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Understandings of Justice by Victim-Survivors of Sexual Violence and their Implications for Different Justice Strategies

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HILDUR FJÓLA ANTONSDÓTTIR

DEPARTMENT OF SOCIOLOGY OF LAW | LUND UNIVERSITY



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Hildur Fjóra Antonsdóttir



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DOCTORAL DISSERTATION

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Abstract <p>The compilation dissertation is shaped by the ambition of Critical Theory, which is to imagine an alternative and emancipatory political reality to the status quo, where people who have been subjected to sexual violence are recognised and enjoy parity of participation in social life. More specifically, it aims to understand how victim-survivors of sexual violence in Iceland perceive, experience, and understand justice; and how, in a Nordic socio-legal context, 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 dissertation contributes to a broad survivor-centred justice agenda which entails the decentring of criminal law in the imaginary space of justice.</p> <p>Paper I analyses how Danish and Norwegian legal policy documents represent the “problem” of victims’ legal status and rights, and the assumptions underpinning arguments for and against strengthening victims’ rights. Paper II explores how victim-survivors experience the criminal justice process in Iceland. Paper III analyses victim-survivors’ experiences of different non-traditional, formal and informal, justice mechanisms and practices in Iceland. Paper IV examines victim-survivors’ views on civil tort claims and monetary compensation in Iceland.</p> <p>In the context of Nordic legal policies, the study shows that the status and rights of victims in the criminal justice procedure are subject to different interpretations of legal principles, which opens up the question of procedural justice to principles of social justice. In line with principles of social justice, being assigned the legal status of a witness in the criminal case with limited procedural rights is understood as a form of injustice by survivors. While the meaning of justice is comprised of several factors, the study highlights how experiences of justice can be connected to notions of space and the ability to exercise one’s freedoms. In the context of tort law, the study finds that pursuing civil claims can risk social and legal judgement and that monetary compensation does not align with survivors’ ideas of justice. It is suggested that state intervention is needed to counteract social norms that undermine survivors’ access to justice, and to incentivise offender accountability to better meet survivors’ justice interests. Finally, the study discusses the possible implications of the development of multiple formal and informal justice processes and practices and its revolutionary potential.</p>		
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*For the research participants,
I hope I have done you justice.*

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Acknowledgements

Before embarking on this doctoral research, I had spent several years in the field of international development, working on furthering gender equality and ending violence against women, including with UNIFEM (now UN Women) and the UN Trust Fund to End Violence Against Women. More specifically, I worked on programmes and projects to strengthen support services for people who had been subjected to gender-based violence, to improve health care services, and to make criminal justice systems work for women. While contributing to this work was a privilege, I couldn't help feeling a sense of unease. At the back of my mind a voice kept asking: Why are we promoting the criminal justice system as the main avenue for justice in cases of gender-based violence when the research shows such limited results? As I discuss further in the introduction to this study, even in the Nordic countries where we are supposed to have a lot of the key ingredients to ensure gender justice, we come up short. These are some of the experiences and observations that led me to the topic of this thesis, i.e. how can we advance the justice agenda for people who have been subjected to sexual violence? What can justice look like?

Over the course of my studies, I have enjoyed the support of many wonderful people and I have many to thank. To begin, I thank Reza Banakar, my supervisor, for continuously challenging me intellectually and providing me with just the right balance between freedom and guidance, coupled with a generosity of spirit and a delightful sense of humour. I will miss our discussions. Karl Dahlstrand, my co-supervisor, I thank for all those lunches, talks about the intricacies of law, and for his unwavering support. Isabel Schoultz, my co-supervisor for the last leg of this journey, I thank for all those last-minute read-throughs and spot-on comments. I'm also exceedingly grateful for the support of my colleagues and fellow Ph.D. candidates at the Department of Sociology of Law, many of whom have also become dear friends. Thank you all for the camaraderie! A special thanks to Ida Nafstad for all those stimulating conversations, personal and professional support, and the friendship.

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Hildur Fjóra Antonsdóttir

Reykjavík, 8 March 2020

List of Original Papers

Paper I. Antonsdóttir, H.F. (2019). Empowered or Protected? The ‘Problem’ of Complainants’ Rights in Danish and Norwegian Preparatory Works on Criminal Procedure. In M.B. Heinskou, M-L. Skilbrei and K. Stefansen (eds.), *Rape in the Nordic Countries: Continuity and Change*. London and New York: Routledge.

Paper II. Antonsdóttir, H.F. (2018) ‘A Witness in My Own Case’: Victim–Survivors’ Views on the Criminal Justice Process in Iceland. *Feminist Legal Studies* 26: 307–330.

Paper III. Antonsdóttir, H.F. (2019). Injustice Disrupted: Experiences of Just Spaces by Victim-Survivors of Sexual Violence. *Social & Legal Studies*. <https://doi.org/10.1177/0964663919896065>

Paper IV. Antonsdóttir, H.F. Compensation as a Means to Justice? Sexual Violence Survivors’ Views on the Tort Law Option in Iceland. Submitted to *Feminist Legal Studies*.

Introduction

Within feminist legal and socio-legal scholarship, much has been written about the failure of the criminal justice system to meet the justice interests of people who have been subjected to sexual violence. Increasingly, feminist socio-legal scholars and criminologists are also exploring the potential of non-traditional justice mechanisms and practices in meeting the justice interests of victim-survivors. In this context, understanding victim-survivors' ideas about justice becomes particularly important. This compilation thesis is a contribution to this field of research from a Nordic, and primarily Icelandic, perspective.

In this thesis, I generally follow the feminist tradition of using the concept “victim-survivor” or “survivor” when referring to people who have been subjected to sexual violence and physically survived, in order to highlight people’s agency in the face of victimisation. As argued by Liz Kelly et al. (1996), this concept is to be understood as encompassing different aspects of experience rather than an either/or fixed identity, or in terms of a chronological separation of different identities, i.e. that there is a journey to be made from being a victim to being a survivor. For people who have been subjected to sexual violence, it can be important to claim an identity as a victim or as a survivor, depending on the context and a person’s subjective experiences at any given time; or, indeed, to claim neither and to go beyond these identities/labels, because “[w]e are all far more than what was done to us” (Kelly et al. 1996: 96).

While Iceland and the other Nordic countries enjoy the highest levels of gender equality according to the Global Gender Gap Index (World Economic Forum 2019), sexual violence remains as a form of gender inequality. According to a recent victim survey by the National Commissioner of the Icelandic Police (2018), 2.8 per cent of people in Iceland aged 18 years and over were subjected to sexual violence in 2016. The prevalence was significantly higher among women, or 4 per cent of women and 1 per cent of men, and significantly higher in the 18-25 age group, or 11 per cent, than in other age groups. Similarly, according to the 2018 crime victim survey in Sweden, 6 per cent of the population

aged 16-84 stated that they had been subjected to sexual offences, or 9.9 per cent of women and 1.6 per cent of men. The highest prevalence among women was in the 20-24 age group, where 34.4 per cent stated that they were a victim of sexual offences. The largest proportion of male victims was in the 25-34 age group, or 3.6 per cent (Brå 2019b). While these surveys do not include children, they do tell us that women are disproportionately affected, particularly younger women.

According to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women, gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately” and is, therefore, a form of discrimination.¹ Moreover, in 1993, the United Nations General Assembly declared that violence against women, including sexual assault, is “a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men”.² The premise of this thesis is that sexual violence is rooted in unequal power relations. As a gender-based crime, it is disproportionately committed by men against women and girls, while men and boys are also affected based on their gender. Moreover, not all women and girls are discriminated against in the same way, because hierarchies of worth situate them differently in relation to each other and in relation to men and boys (Vera-Gray 2017).

For many in the Western countries, Susan Brownmiller’s (1975/1993) book *Against Our Will* marked a watershed in feminist understanding and engagement with the phenomenon of rape. In her book, Brownmiller gives a historical account of rape whereby it became understood as a widespread and pervasive practice, both in war and in peacetime. Further, Brownmiller describes rape as “a conscious process of intimidation by which all men keep all women in a state of fear” and proposes that rape is a crime not of lust, but of violence and power (Brownmiller 1975/1993: 15). Many of the issues on which Brownmiller sheds light in her work have remained key sites for feminist critical engagement. These include the historicisation of rape in different localities and contexts; the relationship between gendered power relations and rape; the relationship between sexuality and

¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations no. 19, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38.

