Contemporary Swedish Feminist Legal Studies – Five Doctoral Theses

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REVIEW ESSAY

Contemporary Swedish Feminist Legal Studies—Five Doctoral Theses

Straffrätt och kön [Criminal law and gender]
Kerstin Berglund
Uppsala, Iustus Förlag, 2007, ISBN 978-91-7678-673-4
(407 pp.)

Straffrätt och mäns våld mot kvinnor. Om straffrättens förmåga att producera jämställdhet [Criminal law and men's violence against women. The ability of criminal law to produce gender equality]
Monica Burman
Uppsala, Iustus Förlag, 2007, ISBN 978-91-7678-649-9
(448 pp.)

Searching for Equality. Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law
Laura Carlson
Uppsala, Iustus Förlag, 2007, ISBN 978-91-7678-646-8
(438 pp.)

Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning [Parents at work. A gender-critical study on the position of parents of young children in labour law]
Jenny Juhlén Votinius
Stockholm, Makadam Förlag, 2007, ISBN 978-91-7061-044-8
(448 pp.)

Barn i rättens gränsland. Om barnperspektiv vid prövning om uppehållstillstånd [Children in the borderland of law. On child perspectives in the determination of granting residence permits]
Eva Nilsson
Uppsala, Iustus Förlag, 2007, ISBN 978-91-7678-657-4
(295 pp.)

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Introduction

The year 2007 stands out as the year when more theses were published in the field of feminist legal studies in Sweden than in any year before.[1] None of these five theses are formally defined as feminist legal studies, but as criminal law, labour law, and immigration law. Feminist legal studies in criminal law and labour law have been carried out before, but immigration law is a new subject for a dissertation.

My aim here is, firstly, to give a general description of the field of feminist legal studies. It is a small field when it comes to disputations and not a distinct subject within legal scholarship. Secondly, in the year 2007 there was a significant increase in approved theses and publications concerning the gendered aspects of law and/or using theories and/or methods from feminist legal studies. Feminist legal studies have increasingly been integrated into legal scholarship and legal education, and have had an impact on both scholarship and education in several aspects. For instance, the interest in theory and methods that feminist legal scholars have has encouraged a general focus on theoretical issues in legal scholarship. Legal scholarship has traditionally been characterized by its closeness to legal practice and by its dogmatic or non-critical approach. Feminist legal studies have challenged this tradition in several aspects (Gunnarsson & Svensson 2009).

Feminist Legal Studies

Feminist legal studies are critical studies of the law, and most feminist legal scholars explicitly define their work as belonging to a critical tradition. Although the five theses discussed in this essay raise different questions, they all depart from a gendered approach towards the legal system. Feminist legal studies question the distinctions between different parts of law, between formal and material neutrality in relation to sex/gender and the understandings of what is to be regulated and how. The focus today is not only or even primarily on women, but on constructions of the category of women and men (gender), on gendered practices and gendered legislation, as well as on the relationship between men and women produced and reproduced in and by the legal system.

Four of the theses are written in Swedish and one in English. The question of language and translation brings about some specific challenges. The terms used for the discipline and the concepts and terms used in the theses are not fully translatable. What is more, the use and meaning of concepts do not fully correspond even in the case of the same terminology. In this essay, I use the term "feminist legal studies" as the general label for the research field (Gunnarsson et al. 2007). In the Nordic languages, the following terms are commonly used: *genusrättsvetenskap* [legal studies in gender] (in Sweden) or *kvinnorätt/kvinnerett/kvinderet* [women's law] (in Finland, Norway, and Denmark). The choice of terms signifies differences in understanding or conceptualization. One could ask whether these differences are intended and what kind of substantial differences they might imply.

In this essay I will discuss the ways in which the field of feminist legal studies is mapped and characterized in recent doctoral dissertations. How do researchers define their work and, above all, how do they contextualize their research in relation

to feminist legal studies in general? The purpose is to raise some issues that should be urgently discussed to enrich the future development of feminist legal studies and legal scholarship in general. It is important to notice that the mapping of the field is not always explicit. Sometimes defining the field happens more through *not* referring to the tradition, or by *not* using certain sources (and without explanations), or by *not* discussing the terminology one uses.

