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Gender and Criminal Law Policy

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Note by the author 2015

This article was written and published ten years ago (2005) in Finnish in Journal Oikeus. It was translated soon after but the English version was not published. I have been asked a few times over the years for publications in English on violence against women but only after encouragement by my Chinese colleagues, I started to browse my files and found this text. What is the point of putting a ten year old text available? The point is not to describe the Finnish law and policy, even if the main analysis on criminal law is still valid. There have been important changes in the policy orientation and the prosecution rules have changed, particularly due to the accession to the Istanbul Convention in 2014. Rather, I hope that the text can illustrate some difficulties in legal reform that can be relevant in other jurisdictions as well. The article makes the point that even a benevolent reform can turn out as problematic if no proper assessment of the gendered effects is made (gender neutrality or gender blindness). Furthermore, the article underlines that specific policies to promote or protect women require a high degree of gender expertise (gender sensitivity).

The article has been translated verbatim and the translation has been edited only slightly. The text is still in present tense even though many of the regulations have been changed. I have noted the most important changes in the legislation in the footnotes. A lot of research and many legislative and administrative reports have been published since 2005, but the references are in the 2005 state.

Abstract 2005

The implementation of a policy for equality can either take the form of special programmes or mainstreaming. In the Finnish criminal policy, gender has mostly been invisible, but a national programme to combat violent crime, published in the spring of 2005, identified violence against women as a special problem and proposed special measures to address it. While the programme referred to alcohol and social exclusion as the general explanations for violent criminality, it did not raise the idea of mainstreaming of gender issues.

The article analyses three legal reforms: the reform of assault (battery) in 1995, the reform of prosecution rules in cases of violent crime in 1995, and the introduction of an Act on the Restraining Order in 1999. While the issue of gender was invisible in the first two reforms, the third reform was a special measure to combat violence against women. The first two reforms have resulted in more lenient prosecution and sanctions for violent crime, and for violence against women in particular. The enactment of the restraining order created a special procedure to address this kind of violence, instead of resorting to ordinary criminal procedures. The main conclusion is that the incorporation of sex and gender into the legal reforms requires both awareness and gender expertise, because the implications of sex and gender are not always as axiomatic as one might expect.

Keywords: criminal law, criminal policy, gender, assault, restraining order

Introduction: ¹From invisibility to special measures

The Finnish criminal law policy shifted in the ten years 1995-2005 first from gender-blindness to special measures and then to policies that attempt to accommodate gender. *Gender-blindness* or invisibility of gender refers to policies that do not recognize gender as a meaningful category or refer to it only as a basis of formal discriminatory treatment that needs to be corrected by introducing formally gender-neutral rules. *Special measures and treatment* mean that gendered crime, particularly violence against women, has been acknowledged and is cited in criminal policy documents but only as a special case within the framework of “actual or real” criminality.

A distinction between special measures and *mainstreaming* as policies to achieve or promote equality is often made in studies on equality politics. In this article I focus on the former, special policies to enhance women’s position as victims of violence. It has to be emphasized, however, that we are not dealing with a specific strategy to achieve equality. Rather, a special policy may just mean that gender has been recognized as a meaningful factor and that special legislative actions have been introduced to take account of the gendered nature of crimes. The thinking in giving special attention to gender goes in the following lines. First, actual criminality is discussed, including serious, perhaps even fatal violence. Then a special case is made of violence against women. A similar discussion revolves around organized criminality, such as drug trafficking and white-collar crimes. Trafficking in women is raised as a special case.

The shift from the gender-neutral policy of silence to special measures was highlighted in an interesting way in the National Programme to Combat Violence, adopted in 2005 (Ministry of Justice 2005:2). The Programme describes how reasons for and understanding of violence was understood. The Programme illuminates a tension between a gender-neutral understanding of violence and observations of gendered violence. The essentially gender-neutral construction of violence is complemented with observations of gendered violence.

With concrete examples of Finnish law and law reform I illustrate the effects of the different constructions of violence (gender-neutral vs. special problem) on criminal law policy. Examples of gender-neutral law reforms are the reforms of assault in the Criminal Code (1995) and of the provisions on prosecution rights (1995). The Act on the Restraining Order (1999) illustrates the notion of gendered violence as a crime that differs from “real crime” and that requires special response,

As a strategy for equality, mainstreaming would entail that gender and its implications would be taken into consideration at all levels of policy. To achieve this, Finnish criminal law policy has a long way to go. The examples of legislation also allow me to examine the potential that mainstreaming has to offer. It is my conclusion that sensitivity to gender not only requires awareness of the significance of the matter but also training and expertise.

¹ This article is a translation from article Sukupuoli ja rikosoikeuspolitiikka. (Gender and Legal Policy) *Oikeus* 3/2005 pp. 230-245. Article that won the Journal’s title Article of the Year is based on my book, entitled Rikosprosessi ja parisuhdeväkivalta (Criminal Process and Violence in Partnership) published in late 2004. This paper is a verbatim translation of the 2005 article. In the footnotes I have indicated some of the most important law reforms that have taken place since. Therefore the numbering of the footnotes does not correspond to the Finnish original.

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Criminal law policy and the causes of violence

A broad concept of criminal policy in crime prevention

In the Nordic countries, a distinction between broad and narrow concepts of criminal policy is often made.² A broad concept of criminal policy encompasses a wide spectrum of measures taken in various sectors of societal policy that have a bearing on criminality, ranging from education to community planning. A narrow concept of criminal policy focuses on treatment of prisoners and their rehabilitation. An even narrower concept is criminal law policy, which refers to the criminal law and its potential to combat crime.