² UN General Assembly Resolution 48/104, Declaration on the Elimination of Violence Against Women (20 December 1993).

violence within and outside the law; and how the dominant “common sense” understanding of rape plays out within the legal system, often in the form of rape myths (Weisberg 1996).

Another groundbreaking contribution to conceptualising women’s experiences of sexual violence is Liz Kelly’s (1988) book *Surviving Sexual Violence*, in which she developed the concept of a continuum of sexual violence in order to capture the range and extent of women’s experiences of violence perpetrated by men. The continuum firstly allows us to identify a “basic common character” underlying the many different forms of violence men use to control women, which include “abuse, intimidation, coercion, intrusion, threat and force” (p. 76). Secondly, the conceptual tool of the continuum enables the documentation and naming of the range of different forms of violence against women based on women’s own experiences (Kelly 1988). Here, the continuum refers to how “the categories used to name and distinguish forms of violence, whether in research, law or policy, shade into and out of one another”, which can pose a challenge to the ways in which we do research, implement policies and enact legal reform (Kelly 2012).

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 women who have been subjected to sexual and other gender-based violence: legislation inspired by feminist legal scholarship has been enacted, support services for victim-survivors have been developed, and more adequate police training has been implemented (Larcombe 2011; 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; Jehle 2012; Krahe 2016), while conviction rates for sexual abuse of minors are often somewhat higher (Jehle 2012). Therefore, if we generally believe that high levels of education, strong belief in adherence to the rule of law, relatively good health and welfare services, coupled with high levels of gender equality are the necessary ingredients to ensure high conviction rates in cases of rape, the Nordic countries seem to largely disprove that hypothesis (e.g. Lovett and Kelly 2009; Antonsdóttir and Gunnlaugsdóttir 2013; Aebi et al. 2014; Brå 2019a).

Using various approaches, feminist socio-legal scholars have theorised about the law’s limited ability to deliver justice in cases of gender-based violence, while coming to different conclusions in terms of how to respond to this problem. Drawing on Marx in her critique of the liberal legal system, Catharine MacKinnon (1989) argues that the state incorporates gendered, racial and class

inequalities into and as law; and sees law as the embodiment of state power, which is understood as equivalent to male power. In liberal societies that are characterised by patriarchy, two things happen according to MacKinnon: “law becomes legitimate, and social dominance becomes invisible”. Here, liberal legalism becomes “a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society” (p. 237). To further the agenda for social change, and for substantive gender equality, MacKinnon argues for a feminist jurisprudence, which is jurisprudence that presupposes gender inequality (MacKinnon 1989).

Inspired by Foucault, Carol Smart (1989) talks about the phallogocentrism of the law where the masculine heterosexual imperative (phallogocentric) merges with knowledge that is produced under conditions of patriarchy (logocentric), producing a “vision of law as a discursive field which disqualifies women’s accounts and experiences” (p. 86). Similar to MacKinnon, Smart sees law as grounded in patriarchy, as well as class and ethnic divisions. However, she is not in favour of substituting that with feminist jurisprudence; turning to law for solutions strengthens law instead of deconstructing it. She warns feminists against fixating on law as the main site of struggle in the attempt to transform women’s lives, and states: “accepting law’s terms in order to challenge law, feminism always concedes too much” (Smart 1989: 5). However, when it comes to rape, she claims that as rape is already in the legal domain, “it must be addressed on that terrain” (Smart 1989: 49). As a strategy to address this problem, she emphasises the importance of continually deconstructing the gender-blind discourse of law (Smart 1989).

Increasingly, some scholars are coming to the realisation that criminal justice is largely unable to effectively handle cases of sexual violence and meet victim-survivors’ justice interests (McGlynn et al. 2012 and 2017; Daly 2014 and 2017; Henry et al. 2015). It is, therefore, “the dominance of criminal law in the imaginative space of justice” that needs to be problematised (Henry et al. 2015: 6), if we are to further the justice agenda for victim-survivors of sexual violence. For research and policy making, Daly (2017) argues, this means that “we cannot continue business as usual”. Instead, a “radical reconceptualization” is needed to adequately address the question of justice for people who have been subjected to sexual violence (Daly 2017: 125), and we need more than one “justice pathway” for victim-survivors (Daly 2011: 2).

Research into different justice pathways for people who have been subjected to sexual violence has included exploring the justice potential of civil tort lawsuits (Feldthusen et al. 2000; Seidman and Vickers 2005; Godden 2012 and 2013; Swan 2013 and 2015); administrative justice (MacKinnon 1979; Swan 2015; Tani 2016); restorative justice practices (Daly 2002; 2006; 2011; 2012; 2014; Koss et al. 2003 and 2004; Koss 2006 and 2014; Ptacek (ed.) 2009; McGlynn et al. 2012; Zinsstag and Keenan (eds.) 2017); and transformative justice in the context of community-based accountability processes (Kelly 2010; Ansfield and Colman 2012; Caulfield 2013; Downes et al. 2016). It is this plural and exploratory approach of incorporating formal and informal justice processes and practices in the effort to further victim-survivors' justice agenda which informs this thesis.

In order to further develop justice options in cases of sexual violence, it is important to understand how victim-survivors perceive, experience, and understand justice. There is limited research on victim-survivors' understanding of justice, although there are important exceptions (Herman 2005; Jülich 2006; Holder 2015; Clark 2015; McGlynn et al. 2017; McGlynn and Westmarland 2019). These studies indicate that victim-survivors' understanding of justice is more complex and nuanced than what can be captured by conventional criminal justice and restorative justice (Herman 2005; Jülich 2006; McGlynn and Westmarland 2019), and that "satisfaction" as a measure to research victims' experiences of procedural and distributive justice in public institutions is inadequate (Holder 2015). For this purpose, McGlynn and Westmarland (2019) coined the term "kaleidoscopic justice", where justice is conceptualised as a "a constantly shifting pattern ... constantly refracted through new experiences or understandings ... an ever-evolving, nuanced and lived experience" (p. 1).

Situated within the field of feminist socio-legal studies, and drawing on victimology, feminist criminology, and feminist political philosophy, this compilation thesis contributes to the knowledge base and conceptual developments sketched out above in the context of Iceland and, to some extent, the other Nordic countries. The premise of the thesis is that, currently, justice is largely unattainable for victim-survivors of sexual violence. This injustice has to do with the pervasive devaluation of things coded as "feminine", and includes the denial of equal protections under the law (Smart 1989; Fraser 1997). 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 democratic theory of social justice as an overarching theoretical framework in this thesis (1997; 2003; 2009).

This 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. The aims guiding this compilation 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. Based on Nordic legal policy analysis and interviews with people in Iceland who had been subjected to sexual violence, the four papers making up this thesis explore various aspects of participants' understanding of justice in relation to different formal and informal justice processes and practices. Specific research questions are presented in each paper and are as follows:

- I. How is the "problem" of complainants' increased participatory rights and stronger legal representation represented in Danish and Norwegian policy documents on laws on criminal procedure? (Paper I).³
- II. From the perspective of victim-survivors in Iceland, is the prevalent legal arrangement, whereby victim-survivors are assigned the legal status of witnesses in criminal cases with limited procedural rights, a just arrangement? (Paper II).
- III. What is the role of space in the way victim-survivors of sexual violence in Iceland can experience justice outside of the criminal justice system? How can an understanding of space help us develop justice responses to sexual violence? (Paper III).
- IV. How do victim-survivors in Iceland understand monetary compensation? How can tort law meet victim-survivors' justice interests? (Paper IV).

Papers I and II focus on the status and rights of victims in the criminal justice procedure in the Nordic countries. In Paper I, 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, and find that these

³ This research question is developed based on the stated aim of the paper.

arguments are largely based on different interpretations of legal principles and assumptions about victims' needs and interests. This leaves the question of victims' status and rights open to the principles of social justice.

