

Bullying at School in Finland and Sweden: Are there any Effective Legal Remedies?

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1 The Context and Aim of this Article

School education is compulsory in Finland and Sweden and most the children aged between 7- and 17 go to school every day. Home schooling is unusual in both these countries¹. Bullying at schools is a serious and quite common problem in Finland and Sweden, but from the international perspective the situation in the Nordic countries is not the worst². In Finland 6–10 % of pupils have been bullied at least once a week³. In Sweden the number is almost the same, but it is difficult to compare these numbers, when the results depend on the age of the respondents and how the questions on the amount and duration of bullying are constructed⁴. At least, in Finland, the bullying is more common at primary school level than in the secondary schools, but any questionnaires on the issue are usually targeted at older pupils⁵.

The typical bullying behavior is physical violence (for example kicking, pushing) or verbal (name-calling). However, the very damaging effect on children of social or psychological bullying like being isolated or ignored should not be understated.⁶ Usually bullying consists of many kinds of unpleasant actions and some form of fear is ever present in the victim's school day. According to Mellor the person who is being bullied is constantly worried that it will happen again and she/he cannot stop it⁷. So, in a definition of bullying, it is the repetitive action and the imbalance between the bully and the victim that distinguishes bullying from other aggression.⁸ For example sexual harassment or violence may be part of bullying, but these can be a separate act lacking the ongoing element⁹. However, that is not to say, that if some action is

1 Gustafsson, Anna, *Kränkande Behandling i skolan. Det rättsliga regleringen av kommunens ansvar*, Uppsala Universitet, Uppsala 2013, p. 16.

2 See Kolstrein, Abraham.M. & Jofré, Maria.I.T., *Bullying: an analysis from the perspective of human rights, target groups and interventions*. International Journal of Children's Rights 21/2013, p. 51. They noted that "adolescents who live countries with large socioeconomic differences are at a greater risk of being bullied."

3 The (Finnish) national institute for health and welfare, 2013: "www.thl.fi/fi/tutkimus-ja-asiantuntijatyo/vaestotutkimukset/kouluterveyskysely/tulokset/tulokset-aiheittain/kouluolo".

4 Folkhälsomyndigheten, *Mobbning, 2014*: "www.folkhalsomyndigheten.se/amnesomraden/statistik-och-undersokningar/folkhalsoatlas/lab-miljo-och-rapportblad/barns-och-ungas-psykiska-halsa/mobbning".

5 Mäntylä, Niina, Jonna Kivelä, Seija Ollila & Laura Perttola, *Pelastakaa koulukiusattu!* Pole-kuntatieto Oy, Sastamala 2013, p.84-85.

6 See Kolstrein, Abraham.M. & Jofré, Maria.I.T., 2013, p. 46–47.

7 Mellor, *Bullying at School: Advice for Families*, SCRE publications, Edinburgh 1997, p.1–2,19.

8 See Olweus, Dan, *Bullying at School*, Journal of Child Psychology and Psychiatry 7/1993, p. 1171-1190.

9 Cf. Askew, Sue and Carol Ross, *Boys Don't Cry. Boys and Sexism in Education*. Open University Press, Philadelphia, 1988, p.38–39. According to them the bullying and the

not bullying, there is no need for intervention. The intervention methods might be the same, but we need a definition of bullying, because of the unique psychological function of bullying and the great harm caused by this kind of ongoing action that consists of many kinds of unpleasant actions.¹⁰

Bullying is not something clearly defined in legislation¹¹. Under the Finnish Basic Education Act (29 §), pupils participating in education shall be entitled to a safe learning environment and the definition of bullying is only mentioned when the Finnish Basic Education Act obligates the Finnish education provider to draw up a plan for safeguarding pupils against violence, bullying and harassment. In Sweden, there is no mention of bullying in the legislation, but a definition of discrimination encompasses bullying if the action has connection to the grounds of discrimination (like religion or gender). Also harassment is mentioned in the Discrimination Act (Discrimination Act 1:4,1:5). The Swedish Education Act protects children from (other) degrading treatment (*kränkande behandling*). Such degrading treatment encompasses everything that violates a pupil's dignity (Swedish Education Act 6:3). The boundary between these definitions and acts is not always clear, because for example according to the Swedish Education Act, the school staff has a responsibility to report any cases where the pupil has been violated, and this *violation* includes both harassment and other degrading treatment.¹²

The aim of this article is to analyze and compare the legal remedies available in Finland and Sweden for cases of bullying in school. Are there any effective legal remedies in cases where intervention is inadequate at school? What kind of supervision system operates in Finland and Sweden and what competences do the complaint authorities and courts have in cases of bullying, additionally, are the tort and criminal liability systems effective?