The National Programme to Combat Violence (2005) was based on a broad concept of criminal policy. It discussed various reasons for the high rate of violent criminality in Finland: use of alcohol, social exclusion, male testosterone, and interaction between perpetrator and victim. As the most important explanations for the violence the Programme cites the use of alcohol and social exclusion, an analysis that, in a conservative estimate, takes up a third, if not more, of the 90 pages of the Programme. The Programme contains a number of proposals to improve alcohol policy, to prevent social exclusion, and to enhance the conditions for children and young people. I find these proposals recommendable. In addition to having other positive socio-political effects, they will indirectly and in the long-term serve to diminish violence. Personally, I was particularly excited about the recommendation for full-day school days, which illustrates the comprehensive view adopted in the Programme of the measures to contain violence.

Nevertheless, alcohol consumption and social exclusion as explanations for violence are riddled with problems. Socio-political measures need a long-term perspective. They will not help the victims here and now, nor will they stop the perpetrator from committing new acts. They blur the line of responsibility and shift it to society.

Against the background of a comprehensive concept of criminal policy, it is perplexing that the Programme fails to discuss the relationship between equality policy and violence. Gender equality as an important societal policy does not even deserve a mention in the Programme. The silence was remarkable as the Equality Programme of the Finnish Government and the international human rights instruments treat violence against women specifically as a problem of inequality and call actions to resolve it as integral part of equality and human rights policies.³

Moreover, current international studies see violence as abuse of power. In particular, connections between violence against women and the prevailing gender system and division of power between the sexes have been analysed both in individual cases of violence and as a more general structural problem in society.⁴

² Jareborg 1995 p 19 eg. Olavi Heinonen makes a distinction between criminal policy and societal policy, the latter of which, in his opinion, also has a major effect on trends in criminality. Heinonen 2002 p 57.

³ Policy statement of Prime Minister Vanhanen's Government 24 June 2003 p 14, www.valtioneuvosto.fi/tiedostot/pdf/fi39357.pdf. For international justice, see Niemi-Kiesiläinen 1998 or 1999. In Sweden, an extensive programme of action on violence against women is based on the understanding of violence from the viewpoint of the power relations and exercise of power between the sexes. See, e.g., SOU 1995:60 Kvinnoväld (Violence against women) and SOU 2004:121 Slag i luften (Strikes in the air).

⁴ In my regard, Violence against women by Dobash & Dobash, from 1979, is a classic in its skilful combined analysis of the various levels. A sizable amount of research literature has appeared since. In Nordic countries, reference must be made to Eva Lundgren, who draws very direct parallels between male exercise of power and violence. Lundgren has summarized her theory in booklet form in Våldets normaliseringsprocess (Normalization process of violence), which was published in 2004.

The construction of violence in criminal law policy

In the past decades, Nordic criminal law policy has relied on the rational and humane neoclassical concept of criminal law. The idea of counteracting crime with more severe punishment was met with criticism. Instead, there has been a general consensus that the preventive effect of criminal law depends on how high is the probability that a sanctions will be the consequence of a committed crime. Thus, the likelihood of being detected is considered important.

It is reasonable to expect that the way in which violence and violent crime are understood (constructed) are meaningful for the design of criminal law. Here the Programme to Combat Violence is quite explicit. According to it, Finnish perpetrators of violent crimes, more often than not, “when intoxicated behave unpredictably to the point of mindlessness”.⁵ “A typical case of homicide in Finland is manslaughter which results from a drunken brawl between heavily intoxicated men who are excluded from society and working life.”⁶ The parties are understood to be on an equal footing: “the beating is between equals”. The roles of victim and perpetrator may be determined by coincidence, because “...in another context, the victim may have been the one engaging in violence”. The Programme uses social exclusion in an almost cynical way to produce otherness, that is, to construe violence as something into which the people in a certain social class are condemned and which does not really concern us in the middle-classes. As a rule, the parties to the violence are men, but “mutual drunken violence between spouses” is a discernible trend, which explains a heavy increase in the number of manslaughter cases in partnership.⁷

There is a long tradition of construing domestic violence in the light of family dynamics and systemic family theories. These theories argue that violence in partnership is primarily a result of failures in interaction in the partnership, a violent incident often takes place at random, and violence is very difficult to predict. The systemic theory stresses the psychological symptoms of the partners as reasons for the violence.⁸ The Programme sides with these theories. “However, an act of violent crime always entails the question... of interaction between perpetrator, victim and possibly others present.”⁹

When studies of violence against women began to examine violence as abuse of power, it was noticed that the violence often was related to the pursuit by the perpetrator to control the victim, his partner, in various ways. Some women even experience the control as a greater problem than the physical violence itself. In many cases the violence recurs frequently, is of a serious nature, and with time grows even more serious. The circle of violence is very difficult to break without help from the outside.

The Programme makes minor concessions towards discourse on domestic violence understood as abuse of power. Contradicting to some degree the above citations, the Programme says that “...the use of violence involves control and abuse of power. This applies in particular to violence committed by men towards women and to violence by parents to their children.”¹⁰ This is one of the very few instances in the Programme leaning to this direction.

⁵ The Ministry of Justice 2005:2 p 10.

⁶ The Ministry of Justice 2005:2 p 8. Similarly, *Lappi-Seppälä & Nuutila* 2002 p. 747.

⁷ The Ministry of Justice 2005:2 p 8.

⁸ In more detail *Niemi-Kiesiläinen* 2004 pp 51-56.

