Nordic Equality at a Crossroads

Feminist Legal Studies Coping with Difference

Edited by

EVA-MARIA SVENSSON
University of Gothenburg, Sweden

ANU PYLKKÄNEN
University of Helsinki, Finland

JOHANNA NIEMI-KIESILÄINEN
Umeå University, Sweden

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Nordic equality at a crossroads : feminist legal studies coping with difference
1.Women - Legal status, laws, etc. - Scandinavia - Congresses
I.Svensson, Eva-Maria II.Pylkkänen, Anu
III.Niemi-Kiesiläinen, Johanna
340'.082'0948

Library of Congress Cataloging-in-Publication Data
Nordic equality at a crossroads : feminist legal studies coping with difference / edited by Eva-Maria Svensson, Anu Pylkkänen, and Johanna Niemi-Kiesiläinen.
p. cm.
Includes bibliographical references and index.
ISBN 0-7546-2408-0
1. Women--Legal status, laws, etc.--Scandinavia--Congresses. I. Svensson, Eva-Maria. II.Pylkkänen, Anu. III.Niemi-Kiesiläinen, Johanna.

KJC1019.A6N67 2004
342.4808'78--dc22

2004048250

ISBN 0 7546 2408 0

Printed and bound in Great Britain by Antony Rowe Ltd, Chippenham, Wiltshire

Contents

Chapter 1

Introduction: Nordic Feminist Legal Studies at a Crossroads

Eva-Maria Svensson, Anu Pylkkänen and Johanna Niemi-Kiesiläinen

The contributions to this collection have sprung out of an awareness that we are now at a crossroads. Nordic feminist legal scholars are currently facing a new reality where we must deconstruct the understandings we have taken for granted about the strong State, progressive equality politics and homogenous societies. Our understanding of equality seems to have been based on the assumption of a homogenous society at a level deeper than we ever could have expected. This assumption was recently challenged by the tragic death of a young immigrant woman in Sweden and in the many-faceted discussions that ensued.

Fadime Sahindal, a young Kurdish immigrant woman, was murdered in Sweden by her own father in January 2002. The murder was soon labelled an 'honour killing' because the motive of the girl's father was to protect the honour of his family. In our opinion, this event symbolizes the end of the previously held beliefs of the homogenous Nordic societies.

The discussions which followed demonstrated the complexity of the issues linked with the Nordic model of equality. The topics ranged from gendered violence, immigration and social integration to the values of Swedish society. The murder touched the Swedes in a profound way. The issue was intensely debated, not only in the media, but also among ordinary people and, in particular, among feminist academics. One of the central issues in the feminist discussion was whether the murder should be viewed as a cultural issue or as a feminist one. Was Fadime murdered because she was a woman or because she was from another culture? Why did Fadime's murder evoke such a compassionate reaction at the same time that thousands of instances of other women being battered and raped by their partners in all Nordic countries went unremarked? Why did the reports of these assaults fail to raise similar concerns?

It is our argument that the reaction to Fadime's fate did not follow from the fact that she was a woman, nor from the fact that she was an immigrant. The reaction is best explained by the fact that she was a Swede. Even before she died, although even more so afterwards, Fadime had become a new symbol for Swedish values.

Well integrated into the Swedish society and culture, at the age of 26, Fadime was an independent young woman, who lived alone and was studying to become a

social worker. She had immigrated as a young girl and had become an interpreter for her father with whom she had had a good relationship. Fadime's father was a manual worker who never adjusted to Swedish society. Fadime had been engaged to a Swedish man, a non-Kurd, who had later died in a car accident. The engagement had broken Fadime's father's heart, prompting him to threaten to kill Fadime because of it. Fadime decided to go public with the alarming situation. Speaking in flawless Swedish, Fadime even brought her case before the Swedish Parliament, addressing the threats facing immigrant women in Sweden.

As an immigrant, Fadime was a symbol of solidarity. As an independent woman, she represented sex equality. With a working class background and a good education, she represented progress and equal opportunity. As an aspiring social worker, Fadime epitomized a sense of shared responsibility for persons in need. And, as the Swedish historian Yvonne Hirdman (2002) has pointed out, Fadime had publicly defended Swedish values. In short, Fadime represented everything about which Sweden is proud. So, an attack on her was an attack on the core values of Swedish society. Fadime was considered to be a member of this society, whereas her father was considered an outsider, who threatened its values.

According to this interpretation,[1] the murderer, an uneducated male of immigrant background, is constructed as the threat and as 'the alien'. But can it lead us any further in our pursuit of understanding the case? As Julia Kristeva (1988) argues, in order to learn something from the alien, we need to recognize the alien in ourselves. The challenge, therefore, of Fadime's murder goes right to the Nordic identity we have constructed for ourselves. Our understanding of a Nordic identity seem to fall short of a genuine understanding of difference and multiculturalism. To create an identity is always to relate oneself to the others, but the question remains, how reflective is this process with regard to controversy and exclusion.

The danger that we can distinguish in the discussions following Fadime's death is that the boundaries between us and them are only drawn in a new place, between the well-integrated immigrant and the 'other' immigrants. What is needed, though, is a renegotiation of the whole concept and notion of these boundaries in order to attain a genuine multiculturalism.

After some thirty years of progressive equality politics, we must now deconstruct the taken-for-granted understandings of the strong and women-friendly State, the mixed blessings of the undeniably progressive Nordic equality politics and the image of culturally homogenous societies.

Nordic equality has been founded on economic growth, progressive welfare and educational policies as well as on the presence of women in politics and in the labour force. The economic and social development of the Nordic societies has relied on a universal mobilization of human resources. Now, privatization, globalization and multiculturalism unavoidably challenge the notions of the concept that has long been understood as 'Nordic equality'. Encountering challenges from peoples and cultures dissimilar to the one cherished in Scandinavia, there are no longer any self-evident planks on which to base the policies of the Nordic welfare states. Fundamental issues with regard to subjectivity, citizenship and equality must be addressed from a new perspective. The communitarian traditions of small and ethnically homogenous societies are now being replaced by a more liberal system in which individual rights and anti-discrimination dominate over more collective patterns and values. As we will argue later, this shift poses a challenge as to how we comprehend law and legal studies.

The Nordic Equality Model

The Nordic equality model has its historical roots in the nation state formation based on egalitarian and communitarian elements. The present understanding of Nordic equality is a product of a little less than hundred years of progressive social policy characterized by social engineering. In the early 20th century, the Nordic societies were very poor. Emigration of surplus labour was extensive. In the 1920s, in Denmark and Sweden, important steps were taken to elevate society and direct it towards economic growth. One part of this politics was to enhance the social equality between men and women. Liberal marriage reforms and pro-natalist policies were one part of this process (Melby et al. 2000). Women were granted legal and economic independence, even if it was understood that most women, nevertheless, would stay at home.

In Finland, the attainment of independence in 1917 and the subsequent Civil War created much social controversy and required resources that were bereft of any constructive social policy. However, women were somewhat more active in political life and working life than in the other Nordic countries. Even today, working ethos and an emphasis on waged labour characterize the lives of women in Finland to a greater extent than in any other Nordic country.