These findings inform Paper II, in which I also explore victim-survivors' experiences and thoughts on their legal status and rights in Iceland and their ideas about a just procedure. As opposed to framing victim-survivors' criticism of the criminal procedure as a question of their psycho-social needs, I analyse the findings using Nancy Fraser's (1997; 2009) theory of social justice, the normative core of which is parity of participation. I conclude that assigning victims the legal status of a witness in the criminal justice process, with limited informational and participatory rights, is wrong and a status injury, as it denies them the requisite standing as a result of institutionalised hierarchies of value within a gendered legal culture.

Paper III includes an exploration of victim-survivors' experiences of administrative justice procedures as well as informal justice practices in Iceland. Drawing on Liz Kelly's (1987; 1988; 2012) concept of the continuum of sexual violence, I develop the notion of a continuum of injustice, which 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. The findings suggest that being subjected to sharing social and geographical spaces with the offender in the aftermath of sexual violence can be mapped on the continuum of injustice. Furthermore, I show the importance of victim-survivors' "right to everyday life" (Beebeejaun 2017) in the aftermath of sexual violence, and find that one aspect of regaining a sense of belonging, which has been identified as an element of justice for survivors (Herman 2005; McGlynn and Westmarland 2019), is having the opportunity to (re)claim their space and regain a sense of freedom.

In Paper IV, I focus on the justice potential of civil tort lawsuits in cases of sexual violence, where the standard of proof is lower than in criminal cases and plaintiffs have party status and equal control over the action. Apart from the financial risk, victim-survivors expressed high levels of ambivalence towards this justice option. Many felt that given their often extensive pecuniary and non-pecuniary losses, it was only fair to receive compensation. At the same time, they did not want to accept "dirty money"; considered that pursuing monetary compensation could undermine their credibility; and found that monetary compensation only partially aligned with their ideas about justice. I suggest that monetary compensation in this context can be understood as a taboo trade-off

(Fiske and Tetlock 1997), which feeds into rape myths about how “real” victims behave (e.g. Edwards et al. 2011; Dinos et al. 2015). Moreover, the findings indicate that a favourable verdict in a civil tort lawsuit and monetary compensation only partially align with survivors’ understanding of justice (Daly 2017; McGlynn and Westmarland 2019). I suggest that state intervention is needed to send a normative signal about the appropriateness of this legal option and to incentivise wrongdoers to take responsibility for their actions, and thereby better meet the justice interests of survivors.

From a broader socio-legal and political perspective, it is also relevant to consider the possible implications of decentring criminal law in the imaginative space of justice if accompanied by the proliferation of different formal and informal justice processes and practices. Here, I suggest, Fraser’s (2008; 2009) concepts of normal and abnormal justice are useful. Normal justice refers to the contestation over justice which nonetheless rests on shared underlying assumptions. Abnormal justice, on the other hand, refers to a situation where disputants do not share a common understanding of what justice claims should look like, where to seek redress, the conceptual space within which claims for justice can arise, and which social differences can entail injustices (Fraser 2008; 2009). The decentring of 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 herald a paradigm shift, a revolution, before a new normal is established.

In the next chapter, I will proceed to review the literature on different conceptualisations of justice in relation to different formal and informal justice processes and practices. These include criminal justice, civil justice, administrative justice, restorative justice, and transformative justice. In addition, I will provide a review of the literature concerning the way in which victim-survivors of sexual violence experience and understand the meaning of justice.

Traditional and Non-Traditional Justice in Cases of Sexual Violence

Here, I will present a review of the literature in relation to different justice mechanisms and practices as they relate to cases of sexual violence. These include: the criminal justice system, tort law, institutional complaint mechanisms based on administrative law, restorative justice, and transformative justice. Here, the criminal justice system is understood as the justice mechanism that is traditionally used in cases of sexual violence, as it is explicitly charged with ensuring justice in cases of sexual violence. While tort law and administrative law belong to the traditional branches of the law, their limited use in cases of sexual violence makes it possible to conceptualise them as non-traditional justice mechanisms in that context. I will also discuss the justice potential of restorative justice and transformative justice in the context of community-based accountability processes.

Criminal Justice

The justification for assigning the central role of criminal justice to the state is often derived from social contract theories. Here, the idea is that citizens give up their right to use force against those who attack their interests in return for the state's promise to protect them by maintaining law and order. Some of the contemporary rationales for the enforcement of criminal justice include deterrence, rehabilitation, incapacitation, and retribution (Ashworth 2005). In cases of sexual violence, however, states have long been criticised for not delivering on their promise.

For decades now, one of the main focus areas of the international gender equality movement has been to improve the treatment of crimes which

disproportionately target women, such as sexual violence (UN Women n.d.; UN Trust Fund to End Violence against Women n.d.). Despite considerable improvements in terms of enactment of legislation inspired by feminist legal scholarship, support services for victim-survivors, and more adequate police training, attrition rates are high in cases of sexual violence, particularly in cases of rape. Lovett and Kelly’s (2009) groundbreaking comparative study on attrition and conviction rates in rape cases across 11 European countries for the years 2001–2007 convincingly shows an overall pattern of increased reporting rates and falling prosecution and conviction rates.

More recent comparative flow statistics are not available, but statistics published in the European Sourcebook of Crime and Criminal Justice Statistics (European Sourcebook) offer some comparative information for the years 2007–2011 (Aebi et al. 2014). For comparative purposes, the offence definitions in the Sourcebook are operational but not legal definitions. The operational definition of rape is “sexual intercourse with a person against her/his will (per vaginam or other)” (Aebi et al. 2014: 369).⁴ It is important to note that one of the main challenges to comparative criminology is the incompatibility of national definitions of official crime data, in addition to different legal systems and recording practices (Jehle 2012). Comparative figures should, therefore, be interpreted with caution. Shown below are recorded rape offences from the Nordic countries for comparison as reported in the European Sourcebook.

Table 1: Registered rape offences per 100 000 population.

	2007	2008	2009	2010	2011
Denmark	13.4	11.4	10.2	10.9	10.1
Finland	14.0	17.3	12.4	15.3	19.3
Iceland	37.1	30.4	31.0	30.9	40.2
Norway	22.7	22.4	23.2	21.6	24.7
Sweden	52.1	59.3	64.1	63.8	69.4

For comparison: Statistics in total for 35 European Jurisdictions

Mean	10.7	10.7	10.6	10.9	11.6
Minimum	0.5	0.7	1.0	0.7	0.5
Maximum	52.1	59.3	64.1	63.8	69.4

Note: Statistics from the European Sourcebook of Crime and Criminal Justice Statistics (Aebi et al. 2014: 42).

⁴ Where possible, the figures include: penetration other than vaginal, violent intra-marital sexual intercourse, sexual intercourse without force with a helpless person, sexual intercourse with force with a child, and attempts. They exclude: sexual intercourse with a child without force, other forms of sexual assault (Aebi et al. 2014: 385).

As Table 1 shows, reported offences are significantly higher in Sweden than in the other countries and indeed the highest of all the 35 European jurisdictions. However, these figures are influenced by the Swedish legislation reform on sexual crimes which came into force on 1 April 2005, whereby the definition of rape was expanded.⁵ The changes included lowering of the requirement of force and the broadening of the definition of rape, with certain acts which were previously classified as “sexual exploitation” now classified as rape. In addition, a new penal provision on rape of a child was introduced, as well as a new offence called “sexual exploitation of a child”, which regulates cases of rape of a child that are understood as less serious in view of the circumstances of the crime (Jehle 2012).⁶ Moreover, Sweden applies a system of expansive offence counts. If a person has been raped several times by the same offender on the same occasion or over a long period of time, these are registered as two or more offences (von Hofer 2000). This expansive counting method coupled with changes to legislation have contributed to higher offence rates and the apparent upward trend in rape in Sweden (Jehle 2012). Otherwise, we see a relatively consistent trend between the Nordic countries for the years 2007–2011, where the statistics from Denmark are similar to the European average, while others follow with increasingly higher reporting rates in the following order: Finland, Norway, Iceland, and Sweden. Across the European jurisdictions, 1.5% of the offenders were females, and the average proportion of minor offenders was 12% (Aebi et al. 2014). It should be noted that there are a range of factors that could explain these differences which are not explored here, including legal definitions and recording practices.

Table 2: Persons convicted for rape per 100 000 population.