⁹ The Ministry of Justice 2005:2 p 11.

¹⁰ The Ministry of Justice 2005:2 p 8.

Gender-neutrality of assault

In what ways does the above described construction of violence manifest itself in actual criminal law policy? Next I shall examine the 1995 comprehensive reform of the law on homicide and violence, more specifically the elements of assault (battery).¹¹ Violence against women was actually mentioned and discussed in the context of the law reform, but only with respect to the right of prosecution (which will be discussed later in the article). The purpose was to take assault within family seriously. As will be evident from what follows, good intentions are not always enough.

The 1995 law reform was introduced to place greater emphasis on the principle of legality. This aim was strengthened by the reform of the law on fundamental rights in the same year.¹² The legality principle requires that the elements of crime be specified unambiguously in the law.¹³ This requirement was to have special importance in the reform of the law on the elements of assault.¹⁴

Psychological violence: nagging or abuse of power?

According to Chapter 21(5) of the Criminal Code,¹⁵ a person is guilty of assault when he employs physical violence on another person or, without such violence, causes bodily injury or pain to another person or renders another person unconscious or into a comparable state. The new wording permits a broader consideration of so-called psychological violence.¹⁶ Views on psychological violence vary with constructions of violence. Interaction models argue that violence is a reaction to disruptions in communication, usually to verbal communication, or so-called nagging, by women, which may be seen as psychological violence. To the contrary, if violence is examined as part of the abuse of power in a partnership, which in many cases involves control of the victim, psychological violence falls into this continuum of violence. The proposal, which represented a gender-neutral construction of violence, did not, however, discuss psychological violence in a domestic setting. Examples of psychological violence cited by Lappi-Seppälä and Nuutila are bullying in the classroom and in the workplace.¹⁷

Liability for punishment for acts of non-physical violence depends on whether the act has consequences specified in the law. Damage to psychological health as a consequence of an assault should be counted as an injury, which is an element of assault according to the CC 21:5. The cases where charges have been brought on the basis of psychological assault are

¹¹ This discussion is based on chapter Rikosoikeus ja sukupuoli (Criminal law and gender) in *Niemi-Kiesiläinen* 2004 pp 73-112.

¹² Provisions on the observance of the legality principle in criminal law are in section 8 of the Constitution Act (1995). A provision on the legality principle was incorporated into the Criminal Code (3 (1)) in 2003 (515/2003). See Government Bill 44/2002 pp 31-33.

¹³ Government Bill 44/2002 p 33.

¹⁴ *Matikkala* 2000 p 14.

¹⁵ The Criminal Code (CC; 1889, as amended in several occasions) can be found in English at <http://www.finlex.fi/en/laki/kaannokset/1889/>

¹⁶ *Matikkala* believes that psychological violence was already punishable in accordance with the law in force before the reform. *Matikkala* 2000 p 107.

¹⁷ In the influential commentary of the Criminal Code, *Lappi-Seppälä & Nuutila* 2002 p 772. Especially Lappi-Seppälä participated in the reform of the Criminal Code, first as a legal counsellor at the Law Drafting Department of the Finnish Ministry of Justice and later as the Director of National Research Institute of Legal Policy, under the same Ministry.

few. One reason for the low number of cases may be the difficulty of proving a causal connection between bullying and damage to health. In addition, the law requires that the consequences must be intentional, which means that the perpetrator should have been able to see them as highly probable consequences of his actions. In other words, "... any exceptional psychological injuries resulting from the act that fall short of the criterion of intent do not affect the assessment of the assault under criminal law..."¹⁸

In cases involving psychological violence in partnership it is difficult to prove that the victim's health has been damaged and that there is a causal connection between psychological assault and damages to health and, in addition, that intent goes as far as the damaging of health. As long as violence in partnership is understood as a reaction to disturbed interaction, as conceived by the interaction model, and regarded as an isolated and exceptional incident, it will not be easy to interpret psychological symptoms as consequences of violence.

Examination of violence from the perspective of power and control would permit to look at the uses of psychological violence that – together with physical violence or irrespective of it – damage the victim psychologically and physically and can therefore satisfy the criterion of intent. This is an example of the ways in which mainstreaming of gender could change the interpretation of law.

The constituent elements of aggravated assault reformulated

The emphasis placed on the legality principle in the 1995 reform had an effect on the formulation of the criteria for the qualification of assault. The criteria for aggravated assault were rewritten in a way that made the threshold to aggravated assault much higher than before. The raising of the threshold is most obvious in violence against women, whereas serious violence against men is likely to be considered as aggravated in the same way as before the reform.

Assault may be qualified as aggravated because of the consequences, the method of perpetration or the instruments used. While the punishment attached to normal grade assault is up to two years of imprisonment, the scale for aggravated assault is from one year to ten years of imprisonment. Consequently, a distinction between the two is essential for both the concrete sanctions and the symbolic meaning of the crime.

Assault is considered aggravated if

- 1) grievous bodily injury or serious illness is caused to another or another is placed in a state of mortal danger, the offence is committed in a particularly brutal or cruel manner, or
- 2) a firearm, an edged weapon (knife) or other comparable lethal instrument is used, and the offence is aggravated also when assessed as a whole (Criminal Code Chapter 21(6)).

The earlier law permitted the grading of an offence as aggravated on the basis of assessment as a whole, even in cases where none of the criteria 1-3 specified in Chapter 21(6) were satisfied, provided that the offence as whole was assessed as aggravated.¹⁹ In the reform, an unambiguous formulation of the constituent elements was a priority. A possibility to regard an

¹⁸ Lappi-Seppälä & Nuutila 2002 p 773.

