



Decentring Criminal Justice:

A Plural Approach to Survivor-Centred Justice in Cases of Sexual Violence

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Introduction

Globally, criminal justice remains the dominant justice paradigm in cases of sexual violence. Considerable efforts have been put into making the criminal justice system work for people who have been subjected to sexual and other gender-based violence. These include laws inspired by feminist legal scholarship, the development of support services for victim-survivors, and better police training (McGlynn and Munro, 2011).

Despite these developments, attrition rates in rape cases largely remain high across Europe, and conviction rates low (Lovett and Kelly, 2009; Krahé, 2016). Therefore, if we believe that high levels of education, strong belief in the rule of law, relatively good health and welfare services, coupled with high levels of gender equality are the necessary that ensure high conviction rates in cases of rape, the Nordic countries largely disprove that hypothesis (e.g., Lovett and Kelly, 2009; Antonsdóttir and Gunnlaugsdóttir, 2013; Brå, 2019).

Increasingly, some scholars are coming to the realisation that criminal justice is mostly unable to adequately handle cases of sexual violence and meet victim-survivors' justice interests (McGlynn and Westmarland, 2019; Daly, 2017; Henry et al., 2015). Therefore, if we are to further develop the justice agenda for victim-survivors of sexual violence we need to problematise »the dominance of criminal law in the imaginative space of justice« (Henry et al., 2015, p. 6) and develop multiple pathways to justice (Daly, 2017). Therefore, we need a better understanding of survivors' ideas and experiences of in/justice.

In my Ph.D. compilation thesis (Antonsdóttir, 2020a), which consists of four papers and an introductory chapter, I contribute to this research agenda, primarily in the context of Iceland but also more broadly in a Nordic context. The thesis is situated within the field of feminist socio-legal studies, and draws on victimology, feminist criminology, and feminist political philosophy. The aims guiding the thesis are, firstly, to gain a deeper understanding of how victim-survivors of sexual violence perceive, experience, and understand justice; and, secondly, to explore whether and how this knowledge can be used to expand and develop strategies which are capable of meeting the justice interests of victim-survivors within and outside of the criminal justice system.



The research material gathered mainly consists of two sets of data. One paper is based on a critical policy analysis (Bacchi, 2009) of Danish and Norwegian legal policy documents (Antonsdóttir, 2019a); and three papers are largely based on a thematic analysis (Brown and Clarke, 2013) of interviews with 35 people in Iceland, 32 women and three men, who had been subjected to different forms of sexual violence (Antonsdóttir, 2018; 2019b; 2020b).

The thesis is shaped by the ambition of Critical Theory, which is to imagine an alternative and emancipatory political reality to the status quo (Fraser, 1997), where people who have been subjected to sexual violence are recognised and enjoy parity of participation in social life. In order to accommodate conceptions of victim-survivor-centred justice and its relation to different justice frameworks, a broad theory of social justice is needed. For that purpose, I use Nancy Fraser's (1997; 2009) democratic theory of social justice as an overarching theoretical framework.

In the thesis I explore the meaning of justice for survivors of sexual violence as well as the justice potential of different formal and informal procedures and practices within different paradigms of justice, including criminal justice and procedure, civil justice, administrative justice, restorative justice, and transformative justice. In this paper, I largely refer to excerpts from the introductory chapter of the thesis and focus on the meaning of survivor-centred justice as well as the main contribution of the thesis' papers in the context of criminal procedure, tort law, administrative justice and informal justice practices.

1. Survivor-Centred Justice

In order to develop alternative pathways to justice for victim-survivors of sexual violence it is important to understand how survivors understand the meaning of justice and identify their justice interests. Importantly, Daly (2017) makes a distinction between survivors' justice needs versus their justice interests. When discussing survivors' justice needs, the focus is on the therapeutic outcomes of different justice procedures, such as survivors' experiences of closure, recovery, healing, and reduced symptoms of PTSD. Examining victim-survivors' justice interests, however, entails understanding survivors' moral and political interests in the context of justice procedures and outcomes. That said, having one's justice interests met can of course have therapeutic effects.

Based on interviews with women survivors of different forms of sexual violence in England, McGlynn and Westmarland (2019) coined the term »kaleidoscopic justice« to capture the complexity and nuance of the way in which the participants described justice. Here, justice is conceptualised as »a constantly shifting pattern ... continually refracted through new experiences and perspectives ... a pluralistic, lived, evolving experience« (p. 197).

Within this framework, McGlynn and Westmarland (2019) also identify the following justice themes: voice, dignity, recognition, connectedness, conse-



quences and prevention. Having a voice, being able to tell one's story, being able to participate in the justice process and influence decision-making; being treated with dignity and respect; receiving recognition, vindication and validation; regaining a sense of connectedness and belonging in society through psychological, financial, and social support; ensuring meaningful consequences for the offender which entails offender accountability and responsibility but is not necessarily tied to punishment; and prevention of sexual violence which entails the transformation of society into one that understands and recognises the harms of sexual violence and actively engages in reducing its prevalence (McGlynn and Westmarland, 2019).