All Nordic countries, in principle, have based their social and equality politics on economically independent individuals, irrespective of gender or family status (Kautto et al. 1999, Kalliomaa-Puha 2000). The image of socially and economically well-developed societies with a strong emphasis on substantive equality, or the equality of results, is, thus, a product of deliberation and active social planning. There have been visions of the best possible world we, as Nordic citizens, could achieve.

The downside of these developments is that the ability to recognize difference and disadvantage on an individual level is less practiced. Liberal notions of individual rights and protected privacy have only very recently come onto the agenda due to the adherence to international Human Rights conventions and the European Union. A liberal understanding of the equality of opportunities does not always fit easily into the framework of collective patterns, for example, into the trade-union regulated labour market. At this moment, under serious consideration in the Nordic societies is the question of how the requirements of individual anti-discrimination and collective egalitarian policies and norms may be accommodated.

In this book, we argue that Nordic equality has been based on sameness to such a degree that it leaves little room for politicians and lawyers to recognize and appreciate difference (Nousiainen 2004). The notion of equality as sameness is most persistently anchored in the legal system. Proactive equality politics are repeatedly hampered by legal constraints.

The authors argue that not only equality and anti-discrimination law, but also the legal system, in general, have been built upon the principles of similarity and assimilation. The authors claim that the model of the sex-neutral, self-supporting, independent individual is assumed as the basis of most fields of law. Gender-related issues are recognized only as far as they are compatible with the idea of a genderless actor. As these articles will demonstrate, people not corresponding to this model, such as care-givers, single parents or weaker parties in sexual encounters, are considered as foreign elements in the legal system. The legal system, with its formally neutral law on non-discrimination, has been unable to realize substantive equality, or the equality of results.

In the Nordic civil law countries, the statutory law system is of primary interest in legal analyses (Nousiainen and Niemi-Kiesiläinen 2001). Furthermore, law is used as a tool to direct the societies, signifying social engineering, not only as a method to resolve conflicts as in the more liberal regimes that have been called residue models. Quite paradoxically, however, the standpoint of Scandinavian legal scholarship is quite formal and seldom concerned with the societal impacts of law. The Scandinavian tradition of legal realism has not included in-depth analyses of legal constructions as such or of their intertwined connections with other than legal norms and social practice. Laws are seen as tools to attain political goals such as equality and welfare, but it has not been conceded that law and legal constructs themselves could have any impact on social life and even be discriminatory by ignoring the inequalities hidden beneath the formally neutral system. It is, therefore, of great importance for feminist lawyers to analyze the impact of the systemic structure of law and its internal lacunae and controversies that produce indirectly discriminatory effects. It will be argued in this book that despite the overtly egalitarian and gender-neutral form of the statutory system and its context in actively promoted equality politics, the outcome can often be less favourable to marginalized people.

The recognition of difference requires first recognition of a context. Legal assessments of similarity and difference, which are at the core of equality and discrimination law based on comparison, mean that law is applied in a certain context. Contextualization has been one of the debated topics in feminist legal studies, but so far it has had little impact in the North. Legal science has been extremely formal with regard to social norms and practices that intertwine with the legal discourse. While we should be aware of the context, at the same time, we should be alert to the dangers that are implied in the application of law in patriarchal contexts. As feminist lawyers, we recognize this danger in positivistic legal dogmatics, which very seldom clearly explicate the assumptions on gender.

Nordic feminist legal studies have become more critical of the possibilities of achieving equality through legal reform. While we are not unwilling to abandon legal reform as such, we want yet to explore the foundations on which such reforms are based. The contributors of this book have become more and more interested in the processes in which both legal discourses and wider societal discourses construct legal concepts and contexts. It is symptomatic that such interest has arisen only after the Nordic welfare and equality model has fallen into crisis. Public concerns are shifted to other spheres: law, market, media, private sphere of contracting.

Equality Through Labour

Since the early 20th century, the Nordic welfare model is based on individual self-support through waged labour. Thus, women's high participation in the labour market has been crucial for the quest for equality. Today, however, we are disillusioned about achieving equality in work and through work. It has been deeply disappointing to realize that the Nordic labour market is not a market of equal opportunity or equal pay. The wage gap between women and men can only be partly explained by occupational patterns. At the same time, the proportion of women in higher positions is still considerably low, also in the Academia (Husu 2001).

The Nordic equality model has been challenged from two directions. On the one hand, its own inability to fulfil the expectations has led to criticism and to the questioning of its premises. On the other hand, the Nation State as a basis for achieving political goals, such as equality, is losing ground. The states have yielded some of their sovereignty to the EU, the globalizing market and trans- or supranational bodies and organizations. The nation states are not necessarily the fora where reform is sought today. Investigations concerning power structures in society, such as the one made in Sweden in 1990, '*Demokrati och makt i Sverige*' (SOU 1990:44), show that there are many areas such as the economy and the market where women actually wield very little influence.

In this book, Susanne Fransson and Christer Thörnqvist make a claim that the failure of the traditional labour market strategies to achieve equal rights for everyone is partly due to the gendered structures within the bargaining strategies. In the chapter, *Gender, Bargaining Strategies and Strikes in Sweden,* they discover notable differences between 'male' and 'female' bargaining strategies, in particular, in the use of the strike. While occupational groups dominated by men have frequently used wildcat strikes to apply pressure to shop-floor wage negotiations, groups dominated by women have remained largely mute. Instead of saying that women are the problem since they do not use labour market strategies, Fransson and Thörnqvist argue that these strategies, as such, are gendered structures.

In the palmy days of the Swedish labour market model, typically female occupations were guaranteed a decent pay increase owing to the so-called solidaristic wage policy. The changes in the 1990s have demanded new strategies. The most important new strategy has been to use legislation for collective purposes; the sys-

tematic use of the legislation against wage discrimination in the health sector is the most obvious case. Expectations have now turned to anti-discrimination law.

The basis for the Sex Equality Acts issued in the 1970s and 1980s[2] was an equality of opportunities, signifying formal equality and anti-discrimination. The Swedish Equality Act was a compromise between two ideologies, liberal and collective, decided upon by a government with a liberal prime minister. Together with the principle of equal opportunity in the Constitution (1976 in Sweden, 1995 in Finland), the Sex Equality Acts predominantly represented a liberal model of regulation. The collective elements were an innovation of the Social Democrats, signifying that the trade unions should have an active role in the promotion of sex equality through equality planning and monitoring.

Through reforms of the Equality Acts, the equality of results policy has been more active than the liberal equality of opportunities policy. Equality of results policies, such as quota systems (SOU 1987:19), have led to an almost equal representation in politics.[3] In the legal sphere, however, it has been more difficult to pursue an active sex equality policy through anti-discrimination cases or positive action (*Jämställdhetsombudsmannen*, Annual report 2001).