¹⁹ The wording of the relevant article before the 1995 reforms: "taking into consideration the circumstances leading to the offence as well as the circumstances apparent in the offence as a whole".

offence as aggravated assault in an overall assessment was seen as matching poorly with the legality principle and was abolished.²⁰

In today's situation, the assessment of aggravated assault always requires that the offence meets the criteria for consequences, method, or instrument specified in Chapter 21(6) of the Criminal Code. *In addition*, it is required that the offence is aggravated also when assessed as a whole.²¹ In contrast to the earlier law, the overall assessment only takes account of the offence, or the act, while earlier the circumstances evident in the crime *and* those leading to it were taken into consideration as a whole. Both amendments narrow the context of assessment. While the overall assessment earlier broadened the classification, it now narrows it down.

A state of mortal danger as an aggravating circumstance for assault is exemplified by case 1998:1 before the Supreme Court. The 1995 amendment replaced *mortal danger* with *a state of mortal danger*, as it did with the aggravating circumstances for other offences, such as robbery. According to the Government Bill, the change in the choice of wording did not envisage a substantive change.²² The Legal Affairs Committee argued that "...assessment as an aggravated offence presupposes concrete consequences: a state of mortal danger and not merely a risk".²³ A Supreme Court ruling on assault by strangulation (KKO 1998:1) reveals that the expression 'state of mortal danger' is narrower than the earlier expression 'mortal danger'. In this case, the Supreme Court found that in overall assessment the act was aggravated and it had caused an abstract mortal danger but not a (concrete) state of mortal danger. Therefore A could not be punished for aggravated assault.²⁴

An alternative element for aggravated assault is that it is committed using *a firearm or a knife or a comparable lethal instrument*. While this criterion, like the others, requires that the act is assessed as a whole, the main rule is that the use of a firearm or a knife classifies an assault as aggravated. In decisions KKO 1999:20 and KKO 1990:9²⁵, the Supreme Court held that a single stab of knife, albeit a forceful one, was enough to classify an act as aggravated.

It is more difficult to define lethal instruments *comparable* to firearms or knives. The earlier wording in the act was "other lethal instrument". The purpose of the change was to restrict the application of this element²⁶, with the grounds that "a wide variety of instruments can be used lethally, including stones, pieces of wooden planks, bags, and several domestic objects. By restricting the constituent element to apply to knives and firearms and to

²⁰ Government Bill 66/1988 p 19, Government Bill 94/1993 pp 13-14.

²¹ Sweden has not introduced this kind of amendment. The means of perpetration for aggravated assault that are mentioned in the law in Sweden are only cited as examples. Brottsbalken (Criminal Code) 3 (6) (1988:2)

²² The Government Bill states that "it is likely that the interpretation under current law has been for mortal danger to refer specifically to the victim's mortal danger and not to perpetration of the crime in a manner that entails *mortal danger*." *Government Bill 94/1993* p 97.

²³ Report of the Legislative Committee, Government Bill 94/1993 p 12.

²⁴ In 1998:1 the male perpetrator had strangled his spouse but he had to stop when other persons arrived to the room. In another case, the perpetrator (son) was not punished for aggravated assault in a similar case before the Supreme Court (KKO 1998:2), which also concerned strangulation that led to the victim's death (father, most likely with a history of violence). The perpetrator was sentenced for assault and grossly negligent homicide.

²⁵ In case KKO 2000:71, where the decision by the Supreme Court concerned evidence, the husband had lashed the wife with a knife. The evidence consisted of a shred in the pants and a bandage on her hand. The man was accused of ordinary assault. In other words, the use of knife does not always qualify the assault as aggravated. Earlier cases where knives were used are KKO 1985 II 172, 1932 II 138 and 1935 II 316.

²⁶ Government Bill 94/1993 p 97.

comparable lethal instruments the legislator wishes to place great emphasis on the norm of greater sanctioning of the use of actual weapons”.²⁷

In case law we not find items typical of domestic violence, such as bottles, glasses, and other movable domestic objects.²⁸ In the light of the above statement in the Government Bill, these instruments do not classify an act as aggravated.²⁹ In a case of domestic violence, a belt used to strangle a victim was not considered comparable to weapons in lethality (Supreme Court KKO 1998:1). However, this is not the only interpretation conceivable. If the degree of lethality of an object were to be assessed according to how it is used in an assault, and not according to its everyday use, a different interpretation might emerge. Accordingly, broken glass might be seen to pose a danger comparable to lethal weapons.

As a constituent element, *the method of perpetration* makes a slight distinction between *the brutality and the cruelty of the act* so that the method of an assault, such as kicking on the head, is usually regarded as a brutal assault and assault on a defenceless victim as an act of cruelty.³⁰ Nevertheless, assault on a seven-year-old child by the child’s mother and her boyfriend where the victim had been beaten a number of times, pressed on the throat, torn by the hair, dropped on the floor and threatened was not considered cruel and aggravated (Supreme Court KKO 2002:2).³¹ Again, the case lends itself to other interpretations.

Among methods of perpetration, strangling usually is not an element that classifies an act as aggravated assault. This may be explained by the above decisions of the Supreme Court (KKO 1998:1 and KKO 1998:2). However, the decisions should not be seen as precedents, because the prosecutor charged them as cases of attempted manslaughter and of manslaughter respectively, and therefore the method of perpetration of assault was not discussed at length. In one case the Supreme Court did hold that strangling amounted to aggravated assault (KKO 1989:141(1)).³² Beating of the victim with a rubber truncheon while another perpetrator was holding him did not, in the Court’s view, merit characterization as brutal (KKO 1996:65). In the reasoning of this decision the Court especially noted that the application of the earlier law would have led to a more stringent outcome.