The current research will concentrate on bullying that does not include sexual (harassment) or discrimination elements, because the EU –legislation has a strong influence on national regulation of discrimination, and the remedies available for discrimination differ from those applicable to other kinds of degrading treatment¹³. In addition, in Finland the legislation concerning equality and discrimination in basic education is changing¹⁴.

The current research also excludes any examination of those situations where the teacher is the bully and focuses on bullying between pupils. Nevertheless, in this article the main issue is the legal liability of school staff

sexual harassment are only different aspects of the same power game and bullying is not a separate phenomenon.

10 See Due, P., Holstein, B.E., Lynch, J., Diderichsen, F., Gabhain, S.N., Scheidt, P., Currie, C. & The Health Behaviouring School-Aged Children Bullying Working Group (2005). *Bullying and symptoms among schoolaged children. International comparative cross-sectional study in 28 countries*. European Journal of Public Health 2005 15(2), p.128–132.

11 See Gustafsson 2013, p.51 and Lundmark & Boström 2012, p. 257.

12 Gustafsson 2013, p. 41.

13 See Dufwa Bill W. *Skolans ersättningsansvar för elevers mobbning*, Svensk Juristtidning 4/ 2005, p.354–355.

14 HE 19/2014 (Government bill).

and the relevant education authority, not the liability of the bully. Pupils at school are children and need adult guidance on how to behave, and furthermore the vast majority of them are younger than 15, the age at which a young person is presumed to have criminal liability in Finland and Sweden.¹⁵ This does not mean that the bullies do not deserve any sanction but the discipline and pupil welfare services should primarily be effective at the school level (*ultima ratio*)¹⁶. In addition, in both Sweden and Finland an underage bully can be liable under the tort law¹⁷. However it is important to note that it is the responsibility of adults to create and sustain a system that effectively prevents the majority of bullying and stops the remainder¹⁸.

2 The Legislation and Supervision

In Finland, education is almost always provided by a Local authority (municipality), and that is also usually the case in Sweden in relation to compulsory schools. However, independent schools that may be run by companies, foundations, or a cooperative association are more common in Sweden than in Finland.¹⁹ The Schools Inspectorate (in Sweden) or the government (in Finland) can withdraw the permit, of any independent school failing to comply with current regulations (Swedish Education Act 26:1-18 and Finnish Basic Education Act 7 §). This article focuses on the schools that form the vast majority in both territories, those governed by municipalities.

According to the Swedish Education Act, the organizer of an activity or staff member in the school must not subject a pupil to degrading treatment (6:9) and is also forbidden from subjecting a pupil to reprisals because the child has participated in an investigation, or reported degrading treatment (6:11)²⁰. Under the Finnish Basic Educational Act, pupils participating in education shall be entitled to a safe learning environment. The Finnish education provider shall draw up a plan, in connection with curriculum design, for safeguarding pupils against violence, bullying and harassment, execute the plan, and supervise adherence to it and its implementation. (Finnish Basic Education act 29 §) It is permissible for that plan to differ in each municipality, but 90 % of all comprehensive Schools in Finland use the KiVa School anti-

15 See Hakalehto-Wainio 2013, p. 235–237; Boström & Lundmark 2012, p. 332 and Frände, Dan Finsk Straffprocessrätt, Edita, Helsinki 2010, p.53–54.

16 See more about *ultima ratio* and the functions of criminal law: Boucht, Jonas, *Mot en kommunikativ straffrätt*, JFT 2/2005 p. 121–122. See even Jareborg, Nils, *Humanitet och straffbestämning*, JFT 2000/5, p. 445.

17 For more information on the Swedish tort liability system related to pupils see: Boström & Lundmark 2012, p.353–357.

18 See The United Nations Convention on the Rights of the Child, Article 19.

19 Boström & Lundmark 2012, p. 67–76.

20 See Gustafsson 2012, p. 43.

bullying program²¹. The obligation to create a plan against degrading treatment also exists under the Swedish Education Act (6:8).

Despite the legislation, many pupils have still been bullied. If the education provider or school staffs members fail to fulfill their legal responsibilities the child needs legal protection. In Finland, Regional State Administrative Agencies work on pupil's rights and legal protection in the field of education, but the parents (or child) have to start the process by writing a complaint²². The parliamentary ombudsman of Finland and the Chancellor of Justice of the Government can also investigate a complaint in Finland if the complainant believes that the staff at the school or some authority in the municipality assigned to carry out public duties has acted in an unlawful manner or failed to fulfil their responsibilities²³. The tasks and powers of these two supreme overseers of legality are almost the same, hence either of them can investigate a bullying matter, but not at the same time²⁴. These two overseers can even investigate matters spontaneously, without a complaint, but this is very unusual. In Finland there is not even any authority that inspects the schools' activity systematically and continuously. Consequently, many researchers assert that there is no effective supervision system in the field of basic education in Finland²⁵. It is problematic that it is practically only parents that having a significant role as overseers of children's rights²⁶. Parents in turn might be concerned that their child will receive worse treatment at school following the parents' complaint and therefore hesitate to act²⁷.