Below, I will discuss the demarcation of the field highlighting the research objectives, theories, methods, academic traditions, and references used in the theses in order to draw conclusions about some differences and similarities between the theses and to make some reflections on the future development of feminist legal studies (Svensson 2007).

The Demarcation of the Field

The object for legal scholarship is the law. The notion of law is, however, complicated. In feminist legal studies it is used as a notion that encompasses the legal norms (rules and principles) expressed through legal sources and communicated, understood, and applied by the legal community as legal norms. Legal research often corresponds to legal education, which in turn corresponds to the functional systematization of the law. The law is divided into separate parts, each with its own norms for interpretation and application of the rules and principles in the field. Some of the main distinctions are, for instance, the one between public and private law, and the one between criminal law and civil law. Public law regulates relationships between the authorities and the citizen, while private law regulates relationships among citizens. Criminal law belongs to the field of public law but with several specific principles not used in other parts of public law.

Swedish legal scholarship has traditionally been characterized by the dogmatic tradition to the point where it has even been understood as synonymous with legal dogmatics. The tradition is characterized by its aim, which is to systematize, interpret, and define what current law is, in order to preserve and create a coherent legal system free from contradictions and to help practitioners in the application of law (Peczenik 1995; Nousiainen & Niemi-Kiesiläinen 2001; Svensson 2007). Demarcation in legal scholarship is still in its purpose a matter of relating to the dogmatic tradition.

In feminist legal studies the aim is not restricted to the one of legal dogmatics, and consequently the demarcation of the field is not the same. The position from which legal issues are studied is explicit and specific, for instance from the position of women or from situations related to women, such as mothering, marriage, or reproductive technologies. Moreover, feminist legal studies can focus on an abstract female subject such as the typical victim of sexualized crimes. When studying the relationship between law and gender, it is the particular relationship at hand that influences which parts of the legal system become relevant, rather than some commonly used systematization of the legal system.

Feminist legal scholars have convincingly shown that the legal rules are not gender-neutral. In spite of this critique, the legal system is still principally considered neutral in relation to sex in that the rules, with some exceptions, do not explicitly refer

to either men or women. The seemingly gender-neutral rules carry with them gendered effects. They do not affect men and women in the same way. Furthermore, the law only regulates certain aspects of our lives and has gendered effects also at this level—everything is not considered serious enough to regulate.

Feminist Demarcations in Relation to Legal Dogmatics

In her thesis, Mona Burman clearly states that her purpose is not that of legal dogmatics (Burman 2007: 26). Burman's main purpose is to "explore and analyse how violence, perpetrator, and victim are constructed in the criminal legal discourse of men's physical and psychological violence against women in intimate relationships" (Burman 2007: 413) and "what legal or social consequences these constructions might have" (Burman 2007: 21).

The aim of Kerstin Berglund's thesis also differs from that of legal dogmatics. The analytic perspective is consequently not to find out what current law "is" on the topic (Berglund 2007: 24–25), but rather to confront the traditional liberal idea of the autonomous individual as a basis for criminal law. With the feminist idea of difference and of the gendered individual she discusses the prerequisites for a rapprochement between women's studies and criminal law (2007: 18, 219). Berglund wants to explore "if the analytical possibilities and the knowledge given by women's studies may provide fruitful discussions also in the field of criminal law" (2007: 219). Berglund is especially interested in the notion of sex and the consequences that different interpretations of the category sex might have (2007: 220) for criminal law.

The purpose of Laura Carlson's work is to examine the efficacy of the existing regulatory system in Sweden with respect to asserting the rights granted under the Acts in efforts to eradicate sex discrimination, as evidenced in the legislation, case law, and collective agreements (Carlson 2007: 21). Through a comparative feminist legal method, she examines the efficiency of a regulatory system that has been constructed in the name of gender equality. Although the aim of Carlson's work is not in line with the purpose of legal dogmatics, she does not explicitly position her research against it.