The Government Bill cites kicking on the head as a specific example of a brutal method of perpetration.³³ During the previous act, it was frequently punished as aggravated assault (Supreme Court KKO 1993:12, KKO 1980 II 7). It is however not certain that the application of the new act would take the same line, as is evident from the following decision on domestic battery by the Assistant Prosecutor-General. “In the light of the pre-trial investigation, the assault was of a serious nature. It was partly perpetrated by kicking on the head, with shoes on, resulting in bleeding head wounds in the victim, severe tumefaction, eight broken teeth, and a fractured jaw, the latter requiring an operation and attachment by steel wire.” In the

²⁷ Government Bill 94/1993 p 96.

²⁸ The examples mentioned in the text are from a small empirical study to the decisions by the prosecutor not to bring charges reported in Niemi-Kiesiläinen 2004.

²⁹ After the article was written, a case in which hitting by a baseball bat and a hammer did not qualify the assault as aggravated reached the Supreme Court; KKO:2009:79.

³⁰ Government Bill 94/1993 p 96.

³¹ The charge was not for aggravated assault, but the somewhat lenient punishments (3 months and 60 days respectively) given by the Supreme Court show that the Court held that it was not aggravated assault. The crime was qualified as murder taking into account the fact that the victim was a defenceless child. KKO 200:29. See also 1988:73.

³² In this respect the constituent elements were not reformulated in 1995; the 1989 decision continues to be of value as a precedent. However, the circumstances of the case as a whole were extremely aggravating, so that the (changed) meaning of the assessment as a whole needs to be taken into account in its interpretation.

³³ Government Bill 94/1993 p 96.

opinion of the Assistant Prosecutor-General, this method of perpetration was *bordering on* aggravated assault.³⁴

This decision reveals how serious effects the 1995 reform carries. Most people would undoubtedly regard the offence as aggravated; on the basis of injuries, danger, and method of perpetration.

In conclusion, the changing of the criteria for aggravated assault in 1995 raised the threshold for each criterion essentially higher. At the same time, the significance of overall assessment also changed, all of which means that the criteria for aggravated assault have become considerably high, perhaps far higher than could be anticipated at the outset.

At the same time, the overall assessment of petty assault was expanded to cover assaults that lead to minor injuries.³⁵ Thus the constituent elements of assault “leak” to the direction of petty assault; in overall assessment, assault may be defined as petty assault on extremely broad terms. And because prosecution of petty assault depends on the victim,³⁶ the broad interpretation of petty assault diminishes the probability of sanctions.

Gendering of aggravated assault

The effects of the introduction of the new criteria for aggravated assault show a clear-cut division by gender; domestic violence is most often perpetrated by men against women. The change in the criteria mitigates punishments for serious crimes, which in turn means a lighter response to serious assault on women. In the much fewer cases, in which a woman commits a serious violent crime, she often uses a knife, which, as a rule, classifies the act as aggravated assault. In contrast, men commit serious violent crimes also by strangling, kicking, banging the victim’s head against a wall and beating with objects or with fist. These methods of perpetration rarely classify an offence as aggravated assault.³⁷

A further point of interest is that there is no mention in the aggravating elements of the suffering experienced by the victim nor the vulnerable or weaker position of the victim as compared to that of the perpetrator. The commentary to the Bill states that the victim’s position should be taken into account as part of the degree of cruelty of perpetration. Thus the victim is reduced into being a part of the method of perpetration.

The forgotten reform of the law on prosecution rights

Prosecution of petty assault, coercion and unlawful threat

In reforming the law on bodily injury in 1995 the legislator envisaged a stronger response to domestic violence. This objective was meant to be reflected in the fact that, even when perpetrated in a private place, assault was to be made subject to public prosecution. Parliament, however, added a Section to the Criminal Code that provided for the victim to

³⁴ Decision of the Assistant Prosecutor-General 28 May 1999 Register Nr 146/22/99. *Lappi-Seppälä & Nuutila* (2002 p 772) cite kicking as a typical method of perpetration in assault.

There is reason to believe that the decision by the Assistant Prosecutor-General is now (2014) out-dated.

³⁵ Before the 1995 reform, the assault was normally qualified as petty (with fines as the only option for sanction) only when there was no injury. Added in 2014 by JN.

³⁶ The prosecution rule for petty assault was change in 2011 (Law 441/2011). All domestic assaults are under public prosecution according to the new CC 21(17).

³⁷ Similarly *Edwards* 1996 p 365 .

state “her firm wish” that the case not go to court. It took nearly ten years to repeal that clause.³⁸ Other changes to the prosecution rules were overshadowed by the struggle over that Section. In spite of good intentions, a gender-neutral construction of violence that ignored gender prevailed in the reform of the prosecution rules.

A discussion of criminal law relevant in domestic violence is not exhausted by crimes of assault. Sustained domestic violence often involves sexual crimes and sometimes crimes against life. It also entails offences that largely go unreported and non-investigated. Unlawful threat – usually to kill – is a very common form of domestic violence,³⁹ but it seldom ends in prosecution let alone conviction.⁴⁰ The same applies to defamation and slander.⁴¹ There are also varying degrees of deprivation of liberty, perhaps even hostage-taking. These crimes are often ignored in the connection of domestic violence. In addition, when violent behaviour is connected to separation or divorce, trespassing, disturbances of domestic peace by intruding and telephoning (stalking), are common, as is damaging of property (crime of damaging).⁴² The main reason for not investigating these crimes lies in their being subject to private prosecution. In other words, the call for prosecution must come from the victim.