The complaint documents reveal some basic problems in the Finnish complaint system. First, parents or guardians do not know the scope of competence of the complaints authorities and courts. Very many complaints contained a claim for compensation or sanction, although any such claims

21 Salmivalli, Christina, Antti Kärnä and Elisa Poskiparta, *Counteracting bullying in Finland: The KiVa program and its effects on different forms of being bullied*, International Journal of Behavioral Development 2011 35, p.405–406.

22 “If a complaint on the grounds of procedural error is made, the Regional State Administrative Agency may investigate whether the municipality has acted in accordance with legislation in force.” (Local Government act 8.2 §).

23 The office of the Chancellor of Justice: Complaint. “www.oikeuskansleri.fi/en/filing-a-complaint/”.

24 See Kuusikko, *Oikeusasiamiesinstituutio*, Suomalainen lakimiesyhdistys, Helsinki 2011, p. 169–174.

25 Hakalehto-Wainio, Suviaanna, *Oppilaan oikeudet opetustoimessa*, Lakimiesliiton kustannus, Helsinki 2013, p.336–341 and Mäntylä, Niina, *Karttakepistä kasvatuskeskusteluun: Lainmukainen kurinpito kouluissa tänään* in Lapsioikeus Murroksessa, Lakimiesliiton kustannus, Helsinki 2013, p. 266–267.

26 Mäntylä, Niina & Ollila Seija, *Skolmobbing i Finland och elevernas problematiska rättsydd*. Nordiska administrativ tidskrift 1/2014, p. 50.

27 These problems were essential in the case of Finnish Regional State Administrative agency: LSAVI-2010-660/Op-13. See Mäntylä et al. 2013, p. 80. In Sweden, Dufwa highlights this relationship between school and pupil when developing the idea of strict liability and insurance. Dufwa 2005, p.358.

should be investigated by the court²⁸. The written procedure used by overseers of legality is even problematic in bullying cases. If parents write a letter of complaint to the Regional State Administrative Agency, for example, and the school or educational authorities of the municipality write a response including the opposite perspective, there are no effective methods to clarify the truth of the matter²⁹. Witnesses may not be called and there is no provision for a visit to the school in question.³⁰ The Complaints authorities in Finland cannot change or overturn decisions made by authorities or courts, or order payment of compensation. Usually they inform the local authority what would be the legal course of action or draw the attention of the authority to the requirements of good governance. (Administrative Procedure Act 434/2003, 53c §)

The Swedish Schools Inspectorate is the closest equivalent authority to the Finnish Regional State Administrative Agencies. The Schools Inspectorate is also responsible for overseeing that the education authority and school staff fulfill their responsibilities, for example by obeying the Administrative Law³¹. Even the remedies are quite similar (an order to do something, complaint, or caution), but the difference is that in a single pupil's case, the competence resides with the Swedish Child and School Student Representative. The difference is also that the Swedish agency conducts regular supervision at every school every five years and that action is not triggered only by a request from parents or guardians as it is in Finland.³²

In Sweden, along with the Swedish Schools Inspectorate, the Swedish Child and School Student Representative has supervisory responsibility under the section of the Education Act dealing with degrading treatment³³. The Child and School Student Representative gives information, helps schools prevent bullying, oversees schools' efforts and represents students who have been bullied in court (Swedish Education Act 6:15). There is no similar position in Finland and in fact – such a position is very rare worldwide. The particular difference in supervision systems is also that the Swedish Work Environment Act and its system of supervisory authorities apply to cases of bullying in Swedish schools³⁴. The municipality is responsible for the pupils' working environment.³⁵ In Finland the working environment regulation does not encompass the pupil's rights.

In addition, there is a similar system of having a parliamentary ombudsman and the Chancellor of Justice in Sweden as found in Finland³⁶. These positions

28 Mäntylä & Ollila 2014, p.49.

29 Mäntylä et al. 2013, p. 125.

30 Mäntylä & Ollila 2014, p. 50.

31 See Boström & Lundmark 2012, p. 121.

32 Gustafsson 2013, s. 120, 125.

33 “www.skolinspektionen.se/en/BEO/English-Engelska/About-BEO/”.