For Jenny Juhlén Votinius the central aim is to elucidate and analyse the normative conflict characterizing the rules concerning the relationship between parenthood and work. The author's epistemological frame lies in critical gender theory. In such a study, the aim is to highlight gendered phenomena and concepts, which can be restrictive for women and men as groups (Juhlén Votinius 2007: 26). The author points out that she uses a legal dogmatics method (2007: 47) together with two other methods, but the general research aim is beyond the aims of legal dogmatics as I have defined it here. The statement that she uses a legal dogmatic method can be understood as a wish to define oneself inside the dogmatic legal scholarship tradition but also as a sign of the fact that feminist legal studies have had an effect on legal dogmatics and changed this tradition. In addition, it can also be read as a wish to be able to contribute to the aim of legal dogmatics. Highlighting the internal gendered restriction of law can actually be in line with the definition of legal dogmatics. But the issue could (and should) have been elaborated in the thesis.

Finally, Eva Nilsson's aim is to highlight problems regarding the status of children in the granting of residence permits. The aim is formulated out of a commonly agreed empirical gap between the intention and the application of the law (Nilsson 2007: 43). As the thesis is critical towards this gap it might be argued that it attempts to undo it and make the application of law more concordant with the (explicit) aim of the legislation. Although this approach seems to be the same as that of legal dogmatics, it is not. Nilsson states that the task for the scholar is to make this gap visible, rather than to hide it behind normative statements, as legal dogmatics scholars tend to do.

To conclude, none of the authors are restricted to or share the purpose of legal dogmatics understood in line with the tradition. Two of them (Burman 2007: 55; Nilsson 2007: 44) mention the commonly used distinction in legal dogmatics defining the core of legal scholarship: the distinction between the internal and the external perspective towards law (Gustafsson 2002; Gunnarsson & Svensson 2009). This distinction is in line with the purpose of legal dogmatics, showing its close connection to practical legal knowledge, namely the knowledge of how to use the law. In case the researcher has an external or epistemological approach to the law, the hegemony of the dogmatic tradition within the field still might lead to an exclusion from the core of legal scholarship. Both Burman and Nilsson make this possible exclusion visible in order to take an explicit standpoint against using the distinction as a way of defining the core of legal scholarship. Feminist legal studies claim to be both inside and outside and still a part of legal scholarship. The other authors do not explicitly challenge the narrow definition of the aim of legal dogmatics. This can be understood in different ways, and I would like to see more discussion on the issue.

The aim of feminist legal scholarship, according to all five authors, differs from or is at least not restricted to legal dogmatics. The critical perspective is prevalent; it means "exploring and analysing how certain concepts are constructed in the criminal legal discourse and what legal or social consequences these constructions might have" (Burman 2007: 413, 21), to "confront two different ideologies" (Berglund 2007: 18, 219), to "examine the efficiency" (Carlson 2007: 21), to "elucidate and analyse normative conflict" (Juhlén Votinius 2007: 16), and to "highlight problems" (Nilsson 2007: 43), respectively. None of the authors explicitly aim to further legal practice; instead, the knowledge produced is addressed to the scientific community and the legislative system and its process. There is no explicit aim to create a coherent normative system but rather to point out incoherence in the legal system in order to, in the long run, claim changes in the law and its application, and perhaps even its coherence. In a long-term perspective the result of this research can be compared to legal dogmatics, but the differences are important. The critique of the taken-for-granted knowledge as well as of the present law system exceeds the dogmatic sphere. Where legal dogmatics is restricted, feminist legal studies are free to use other arguments than those authoritative in the hegemonic dogmatic view.

Demarcating Feminist Legal Studies

Berglund uses the terms women's studies (*kvinnoforskning*) and more specifically women's law (*kvinnorättslig forskning*) as umbrella terms for the field, and she furthermore defines it as consisting of several research perspectives which have

in common that they are a result of taking a standpoint in a feminist ideology and admit the relevance of gender (Berglund 2007: 19). The expressions are meant to be synonymous with feminist legal studies (*genusrättsvetenskap*) (2007: 143). "Women's studies" does not imply a focus on women only; on the contrary, the focus is on the importance of gendered meanings and practices.

In Burman's thesis, the term gender perspective (*genusrättsvetenskaplig ansats* and *genusperspektiv*) is used. The objective of her research is to "describe, problematize, and analyse the legal position for physical persons" (in the legal system there are also juridical persons, such as companies). Burman continues: "a certain focus may be to make visible inequality between women and men and as a result contribute to a more equal society" (Burman 2007: 20).