	2007	2008	2009	2010	2011
Denmark	1.8	1.6	1.8	1.6	1.9
Finland	2.0	2.1	2.2	1.8	2.4
Sweden	4.0	4.6	4.4	3.8	3.5

For comparison: Statistics in total for 38 European Jurisdictions

Mean	1.8	1.7	1.7	1.7	1.5
Minimum	0.2	0.1	0.2	0.2	0.2
Maximum	6.9	6.1	5.7	6.2	8.7

Note: Statistics from the European Sourcebook of Crime and Criminal Justice Statistics (Aebi et al. 2014: 163).

⁵ In the years 2003 and 2004, the rate of rape per 100,000 in Sweden was at 29, in 2005 at 42, in 2006 at 46, and at 53 in 2007 (Jehle 2012).

⁶ Swedish Government Bill 2004/05:45, New legislation on sexual crime (En ny sexualbrottslagsstiftning).

Table 2 shows the number of persons convicted for rape per 100,000 population. Statistics from Iceland and Norway are not available for this comparison. Again, Denmark is close to the European average, while Finland is slightly higher and Sweden significantly higher. Comparing Tables 1 and 2, we see that conviction rates are low in relation to the number of registered cases. For the years 2007–2011, Lithuania has the highest conviction rate per 100,000 in Europe. The high conviction rate in Lithuania does not come with an explanation, but a contributing factor may be that Lithuania has, like Sweden, a broader definition of rape which includes sexual intercourse with a child without force (statutory rape), and the age of consent is 16 years, while it is 15 years in Sweden (Aebi et al. 2014).

While these numbers give an indication of the overall trend within each country in terms of reported cases and conviction rates, they paint an incomplete picture. In addition to the problem of varying definitions of offences coupled with different recording practices, these figures do not provide information on where in the criminal justice procedure the attrition occurs. Moreover, reported cases do not tell us about the overall prevalence rate of rape and other sexual offences. While attrition is a phenomenon that applies to criminal offences in general, there is evidence to suggest that it is particularly common in cases of sexual assault (Krahé 2016), which is often attributed to deficient evidence or lack of evidence (Antonsdóttir and Gunnlaugsdóttir 2013; Brå 2019a; Jehle 2012). This is, however, also tied to the evaluation of evidence in the context of the interpretation of the criminal standard of proof (beyond reasonable doubt). International research spanning decades has convincingly shown that rape myths can influence judicial decision making to the detriment of victims' credibility (Ehrlich 2001; Temkin and Krahé 2008; Walklate 2008; Edwards et al 2011; Dinos et al 2015; Ívarsdóttir 2019). That discussion is, however, beyond the scope of this thesis.

One of the ways in which the legislature has responded to the low conviction rates in cases of rape is to expand and reformulate the definition of rape. Feminist scholars have debated whether the definition of rape should be centred on force/coercion or on non-consent (see for example MacKinnon 1989; Andersson 2001; Munro 2010; Burman 2010; MacKinnon 2006; 2013). In the Nordic context, the legal definition of rape has historically been defined on the basis of force/coercion and, more recently, the inability of the victim to resist. In 2018, however, both Iceland and Sweden changed their laws to include lack of consent as a part of the legal definition of rape. In addition, Sweden followed Norway and

also criminalised negligent rape and, in addition, negligent sexual abuse in which the offender had not intended to commit rape or assault. It remains to be seen whether this will affect prosecution and conviction rates in these Nordic countries.

Over the last years in Sweden, around 5% of reported rapes have led to a conviction. In a recent study commissioned by the Swedish government, the question was asked whether there is scope to increase the proportion of prosecutions and convictions in rape cases by increasing the quality of work carried out by police and prosecutors (Brå 2019a). The study was based on a content analysis of 785 randomly selected rape cases from 2016, and all verdicts in rape cases from 2017 where the victims were women aged 15 years and older. The study found that, theoretically, the potential to increase prosecution and conviction rates lies in cases where charges were not issued primarily because of the following reasons: 1) the victim did not want to participate in the investigation, 2) the police failed to question the suspect, or 3) the evidence was insufficient. This applied to half of the cases which did not lead to charges being issued. Based on an in-depth analysis of 200 police investigations, the study found flaws in a considerable number of investigations, pertaining to both investigations that dragged on in terms of time and the disuse of available investigative measures. However, the findings also showed that charges were more often issued in cases where the suspect had a non-Swedish background (Brå 2019a).

The most recent study conducted in Iceland tracking attrition and conviction rates in rape cases included all rape cases reported over a two-year period in 2008 and 2009 (Antonsdóttir and Gunnlaugsdóttir 2013). The study found that police investigations were discontinued in 53% of the cases. Of the cases sent to the prosecutor, 65% of cases were dropped, largely due to lack of evidence. The overall conviction rate for reported cases was 13%, or 23 out of 181 cases.⁷ Similar to the Swedish study, cases were significantly more likely to result in a prosecution if the case was reported within 24 hours of the offence; if the police used coercive measures; and if the police used more extensive investigative measures. Another similarity was that cases were found to be significantly more often referred to the public prosecutor when the accused was a foreign national rather than an Icelandic national. However, prosecutors were less likely to issue charges in those cases than in cases where the accused was an Icelandic national. Charges were significantly

⁷ This overall conviction rate does not include cases where the statute of limitation had run out (two cases) and where the offender was too young to face charges (six cases).

more often issued in cases where the accused suffered from mental health or social problems and/or had an alcohol or drug use problem (Antonsdóttir and Gunnlaugsdóttir 2013). In a 2014 study on the views of professionals working within the criminal justice system, one of the findings included the perceived importance of improving the education and training of police investigators (Antonsdóttir 2014).⁸

Based on these Nordic studies, there is reason to believe that improving the criminal justice procedure, in particular the quality of police training and investigations, could lead to increased prosecution and conviction rates. However, there is also cause for concern that higher conviction rates could disproportionately affect vulnerable offenders as opposed to the average offender. From the perspective of victim-survivors, achieving justice in the form of a criminal conviction therefore remains an unlikely outcome in cases of sexual violence, particularly in cases of rape. However, experiencing a sense of justice is not only tied to the outcome of the case, but is also related to the way in which people experience the justice procedure.

Criminal Procedural Justice

Studies in the field of victimology have shown that it is important for people who have been victimised to be treated with dignity and respect by the police and legal professionals; to be informed about how the criminal justice system works and how their case is progressing; and to be able to participate and have a voice in the criminal justice process (Wemmers 2010; Laxminarayan 2012). In the context of common law jurisdictions, feminist socio-legal scholars have shown how the marginal legal status and limited rights of victims in cases of sexual and gender-based violence function to the detriment of survivors (e.g. Temkin 1987; Smart 1995; Lees 2002; Wolhuter et al. 2009).

The legal status and rights of victims differ between the Nordic countries, and have historically been stronger in Finland and Sweden than in Denmark, Norway and Iceland. In Finland and Sweden, victim-survivors can obtain full party status in the criminal case as auxiliary prosecutors with full participatory rights. In Sweden, however, this only applies if and when the prosecutor decides to issue

⁸ In the case of Iceland, police education was conducted on a high school level before 2018, but now takes place at a university level.

charges in the case, and victim-survivors therefore have limited informational rights during the police investigation stage. In Denmark, Norway and Iceland, on the other hand, victim-survivors have the legal status of witnesses, as is the case in the common law countries, with limited informational and participatory rights (Robberstad 2002). In 2008, however, victims' rights were strengthened considerably in Norway and now victims of serious crimes, such as cases of sexual violence, have been afforded increased party-like rights (Robberstad 2014). In all of the Nordic countries, the victim-survivor can file a private compensation claim as part of the criminal case and can thereby obtain legal standing in relation to this claim (adhesion procedure). However, there is variation between the Nordic countries in terms of the rights this affords victim-survivors (Robberstad 2002; 2014).

There is limited research on how survivors of sexual violence experience their legal status and rights. In Sweden, several studies have looked at the experiences of victims in general of the criminal justice process, which include survivors of sexual violence (e.g. Lindgren 2004; Brå 2010; Carlsson and Wennerström et al. 2010). In addition, there is research on the experiences of child victim-survivors of sexual abuse in the criminal justice system (Back 2012; Johansson 2011). Other studies have looked at how victims of violence in close relationships experience the criminal justice system (e.g. Agevall 2012). However, research and policy debates regarding the rights of victim-survivors in Sweden have mainly focused on their need for support and assistance (Wergens 2014).