34 Gustafsson 2013, p.38.

35 Prop.1989/90:61 p.5, 23.

36 Wieslander, Bengt: JO-ämbetet i Sverige, Smedjebacken 1995, p. 53–55.

can oversee the action of the Swedish Child and School Student Representative as much as the action of education staff in a municipality. However in Sweden the collective agreement determines that the proposed discipline measures cannot be used as broadly to discipline municipal authorities as they could on a governmental authority (Public Employment Act, SFS 1994:260, 1-2, 15 §).³⁷

3 What Kind of Intervention is Appropriate?

In Finland, when the complaints authorities to conclude that a teacher, principal or local education authority has failed to fulfill their responsibilities, a few points are fundamental. First, the intervention should happen as soon as possible³⁸. This assumes that the parents or child have told the school staff about the bullying, or that the staff has become aware of the bullying in some another way. If nobody knows about the pupils being bullied at school, there cannot be a responsibility to intervene³⁹. Second, in most cases the only sanction applied to the bully was a reprimand, even if that remedy had been tried previously and had proved ineffective⁴⁰. According to the complaints authorities the school staff should check upon the effectiveness of the intervention regularly and step up the severity of sanctions if the milder remedies fail to stop the bullying.⁴¹ In Finland, a bully may be kept in detention for a maximum of two hours or may be given a written warning. Following that the pupil may be suspended for a maximum of three months. In situations constituting an acute safety risk, a pupil who disrupts teaching may be dismissed from the classroom or other teaching facility for the remainder of the class or be ordered to leave a school function. A pupil may even be excluded from participating in education for the remainder of the school day. (Basic Education act, 36 §)⁴² In addition, the complaint documents highlights that the victim and the bully have right to pupil welfare services, even after the bullying ceased⁴³. A pupil has access to for example, a school doctor or psychologist at no cost both in Finland and Sweden.

In Sweden, the disciplinary measures are almost same as in Finland⁴⁴. In addition, there is an option to relocate the bully temporarily or permanently from a municipal school to another (municipal) school (Education Act 5:12-13 and 10:30). In fact, also in Finland there is a provision in the Finnish Basic Education Act that could be used in bullying cases (but never has been), it

37 See Boström & Lundmark 2012, p.119–121.

38 LSSAVI-2010-00599/Op-13.

39 LSAVI-2010-660/Op-13.

40 See LSSAVI/340/06.06.01/2010 and LSSAVI/3323/06.06.01/2010.

41 Mäntylä et al 2013, p. 123–124.

42 See Hakalehto-Wainio 2013, p. 187–210.

43 See:the decision of parliamentary ombudsman 214/4/09 and Mäntylä et al. 2013, p. 53–54.

44 See Boström & Lundmark 2012, p. 293–318.

states: “For a well-founded reason relating to educational arrangements, the local authority may change the place of education without changing the language of instruction” (6.2 §). It is more usual to move a pupil to another class group within the same school. Finnish research has found this to be an effective way to help the victim⁴⁵.

Ensuring the investigation and intervention occur without delay is important to the victim, but also the accused benefits when he/she knows the sanctions to be imposed or that he/she will be cleared promptly. Also the liability of the municipality for damages will become greater if over time the victim sustains more injury.⁴⁶ So, local authority shall see to it that a matter is effectively clarified. Both Finnish and Swedish administration law includes a principle of judicial investigation that states that the investigation authorities are responsible for clarifying the case to whatever extent the nature of the case demands⁴⁷. For example the victim of bullying might deny the bullying happened and in such cases, local authority is obliged to clarify the issue without assistance of victim (for example Finnish schools have had some success by using anonymous questionnaires as instruments to clarify who are the victims and the perpetrators in bullying cases)⁴⁸.

The awareness of authorities and the available options to clarify cases of bullying have taken center stage in the legal discussion in Sweden too. There member of staff have a duty to report school bullying to the principal. Staff members get to know of bullying through conversations with pupils or through their own observations⁴⁹. The principal is obliged to escalate the matter further to the organizer of education. Then the organizer of education (the municipality in this article) is responsible for determining the circumstances of the case. If the investigation shows that a pupil has been bullied, the organizer of education is responsible for intervening using legitimate measures to prevent the continuation of the bullying.⁵⁰ In Sweden, these obligations have been incorporated into the legislation (Education Act 6:10) whereas in Finland the legislation on intervention is scant. Drafting materials accompanying the Swedish act makes it clear that the imposition of this reporting duty is intended to heighten the municipality’s awareness of degrading treatment to make intervention and prevention possible on their level⁵¹. This demands that practical routines are established between a school and a municipality (e.g. determining how quickly incidents must be reported)⁵².