Because anti-discrimination unavoidably involves litigation, lawyers could engage themselves in cases that provide arenas for an active argumentation for and application of the equality principle. Pursuing cases is a strategy vis-à-vis environmental issues and the human rights of marginalized groups. When it comes to sex equality, it does not seem to be such an efficient method. The Swedish Sex Equality Ombudsman has pursued cases related to sex equality for several years, but the office seldom ends up in a winning case, such as the one in April 2002 (ADD 45/2002). Other lawyers in Sweden have been reluctant to take on employment discrimination cases. In Finland, the Equality Ombudsmen have shown no interest in litigation. Private claimants have taken cases to court not without some success, but the compensation for discrimination is low and there is no chance of getting one's job back.

Another challenge to the Nordic equality model is the shift of power to international fora and to the European Union, in particular. When Finland and Sweden joined the EC in 1995, a strong feminist lobby argued that this membership would be detrimental to Nordic sex equality politics. Women in the Nordic countries have attained both political power and economic independence, to some extent, due to positive action policies such as quotas. It was argued that when power is shifted from nation States to the European Union, power is also shifted from women to men as the EU structures are much more male-dominated. Recent feminist legal scholarship has also shown how, for example, the EC case law relating to sex equality reproduces patriarchal structures (Lundström 2001; Shaw 2001). But we can distinguish an opposite effect as well. After the Amsterdam Treaty, the Member States are obliged to pursue policies which promote equality and remove obstacles to equality. Especially in Sweden, this new approach in EU law has coincided with active equality politics at the national level. As will be argued by Svensson and Pylkkänen, it has not been easy to translate these claims into national law.

One example of how difficult it is to implement policies that require the active promotion of equality is given by Karoliina Ahtela in the chapter, *Promoting Equality in the Workplace: Legislative Intent and Reality.* In Finland, the Equality Act of 1987 requires all major employers to establish equality plans to promote equality in the working place. The promotion of equality by these plans has not been realized as it had been intended to be upon the enactment of the Act. According to Ahtela, the reasons for the failure stem from the fact that the legislation was passed as a response to requirements from the outside, that is, the UN and later, the EU. Therefore, the equality plans, required by law, lack legitimacy in the Finnish labour market. The law and the plans are not accompanied with any insight into the construction of inequalities in the working place. Even when there is a consciousness of inequality, its structural bases are not recognized and plans are not put into effective use. Ahtela points out that a law has to be congruent with politics and society in order to be efficiently implemented. Ahtela raises important concerns about the implementation of equality law both in national and in the EU contexts.

Reproduction and Care

In the Nordic feminist studies of the 1980s and early 1990s, two fields of interest may be distinguished. In Sweden and Finland, feminist legal research was mostly interested in equality legislation and the regulation of labour relations from the women's point of view; as for examples, see Fransson and Thörnqvist in this volume. In Norway, under a new disciplinary title, 'Women's Law', new areas of law were addressed from a woman's point of view. The idea was to identify problems that were common among women, to analyze them, and to offer alternative interpretations that would lead to legal reform. The Norwegian Women's Law intersected traditional areas of law and created new fields of law, such as Housewife Law, Birth Law and Money Law (Dahl 1987). The Norwegian term *Kvinderet*, 'Women's law', has become the name used in all Nordic countries to refer to a discipline that is interested in the legal regulation of women's issues.

A mutually-held interest for both the Norwegian and the Swedish-Finnish approaches has been the regulation of care and its effects on women. For feminists, the question of how to deal with women's caring duties has long been a sensitive issue. Some of them think, quite plausibly, that home care strengthens patriarchal structures and enforces dependency. Especially in Sweden and Finland, equality politics have strived to combine work and motherhood as a feasible option within the more or less formally equal legal framework. The approach of the Norwegian women's law has been different. Its method has been to focus on women as a social category: to take up legal issues with relevance to women, such as home care, to consider alternative interpretations of law and to suggest legal reform.

While equality in the labour market has mainly concerned the similarities or differences between women and men, the politics of care also raise the issues of

equality and difference among women. While caring responsibilities are not equally shared by men and women, they are not equally shared among women, either. It can be argued that this division is an artificial one. Actually, many women with or without a job choose to care for their children, old parents or sick partner at some phase in their lives.

As an author deriving her analysis from the Norwegian women's law tradition, Hege Braekhus discusses in her chapter, *Care and Social Rights,* the legal framework of financing home care in Norway. In Norway, social problems linked with caring responsibilities have been resolved with a multiplicity of measures that together build a patchwork quilt, often sewn up with concerns other than caring itself. It is not at all sure that the aim to secure women's economic independence as caregivers is secured in practice. The patchwork of regulations includes internal contradictions and gaps that reiterate the patterns of dependence rather than change them.

Furthermore, Braekhus discusses the evaluation of different occupations. Obviously the work done mostly by women is given less value than the work done mostly by men. Care is an occupation considered to have low value, no matter whether it is done as unpaid activity in the private sphere or as paid work in the labour market. Braekhus argues that care is work no matter where and no matter under what circumstances it is done. As such, care should be valued not only as a way to obtain a moderate income and social rights, but also as a ground for a better than moderate level of income. However, as long as women have little influence in the prioritized choices of national economy, such a vision may remain utopian.

If care is seen as work that should be compensated, the following questions inevitably arise: who should be obligated to pay for it and at which level: the caregiver herself or himself, the partner or the State? Politically, the fiercest controversies among the Nordic countries, nowadays, concern the care of one's own children.

The EU, as well, has become interested in this issue. The Presidency conclusions of Barcelona European Council, held on 15–16 March 2002, defined an aim to provide childcare to at least 90 per cent of children between the ages of three and the mandatory school age by 2010 and to at least 33 per cent of children under the age of three (Paragraph 32). The same concern, *viz.*, to remove disincentives for female waged labour, had been in the background of corresponding Nordic provisions since the 1970s.

The Nordic countries have chosen different policies. In Sweden and Finland, every child is assured of a day care place in a day care facility, mostly provided for by municipal day care centres. Sweden has built a comprehensive network of day care facilities. Finland has promoted alternatives and 'family choice', which has meant both municipal and state-funded day care and financial support to families who choose to care for their children in private arrangements. Norway introduced a home care allowance system in 1998. For a short period of time in 1994, even Sweden had such a system, introduced by the conservative government.[4] It was criticized as unequal and was abolished by the social democratic regime after the following election.[5]

The Norwegian allowance system has come to stay. Benefits are paid to families who have children between the ages of one and three and who are not cared for in state-subsidized day-care centres. The actual benefit, however, is low and it is impossible to live on it. It is a modest contribution to the family budget. In the chapter, *The Norwegian Home Care Allowance,* Kristine Korsnes discusses this scheme and argues that, despite the low level of compensation, the scheme, however, can be seen as highlighting the important issue of the value of care.

Family Model and Equality

The two trends in Nordic feminist law, equality through the labour market and the focus on women's problems, have both turned out to be problematic as means to obtain equality or to reveal obstacles for equality. As will be discussed below, Nordic feminist legal studies have of late turned into analysis of law itself, into asking questions about how law, legal practice and legal studies themselves construct gender and gendered structures. The latter part of this book consists of examples of this approach, starting with a discussion of about how the gendered structures of family law, tax law and social law have a combined effect on women's lives.

