 The rationale of the regulation of adultery was to protect the family. Forsman II 1917, 37-39, *Alamaiset ehdotukset* 1884, 176.
  - 16 Chapter 25, Section 8.
  - 17 Act 24.7.1998/563 came into force 1.1.1999.
  - 18 The prohibition of fornication was repealed in 1926 (5.2.1926/24), adultery in 1948 (23.9.1948/683) and prostitution in 1936. Prostitutes, however, were subjected to repressive health and social control measures until 1986 (Law on flagrant 57/17.1.1936).
  - 19 As legal scholars were diligent to point out, rape in marriage included elements for which punishment could follow as undue coercion or assault (Rautio 1999, 382). These crimes, however, carry a far lesser punishment than rape. The provision of rape was changed in 1994 to include rape in marriage. Here, as in many others respects as well, Finland has been far more conservative than other Nordic countries. In Sweden, for example, rape in marriage was made a crime in the reform of the Penal Code of 1965.
  - 20 Criminal Code, Chapter 20, Section 10.
  - 21 Criminal Code, Chapter 20, Section 10.
  - 22 Criminal Code, Chapter 20 Section 5.
  - 23 Criminal Code, Chapter 20, Section 4.
  - 24 Criminal Code, Chapter 20, Sections 2 and 3.
  - 25 Criminal Code, Chapter 20, Section 5. The protection of immature persons was added to the text in Parliament, see Parliamentary Committee, LaVM 3/1998, 22. Even though the Committee Report does not specifically mention it, it was probably thought that this provision would replace the repealed special age of consent for homosexuals, Rautio 1999, 383.
  - 26 Patronage fulfilled the elements of either fornication, if the patron was not married, or of adultery, if he was married, in the 19th century, but the criminal justice system was not interested in prosecution of these crimes. See p. 175.
  - 27 Criminal Code, Chapter 20, Section 8.
  - 28 This view is also recognised in Government Bill 6/1997, 168.
  - 29 Report of the Committee for Ordinary Law 3/1998, 8-9.
  - 30 Lag (1998:408) om förbud mot köp av sexuella tjänster (Law against Buying Sexual Services) came into force 1.1.1999 in Sweden. About the experience, see SOU 2001:14, 307. Olsson and Svensson 2000.
  - 31 See, about such development in femicides, Nourse 1996.
  - 32 The cases are known by the name of the place where the crimes took place, such as the

- Södertälje* case (NJA 33 Government Bill 6/19 34 Criminal Code, Chapt 35 Criminal Code, Chapt 36 Criminal Code, Chapt

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- Södertälje* case (NJA 1997 s. 538) and the *Rissne* case (*Svea hovrätt* B 3935-00, 13.7.2000).  
 33 Government Bill 6/1997, 172, for earlier requirement, Honkasalo 1970, 100.  
 34 Criminal Code, Chapter 20, Section 5(2).  
 35 Criminal Code, Chapter 20, Section 6.  
 36 Criminal Code, Chapter 17, Section 21.

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## On the Limits of Argumentation

### Focus on Conceptual

For several decades now, the feminist slogan "Smart, in her *Feminism* in a nutshell that is, I think the growth of modern feminism that equality of opportunity. Law may remain oppressive formal rights which are early feminists to demand and may even be detrimental right...for which there is no mention of equality is too late" (Italics KN).

According to Smart, the dilemma of outdated notions of opportunity. In the past, women's claims. It has been possible to promote women's interests, however, that the productive. Resorting to the difference between men and women. To engage in the discourse of the Empire strikes back with the wit of women. Although rights have always, or at least in the past, that her rights have been in the state, but rights may be held by successful individuals. Legislation