45 Mäntylä & Ollila 2014, p. 50.

46 Gustafsson 2013, p. 88.

47 Lundin 2012, p. 199 and Kulla, Heikki, *Hallintomenettelyn perusteet*, Talentum Helsinki 2008, p. 193–198.

48 For example in the Finnish case ESAVI-2010-03629/Op-13.

49 Gustafsson 2013, p. 82.

50 See Boström & Lundmark 2012, p. 262–263.

51 Prop 2009/10:165, p.332.

52 See: Skolinspektion 43-2011:1248.

There is even some “active duty” regulation in the Swedish Education Act (6:6-8)⁵³. Under the Act bullying must be prevented and stopped using all reasonable endeavors. As in Finland, the municipality must draw up a plan specifying the details of the proposed intervention⁵⁴. However, the difference is that in Finland there is no specific legislation concerning such endeavors or the annual development of the above-mentioned plan. The Swedish Education Act mandates the plan be drawn up every year and that it must include an overview of the action. (Swedish Education Act 6:8). Of course legislation cannot guarantee things work in practice⁵⁵. However, as Gustafsson notes that (in relation to Sweden), the development of an intervention process requires the relevant authorities acquire information on the circumstances occurring in schools at least once a year⁵⁶. So, there is a stronger development perspective concerning school bullying in Sweden, maybe because of the more effective supervision and inspection system.

In Sweden the responsibility to intervene covers not only the school activity but even that activity that has a *close connection to the school* (for example the journey taken to school)⁵⁷. In Finland, there was an attempt to incorporate an obligation to trigger intervention in bullying cases that happen on the way to school into the Basic Education Act, but currently the Act only includes a mention that members of the school staff should report any case of bullying that happens on the way to school to the parents or guardian of the bully and the victim.⁵⁸ This means that in Finland the school is not permitted to action its disciplinary measures, when bullying happens on the way to school, but not on the premises. Bullying occurring outside school hours has to be addressed with the help of other authorities.

4 Criminal Liability

The age of criminal responsibility is set at 15 in Sweden and Finland meaning that most pupils cannot be held responsible for any of their action that would otherwise give rise to criminal charges. This shifts the focus of liability toward teachers, principals or local authorities. In Sweden the criminal liability of school staff and the organizer of education may derive from the Work Environment Act: a teacher or principal may be criminally liable of Work Environment Crime if they do not fulfill their responsibilities under the Work

53 Gustafsson 2013, p. 72.

54 In practice the plan is the instrument where it is recommended to describe the routines, limitation of liability and documentation methods. Prop. 2005/06:38, p.139.

55 See Lundmark & Boström 2012, p.260–261.

56 Gustafsson 2013, p. 75.

57 Prop. 2005/06:38, p. 142.

58 HE 66/2013, p. 11,31,43. Mäntylä 2013, p.252.

Environment Act⁵⁹. In contrast the violation of the official duty regulation derived from the Swedish Criminal Code (20:1) is not considered appropriate (or at least is not used) at the municipal level⁶⁰. This interpretation has not been as clearly established in the Swedish legal literature⁶¹.

Bullying at school and the responsibility of a principal has in some cases been considered a work environment crime (*arbetsmiljöbrott*). In the case NJA 2005, P.596 the principal did not report a case where a pupil was dangled from the school's fifth floor window by other pupils in good time to the supervisory authority⁶². Under the Work Environment Act the principal has to report if an incident posed a serious danger to life or health. This even includes threat to mental health. In the case referred to above, the High Court⁶³ adjudged the action of the pupils did not constitute a serious danger to health, and court advised that intimidating and degrading treatment does not automatically constitute serious danger to health. The pupil was scared to go to school after the episode and suffered nightmares and suicidal thoughts. The case was dismissed.⁶⁴

In Finland, the education authorities at the municipal level, school principals and most teachers are public officials and there have been judicial proceedings concerning bullying and criminal liability (violation of official duty/negligent violation of official duty). However, the law of tort is the most effective method to ensure officials are held responsible for the actions, because in these cases the municipality in practice is always the defendant. In criminal

59 Söderlöf points out that usually at the municipal level the administrative manager has the main responsibility concerning the work environment, but she/he can delegate tasks to subordinates. Söderlöf, Göran, *Några frågeställningar om påstått arbetsmiljöbrott på skolans område*, Nordsteds, Stockholm, 2013: "www.nj.se/cms/pub/analys-goran-soderlof-2".

60 Berggren, Nils-Olof, *Något om tjänstefelansvaret*, in *Festskrift till Madeleine Leijonhufvud*, Nordsteds, Stockholm 2007, p.36–38.

61 For example Boström & Lundmark (2012) *see* that the regulation concerning violation of official duty is applicable to the principal (but even they note that such a situation is unusual) Boström & Lundmark, *Skoljuridik*, Liber AB, Malmö 2012, p. 267, 334.

62 The legislation on reporting has changed recently (Work Environment Order 2014:365).

63 In Finnish and Swedish criminal cases, the court of first instance is district court and the appellate court is superior to it. The high court is superior to the appellate court and in the case referred to above, the high court adjudged the action of the principal differently than the appellate court did.