Nordic equality has been based on an idea of self-supporting individuals who organize reproduction in dual breadwinner families. During the 20th century, the trend in family law has been towards increasing individualism and independence in family relations. Even if marriage is still regulated as an institution, the individualism in marriage has been continuously fortified. In practice, however, personal and economic dependence is the reality for many people. The relation of dependence and self-support in family, tax and social law is the object of Monica Burman, Åsa Gunnarsson and Lena Wennberg in the chapter *Economic Dependence and Self-support in Family, Tax and Social Law.*

They show that normative and structural patterns are shaped according to divergent models in different areas of law: the nuclear family model and the individual model. They argue that tax law is based on an individual model, but social security law, on the nuclear family model. While family law is mostly based on an individual model, traces of the family model are found in the regulation of matrimonial property and support. Since women's living conditions are intertwined with family life more than men's living conditions are, women have to deal with normative and structural constraints derived from the predominance of the public side of life to the neglect of the private side in which their caring role still creates patterns of dependence. Therefore, women often encounter, to their detriment, the contradictory or competing requirements of family, tax and social laws.

Sexual Violence and Sexual Images

Violence against women and discriminatory sexual images of women were core themes in feminist legal scholarship during the 1990s. These themes have also been central in Nordic scholarship and in sex equality politics and legislation. Initiatives have been taken to integrate criminal law perspectives into social policy, both in theory and in practice. The Swedish legal reform, *Kvinnofrid*, or 'Women's peace', bears excellent witness to this trend to utilize feminist knowledge in the law drafting (Nordborg & Niemi-Kiesiläinen 2001).

Sex crime law is usually understood as manifesting the sexual difference. Johanna Niemi-Kiesiläinen points out in her chapter, *The Reform of Sex Crime Law and the Gender-Neutral Subject*, that sex crime law has been used to make distinctions among women as well: a distinction between maidens and wives, on one side, and other women on the other side or a distinction between good women and bad women. Taking a constructivist stand, Niemi-Kiesiläinen argues that law also plays a crucial role in the construction of sex and sexuality today. The Finnish reform of the law on sexual offences from the late 1990s and the gender-neutral concept of the legal subject signify a completion of a liberal project that has made sexual crimes sex-neutral and neutral in relation to expressions of sexuality. According to her, the law on sex crimes also constructs the liberal subject and a liberal notion of sexuality.

The aim to protect sexual self-determination, however, is problematic when it comes to situations and relations in which the parties would not otherwise attain the full standard of self-determination. Some sexual relations, for example, with regard to minors or in the workplace, are relations which are characterized by weak self-determination, strong dependence and inequality. The author argues that a law based on gender neutrality and a protection of liberal self-determination is inadequate to deal with such situations and, at worst, makes power imbalance invisible and difficult to recognize and assess. Niemi-Kiesiläinen suggests that the focus be shifted towards a conceptualization of integrity as the protected good in sex crime and understanding sex, sexuality and subjectivity in relational terms. This kind of understanding would make it possible to account for different victims and different types of violations.

Feminist Legal Studies

Nordic feminism, including legal feminism, has shared a faith in national politics and legal reform as a means to achieve equality. Therefore, the decline of space for national politics, where the State of our time has even been characterized as an impotent State (Therborn 2000), is a paramount question for Nordic feminist studies. Political or, rather, private activity in the non-traditional sense is on the rise and power has shifted to international fora. It is our concern that such activities seem to lack

the democratic safeguards related to nation States. How do these forces deal with issues related to equality, if at all?

Throughout the process of European integration, clashes of different legal cultures have become apparent. For example, the Swedish legislation of positive action in academia[6] with a predefined political aim and a clearly defined end result, *e.g.*, that a position *shall be* filled with a competent applicant of the underrepresented sex, even if he or she is less qualified than an applicant of the overrepresented sex, has been deemed to be in conflict with EC law (ECJ C-407/98). According to the Court, one is *allowed* to advance the equality of opportunities, but not to define the *automatic outcome* of certain measures.[7]

One difficulty in adapting to the EC law concerns indirect discrimination. It is not easily accepted that formally neutral criteria or factors can produce indirectly discriminatory effects and, thus, become forbidden discrimination. Correspondingly, the role of positive action has remained inefficient and is surprisingly seldom considered legitimate.

These examples demonstrate an implicit problem in sex equality law. The principle of equality as adopted in most European Constitutions, may be an obstacle when it comes to the horizontal implementation of the equality principle. A rule can be understood as a tool for implementing the principle but at the same time, it can be claimed as violating the equality principle if and when its purpose is to change the unequal relation itself, for example, with positive action. Finally, equality issues have to be balanced with other values. When doing so, equality often remains a principle that is of a relative rather than of an absolute character.

In Nordic feminist law, this paradox of equality law, together with disillusionment with the policy of equality through labour and with the failed efforts of upgrading care work, have led to a paradigmatic shift. The approaches in Nordic feminist legal studies vary a lot today. We can no longer talk about a uniform 'Nordic Women's Law'. What seems to be a common feature, however, is the more reflective and self-critical attitude towards law itself.

This disillusionment with traditional approaches to law has led to a critical analysis of the basic concepts that, as we argue, signifies an epistemological turn in Nordic legal science. The traditional approach of legal science to look at legal norms is inadequate to address the problems of women. It is felt that the positivistic understandings of normativity must be contested as well. The interaction between legal and other societal norms needs to be incorporated into a broader analysis of legal regulation. In the Nordic countries, socio-legal studies have not been a part of mainstream legal science as they are in some other European countries.

While women's law approach originally recognized the need to construct new concepts in order to address women's legal interests and concerns, it nevertheless operated within a positivist legal framework and mode of argumentation. Recently, Nordic feminist legal scholarship has distanced itself from the previous positivistic understandings of law. It is also interested in the construction of legal concepts as well as those concepts of related societal discourses. This approach is characterized

by a critical reading of the legal canon as a whole, not only by certain concepts believed to be unfavourable to women.

The turn that has taken place in Women's Law during the past ten years epitomizes an aim of questioning the current normative basics of law and arguing for new interpretations of normativity. Instead of providing a new truth to replace the old one, feminist legal scholarship is critical towards the universal normative order as such. The new feminist legal studies challenge the strong belief in the systemic coherence of the legal order, which remained strong in Nordic jurisprudence. It is argued that the universal normative order has actually been constructed from one point of view, which, in this analysis is the male point of view. There has been an 'egalitarian bias' in our understandings of law that must be opened up to critical scrutiny. The new feminist legal studies is interested in how concepts are constructed in law, jurisprudence and other legal discourses. It is also interested in reconstruction, but it has to be built on an analysis of the gendered structure of the legal system and a legal mode of argumentation.

The debates on 'sex' and 'gender' have been central to feminist legal studies. In Sweden, the historian, Yvonne Hirdman, has developed a structural conceptualization of sex and gender utilizing the concepts of *'genus'* and *'genus theory'*. She makes an effort to analyze gendered structures in society as a whole. *Genus* theory is an attempt to incorporate the unequal power relation between men and women into social analysis at all levels. In her work, Eva-Maria Svensson has considered the theoretical implications of *genus* theory in law and the implicit gendered elements of the language of the law (Svensson 1997; Svensson 2001).