In Norway, there is limited research on victim-survivors' experiences of the criminal justice system, with the important exception of Vigrestad's (2004) Master's thesis, for which she interviewed eight women who had been subjected to rape and had reported it to the police. These women had experienced the criminal justice process before the legal status and rights of victims were strengthened in Norway in 2008. They were reported to have felt marginalised throughout the criminal justice process, and wished to be a part of the case and to have the same rights to participate as the defendant (Vigrestad 2004).

Papers I and II in this thesis contribute to the research in the field of sexual violence and procedural justice in the Nordic context, which is at present limited. In Paper I, I conduct a critical analysis of Danish and Norwegian legal policy documents on the status and rights of victims in cases of sexual violence. In Paper II, building on the previous paper, I conduct a thematic analysis of interviews with

victim-survivors in Iceland about their views and experiences of the criminal justice procedure.

Civil Justice

In recent years, there has been a considerable rise in tort claims filed in the United States by victims of rape and sexual assault, although these claims are mostly filed against third parties such as employers, businesses, and institutions (Bublick 2006; Swan 2013; Swan 2015). A number of such cases have also been identified in Canada (Feldthusen 1993; Feldthusen et al. 2000) and in the United Kingdom (Godden 2013), including recent notable cases in Scotland (Ross 2017; Carrell 2018). Stand-alone civil lawsuits in cases of serious sexual violence, such as rape, seem to be very rare in Iceland and in the other Nordic countries (Antonsdóttir 2014).

When examining legal practice in the field of tort law, feminist scholars have pointed to evidence of structural biases which function to the detriment of women and minorities (e.g. Bender 1993; MacKinnon 1979; Chamallas 1998; Conaghan 2003; Adjin-Tettey 2004; Chamallas and Wriggins 2010; Richardson and Rackley 2012). Chamallas (1998) has shown for example how hierarchies of value play out in legal practice, where physical injury and property damage are valued more highly than emotional injury or relational harm. MacKinnon (1979) has further emphasised that sexual violence should not simply be treated as a private tort injury, because sexual violence is also a social wrong.

Despite these challenges, legal scholars have noted a number of advantages to civil claims. Firstly, plaintiffs are considered full legal subjects, and therefore have more control over the action than in a criminal case. Secondly, the standard of proof in private law/civil law is lower than in criminal law. Thirdly, although private lawsuits are intended for civil wrongs and criminal law for public wrongs, both can have a deterrent effect in practice. Furthermore, an increasing number of successful claims can motivate others to take legal action and thereby have a public impact (Perry 2009; Godden 2013; Swan 2013). On the other hand, the main drawbacks include that plaintiffs have to finance their own lawsuits, and that there is a real risk of impecunious defendants. In addition, the admission of sexual history evidence would not be limited as is often the case in criminal law (Godden 2012). Also, framing rape as a civil wrong as opposed to a criminal

wrong would place the responsibility of pursuing a case on the survivor, which “could trivialise and privatise the wrong and harm of rape” (p. 164). There is seemingly little research on how victim-survivors of sexual violence understand or experience using tort law, although the Canadian studies by Des Rosiers et al. (1998) and Feldthusen et al. (2000) are important exceptions.

In Iceland, as is common in many civil law jurisdictions, the complainant has the right to file a civil claim in conjunction with the criminal case (Brienen and Hoegen 2000). However, in most of the Nordic countries, including Iceland, judges are not allowed to consider the civil claim unless the accused is found guilty of the crime. This has to do with the so-called same-direction principle (*ensretningsprincippet*), which means that the outcome of the tort claim should follow the same direction as the outcome of the criminal case. Therefore, the standard of proof required is, in fact, the criminal standard as opposed to the civil standard. In Norway, however, judges are not required to follow the same-direction principle, and it is not uncommon that compensation claims are considered independently from the criminal case. This means that even if the accused is not found guilty, the court can consider the compensation claim and the acquitted person can be liable to pay damages. Here, the court does not use the criminal standard of proof (beyond reasonable doubt) but rather a lower burden of proof similar to that of clear and convincing evidence (or *klart sannsynlighetsovervekt*).

This Norwegian practice of not following the same-direction principle has been much discussed among legal scholars and practitioners in Norway and Denmark. Some argue that the Norwegian legal practice is preferable from an efficiency point of view, since the victim does not have to pursue a civil tort case after an acquittal in the criminal case, and this allows victims better access to justice, as financial risk might otherwise prevent victims from pursuing their rights in a civil case (Garde 1998; Strandbakken 1998; Strandbakken og Garde 1999; NOU 2000; Bet nkning 2010). Others argue that the same-direction principle should apply, to ensure that the decision in the criminal case is unequivocal and that the acquittal is not put in doubt (Smith 1999; 2004a; 2004b; 2007). The issue has also been raised that this Norwegian legal practice can have unforeseeable influence on the handling of the case. It is possible that judges might find it easier to acquit the accused if it is also possible to find them liable to a degree. On the other hand, judges might become hesitant to find the defendant liable for damages after having found them not guilty of the crime (NOU 2016).

This practice by the Norwegian courts of assessing compensation claims independently after an acquittal in the criminal case has been challenged before the European Court of Human Rights (ECHR), particularly on the basis of Article 6(2), which states: “Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law” (see *Y v. Norway* 2003 (56568/00); *Ringvold v. Norway* 2003 (34964/97); *Orr v. Norway* 2008 (31283/04)). In short, the ECHR found that to evaluate the civil claim on the basis of a lower burden of proof does not, in and of itself, violate Article 6(2) as long as the practice is not contrary to domestic legislation, and the boundaries between the compensation claim and the criminal case are not blurred in the legal assessment and the subsequent wording of the verdict (*Y. v. Norway*, 11 February 2003 (56568/00)). This Norwegian legal practice offers a stark example of how it is possible to reach two different legal outcomes based on different standards of proof.

In the context of Western countries, there is limited research on how victim-survivors of sexual violence experience pursuing civil tort lawsuits. Although 20 years old, a key study in this context was made by Feldthusen et al. (2000), where interviews were conducted with survivors of sexual violence in Canada who had pursued compensation in different ways, including tort lawsuits (see also Des Rosiers et al. 1998). Generally, the most common motivation for pursuing compensation among victim-survivors was to seek public affirmation of the wrong committed against them, to have their experiences acknowledged, and to gain a sense of closure. Financial reasons were mostly a secondary motivation. Many participants understood the compensation received as a symbol of acknowledgement and understanding of the impact the violence had had on them and their lives. However, some reported that they had experienced the financial awards as “dirty money”, “hush money” or “blood money” (Feldthusen et al. 2000: 98).

Studies on victim-survivors of sexual violence who have pursued financial assistance from a state-based compensation scheme indicate that at least some survivors are hesitant and/or ambivalent when it comes to pursuing monetary compensation. Some attach negative connotations to what they perceive as being paid for having been subjected to sexual violence; and feel that pursuing compensation may undermine their credibility due to the myth of women lying about rape for monetary gain, and the associated social stigma (Holder and Daly 2018; Smith and Galey 2018).

In the Nordic context, little is known about how victim-survivors of sexual violence experience monetary compensation, although a few studies have explored the meaning of compensation for victims more generally (Dahlstrand 2012; Viblemo et al. 2019) and for young survivors of the Utøya shooting in Norway (Nilsen et al. 2016). Paper IV of this thesis contributes to research in this field, where I explore how victim-survivors in Iceland understand and experience compensation in cases of sexual violence and how stand-alone civil tort suits align with their understanding of justice.

Administrative Justice and Labour and Employment Laws

In her influential book *Sexual Harassment of Working Women* (1979), Catherine MacKinnon made the argument that sexual harassment in the workplace should be understood as discrimination on the basis of sex, as it systematically disadvantages women in the workplace. Today, the use of administrative law and procedures to handle cases of gender-based discrimination is widely practised in cases of sexual harassment. Laws on gender equality, particularly in terms of equal employment opportunities, define sexual harassment as a form of discrimination and workplaces are encouraged, or mandated, to establish procedures, such as complaint procedures, to respond to allegations of sexual harassment.