64 A charge against a teacher and a principal dismissed even in the case Svea Hovrätt 7.11.2012, nr B 2169-12 (the appellate court). Three 9-year-old children fell from the school's second floor window were injured. This case does not relate to bullying, but it confirms that the Work Environment Act is suitable even in a school environment and a principal has such a competence, independence and a role as decision maker that makes her/his responsible for the working environment in a school. Even a teacher may have this kind of responsibility through his/her task of surveillance, but in this case the teacher had not abdicated her responsibility. Nor could the principal have done more than what he did. In addition in this case the role of the real estate department in municipality was significant, which made the distribution of liability unclear and exonerated the principal.

proceedings it is difficult to qualify the responsibilities of a single authority concerning bullying cases when usually resolving them involves many people. This is particularly problematic in Finland, where there is no regulation concerning distribution of work in bullying cases. To incur criminal liability, a party must be aware of her/his responsibilities⁶⁵.

In Finland, the violation of official duty in school bullying matter means that a public official, violates his or her official duty based on the provisions or regulations to be followed in official functions and the act, when assessed as a whole, taking into consideration its detrimental and harmful effect and the other circumstances connected with the act, is not petty. Negligent violation may arise if a public official violates his/her official duty through carelessness. (Finnish Criminal Code 40:9-10)

In the Finnish case R10/527 15.12.2010 (the appellate court) a head of local education department, two principals and a teacher were accused of violation of their official duty or negligent violation of official duty. A pupil had been bullied physically and verbally several years. In the first two years the school staff did not work effectively, but because later they had applied almost every possible measure to stop the bullying, the district court decided to dismiss the charge. It argues that the violation of official duty had been petty. The court of appeal arrived at the same decision.

The above-mentioned case illustrates two points in the Finnish legislation that are open to criticism. First, the legislation does not ensure that a pupil gets help as soon as possible, and second, the role of each authority should be clarified and be binding through legislation in bullying cases. In this case the school staff and education authorities could never stop the bullying. Intervention is more effective if it happens at an early stage.

In the Swedish system, for there to be criminal liability in bullying cases, a clear connection must be established to the effects of that bullying. In cases of bullying it is very difficult to prove the effect on mental health, and work environment crime legislation does not seem a very useful. Without effective criminal liability, the preventative aspect of a legal system has to function in some other way, and it seems that the Swedish solution has been to strengthen the preventative function of law of tort. The Swedish Court of Appel has increased the level of compensation awards to ensure tort liability has a preventative function⁶⁶. The move is not without its critics, however, and Gustafsson argues that this kind of function should be incorporated into the Education Act, to ensure it carries more weight⁶⁷.

65 See HE 44/2002 p. 32 ja 34 and Frände, Dan, *Yleinen rikosoikeus*, Edita, Helsinki 2008, p.31–50.

66 Hovrättens för Västra Sverige 25.10.2012, T 2021-11 and 6.6.2011 T3724-10. See even Prop 2005/06:38, p. 109.

67 Gustafsson 2013, p. 157. See even Berggren 2007, p. 40.

5 Tort Liability

In both countries the damages for giving rise to a claim for compensation are personal injury (physical or moral), damage to property, and pure economic loss that is not connected to the above-mentioned forms of damage⁶⁸. In the bullying context, an example might be the loss of opportunity to study beyond the basic education level if bullying lead to poor exam results.⁶⁹ However tort liability can arise if a child, who has been bullied, has suffered a fundamental harm that can be proven and causally linked to bullying.⁷⁰

In Finland, there is no special regulation related to tort liability of school staff in the Basic Education Act, but the Constitution of Finland (731/1999) and the Tort Liability Act (412/1974) specify the tort liability of public officials. In Sweden, there is regulation of tort liability both under Education Act (6:12) and the Tort Liability Act. Gustafsson states that the tort liability can become an issue if members of a school's staff or organizer of education subject a pupil to degrading treatment; do not fulfill their duty to prevent degrading treatment (action taken to cease bullying should be documented); or if in a single case, they have not fulfilled their responsibility to report, clarify or intervene.⁷¹ In practice, as in Finland, the tort liability applies to the organizer of education through vicarious liability and a single teacher or principal is not subject to such legal liability.

It is not easy to say which measures are appropriate for each case. Currently the plan is significant when analyzing the adequacy of measures. In the older Finnish case detailed below this kind of plan was not yet a legal requirement, but even then, a simple reprimand or measures focusing on the victim were not satisfactory.