The 1995 reform changed petty assault (Criminal Code 21 (7)), unlawful threat (Criminal Code 25 (7)), and coercion (Criminal Code 25 (8)) into crimes that require a complaint by the victim to be prosecuted. Formerly, they had been subject to public prosecution when perpetrated in a public place, before a public official, by a public official in the performance of official duties, by a prisoner, or with a firearm or with other lethal instrument. The above listed crimes required a complaint by the victim only when carried out in a private place in the absence of any of the criteria listed above.⁴³ The broadening of the scope of crimes subject to private prosecution was a significant change, which has received little attention.

Prosecution of sexual crimes

During the same period in 1998, rape was changed from a crime requiring complaint into one subject to public prosecution. But it was still made to one governed by the “explicit wish” by the victim clause. The reason given for this special formulation was that rape - since 1994 – was punishable also in cases where the victim was a marital partner. It was considered that because of a particular bond between perpetrator and victim it was reasonable to leave the decision on prosecution to the victim.⁴⁴ The same “explicit will” clause to renounce prosecution (Criminal Code 20 (12)) came to apply to sexual abuse in cases of

³⁸ Act 712/2004 replaced Criminal Code 21(17). Government Bill 144/2003.

³⁹ For example see *Husso* 2003.

⁴⁰ Precedents set by the Supreme Court contain descriptions of various crimes, which have not led to prosecution. Examples are KKO 1998:1, KKO 1987:130.

⁴¹ Calling the victimized spouse by names, most commonly as a whore, is hardly considered a crime. Added in 2014.

⁴² For prosecution rights regarding various crimes, see *Niemi-Kiesiläinen* 2004 p 262.

⁴³ Following the reform, unlawful threat and coercion are subject to public prosecution only in cases where a very important public interest so requires and in cases where they have been committed using a lethal weapon (Criminal Code 25 (9)). The place of commission is no longer important. For the right of prosecution in violent crimes, see *Niemi-Kiesiläinen* 2004, specifically p 264.

⁴⁴ Government Bill 6/1997 pp 162-163.

unconsciousness⁴⁵ and disability (Criminal Code 20 (5)(2)) as well as sexual abuse of children (Criminal Code 20 (6)).⁴⁶

The Government Bill did not give specific reasons for the provision permitting renunciation of prosecution in cases concerning sexual abuse of a person who is unconscious, disabled, or in a helpless condition for some other reason. In the case of sexual abuse of a child, the stated justification for the provision was that this was in the interest of the child. It was considered that this interest would best be served when the explicit wish of the victim would be allowed to play a role in the consideration of charges. The justification given for this was that, “especially for a fairly grown-up child”, legal proceedings could be a difficult experience and a disservice to her or his interests.⁴⁷ No notice was taken of the implications of impunity for the child’s interest and development.

Of sexual crimes, coercion to sexual intercourse⁴⁸ and coercion to a sexual act are crimes subject to private prosecution. The most serious crime subject to public prosecution is sexual abuse in cases referred in Chapter 20 (5)(1) of the Criminal Code (up to four years of imprisonment). This concerns sexual intercourse or other act that essentially violates sexual self-determination in cases where the victim is particularly dependent on the perpetrator. The law enumerates those less than 18 years of age who are in a school or other institution, inmates in a hospital or other institution, particularly immature young persons, and special dependence in general. This applies to situations where, because of her or his special dependence, the victim is incapable of exercising her or his ordinary right to sexual self-determination. The restricted capacity to exercise sexual self-determination conflicts with the provision that it is up to the victim to decide whether or not charges should be brought.⁴⁹

In conclusion, a number of relatively serious violent crimes and of very serious sexual crimes continue to be subject to private prosecution or to the provision on “explicit wish”. If the rights of prosecution are compared with those relating to property crimes or crimes against public order and safety, a considerable difference may be discerned. Theft, robbery and fraud, for example, are subject to public prosecution; only petty fraud and petty theft fall in the category of private prosecution. Crimes against public authority and public order are subject to public prosecution. When, in addition, it is borne in mind that the latter crimes cannot be mediated but that mediation is used in violent crimes, the conclusion must be drawn that the criminal law system approaches violent crimes in a manner that is strikingly different from its approach to other crimes.

The central role afforded in the system to the victim’s opinion plays havoc with criminal accountability. Moreover, it leads to a situation where the crimes committed against strong individuals in society are punished while those against vulnerable persons are treated with impunity.

⁴⁵ The prosecution rules for sexual crimes against adults were changed in 2014 so that now these crimes are under public prosecution (Law 509/2014). The reform was related to the joining to the Council of Europe Convention on the Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention 2011).

⁴⁶ The matter was discussed in Parliament, because it was referred to it in the context of the abolition of the “explicit will” clause, Government Bill 144/2003. Parliament considered that no change was needed.

⁴⁷ Government Bill 6/1997 p 163. All sexual crimes against children were made offences under public prosecution in 2011 (Law 540/2011). This change was inspired by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007. Government Bill 282/2010.

⁴⁸ Lower degree of rape. This crime was abolished as a lower grade of rape and integrated into the rape in 2014 (law 509/2014).

⁴⁹ These crimes are under public prosecution after 2014.