In 1989, MacKinnon further argued that sexual violence should also be understood as a form of gender discrimination (MacKinnon 1989). An internationally well-known example of treating sexual violence as a form of discrimination within the framework of administrative justice is Title IX of the United States Education Amendments of 1972. Title IX mandates non-discrimination on the basis of sex in all educational programmes and activities receiving federal funds, and is increasingly being used in cases of sexual violence on college campuses (Tani 2016). There is, however, an on-going debate on how best to ensure procedural fairness in such cases (Swan 2015).

In Iceland, there are two different legislative frameworks that pertain to sexual harassment and violence in the workplace. Firstly, the Icelandic Act on Equal Status and Equal Rights of Women and Men (No. 10/2008, the Gender Equality Act) explicitly includes gender-based violence as a form of discrimination in

addition to sexual harassment. Article 22 of the Gender Equality Act now stipulates that “[e]mployers and the directors of institutions and non-governmental organisations shall take special measures to protect employees, students and clients from gender-based violence, gender-based harassment or sexual harassment in the workplace, in institutions, in their work for, or the functions of, their societies, or in schools”. The Centre for Gender Equality, under the control of the Minister, is charged with handling administration in the sphere covered by this Act. If the Centre for Gender Equality has reason to suspect that an institution, enterprise, or non-governmental organisation has violated this Act, it shall investigate whether there is reason to request the Gender Equality Complaints Committee to examine the matter. Violations of the Act, or of regulations issued thereunder, may be punishable by fines to be paid to the State Treasury, unless heavier penalties are prescribed in other statutes.

Secondly, Article 65 of the Act on Working Environment, Health and Safety in Workplaces, No. 46/1980 stipulates that “[t]he employer shall be responsible for drawing up a written programme of safety and health in the workplace”. Accompanying regulation no. 1009/2015 further stipulates that the employer shall make a risk and safety assessment and describe how they will respond to complaints, tip-offs, or a reasonable belief that bullying, sexual harassment, gender-based harassment, or violence is taking place or has taken place at the workplace⁹. The Administration of Occupational Safety and Health is charged with monitoring the implementation of the regulation. Non-compliance is punishable by fines paid to the State Treasury, unless heavier punishment is applicable through other legislation.

It has, however, been pointed out that these two legislations overlap, and that there is a need to harmonise and clarify the legislative framework in this regard (Bjarnadóttir 2019) and ensure a more coordinated approach by the institutions charged with monitoring the implementation of procedures (Valdimarsdóttir et al. 2019). The Gender Equality Act is currently undergoing a review.

With one notable exception, there is scarce research on how these legislative frameworks work for people who have been subjected to sexual violence and harassment. Following the #MeToo movement, the issue of sexual harassment has come into sharp focus in Iceland, and in 2019 the Social Science Research

⁹ Regulation about Actions against Bullying, Sexual Harassment, Gender-Based Harassment and Violence in the Workplace No. 1009/2015.

Institute at the University of Iceland conducted a study for the Ministry of Social Affairs on the prevalence and nature of bullying and sexual and gender-based harassment in the Icelandic labour market (Valdimarsdóttir et al. 2019).¹⁰ The findings suggest that while employers largely find that they have adequate response plans in place, employees are critical in this regard and report that employers and workplaces are not responding adequately in cases of bullying and sexual and gender-based harassment. According to the study, around 16% of employees reported having been subjected to sexual harassment in the workplace, or 25% of women and 7% of men. Participants with disabilities or impairments were more likely to have suffered sexual harassment in the workplace than others. Participants of a foreign background were less likely to report having been subjected to sexual harassment than those with Icelandic citizenship. However, based on the result of the qualitative part of the study, there are indications that this difference can be traced to different cultural understandings. Younger people, between 18 and 25 years of age, were more likely to report having been subjected to sexual harassment than older participants (Valdimarsdóttir et al. 2019).

According to the study, offenders were largely male co-workers, male employers or supervisors, and male customers and clients. Only 19% of those who reported having been subjected to sexual harassment chose to formally complain. Of those who did file a complaint, 42% had done so at their place of work and 12% had done so to their labour union.¹¹ According to complainants, their complaint led to improvements in 62% of cases, around a third said that the complaint did not lead to any changes, and 7% said that the situation had worsened following the complaint. For those who did not come forward with a complaint, 66% reported that the reason had been that they did not feel the harassment was serious enough. Other reasons, however, were that they did not know who to turn to, thought

¹⁰ The survey results are based on three different samples conducted by the Social Science Research Institute at the University of Iceland in 2019: 1) randomised sample of 5,500 people between the ages of 18-68 from the Social Science Research Institute's internet panel. The response rate was 45%. 2) randomised sample of 3,000 immigrants from the Registers Iceland. The response rate was 32%. 3) randomised sample of 600 companies in Iceland with five employees or more from the Credit Info register. The response rate was 60%. Responses in samples 1 and 2 were merged and weighed based on gender, age, residence and education. In addition, 21 interviews were conducted with people who had experienced bullying or sexual harassment in the workplace (equal numbers of men and women, Icelandic and non-Icelandic citizens). Two focus groups were also conducted with employers and human resource managers.

¹¹ In addition, 46% had filed a complaint elsewhere.

that the situation might worsen, or did not trust anyone at the workplace (Valdimarsdóttir et al. 2019).

According to the same study, 35% of employers reported that a response plan had been put in place to process complaints about bullying, sexual harassment, and gender-based violence and harassment. However, this percentage varied based on the size of the workplace: 75% of workplaces with 50 employees or more, 31% of medium sized workplaces, and 16% of workplaces with less than 10 employees. Around half of these workplaces had presented the response plan to their employees during the last 12 months at the time of the survey, and only 18% of employers had attended courses on prevention and responses to cases of bullying, harassment, and violence (Valdimarsdóttir et al. 2019).

The study further found that around 2.5% of employers reported that they had received a formal complaint about sexual harassment and 3.3% had received an informal complaint. In addition, 1.1% of employers had received a formal complaint about gender-based violence. According to employers, they had always responded in some way to formal complaints, either by conducting discussions with the offender or, in some cases, the offender was dismissed.¹² In cases of informal complaints, the most common response from employers was to talk to both parties, and in some cases employers and employees had been offered education. One of the difficulties in cases of sexual harassment raised by employers in focus group interviews was related to issues of proof, or as one participant said: “I believed her. That was not the problem. But the problem was that we didn’t have anything to hold on to. She didn’t have anything in writing, and no one saw anything” (Valdimarsdóttir et al. 2019: 171).

In a notable case associated with the #MeToo movement in Iceland, which has received much media attention, the Reykjavík City Theatre (henceforth the Theatre) and the theatre director were sued by a former employee, a well-known actor in Iceland, who had been dismissed following complaints from a number of women, including employees, who accused him of having subjected them to sexual harassment. Although the employee received a paid period of notice as per his employment contract, the Reykjavík District Court found both the Theatre

¹² The response plan was activated in three out of seven cases of sexual harassment and in two out of three cases of violence. Offenders had been dismissed in three out of seven cases of sexual harassment and in two out of three cases of psychological or physical violence. In four out of seven cases of sexual harassment, the investigation was conducted by an external actor, otherwise they were investigated by persons within the workplace (Valdimarsdóttir et al. 2019).

and the theatre director personally liable for damages based on a wrongful dismissal. According to the verdict, regulation no. 1009/2015 had not been sufficiently adhered to. The theatre director had respected the wishes of the women to remain anonymous, but the court found that the employee had not been sufficiently informed about the exact nature of the complaints in order to be able to respond to them. The court also found that the Theatre should have offered the employee an opportunity to change his behaviour before deciding to dismiss him (Verdict E-137/2019).

The verdict has been criticised on numerous fronts, not least for turning the purpose of the regulation on its head given that its aim is to protect those who are subject to sexual harassment and violence. Moreover, the Theatre is run by the Reykjavík Theatre Company and is therefore not a public institution. Rules stating that a formal warning must be issued before a decision of dismissal is taken do not apply to the private sector. In addition, the employee did not base his lawsuit on this aspect of the employment laws (Júlíusdóttir 2019). While the verdict has been appealed, it raises questions about the de facto ability of employers to protect their employees from sexual harassment and violence.