In the case of Finnish Court of Appeal (Turun hovioikeus) S99/2345 1.3.2001 (no change to the district court's decision) the municipality had to pay 75 500 Finmarks (about 12 200 euros) in damages, when a pupil was continuously bullied in a physical and mental way (kicking, hair-pulling, name-calling). The judgment indicated that the school staff was conscious of the bullying and that the bullying had consequences for the pupil's mental health. The pupil who had been bullied was moved to another class and the bullies were reprimanded. The court noted that the school staff should have been more active, and the measures that were taken were not effective enough in this case.

68 See Dufwa, 2005, p. 350.

69 Prop 2005/06:38 p.111–112.

70 Dufwa 2005, p.351.

71 Gustafsson 2013, p. 139. The municipality was ordered to pay damages of 25 000 Swedish crowns, because it did not fulfill its responsibilities to the pupil who had been bullied. The bullied pupil was isolated and excluded from other children's games and ignored during lunch and breaks. The bullies made pejorative comments about her clothes and appearance, laughing at her and whispering about her. Inter alia, the plan, the detailing responsibilities for investigation and intervention should specify, was missing. The Swedish Court of Appeal (Hovrättens för Västra Sverige) 6.11.2011 T3724-11.

In the next Swedish case, the main point is that it is important that the staff sees the pupil who has been bullied as a victim and the staff fulfills its responsibilities by clarifying who the bullies were and by taking measures.

A 10 year old pupil had been bullied extensively in a physical and verbal manner (by hitting, kicking, throwing things at him, calling him fat and stupid) in his first term in a new school. According to the court it was very clear that the bullying had been intense. The school staff had not discovered who the perpetrators of bullying were or given out sanctions very effectively. Because the staff had made “an agreement” with the bullied pupil (requiring the pupil to attend all lessons, go out for every break, not to go home if he became sad or angry etc.) there was no balance between the role of victim and that of the perpetrators. The court noted that the pupil who had been bullied could have felt that he had been the cause and answerable for the violations. The pupil received 30 000 Crowns in damages, because the school staff members had not fulfilled their responsibilities in terms of determination and measures. 7.4.2009 Gotlands District Court (tingsrätt) T 339-08

Gustafsson found the bullying in the previous case to be a very typical example of degrading treatment in Sweden⁷². But can bullying be so typical among children that the school staff has no realistic opportunity to stop it?

In the Finnish case Rovaniemen hovioikeus 27.6.2003 S 02/541 (the appellate court), the court decided that name-calling is so *common* in secondary school that it would be unrealistic to oblige the school to eradicate it completely. If bullying does not cease despite the school staff taking extensive measures, school staff members and municipal authorities cannot be held legally liable. Accordingly there is no route to ensure bullying ceases completely in Finnish schools, although under the Finnish Basic Educational Act pupils participating in education shall be entitled to a safe learning environment.⁷³

The bullying in the case mainly consisted of name-calling and it happened very often by many different pupils. The school staff held discussion with the bullies, other pupils in the same class and the victim’s parents. Staff intervened in every bullying situation they became aware of and the state of the victim was systematically monitored. The victim was moved to a more peaceful class, but when the bullying still continued, the parents opted for home education. They claimed damages for the costs of home education. The court decided that the proof was not adequate when one of the medical reports was requested too late and a writer of the other report lacked suitable expertise. The Court of Appeal decided as the district court had, that the school staff had done everything that they could, considering the extent and type of the case. Rovaniemen hovioikeus (the appellate court) 27.6.2003 S 02/541

72 Gustafsson 2013, p. 54.

73 See Mäntylä & Ollila 2014, p. 50.

In Sweden too legal praxis establishes that the legislation does not guarantee pupils can attend school without being subject to any form of bullying, if the staff has tried to intervene and apply measures appropriate to the case.⁷⁴

Finally is important to highlight some procedural questions in relation to a tort liability. Because in Finland the law of tort has developed through general legislation, it is not well suited to deal with the special features of bullying cases. First, there is a difference between the burden of proof in Finland and Sweden. In Sweden, if a pupil provides evidence of circumstances that gives a reason to assume that he or she has been exposed to degrading treatment, the defendant (municipality) has to establish that exposing to degrading treatment has not taken place. (Swedish Education Act 4:16)⁷⁵ However, according to Gustafsson, this provision has been problematic in practice⁷⁶. In Finland in contrast, there is not even any special regulation concerning the burden of proof in bullying cases and this kind of solution can be criticized in light of another procedural question: the cost of proceedings⁷⁷. Even this is settled better in Sweden. The Swedish Child and School Student Representative as a part of the Swedish Schools Inspectorate can represent a pupil in court⁷⁸. (Swedish Education Act 6:15) This means that the risk of costs does not fall on the family of the victim in a bullying case. The Finnish system needs procedural reform. When the alleged bullying took place in school, it is the municipality that would be defendant in court, meaning the defendant has significantly better opportunities and resources to obtain evidence than the allegedly bullied pupil or his/her family. In addition, the weaker party should be protected from the risk of paying costs of proceedings.