The chapters by Burman, Gunnarsson and Wennberg, and Niemi-Kiesiläinen, in this volume, are examples of works in which the construction of legal concepts in the respective fields of law are analyzed from a gendered point of view. Furthermore, they consider the possibility of a power conscious de- and reconstructions. In Sweden, recent legal reforms of legal education (Burman, Svensson and Ågren 2003), positive action in the recruitment of university personnel, women's peace reform in criminal law (Nordborg & Niemi-Kiesiläinen 2001) and the criminalization of the purchase of sex (Pylkkänen and Svensson in this volume) are all examples of how the structural understanding of *genus* relation can have an impact on the law drafting.

An additional legal concept in need of a critical analysis is equality. Equality is still often understood as a static concept creating a biased standard against which claims of inequality are measured, thus dichotomizing it into 'the norm' and 'the other'. Such an understanding of concepts as predefined implies a danger in universal meanings that continue the processes of marginalization. Another approach to the concept of equality is presented in the chapter by Kevät Nousiainen, *On the limits of the Concept of Equality; Arguments for a Dynamic Reading*. Nousiainen argues that while equality and rights have for some decades had a bad name in feminist research, they, nevertheless, can include significant dynamic potential. According to her, such a dynamic understanding might avoid both denial of difference and denial of sameness.

The strong tradition of social equality, including sex equality, has been based on the ideology of sameness, whereas issues relating to multiplicity and pluralism have only very recently come onto the agenda. In fact, our traditions of liberalism are quite diluted, or, they have been intertwined with a communitarian ethos. Furthermore, discussions on legal personality have merited less scholarly interest than the equality policies of the welfare state. However, the increasingly international discourse urges the use of rights to promote the individual in the Nordic countries as well. Rights debate has also been ambiguous because it is not always clear whose rights we are talking about and what they are. Yet, it is a challenge we must face.

We are concerned about the prospective capabilities of law and public policies to handle diversity in multicultural Europe, including the Nordic countries. While we are critical about the advantages and disadvantages of the 'world's best sex equality politics', purportedly existing in Sweden, as defined by the United Nations (Pylkkänen and Svensson in this volume), we still think that the political dimension of Nordic welfarism, to promote people in vulnerable positions, is an important starting point both in feminism and in other respects. Liberalism with a lack of sensitivity towards differences in power is destructive, but rights consciousness combined with sensitivity to an uneven distribution of resources and adequate supportive structures could be the Nordic model of real multiculturalism and equality.

We analyze both the current problems and the positive values connected with the 'North' which are still worth preserving, such as the collective traditions. Focus is on equality issues related to the contemporary process of convergence in Europe. We realize that much of our understandings have been derived from certain inherent nationalistic constructions and narratives, but, at the same time, we see the Nordic countries as 'the others' in a European context dominated by the big legal cultures of the European Union. It is our hope that a dialogue between 'the European' and the 'Nordic' could be dismantled – from both sides – of certain ethnocentric biases that undoubtedly have complicated dialogues so far. The current debates on European citizenship, reinforced employment strategy or anti-racist programmes concern us in the North as much as they do scholars anywhere else.

The question of diversity must be reconciled with traditional thinking about equality and equality politics. An increasingly sharp focus on differences, pluralism, and many-faceted cultural representations and identities requires further analysis, especially, vis-à-vis, discriminatory practices. The challenges we feminists are facing today are numerous: we must learn to cope not only with diversity, but also with new actors, new relations and new ways of imposing normative order. We have to communicate with other traditions of culture and knowledge.

Promoting sex equality is an international issue and currently much focused upon in the human rights discourse. In the international context as well as in the contexts of the Nordic countries, developments have moved towards a requirement of a more actively promoted strategy. The contemporary strategy, gender mainstreaming, is the one now used in the Nordic countries, in the EU as well as in human rights instruments. The strategy and its connections to international and Nordic feminist

perspectives are focused upon in the chapter, *Equality through Human Rights – International and Nordic Feminist Perspectives on Rights*, by Sari Kouvo. She points out that the international discourse is primarily based on the civil and political rights of an individual as the norm for human rights. The Nordic approach has valuable elements, *i.e.*, the priority assigned to the community and the interdependence of civil and political rights with economic and social rights.

Finally, Hanne Petersen heads for the future and the global world in the chapter, *Bringing Difference into the Classroom*, detailing her reflections on teaching an Erasmus course at the University of Copenhagen. Dealing with differences in moral and legal education requires continuous and self-conscious reflections on the part of the teacher. Diversity and difference on an individual level, such as in a teaching situation, are hard to deal with, perhaps even harder than on a general level, but diversity and difference also open up to new ways of thinking and understanding the world.

Teaching foreign students Nordic law, the issue of community and communality always emerges. In the Nordic countries, the state obviously wields a greater role in constructions of community than elsewhere. However much we still think that the State has a responsibility to support families, local unities and interest groups, we have to focus on other driving forces as well. It has been claimed that in the Nordic countries, the State has been understood as almost the same as a society or a community with shared values. But, at the same time we are conscious of the social control deployed by the State and the disability of recognizing conflicts between minority rights and individual rights, especially on the axis of gender and ethnicity. The conflicts usually arise when the rights of an individual are in conflict with the values of cultural minority communities as was the case with Fadime Sahindal.

The state could not protect her rights. Fadime knew that she was threatened. She had taken all possible precautions and Swedish society had done all it could to protect her. Fadime, however, could not bear the isolation from the family and she met up with her fate when she went to meet her mother and sister in a secret place. In her eyes, as well as in the eyes of her father, Swedish society must have been a lonely place with a dearth of community among people.

The discussions that followed Fadime's death indicates that a many-sided discourse on multiculturalism is possible. Many voices of immigrant women were heard, representing different standpoints. While it was self evident that means of protection of threatened immigrant women had to be developed, a broader discussion about the integration process and cultural encounters was also activated by the tumultuous event of Fadime´s death.

Notes

1 Eva Lundgren, Jenny Westerlund and Åsa Eldén presented a very similar analysis of the discussion after Fadime's death (5th European Feminist Research Conference: Gender and Power in the new Europe, Lund 20–24.8.2003). They, however, concluded by emphasizing the pervasive existence of violence against women in Swedish society.

2 1976 in Iceland, 1978 in Denmark, 1979 in Norway, 1980 in Sweden, 1987 in Finland.

3 *Varannan damernas* ('Ladies by turn') was the first governmental report explicitly based on a perspective addressing gendered power structures. Cf. Lindvert 2002.

4 Lag (1994:553) om vårdnadsbidrag.

5 It was repealed after six months, 1 January 1995.

6 The so-called 'Tham Professorships', (Law 1995:936) allocating certain positions of research fellows and professors to the underrepresented sex in order to enhance sex equality.

7 There has been a discussion after the decision of the ECJ on whether or not the Swedish legislation relating to affirmative action is in accordance with EC law. The Equality Ombudsman argues that it is not in conflict with EC law, *JämO* decision nr. 848/00.

References

Burman, Monica, Svensson, Eva-Maria and Ågren, Karin (2003), 'Kunskapsbildning inom juristutbildningen – exemplet könsrelaterad kunskap', *Retfærd*, Vol 26(2), pp. 20-38.