Two of the participants in this study had experienced using administrative complaint procedures. In Paper III, their experiences, among others, are analysed in relation to their understanding of justice.

Restorative Justice

While restorative justice is not a focus of any of the papers making up this thesis, there is reason to discuss the justice potential of restorative justice for victim-survivors here, since it is the most prominent justice option outside the legal system and has influenced other justice processes and practices.

The main focus of restorative justice is dealing with the aftermath of crime by repairing the harm done to people and relationships (Braithwaite 1989; 1999). Restorative justice has been described as a philosophy or a paradigm which includes guiding principles and values but is comprised of many different models, and has predominantly been used in relation to youth crime (Zinsstag and Keenan 2017). In some countries, however, restorative justice is used in all types of cases, including cases of sexual violence, such as in Belgium, Denmark, Norway, New Zealand, Canada, and Australia (Keenan 2017).

The United Nations Handbook on Restorative Justice Programmes (United Nations Office on Drugs and Crime 2006) defines restorative justice processes and outcomes as:

... any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. [...] Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender (United Nations Office on Drugs and Crime 2006:100).

There are a number of different models that have been developed under the auspices of restorative justice. The models that have been used in cases of sexual violence are mostly victim-offender mediation/dialogue (VOM/VOD) and family group conferencing (or conferencing). VOM/VOD is a primarily dialogue-driven encounter between the victim and the offender, with minimal involvement of the mediator. VOM/VOD emphasises victim empowerment, offender accountability, and restoration of losses. Conferencing is based on similar principles to VOM/VOD, but is used in cases where family members or members of the community are involved in addition to victims and offenders (Ptacek 2009; Zinsstag and Keenan 2017).

In cases of sexual violence, the benefit of restorative justice has been questioned, given that the primary focus of many such programmes is to integrate the offender back into the community and therefore victims' needs and interests can end up in second place. Further, there is an underlying assumption in restorative justice practice that victims are angry with their offenders, while cases of violence against women are often characterised by a lack of anger and a strong sense of self blame and shame (Ptacek, 2009:19-23).

From a feminist perspective, scholars have been critical of using restorative justice in cases of gender-based violence. Their concerns include that restorative justice might risk re-privatising gender-based violence (e.g. Coker 2002; Stubbs 2002); might risk survivors' safety and allow for revictimisation due to power imbalance (e.g. Stubbs 2002; Coker 2002; Daly and Stubbs 2006; Keenan and Zinsstag 2014); is not able to guarantee offender accountability and responsibility (e.g. Stubbs 2002; Cossins 2008; Herman 2005); is based on an assumption that community members will be supportive to survivors and contribute to holding

offenders to account, which cannot be guaranteed (Niemi-Kiesiläinen 2001; Coker 2002; Herman 2005); and is inadequate in addressing the broader structural inequalities of race and class in which gender-based violence is embedded (Coker 2002).

There are, however, examples of restorative justice programmes that have been specially designed to be victim-centred, with a strong focus on trained personnel, careful case selection, survivor safety, and management of power imbalances. These include the RESTORE¹³ Program in Arizona, United States (Koss 2014), and Project Restore in New Zealand, which is inspired by the former (Jülich and Landon 2017). Therefore, there is reason to discuss in more detail the outcomes of these programmes from survivors' perspective.

RESTORE is a restorative justice conferencing programme adapted to prosecutor-referred adult misdemeanour and felony sexual assaults (Koss, 2014:1623). Components of the RESTORE conferences importantly include “voluntary enrolment, preparation, and face-to-face meeting where primary and secondary victims voice impacts, and responsible persons acknowledge their acts and together develop a re-dress plan that is supervised for 1 year” (Koss, 2014:1623). The project has undergone an empirical outcome evaluation of 22 cases. Although the sample is small, the findings indicate that victim-survivors and responsible persons (the one responsible for the injustice) generally felt safe, listened to, supported, and treated fairly in the process. The results were more mixed when it came to whether the responsible person seemed to accept responsibility according to the victim, although 66% of the victims strongly agreed that they did, while 33% disagreed/strongly disagreed. In terms of the responsible person feeling sincerely sorry, all responsible persons reported feeling sorry, although according to victims, only half of them seemed sincerely so (Koss, 2014).

In a recent study, Jülich and Landon (2017) report findings from a desk-based case review of 12 cases of sexual violence that were referred to Project Restore in New Zealand over an 18-month period between 2011 and 2012, all of which were referred by the court system for pre-sentence restorative justice. The analysis was made using Daly's (2014) Victimisation and Justice Model as a framework to analyse to what degree victims' justice needs and interests were met through the

¹³ RESTORE stands for Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience.

restorative justice programme. Daly's (2014; see also 2017) model provides a framework to determine whether a justice mechanism is effective from a victim perspective, and identifies specific victim justice interests as being prerequisites for victims to experience a sense of justice. These include: being informed of their options in order to be able to participate and ask questions throughout the justice process; having a voice and be able to tell their own truth about what happened and how it has affected them; having their experience validated, believed, and not blamed; being vindicated in some form, either by the legal system or their community; and there needs to be offender accountability in some form, which can include offenders taking active responsibility for the wrong caused, showing regret and remorse, or to receiving censure or sanction (Daly, 2014: 388). Jülich and Landon's (2017) findings indicate that these justice interests were met to a large extent, except in terms of offender accountability, which depends on the ability of the offender to understand the impacts of their harmful behaviour.

These studies indicate that specially designed victim-centred restorative justice programmes can, to a degree, meet victim-survivors' justice needs and interests, although the results are mixed when it comes to victim-survivors' perceptions of offender accountability. However, in the two programmes mentioned above, cases are referred to restorative justice either from prosecutors who deem them "provable at trial" (Koss 2014) or from the courts, where offenders have acknowledged wrongdoing or have pleaded guilty to a crime (Jülich and Landon 2017). Therefore, these are not representative of the majority of cases of sexual violence in which those accused readily deny all charges. However, there are also examples of cases where restorative justice has been used independently of the criminal justice system with favourable outcomes for survivors. McGlynn et al. (2012) conducted an exploratory study of a restorative justice conference involving an adult survivor of child rape and other sexual abuse. When asked if she would recommend restorative justice to another woman in similar circumstances, she is reported to have replied that "if the woman was at the right stage in her recovery, sufficiently strong to undertake a conference, and after ensuring the necessary professional support and careful planning, then she should: 'take a deep breath and do it'" (p. 240).

In the Nordic countries, victim-offender mediation is widely practised in Norway, Denmark and Finland, but to a much lesser extent in Iceland and Sweden (Nylund et al. 2018). According to the Icelandic Director of Public Prosecutions Directive no. 8/2017, prosecutors can not refer sex offences to

restorative justice. In Denmark and Norway, victim-offender mediation is conducted in all types of cases, including in cases of sexual violence. While there are examples of reports and books written by practitioners (e.g. Madsen 2005; Andersson and Madsen (eds.) 2017), research on mediation specifically in cases of sexual violence is seemingly not available.

Transformative Justice

While restorative justice has sometimes been described as having transformative potential, in particular for participants on a personal level, it has been critiqued for not addressing the larger context of the structural inequality within which crimes take place (Morris 2000; Coker 2002).

Transformative justice is about understanding crime as a symptom of deeper societal problems which call for broader structural change. It is often coupled with an abolitionist stance towards the criminal justice system due to its punitive approach to justice and how it exasperates biases along the lines of race and class (Morris 2000). As opposed to seeking to retrospectively redress harms, the aspiration of transformative justice is to contribute to the reconfiguration of power beyond individual experiences of violence and injustice (Boesten and Wilding 2015). In the context of gender-based violence, Coker (2002) further argues that a transformative justice approach needs to incorporate an understanding of the gendered power relations within which such violence takes place and how it is connected to ideas about masculinity and femininity.

There are varying examples of how accountability processes have been developed within radical and progressive communities to address cases of sexual violence based on the ideas of transformative justice, as well as within indigenous communities. In the United States, these include Incite! Women, Gender Non-Conforming, and Trans People of Color Against Violence (Downes et al. 2016); Philly's Pissed and Philly Stands Up in the anarcho-punk community in Philadelphia (Kelly 2010), and Creative Interventions (Kim 2011). Such processes have also been used and developed within radical left-wing social movements in the UK (Downes et al. 2016; Downes 2017) and in community projects in Australia (Caulfield 2013; Howe 2018).