Restraining order: an example of special policies

The last example is restraining order, the enactment of which was one of the first concrete legislative measures to address domestic violence. Although the law itself is gender-neutral, it was borne out of awareness of and concern for gendered violence and out of need for special actions. The proposal for the law came from MP Margareta Pietikäinen and was signed by 105 MPs out of 200.⁵⁰ It was spurred by dissatisfaction with the means available to victims of domestic violence and by awareness of the existence of restraining order in Sweden. The proposal was dispatched to the Ministry of Justice for preparation, and the Act on the Restraining Order came into force at the beginning of 1999. For the first time in the law reform, domestic violence and the safety of the victim came into the foreground.

The issue of the restraining order does not require suspicion that a crime has been committed; a risk of crime or other serious harassment is required. The assessment is for the future. In the assessment of the risk, account must be taken of the circumstances of those involved, of the nature and recurrence of the risk or harassment as well as the probability of the perpetration of a crime and of the continuation of harassment. A comprehensive risk assessment should be made, usually on the basis of earlier crimes. In particular, this applies to domestic violence where previous crimes are usually assaults (battery). Other typical crimes include unlawful threat and violation of domestic peace.⁵¹

When the parties do not live together, an order may be issued against such serious forms of harassment that do not constitute a criminal offence.⁵² This type of harassment covers intrusive traditional and electronic mailing and intrusive text messaging as well as stalking in the vicinity of home and other places frequented by the protected person.⁵³ The Act does not provide an exhaustive list of the forms of harassment, for this would obviously be impossible. This kind of regulation inevitably means that, as regards harassment, the Act does not define unambiguously grounds for the restraining order. While the broadness of interpretation permitted by the Act is an advantage that allows for the flexible use of the restraining order in unexpected cases of harassment and threat, from the perspective of the legality principle it may present problems.

A restraining order is granted by a district court in a procedure that differs in several instances from a criminal process (quasi-criminal process). As applicable, the procedure follows the principles governing the criminal process sections 4 and 6(1) of the Act on the Restraining order), primarily those relating to criminal cases pursued by the victim herself.⁵⁴ While criminal investigation starts with a report of a crime to the police or when the police otherwise suspects a crime, the procedure to obtain a restraining order starts with an application submitted to the court (section 5(1) of the Act). An application may be filed by the threatened person or by the prosecutor, the police or the social authorities, who also have a right to be present in the proceedings (Sections 5 and 6 of the Act). The court may instruct the police to carry out a police investigation into the matter (Section 5(2) of the Act), and it is the duty of the District Court to ensure that the case is examined in every detail (Section 6(3) of the Act).⁵⁵ The *travaux préparatoires* of the Act state that the District Court must, *sua*

⁵⁰ Private Member's Bill 67/1995 Margareta Pietikäinen et al. The following discussion is based on Niemi-Kiesiläinen 2004 pp 242-247.

⁵¹ Ropponen 1999 p 30.

⁵² Since 2005 the protection order has been available also when the threatening person and the victim live together (Emergency Barring Order).

⁵³ For examples, see Ropponen 1999 p 27.

⁵⁴ Government Bill 41/1998 pp 20-21.

⁵⁵ Helminen, Kuusimäki & Salminen 1999 p 88.

sponte, investigate facts and obtain evidence in the matter. These provisions constitute a significant departure from the current procedural thinking where the separation of investigation and sentencing is understood to be a basic legal safeguard.

The procedure for a restraining order does not contain pre-trial investigation, because it is not necessarily based on a crime. Instead, a police investigation under the Police Act may be carried out (section 5 (2)). In the police investigation, coercive measures are generally not available; therefore seizure of evidence, house search, physical examination, and bodily search to obtain evidence are excluded. Without coercive means, the collection of evidence largely rests with the victim.⁵⁶ A manual published by health and social welfare authorities gives instructions on the kind of evidence that is useful to collect: medical certificates, reports of crime made to police, letters and similar conventional messages on paper, text messages, taped threats as well as requests for help by the victim, reflecting her fear, to police, social welfare authorities and NGOs.⁵⁷ In other words, the manual urges to obtain material that contains evidence of crime, such as threats and defamation.

Punishment for the violation of the restraining order ranges from a fine to a term of imprisonment up to one year (Criminal Code, Chapter 16 (9)). As the maximum penalty is one year imprisonment, a person who is suspected with probable reasons of the violation of a restraining order may be arrested on the regular conditions, in other words, whenever there is a risk of evasion, collusion, or continuation of the crime. In addition, as stated by *Helminen, Kuusimäki* and *Salminen*,⁵⁸ the powers under the Police Act may be exercised to remove the perpetrator (sections 14 and 20 of the Police Act). The law does not permit an automatic arrest for the breach of a restraining order, but the grounds for arrest must always be assessed case by case.

From the very entry into force of the Act, the restraining orders turned out to be indispensable. Each year, more than a thousand orders have been issued.⁵⁹ The largest group on whom orders have been imposed are former husbands or live-in partners (69 per cent).⁶⁰ In 8,6 per cent of the cases, orders were imposed against the applicant's son. In nearly all cases, orders were imposed on men (96 per cent), whereas the majority of the applicants were women (84 per cent). Many applicants have benefited from the order, but one cannot rely on it to guarantee absolute safety. A great many violations of the order have been reported; in 2002, there were 800 reported cases, and 175 people were convicted⁶¹. The most common sanction was fine (74 per cent).⁶²

The restraining order is an example of the fact that gendered violence is acknowledged and regarded as a specific type of criminality. Because it differs from ordinary criminality, it needs to be addressed with special measures. Here, special measures mean that violence against women carries sanctions different from those used on other types of violence (restraining order instead of a punishment) and that the acts of violence are dealt with in a different procedure (procedure for restraining order and not criminal process).