Dahl, Tove Stang (1987), *Women´s Law. An Introduction to Feminist Jurisprudence*, Universitetsforlaget AS, Oslo.

Hirdman, Yvonne (2002), 'Hon sviker det som Fadime stod för', *Dagens Nyheter*, 30 January 2002.

Husu, Liisa (2001), *Sexism, Support and Survival in Academia: Academic Women and Hidden Discrimination in Finland*. University of Helsinki.

Kalliomaa-Puha, Laura (ed.), (2000), *Perspectives of Equality. Work, women and family in the Nordic countries and EU*, Nord 200:5, Nordic Council of Ministers, Copenhagen.

Kautto, Mikko, Heikkilä, Matti, Hvinden, Björn, Marklund, Staffan and Ploug, Niels (1999), *Nordic Social Policy: Changing Welfare States*, Routledge, London.

Kristeva, Julia (1988), *Étrangers à nous-mêmes*, Fayard, Paris.

Lindvert, Jessica (2002), *Feminism som politik*, Boréa Bokförlag, Umeå.

Lundström, Karin (2001), 'The ECJ's Conditional Release of Women', in K. Nousiainen, Å. Gunnarsson, K. Lundström, and J. Niemi-Kiesiläinen (eds), *Responsible Selves. Women in the Nordic legal culture*. Ashgate, Dartmouth, pp. 263-373.

Melby, Kari et al. (2000), *The Nordic Model of Marriage and the Welfare State*, Nord 2000:27, Nordic Council of Ministers, Copenhagen.

Nordborg, Gudrun and Niemi-Kiesiläinen, Johanna (2001), 'Women's Peace. A Criminal Law Reform in Sweden', in K. Nousiainen, Å. Gunnarsson, K. Lundström, and J. Niemi-Kiesiläinen (eds.), *Responsible Selves. Women in the Nordic legal culture*. Ashgate, Dartmouth, pp 353-373.

Nousiainen, Kevät (2004), 'Against discrimination or for equality?', in V. Puuronen et al. (eds), *New Challenges for Welfare Society*, Joensuu university press, forthcoming.

Nousiainen, Kevät and Niemi-Kiesiläinen, Johanna (2001), 'Introductory remarks on Nordic Law and Gender Identities', in K. Nousiainen, Å. Gunnarsson, K. Lundström, and J. Niemi-Kiesiläinen (eds.), *Responsible Selves. Women in the Nordic legal culture*. Ashgate, Dartmouth, pp. 1-22.

Nousiainen, Kevät, Gunnarsson, Åsa, Lundström, Karin and Niemi-Kiesiläinen, Johanna (eds.), (2001), *Responsible Selves. Women in the Nordic legal culture*. Ashgate Dartmouth.

Shaw, Jo (2001), 'Gender and the Court of Justice', in Gráinne de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice*, Oxford University Press, Oxford.

Svensson, Eva-Maria (1997), *Genus och rätt. En problematisering av föreställningen om rätten*. Iustus Förlag, Uppsala.
Svensson, Eva-Maria (2001), 'Sex Equality: Changes in Politics, Jurisprudence and Feminist Legal Studies', in K. Nousiainen, Å. Gunnarsson, K. Lundström, and J. Niemi-Kiesiläinen (eds.), *Responsible Selves. Women in the Nordic legal culture*. Ashgate, Dartmouth, pp. 71-104.
Therborn, Göran (2000), 'Globalizations. Dimensions, Historical Waves, Regional Effects, Normative Governance', *International Sociology*, Vol 15(2), pp. 151-179.
SOU 1987:19 *Varannan damernas*
SOU 1990:44 Demokrati och makt i Sverige
SOU 1995:60 Kvinnofrid. Huvudbetänkande av Kvinnovåldskomissionen (Women's Piece)
Jämställdhetsombudsmannen, Annual Report 2001.
EC Court of Justice Case C-407/98

Chapter 2

Contemporary Challenges in Nordic Feminist Legal Studies

Eva-Maria Svensson and Anu Pylkkänen

Introduction

The objective of this chapter is to discuss the traditions, current developments and challenges of the 'Nordic model of equality'.[1] The Nordic model usually connotes distributive justice and a substantive notion of equality.[2] Individuals are seen as basically similar and independent of family status (Sainsbury 1994; Fraser 1995; Sörensen and Bergqvist 2002). Faith in the state's ability to promote sex equality and social equality at large through legislation has been virtually unwavering, especially in Sweden. The role of social engineering has been less significant in Finland. Irrespective of the same legal framework and obligation to promote equality, there are differences in politics and legislation within the 'Nordic model'.[3] It is important, therefore, to analyze these countries from a comparative perspective, and to ask what the relation among feminism, feminist legal studies and sex equality politics is today. Furthermore, we must also look at other arenas, actors and methods to promote the democratic goal of equality when the state loses its strength in favour of other forces.

The notion of equality, however, is not unambiguous. The strong tradition of social equality, including sex equality, has been based on the ideology of sameness, whereas the issues related to multiculturalism and pluralism have only very recently come onto the agenda. Furthermore, discussions on legal personality or anti-discrimination have merited less interest than the collective equality policies of the welfare state. A liberal discourse on individual rights has been fairly weak in the Nordic countries. The tensions between these two traditions, *viz.*, the Nordic 'communitarian' tradition and the liberal tradition, are at the crux of our analysis.

The Challenges of the Nordic Feminist Legal Studies

Trust in the ability of law and politics to improve the situation of women has occurred quite naturally in the Nordic context.[4] The State has long been understood as

Mannelqvist, Ruth (2001), 'Efterlevandepensioner och familjen – tillbaka till framtiden?' in Monica Burman and Åsa Gunnarson (eds), *Familjeföreställningar. Om familjens betydelse inom juridik, ekonomi och forskning,* Iustus, Uppsala.

Melby, Kari, Pylkkänen, Anu, Rosenbeck, Bente, and Christina Carlsson Wetterberg (eds), (2000), *The Nordic Model of Marriage and the Welfare State,* Copenhagen: Nordic Council of Ministers, Nord 2000:27 .

Mossler, Karin, Torége, Jan and Öström, Anna (1999), '120.000 barn berörs av långvarigt socialbidrag', *SCB Välfärdsbulletinen*, Nr 2, pp. 16-19.

Nordborg, Gudrun (1999), 'Kärlek och ekonomi – juridiskt undantagstillstånd?', *Kvinnovetenskaplig tidskrift*, Nr 1, pp. 49-63.

Nussbaum, Martha (1999), *Sex and Social Justice.* Oxford University Press, Oxford.

Nyberg, Anita (1997), *Women, men and incomes. Gender equality and economic independence*, SOU 1997:87.

Nyman, Charlott, (2002), *Mine, yours or ours? Sharing in Swedish couples,* Doctoral theses at the Department of Sociology, Umeå University, No 24.

Olsen, Frances (1995), *Feminist legal theory*, Aldershot, Dartmouth.