Moreover, previous research on how victim-survivors of sexual violence understand and experience justice indicate that their understanding of justice does not fully align with either retributive or restorative ideas about justice, while containing elements of both (Herman, 2005; Jülich, 2006; McGlynn and Westmarland, 2019).

The results of my thesis support these findings and contribute further to this research agenda.

2. Criminal Justice Procedure

Victimological research on the experiences of crime victims within criminal justice systems tend to draw on Lind and Tyler (1988) where procedural justice is conceptualised in terms of victims' psychosocial needs and in terms of how satisfied they are with the criminal justice process (e.g., Laxminarayan, 2012). These studies have found that it is important for people who have been victimised to be met with dignity and respect by the police and legal professionals; to be informed about the workings of the criminal justice system and how their case is progressing; and to be able to have a voice and participate in the criminal justice process (Laxminarayan, 2012).

Based on the findings of the thesis, however, I argue that procedural justice is not only about victims' satisfaction levels and psychosocial needs, but also about structural fairness and (gender) equality (Antonsdóttir, 2018). While defendants enjoy party status and full procedural rights in the criminal justice procedure, the legal status and procedural rights of victims differ between jurisdictions, also between the Nordic countries. Historically, the legal status and rights of victims has been stronger in Finland and Sweden than in Denmark, Norway and Iceland. In 2008, however, victims' rights were strengthened considerably in Norway (Robberstad, 2014).

In Antonsdóttir (2019a), I conduct a critical policy analysis (Bacchi, 2009) of argumentation for and against strengthening victims' status and rights in Danish and Norwegian legal policy documents from the mid-2000s. The results of these policy deliberations were that in Norway, victims were afforded participatory rights and stronger legal representation in court, while in Denmark



this was largely not the case. Here, I show how the question of victims' legal rights and status is subject to different interpretations of legal principles such as the equality of arms principle and the objectivity principle. Legal policy arguments against strengthening victims' rights are based on the assumption that victims' real interests are to be protected from the criminal justice system, while arguments in favour are based on the notion that strengthening victims' rights will have an empowering effect and thereby decrease their negative experiences (Antonsdóttir, 2019a). I suggest that these different assumptions about victims' justice interests and the contrasting interpretation of legal principles leaves the question of victims' rights open to the principles of social justice

In Antonsdóttir (2018), based on a thematic analysis of interviews with victim-survivors of sexual violence in Iceland about their experiences of the criminal justice procedure, I frame their criticism of the criminal justice system as claims of injustice as opposed to framing it as psycho-social needs. Drawing on the critique of feminist legal scholars (Robberstad, 1999; Niemi-Kiesiläinen, 2001), I proceed to apply Fraser's (1997; 2009) social justice principles and evaluative standards to the question of victims' legal standing and rights in Icelandic criminal justice procedure and in the broader context of Nordic criminal procedure.

Firstly, based on the principle of »all subjected« (Fraser, 2009), I argue that victims should have legal standing in the criminal case given that they have clear interests in the process and outcome of the criminal justice procedure and, therefore, have moral standing as subjects to its governance structure. Assigning victims the legal status of witnesses to the crime committed against them, as is the case in Iceland and Denmark, therefore, constitutes a case of misframing as they are wrongfully denied the chance to participate in the authorized contest over justice.

Secondly, I proceed to apply the principle of »participatory parity« (Fraser, 1997) to evaluate, firstly, whether victims are being denied participatory parity by the institutionalisation of majority cultural norms within the legal system; and secondly, whether strengthening victims' status and rights in itself denies participatory parity to suspects and accused. I argue that not allowing for parity of participatory rights between the survivor and the accused constitutes a case of misrecognition, a status injury, since it denies survivors the requisite standing as a result of institutionalised hierarchies of value within a gendered legal culture.

In my findings, I conclude that not recognising victim-survivors' legal and social justice interests puts them in a position of inequality in relation to the state and in relation to the defendant. Given the gendered character of sexual violence, this position of inequality – this status injury – becomes even more pronounced in such cases. Of the Nordic jurisdictions, the Finnish criminal justice process is the one most closely aligned with the principles of social justice which is not the case in Iceland and Denmark (Antonsdóttir, 2018).



3. Civil Justice: Tort Law

In Antonsdóttir (2020b), I focus on the justice potential of stand-alone civil tort lawsuits in cases of sexual violence. In the paper I discuss how participants' understanding of justice did not fit with influential justice theories within tort law as they neither subscribed to notions of justice in terms of financial deterrence and efficiency nor in terms of corrective justice. Instead, participants emphasised the importance of official recognition of the wrong that was done to them and is, therefore, primarily aligned with the norms of distributive justice (Antonsdóttir, 2020b).