⁵⁶ Government Bill 41/1998 p 21. On the other hand, it is stressed – somewhat conflictingly – that it is for the complainants to obtain evidence, see Government Bill 41/1998 p 21 and *Ropponen* p 13.

⁵⁷ *Ropponen* 1999 pp 5-6.

⁵⁸ *Helminen, Kuusimäki & Salminen* 1999 p 89.

⁵⁹ In 2002, a total of 1327 orders were issued, affording protection to 1867 persons. Government Bill 144/2003 p 4.

⁶⁰ *Ropponen, Manual for Restraining orders. Statistics* 1999.

⁶¹ Government Bill 144/2003 p 4. In 2000, 159 were convicted, of whom 9 per cent were women. Crimes investigated by courts 2000, p 166.

⁶² *Annul of Legal Statistics* 2003 p 170. According to the Government Bill, fine was imposed only in half the cases. Government Bill 144/2003 p 5.

Although the overall purpose has been to improve the status of victims of domestic violence, several features of the Act reveal that this type of criminality does not meet quite the same seriousness of attention as other violence. First, the procedure for the restraining order does not focus on violence but on a risk of crime. In practice, the loose formulation of the grounds for protection has not been a problem for the legal protection of the person posing a risk. Rather, the risk of future harassment or violence has been proved by evidence of several instances of crime that has been going on for some time. This raises the question whether the restraining order affords sufficient protection to the victims. In principle, it may be difficult to obtain a restraining order after a single crime, even a serious one (rape e.g.), because a long-term risk may be difficult to prove.

Secondly, because the procedure does not concern a crime, coercive means of criminal investigation are excluded. In practice, the investigation and the obtaining of evidence are left to the victim, whereas in a criminal investigation they are the duty of the police.

Thirdly, the punishment for the violation of the restraining order – a term of a year's imprisonment in the maximum – reflects the degree of seriousness that is assigned to domestic violence. This is a more severe punishment than that for petty assault (the scale is for fines only), but more lenient than ordinary assault (a maximum sentence of two years of imprisonment). On the other hand, the violation of restraining order is subject to public prosecution. It would seem that the measure of restraining order was introduced as an alternative following realization that, because of the "explicit will" clause, the criminal process was not fulfilling its function.⁶³

I do not mean to say that the restraining order is a failure. The reverse is true: it has been in widespread use, and it has provided protection to a number of people at risk. But it does not work in all cases, as is evident from the large number of violations. In my opinion the problem lies in the removal of the restraining order from the criminal process.⁶⁴ Criminal law and procedural law both provide means to intervene in violent criminality, but these are means that, for various reasons (some of which have been discussed earlier), do not work in the best possible way in violence against women. The introduction of special measures diverts attention from the problems of the criminal process. It is also in the nature of the criminal process that, to counter-balance interference with the suspect's rights, the rules and principles of criminal procedure guarantee him important legal safeguards. Special measures entail the risk of abrogating from these legal safeguards for the sake of efficiency.

The potential in mainstreaming

The most significant feature predicting criminal behaviour in a human being is gender. Gender is also a factor in explaining the kinds of situations where people fall victim to crimes. Inevitably, gender therefore plays an important role in criminal law policy. Gender is also becoming visible in criminal law policy in Finland. However, it is not insignificant in which ways gender shows and is construed in criminal justice policy.

The National Programme to Combat Violence is a formal document that describes the meaning of gender in violent criminality. It barely mentions the view that has emerged as a result of the research in the past few decades and that is also taken in the Finnish Government Equality Plan: that violence against women reflects inequality between women and men. The

⁶³ As explained in the previous sections, the prosecution rules have been changed.

⁶⁴ One of the coercive measures in crime investigation is travel ban. Since 2014 the ban can have also a function of victim protection. Coercive Measures Act 806/2011.

Programme rests on a totally different argument: violence as drunken brawls between socially excluded, but equal men.

I have used examples of the reforms of the laws governing prosecution rules and constituent elements of assault to show that a gender-neutral approach may overlook significant aspects of gendered violence and lead to circumstances that probably nobody intended. Although it was suggested at the time of the 1995 reform that violence within families should receive a more serious treatment, in actual fact the reform brought about greater leniency both in classification of acts as aggravated crimes and in the regulation of prosecution rules. In my examination of assault I attempted to raise gender-sensitive, alternative interpretations of the provisions to illustrate the potential in mainstreaming.

To date, the most important step to intervene in domestic violence is the enactment of the Act on the Restraining Order in 1998. With respect to violence against women, the Act represents a special measure: it created a particular procedure, separated from the criminal process, to deal with this type of criminality. In a special procedure, severe punishments cannot be imposed and severe coercive measures cannot be used to address violence as could be done in a regular criminal process.

As a means of equality policy and legislation, special measures have often generated problems. They may be counterproductive and turn against the group they were designed to protect. In this case, the channelling of domestic violence into the restraining order procedure may have contributed to a circumstance where the problems of the criminal process have not received serious attention. Even the abolition of the “explicit will” clause took ten years.

Consequently, special measures do not suffice: issues relating to gender must be incorporated in the mainstream of criminal law policy. This requires expertise and training in those issues. In this respect, the training of law professionals leaves much to be desired. Gender issues have not become mainstream in the training, and in complementary education questions concerning violence against women are only now coming to the fore. Nevertheless, the first step is to realize that awareness of the links between law and gender is not a matter of course but requires research and training.

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