Pentikäinen, Merja (1999), *The Applicability of the Human Rights Model to Adress Concerns and the Status of Women,* Forum IURIS, Publications of the Faculty of Law University of Helsinki.

Ringbäck, Gunilla, et al. (2000), 'Mortality among lone mothers in Sweden: a population study', *The Lancet*, Vol. 355 2000, pp. 1215-1219.

Sevenhuijsen, Selma (1998), *Citizenship and the Ethics of Care. Feminist Considerations on Justice, Morality and Politics*, Routledge, London.

Shaw, Jo (2000), 'The problem of Membership in European Union Citizenship', in Laura Kallioma-Puha (ed), *Perspectives of equality: work, women and family in the Nordic countries and EU,* The Research Program 'Norden och Europa', Nordic Council of Ministers, 2000:5, Copenhagen.

Svensson, Eva-Maria (2001), 'Sex Equality: Changes in Politics, Jurisprudence and Feminist Legal Studies', in Kevät Nousiainen, Åsa Gunnarsson, Karin Lundström, Karin and Johanna Niemi-Kiesiläinen (eds), *Responsible Selves. Women in the Nordic legal culture*, Ashgate Publishing, Aldershot.

Svensson, Lars (1997), 'En historia om löneutjämning – kvinnors och mäns löner i långsiktigt perspektiv', in SOU 1997:136.

Sörendal, Hanna (2001), 'Skuldsanering och kön', in Monica Burman and Åsa Gunnarson (eds), *Familjeföreställningar. Om familjens betydelse inom juridik, ekonomi och forskning,* Iustus, Uppsala.

Teleman, Örjan (1998), *Bodelning under äktenskap och vid skilsmässa*, 3rd edition, Norstedts, Stockholm.

Tottie, Lars (1990), *Äktenskapsbalken och promulgationslag m. m*, Norstedts, Stockholm.

Tronto, Joan C. (2001), 'Who Cares? Public and Private Caring and the Rethinking of Citizenship', in Nancy J Hirschman and Ulrike Liebert (eds), *Women and Welfare. Theory and Practice in the United States and Europe*, Rutgers University Press, New Brunswick, New Jersey and London.

Wennberg Lena (2001), 'Ensamstående mödrar – rätt till välfärd eller försörjda av män?', in Monica Burman and Åsa Gunnarson (eds), *Familjeföreställningar. Om familjens betydelse inom juridik, ekonomi och forskning,* Iustus, Uppsala.

Chapter 8

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

Johanna Niemi-Kiesiläinen

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.[1] 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)[2] 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.[3] 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 19th century liberal society, the protection of 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 preparatiores* 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.[4] 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 underaged 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.

The First Historical Construction: The Regulation of Sexuality as an Exchange between Families

The regulation of sexuality during the Middle Ages and in early modernity was connected with the arrangements of economic relations among families. In the event of a marriage, property and labour were transferred from one family to another (Pylkkänen 1990, 91) in an exchange transaction. The property arrangements for marriage were, partly, made to secure the economic position of the bride, while, after the marriage, the responsibility for the daughter was handed over to the husband's family. In some cases, her economic position was protected with something known as a morning gift. And, of course, the regulation emphasized the need to guarantee marital birth to the children.

The legal framework in which the control of sexuality took place was marriage law. Criminal law was less significant (Aalto 1996, 92) and it supported the marriage law. In particular, the crime, 'maiden violation', protected the authority of the custodian, that is, of the father or of other male relatives to arrange a maiden's marriage by making the seduction of an unmarried girl a crime (Kristoffer's land law 1442, the Book of Marriage 1.1). In maiden violation, the male relative in charge was the party whose right had been infringed upon, not the young woman herself. Consequently, the young woman, who was seduced or forced into the extra-marital relationship, was not punished for it (Pylkkänen 1990, 83; 105; Aalto 1996, 91).

Thus, the control of sexuality was a male prerogative. A number of researchers discuss the gender system of this era in terms of ownership (Table 2). Not only were the perpetrators explicitly men, the objects of protection were also men, as owners of women's sexuality (Brownmiller 1975). The object of both the crime of rape and 'maiden violation' was the husband or the custodian (usually male) (Utriainen 1994, 124). An important criterion for punishment was the status of the woman violated. Women with the status of maiden or wife were of greater value than other women. Violations of these types of women were punished more severely than the violations of women who were neither maidens nor wives. Another status differentiation was made between maidens of marital and extra-marital birth. The seduction of a maiden of extra-marital birth was punished with a fine that was only half of what the perpetrator had to pay for the seduction of a maiden of marital birth (Kristoffer's land law 1442, the Book of Marriage 3.1).

In order to be protected by criminal law, a woman had to be under the protection of a man – either a husband or male custodian who acted as the head and representative of the family or clan. The stronger the social position of the family, the more effective the protection afforded to the woman. In practice, a woman who belonged to the lower strata of society or who was on her own could not expect the criminal law to protect her very effectively.

This asymmetrical protection is exemplified by the regulation of adultery. According to medieval law, a married woman was punished and lost her status and any economic benefits which had been conferred upon her by marriage if she committed adultery (Magnus Eriksson's (1350) and Kristoffer's land law (1442) the Book of Marriage 11; Utriainen 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 16th and 17th 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 16th and 17th 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-16th 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[5] 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.[6]

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 (Pylkkänen 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 18th century Sweden and Finland. Punishments were made more lenient. In particular, capital punishment was systematically mitigated by the Courts of Appeal (Anners 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 (Anners 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.[7]

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 20th 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).[8]

The double standard practically required an institutionalized system of prostitution.[9] Prostitution was explicitly forbidden.[10] What was punishable was prostitution by women.[11] Men could be punished for a number of activities that included leading, tempting or forcing a woman into prostitution or into comparable depravity.[12] 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 19th 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-19th 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.[13] 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.[14] 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.[15] 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 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[16] – 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 20th 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 preparatoires*, 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,[17] 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.[18] 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.[19] 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 preparatoires* 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 preparatioires* 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) 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 preparatoires* 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[20] – 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.[21] 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[22] or as coercion into a sexual deed.[23] 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.[24] 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

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.[25] 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.[26] In the 1998 reform, a prohibition to buy sex from persons under eighteen was enacted.[27] 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.[28] 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 preparatoires* 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 preparatoires* 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 power of a procurer, in the level of violence and in the prevalence of sexually transmitted diseases, were carefully enumerated.[29] 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.[30]

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 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 19th century. While it disregards the relational aspects of human life, it is also blind to its own gendered quality. In the 19th 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 a 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.[31]

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 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 19th 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,[32] 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.[33] 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[34] 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 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.[35] 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.[36] 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 19th century was reflected in the law.

In the late 20th 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 sex crime law is to protect sexual self-determination. In the liberal *travaux preparatoires*, 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 21st 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 flagrants 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, Rautio1999, 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 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.

References

Aalto, Jari (1998), *Tager man qvinno med våld.* Naisiin kohdistunut seksuaalinen väkivalta 1840-64 Turun ja Vaasan hovioikeuspiirien oikeustapauksissa. (Sexual Violence in Finnish Courts 1840-64) Suomen ja Skandinavian historian tutkielma. Stencile. Helsinki: University of Helsinki.