6 Conclusions

There is difference between the legal remedies for discrimination and for bullying in the absence of discrimination. The significant national developments in the area of discrimination and the legal remedies for it are based on EU legislation. A similar model could prove effective to address the issue of bullying in the absence of discrimination, especially in Finland, where there is a great need for effective legal remedies to address school bullying, and

74 NJA 2001 s.755, in this case was critical that the victim fell silent and made the school's measures more difficult. See Gustafsson 2013, p. 88-89. See even (Dufwa 2005, p.355–357) who analyzes the possibilities of strict liability in bullying cases.

75 See Boström & Lundmark 2012, p. 266.

76 Gustafsson 2013, p. 150,152. It is even difficult to analyze the significance and problematic nature of these provisions, because most of the cases will be settled and legal precedent is scarce.

77 Instead under the Finnish Equality Act there is a special regulation: After the presumption of discrimination the *defendant* must prove that the prohibition of discrimination has not been violated (section 11-12).

78 Despite the legal precedent on bullying being scarce. The reason might be that it is still possible to settle the case out of court.

a special compensation system and the reversal of the burden of proof could be appropriate instruments to strengthen the legal protection of the victim.

The strong division between discrimination and other degrading treatment may even be a problem in Sweden, because it is not easy to dissociate these two situations in cases of bullying. Discrimination and other degrading treatment may occur in the same case, but there is separate legislation, supervision, sanctions and even authorities who have the right to act.⁷⁹ In theory, this kind of division exists in Finland too, but in practical terms it is not yet apparent in the basic education system, because the legislation concerning discrimination is not well developed in relation to children. However both countries' systems are still based on separate authorities, but the Swedish system has developed recently so, that here are fewer authorities than earlier involved in the field of discrimination⁸⁰. However, for example although the Child and School Student Representative is a part of the Swedish Schools Inspectorate, the office also functions independently. While the Child and School Student Representative works to counteract degrading treatment, any bullying case concerning pupils with special educational needs resides with the Schools Inspectorate. For parents and guardians the system may seem complicated, especially when they do not know the difference between the court system and other bodies overseeing regulations to counter bullying. This is not surprise, when there are two supreme overseers of legality, and in addition in Finland, Regional State Administrative Agencies acting as the authority for complaints and even as an appellate court in some educational cases (although not bullying cases). Finnish research results shows that parents do not know the different legal remedies available or understand the difference in competence between different supervisory authorities and courts⁸¹. At the least, the complicated system of legal remedies requires that accessible guidance be provided to the education sector.

The Swedish Education Act (1:10) even includes a requirement to take account of the best interests of a child and the child's opinion, provision arising from the Convention on the Rights of the Child⁸². This means for example that the decision maker has to evaluate the need for investigation and intervention in a bullying case relative to the best interests of the child. Sometimes a pupil who has been bullied does not want any measures taken, but this is rarely in the best interests of the child. Finnish education legislation contains no general mention of the best interests of the child, but the convention is in effect as a law in the Finnish legal system. This does not seem to be the best solution, because the convention is not familiar to many decision makers and it has little practical legal effect.

79 These two grounds and compensations are possible to address in the same trial, but it does not help in that problem that the grounds are difficult to dissociate from each other. *See Gustafsson 2013, s.159.*

80 Gustafsson 2013, p.159.

81 Mäntylä & Ollila 2014, p. 49.

82 *See Gustafsson 2013, p. 93.*

The criminal law does not substantially enhance the legal protection of victims of bullying in either Finland or Sweden. In Finland, the unclear distribution of responsibility between school staff and the provider of education causes the biggest problems in the criminal system, and in Sweden the work environment crime legislation does not seem very useful given the essential elements of the offence. The legality principle is difficult to fit in bullying cases where it is difficult to state in advance how the staff should work in each case. Accordingly, it is more realistic to develop the liability under the law of tort and an effective compensation system. In this aspect Sweden has progressed further than Finland, especially on the procedural circumstances.

Finally, it is clear that in Sweden, the legislation concerning bullying has been developed more systematically. While in Finland these same aspects are mostly found in the complaint authorities' interpretations, the preventative function of these decisions is virtually non-existent, especially given that the Regional State Administrative agencies do not publish their comments. In Sweden, more detailed legislation protects a pupil's rights more effectively, and there is more effective supervision, remedies, and procedural provisions to provide access to their rights. In practice these legislative solutions are not trouble free, and the schools' plans to counter bullying are still hugely significant in Sweden too, but at least the choice to develop the victim's status through legislation has a preventative and symbolic effect. It is proof that society recognizes the serious nature of the bullying issue.