Carlson uses international terminology; feminist legal theory and feminist jurisprudence are comparable (Carlson 2007: 30–32). Her aim is to strike a balance between formal justice and substantive justice. The focus of her work is "the equality of women at work" (2007: 30). The specific theory used is a post-liberal feminist legal theory, a methodological model based on three tasks for feminist jurisprudence. This brand of feminist legal studies is not common in a Nordic context.

In her thesis, Juhlén Votinius tackles the legal system from a critical epistemological gender perspective (*könskritiskt kunskapsintresse*). "In such a study the aim is to make visible gendered phenomena and conceptions that have a restrictive effect on the group of women and the group of men" (Juhlén Votinius 2007: 26). According to Juhlén Votinius, feminist legal studies (*feministisk rättsvetenskaplig forskning*) focus on issues concerning the relationship between women and men, on understandings of being female and male, and, finally, on issues concerning gendered power relations. A gender-critical legal analysis focuses on how the legal system is part of the production and reproduction of a sex/gender order (*könsordning*).

Finally, Nilsson states that she has a feminist approach to legal studies (*feministisk ansats*). According to Nilsson, a feminist approach means that the aim of the research is to "identify, uncover, and change power structures connected to sex or gender" (Nilsson 2007: 18). A feminist legal perspective involves challenging the limits of the legal system and questioning the claim of objectivity and impartiality. The starting-point is that implicit preferences in law, such as objectivity, impartiality, and rationality, are seen as gendered and gendering constructions. The task for feminist legal studies is to unveil these hidden constructions embedded in law.

To conclude, all five authors use different terms for the field to which they define themselves as belonging. The differences in terminology probably relate to the sources of knowledge, namely to the tradition to which the authors relate. Carlson, writing in English, consistently uses the term feminist jurisprudence. Some of the authors writing in Swedish could have been more explicit about their choices of terms. For example, the practical and methodological consequences of Juhlén Votinius' use of a critical epistemological gender perspective (*könskritiskt kunskapsintresse*) remains unclear and thus also the question of its essential importance. In many respects, her study is similar to feminist legal studies in general. Carlson could have discussed theoretical approaches and methods used in other theses in order to position herself within the field. It would have been of great value

if both Juhlén Votinius and Carlson had positioned their work in relation to other research in the Nordic field of feminist legal studies.

Berglund's starting-point is in the field of women's studies and, more specifically, in feminist epistemology. She analyses how sex and gender have been studied and can be studied in criminal law. She discusses the field of feminist legal studies and clearly positions herself in its tradition. Burman and Nilsson also elaborate the tradition of feminist legal studies. Both relate their work to the field, both internationally and nationally. Burman refers to earlier work with the term "feminist legal studies" (*genusrättsvetenskap*) and describes the essential characteristics of the field. She develops earlier methodologies and elaborates social constructionism and critical discourse analysis.

Theoretical and Methodological Points of Departure

Legal scholarship is primarily a methodological discipline, and theoretical positions are seldom explicit. According to the predominant dogmatic position, one specific method, the legal method, is the preferred method to approach legal knowledge. Against this background the tradition of feminist legal studies stands out as an exception; both theoretical and methodological premises are often made explicit. Another characteristic feature in feminist legal studies is that theory and method are intertwined (Gunnarsson & Svensson 2009).

Berglund's work can be characterized as epistemological. The aim is to make women's studies come closer to criminal law, in order to test the theoretical and analytical perspectives, arguments, and knowledge produced in women's studies (Berglund 2007: 23). The theoretical premises become the object of study, rather than a theoretical standpoint. The method used is described as "translating the discussion themes of women's studies in order to give them relevance in criminal law" (2007: 23).