Aalto, Seppo (1996), *Kirkko ja kruunu siveellisyyden vartijoina. Seksuaalirikollisuus, esivalta ja yhteisö Porvoon kihlakunnassa 1621–1700*, Suomen historiallinen seura, Helsinki.

Alamaiset ehdotukset Suomen Suuriruhtinaanmaan Rikoslaiksi. Komitea, määrätty tarkastamaan vuonna 1875 painettuja alamaisia ehdotuksia. (Proposal for the Criminal Code) 1884. Helsinki: Suomalaisen Kirjallisuuden Seura.

Andersson, Ulrika (2001), 'The Unbounded Body of the Law of Rape: The Intrusive Criterion of Non–Consent', in K. Nousiainen, Å. Gunnarsson, K. Lundström and J. Niemi-Kiesiläinen (eds) *Responsible Selves. Women in Nordic Legal Culture*, Ashgate, London.

Anners, Erik (1965), *Humanitet och rationalism. Studier i upplysningstidens strafflagsreformer – särskilt med hänsyn till Gustav III:s reformlagstiftning*, Rättshistorisk Bibliotek 10, Stockholm.

Anttila, Inkeri (1994), 'Två reformer av lagstiftningen om sexualbrott', *Nordisk Tidsskrift för Kriminalvidenskab*; Vol. 81, pp. 15-24.

Bell, Vikki (1995), 'Beyond the "Thorny Question": Feminism, Foucault and the Desexualization of Rape', in J. Temkin (ed.), *Rape and the Criminal Justice System*, Dartmouth, Aldershot. Original edition (1991) *International Journal of the Sociology of Law*; Vol. 19, pp. 83-100.

Blomstedt, Yrjö (1964), 'Rikoslakireformin ensimmäiset vaiheet vuoden 1866 osittaisuudistuksiin saakka', *Historiallinen arkisto*, Vol. 59; pp. 421-518.

Brownmiller, Susan (1974), *Against Our Will*, Simon & Schuster, New York.

Davies, Margaret (1994), *Asking the law question*, Sweet & Maxwell, Melbourne.

Duncan, Sheila (1996), 'The Mirror Tells: Constructions of Gender in Criminal Law', in A. Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law*, Cavendish, London.

Estrich, Susan (1987), *Real Rape*, Harvard Univ. Press, Cambridge.

Fischer, Karla, Vidmar, Neil and Rene, Ellis (1993), 'The Culture of Battering and the Role of Mediation in Domestic Violence Cases', *Southern Methodist University Law Review*, Vol.46, p. 2117.

Forsman, Jaakko (1917a), *De särskilda brotten enligt strafflagen af den 19 december 1889, Anteckningar enligt föreläsningar. Första afdelningen: Brotten mot individens rättsgebit.* (Crimes against Individuals) Juridiska studentfakultetens förlag, Helsinki. 2-3 uppl.

Forsman, Jaakko (1917b), *De särskilda brotten enligt strafflagen af den 19 december 1889, Anteckningar enligt föreläsningar. Andra afdelningen: Brotten mot det medborgerliga samhällets rättigheter*, Juridiska studentfakultetens förlag, Helsinki. 2-3 uppl.

Gordon, Linda (1989) *Heroes of their own lives: The politics and history of family violence Boston 1880-1960*, Virago, London.

SOU 1995:60 Kvinnofrid.
SOU 2001:14 Sexualbrotten. Ett ökat skydd för den sexuella integriteten och angränsande frågor. (Sexual Crimes, Including English Summary)
Svensson, Eva-Maria (1997), *Genus och rätt. En problematisering av föreställningen om rätten*, Iustus förlag, Uppsala.
Svensson, Eva-Maria (2000), 'Kritik av en juridisk argumentation – det krävs två för att dansa en tango', in Gudrun Nordborg, Karin Ågren and Eva Nilsson (eds), *Rapport från 10:e Nordiska Kvinnojuristmötet*, Iustus förlag, Uppsala.
Telste, Kari (1994), '"Hun torde icke aabenbare det..." Seksualitet, kjønn og kropp i norsk rettsmateriale på 1600- og 1700-tallet', in Marianne Liljeström, Pirjo Markkola and Sari Mäenpää (eds), *Kvinnohistoriens nya utmaningar: från sexualitet till världshistoria: konferensrapport från det IV Nordiska Kvinnohistorikermötet 27-30 maj 1993, Tammerfors*, University of Tampere, Department of History 17.
Träskman, Per Ole (1998), 'Går det att tygla lusten? Om straffbar pornografi, pedofili och prostitution' *Tidskrift utgiven av Juridiska Föreningen i Finland* pp. 352-373.
Tuori Kaarlo (1997), 'Ideologiakritiikistä kriittiseen positivismiin', in Juha Häyhä (ed.), *Minun metodini*, WLST, Helsinki, pp. 311-329.
Utriainen, Terttu (1994), 'Hur har sexualbrottens normer förändrats i Finland?', *Nordisk Tidsskrift for Kriminalvidenskab*, Vol. 81(1), pp. 122-129.
Utriainen, Terttu (1996) 'Inkeri Anttila ja seksuaalipolitiikka', in Raimo Lahti (ed.), *Kohti rationaalista ja humaania kriminaalipolitiikkaa*, Helsingin yliopisto (Kriminologian julkaisuja 2), Helsinki, pp. 222-226.

Chapter 9

On the Limits of the Concept of Equality: Arguments for a Dynamic Reading

Kevät Nousiainen

Focus on Conceptual Change

For several decades now, equality has had a bad name in feminist research. Carol Smart, in her *Feminism and the Power of Law*, published in 1989, presents a critique in a nutshell that is, I think, representative for many feminists. To cite Smart: '[t]he growth of modern feminism...corresponds both to notions of equality and the idea that equality of opportunity can be achieved through law in the form of legal rights. Law may remain oppressive to women, but the form it takes is no longer the denial of *formal rights* which are preserved to men... while it might have been appropriate for early feminists to demand legal rights...the rhetoric of rights has become exhausted, and may even be detrimental... especially ...where the demand is for a "special" *right...for which there has been no masculine equivalent...*'. Also, '... the liberal notion of equality is *too limited to affect structural inequalities...*' (Smart 1989, 139. Italics KN).

According to Smart, feminists in the late 20th century have had to face the dilemma of outdated notions of equality and legal rights as a means to equality of opportunity. In the past, rights have been an intrinsic and useful part of feminist claims. It has been possible to couch feminist claims in terms of rights and, thus, promote women's interests and get social wrongs recognized. Feminists should notice, however, that the language of equality and rights has become even counterproductive. Resorting to the language of rights gives a false impression of the power difference between men and women as having been resolved, which is not the case. To engage in the discourse of rights opens the door to competing rights. The male Empire strikes back with the same means, using the rights of men against the rights of women. Although rights are often formulated to deal with *a social wrong*, they are always, or at least in the UK, Smart adds, *focused on the individual* who must prove that her rights have been violated. Rights are devised to give protection against the state, but rights may be also used by some individuals against some other, less powerful individuals. Legislation on gender equality may be used by men just as much as