Firstly, while victim-survivors often reported extensive pecuniary and non-pecuniary losses as a consequence of the violence done to them, they generally did not equate monetary compensation with justice. Many found it absurd to assign monetary value on the harm they had been subjected to and also associated monetary compensation with being paid off, viewing it as dirty money or blood money. I therefore argue that their views can be understood in the context of taboo trade-off theory (Fiske and Tetlock, 1997). Here, monetary compensation and the harm of sexual violence can be understood as not only cognitively incommensurable, i.e., where people reject certain trade-offs because the requisite mental process involved is unfamiliar or difficult; but also constitutively incommensurable, i.e., when people believe that a certain value trade-off subverts or undermines the traded value which has moral implications. Monetary compensation can, therefore, be understood as devaluing the harm of sexual violence and as a taboo trade-off (Antonsdóttir, 2020b).

Secondly, some participants also worried about pursuing compensation for fear of being stigmatised and accused of lying about the sexual violence for monetary gain. For many, pursuing monetary compensation was therefore understood as a risk to their credibility, which according to legal practice is often seen as the most valuable asset of a »real« victim. I therefore argue that for survivors of sexual violence, pursuing monetary compensation can risk social and legal judgement and threatens their moral standing, which also feeds into social myths about how »real« victims behave (Antonsdóttir, 2020b).

Thirdly, while a legal decision finding the defendant responsible for the harm can serve as an important symbol of recognition for survivors, it may well only meet their justice interests in a limited way. An important component of justice for survivors centres on offender accountability, responsibility, and ultimately the prevention of further sexual violence. In the paper I discuss the policy implications of these findings and how it is possible to develop the tort law option in a way that better meets survivors' understanding of justice and addresses the problem of taboo trade-offs (Antonsdóttir, 2020b).



4. Administrative Justice and Informal Justice Practices

In Antonsdóttir (2019b), I show how informal justice practices and administrative justice procedures can facilitate victim-survivors experiences of justice when they are able to (re)claim their space, or when it is possible to create, what I call, »just spaces«.

Firstly, many participants described feelings of extreme fear and anxiety in cases where offenders remained in or re-entered their life space in some way, and how it severely limited their agency and freedom of movement as well as their social, educational, and economic relations and opportunities. I suggest that the way in which survivors described their existential and bodily reactions in these contexts can be conceptualised on Kelly's (1988) continuum of sexual violence which captures the range and extent of women's experiences of men's violence.

Secondly, I draw on McGlynn and Westmarland's (2019) concept of kaleidoscopic justice as discussed above. I suggest how the meaning of connectedness, or belonging, in this context can be further developed by incorporating the notion of space. Here, space is shown to be multi-dimensional both in terms of its existential-phenomenological qualities and in terms of its social, geographical, and political aspects. The creation of »just spaces« relies on the active recognition, solidarity, and support of people »who count« in a given context and who ensure that these spaces are sustainable enough. People who count can include family members, friends, colleagues, and those in positions of authority (Antonsdóttir, 2019b).

Thirdly, in my effort to further conceptualise what I suggest calling a »just claim to space«, I reconceptualise Kelly's (1988) concept of the continuum, but in the context of injustice. The »continuum of injustice« frames sexual violence as a form of gender injustice, the range and extent of which is largely met with routine and mundane legal and social impunity. I argue that the creation of just spaces can be understood as a disruption of this continuum of injustice, whereby victim-survivors can exercise their »right to everyday life« (Beebe-ejaun, 2017) and experience a sense of belonging and freedom.

I conclude that informal justice practices and administrative justice procedures are examples of social and institutional platforms through which an intervention in the continuum of injustice becomes possible, although is by no means guaranteed (Antonsdóttir, 2019b).

Concluding Remarks

Here, I have discussed some of the findings in my Ph.D. thesis and argued for the importance of better understanding victim-survivors' views on justice in



order to not only continue to develop the criminal justice system to better meet their justice interests, but also to develop alternative justice options.

In the introductory chapter of the thesis, my overall conclusion draws on Fraser's (2009) concepts of normal and abnormal justice, where I suggest that decentring criminal law in the imaginative space of justice, accompanied by the development of multiple formal and informal justice processes and practices, has the potential to bring about a paradigm shift in the way in which justice for survivors of sexual violence is understood and actualised.

As there is limited scope here to discuss the various different aspects of justice in this context, such as restorative and transformative justice, I refer interested readers to the thesis which is accessible on-line.¹

Kontaktoplysninger

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1. See Lund University Publications: <https://lup.lub.lu.se/search/publication/4133fd45-3116-4891-8e4c-5c95b088da5d>



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