Berglund studies feminist legal scholarship from a theoretical perspective that draws from the insights of feminist studies. She concludes that feminist legal studies differ from other feminist studies in an important way. The theoretical understandings of concepts such as sex or gender and knowledge have normative consequences. How the legal system is constructed has direct effects on society and all individuals. Furthermore, feminist legal scholars participate in the construction of the legal system and should do so to a greater extent, not only through deconstructive analysis but also through reconstructive efforts. Berglund states that it is deplorable that several of the works of feminist legal scholars explicitly state that their legal perspective is not internal, but external (*utomrättsligt*). This does not mean that they say nothing about current law; it just means that the purpose is not restricted to systematizing, interpreting, and defining what current law is, in order to preserve and create a coherent legal system free from contradictions to help practitioners in the application of the law. Feminist legal scholars do not consider themselves handmaidens of legal practitioners in this sense. The distinction of internal and external legal perspectives comes from legal dogmatics where a distinction is made between knowledge *in* law and *on* law. One standpoint in feminist legal studies is that this distinction is not relevant in scholarship (see e.g. Burman 2007: 55; Nilsson 2007: 44).

Burman and Nilsson share a theoretical and methodological basis in feminist legal studies (*genusrättsvetenskap*), social constructionism, and critical discourse analysis (Burman 2007: 26; Nilsson 2007: 18). Both refer to Nordic and international feminist legal and other scholars. Their methods are well explored and used consistently. The method, critical discourse analysis, is similar to the methods used in feminist legal studies in general, even if they are labelled differently.

Carlson uses two methods: comparative law (which I omit) and a post-liberal feminist legal theory as espoused by Judith Baer (Carlson 2007: 31). This very briefly introduced theory grows into a method or a model applied in the work.

Juhlén Votinius uses discourse analysis in addition to argumentation analysis and "the legal method" used in legal dogmatics (Juhlén Votinius 2007: 47). However, none of the methods are elaborated. She gives no references in relation to her methods. Concerning the legal dogmatic method one reference to Aleksander Peczenik (1995) is made. It seems that the legal method is used to describe the law in order to expose it for criticism. But in feminist legal studies, as well as in discourse analysis, there is no such "pure description before" criticism. Without an extension of the notion of legal dogmatics and an explicit elaboration of the issue, it is, according to my opinion, hard to combine the legal dogmatic method (as defined by Peczenik) with a gender-critical perspective or with a discourse analysis that would be in line with feminist legal studies. Therefore, I understand Juhlén Votinius' reference to legal dogmatics as indicating that the study is a legal study and that the material used is to some extent the same as in other legal studies.

But Juhlén Votinius also uses other than legal material in a way that differs from the legal dogmatic usage. She tries to find out why certain legal rules, aimed at enabling parents to combine work and parenthood, do not have the desired impact. If the purpose is to extend the notion of legal dogmatics, this could have been explicitly stated. If the purpose is to state that this, in fact, is part of contemporary legal dogmatics, it also could have been explicitly discussed.

Conclusions

Feminist legal scholars still mainly relate to and deal with the tradition of legal dogmatics, partly in a non-reflective way. Positions both inside and outside legal dogmatics are seldom explicitly explored. The situation might have to do with the unclear definition of legal dogmatics; the tradition can be understood both in a narrow and in a broad way. If the commonly used definitions of legal dogmatics are taken seriously, they exclude most of the characteristics of feminist legal studies, such as critical perspectives, the use of other than legal authoritative arguments, and the nature of the sources to be used. At least two strategies are possible here. Firstly, legal dogmatics (still the most dominant perspective in legal studies) can be extended and encompass feminist legal studies. This process requires changes in the tradition of legal dogmatics. Secondly, feminist legal studies can turn to the broader field of legal studies, which includes not only feminist legal studies but also other critical perspectives.

Irrespectively of which one of these strategies is taken, there is a need for feminist legal scholars to position themselves in relation to the tradition of feminist legal

studies. Discussion within the field helps to elaborate concepts, methods, and theories that can be useful not only for feminist legal scholars, but for legal scholars in general.

To conclude, the field of feminist legal studies could be further developed and elaborated if concepts and theoretical and methodological tools were studied and analysed to a greater extent. Some of the theses assessed here are good examples of this internal discussion that is necessary if the field is to be developed further. My wish is that even more of the published works in the field of feminist legal studies could start with a discussion and a mapping of the field instead of simply relating to the general field of legal studies.

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Note

[1] Between 1978 and 2006, at a high estimate 10 scholars have completed their LLD degrees in the field of feminist legal studies. All translations from Swedish to English by the author.

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