In the context of sexual violence, and other harms, transformative justice practices entail the direct involvement of those who have caused harm, who are

supported to understand and change their behaviour; and with survivors, who are believed and supported for the purposes of empowerment. In addition, there is a strong focus on public education to foster a culture of sexual responsibility, coupled with a critical stance towards state service-based responses such as police and prisons (Kelly 2010; Kim 2011; Downes et al. 2016).

Several challenges have been identified when undertaking community accountability work. Community accountability projects often have limited if any budget, and participants are generally unpaid and receive limited external supervision. These limited resources, coupled with the prevalence of gender-based violence, can lead to burnout, fatigue, and secondary trauma (Caulfield 2013). Another challenge is limited community capacity to live up to the lofty ideals of transformative justice. When the person causing harm is unwilling to take responsibility for it, such community responses often come down to excluding that person from specific community spaces in order to create safe spaces for survivors. Such exclusion is often viewed as controversial and has been criticised for replicating the tactics of the criminal justice system (Caulfield 2013; Downes et al. 2016).

Moreover, social justice movements can be faced with ‘counter-organising’ (see Incite! 2006 in Downes 2017), where some community members outright disrupt demands for accountability and discredit survivors’ experiences of violence. This can involve “the harassment, isolation and disbelief of survivors and their supporters who raise the issue of gendered violence and demand accountability”, where abusers make “counter-allegations of violence, claiming victimhood status, questioning the legitimacy of an accountability process and/or deliberately obstructing and drawing out the process to exhaust those involved” (Downes 2017). This can have detrimental consequences for survivors and undermine accountability efforts more broadly, leading to divided communities (Downes 2017).

The idea of community-based accountability processes and accountability practices in this context was seemingly first publicly introduced in Iceland in 2011 at the Radical Summer University (*Róttaki sumarháskólinn*), a project that strives to link radical activism and ideas (sumarhaskolinn.org). There is further evidence that groups within progressive communities in Iceland have made several attempts to apply the methods of community-based accountability processes in their localities. When interviewed, people who had been involved with such processes said that the idea is that those who have committed violence are not “monsters”,

but rather in need of the opportunity to work through their issues, and that survivors should be given space to regain a sense of security and freedom. However, they also reported that the accountability process can prove volatile, and can lead to offender exclusion, and disruption and dissolution within families and among friends (“Eldfimt ábyrgðarferli” 2013).

In one such case, the person responsible for the violence wrote several blog posts about his experiences, prompting the survivor in the case, along with her friends, to publicly respond. This led to much public debate about dealing with cases of sexual violence outside the criminal justice system, and has been in the subject of a novel (Grettisson 2015) and a theatre production. These debates indicate an acknowledgement that the criminal justice system is ill equipped to handle cases of sexual violence, while at the same time survivors and their supporters are criticised for taking the law into their own hands or enacting unlawful revenge (e.g. Kristjánisdóttir 2017; Jóhannsson 2018). An analysis of the public debate on this topic is, however, outside the scope of this thesis.

To date, no research has been carried out on the experiences of people involved in accountability practices in Iceland; however, in Paper III, the experiences of one survivor are analysed among others in the context of their experiences of justice.

Survivor-Centred Justice

There is increasing realisation that criminal justice is unable to effectively handle cases of sexual violence (McGlynn et al. 2012; McGlynn et al. 2017; Daly 2014; Daly 2017; Henry et al. 2015). This situation requires a shift from a sole focus on criminal justice to a broader justice agenda for survivors of sexual violence. For research and policy making, this means that we have to rethink how to adequately address the question of justice for people who have been subjected to sexual violence (Daly 2017: 125). In line with this realisation, there are an increasing number of studies focusing on how people who have been subjected to sexual violence understand the meaning of justice (Herman 2005; Jülich 2006; Holder 2015; Clark 2015; Daly 2017; McGlynn et al. 2017; McGlynn and Westmarland 2019). Below, I will discuss some of the main findings of these studies.

Importantly, Daly (2017) makes a distinction between victim-survivors’ justice *needs* versus their justice *interests*. When discussing justice needs in relation to

different justice mechanisms, 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. Here, as Holder (2015) has emphasised, it is a question of understanding people who have been subjected to violence as citizens first as opposed to reducing them to only victims. That said, having one's justice interests met can of course have therapeutic effects.

Several studies have found that victim-survivors' visions of justice do not fit well with either retributive or restorative ideas about justice, while containing elements of both (Herman 2005; Jülich 2006; McGlynn et al. 2017). Based on interviews with victim-survivors of historical child sexual abuse, Jülich (2006) found that although survivors spoke of justice in ways that reflected the goals of restorative justice, they were "reluctant to endorse restorative justice as a paradigm within which they would pursue justice" (p. 125), particularly those who had not reported the abuse to the police. Those who had reported to the police were not convinced that restorative justice would provide them with a sense of justice.

Herman (2005) finds that for victim-survivors, it is not about restoring the relationship with the offender (where such a relationship had existed), as suggested in restorative justice literature, but about restoring the relationship with their community. For the research participants in her study, the retributive aspects centred on their wish to have their offenders "exposed and disgraced" – not primarily for punitive reasons, but rather because "they sought vindication from the community as a rebuke to the offenders' display of contempt for their rights and dignity" (p. 597).

Based on a thematic analysis of interviews with 20 women victim-survivors of different forms of sexual violence in north-east England, McGlynn and Westmarland (2019; see also McGlynn et al. 2017) coined the term "kaleidoscopic justice" to capture the complexity and nuance of the way in which the participants described justice:

Kaleidoscopic justice is justice as a constantly shifting pattern, continually refracted through new experiences and perspectives, with multiple beginnings and no finite ending. Justice as a pluralistic, lived, evolving experience (McGlynn and Westmarland 2019: 197).

Within this framework, McGlynn and Westmarland (2019) identify the following justice themes: consequences, recognition, dignity, voice, prevention and connectedness. Here, *consequences* have to be meaningful and flow from the actions of the offender. The term is understood as having a potentially broader meaning than mere accountability, and includes offender responsibility but is not necessarily tied to punishment. Receiving *recognition* means that others understand what the victim-survivor says as existing and true, and therefore goes beyond “being believed” to include ideas of vindication and validation. It is about remedying the injury to self-respect. The theme of *dignity* further emphasises the need to be recognised as a person of worth and having social standing, and therefore being treated with respect. Having a *voice* means more than being able to tell one’s story; it means having the power to actively participate in the justice process and thereby influence decision-making. *Prevention* of sexual violence is of fundamental importance to survivors’ sense of justice; it entails the transformation of society into one that understands and recognises the harms of sexual violence and actively puts in the effort to reduce its prevalence. Finally, *connectedness* means to regain a sense of belonging in society. It is about being recognised and treated with dignity and respect; and about being psychologically, financially, and socially supported (McGlynn and Westmarland 2019).

In this thesis, I follow the lines of inquiry outlined above, exploring the ways in which victim-survivors in Iceland understand and perceive justice in relation to different formal and informal justice processes and practices. In this context, it is however important to be mindful of Herman’s (2005) warning in that sexual violence is uniquely designed to shame and stigmatise people, and no matter which justice model is used, they “will inevitably fail” if “[c]ommunity standards are the standards of patriarchy” and where public attitudes towards these crimes remain conflicted and ambivalent (Herman 2005: 598).

Theoretical Framework

Informed by Critical Theory, the ambition of this thesis is to imagine an alternative and emancipatory political reality to the status quo, where people who have been subjected to sexual violence are recognised and enjoy parity of participation in social life. Its premise is that, at present, justice is largely unattainable for people who have been subjected to sexual violence, and that to advance the justice agenda, it is necessary to move beyond a one-dimensional focus on the conventional criminal justice system. In order to accommodate conceptions of survivor-centred justice and its relation to different justice frameworks, a broad theory of social justice is needed. The overarching theoretical framework of the thesis is informed by Nancy Fraser's (1997; 2003; 2009) democratic theory of social justice, which offers different but interlinked conceptions of justice in broad terms as well as evaluative standards to assess claims of injustice. I will begin this chapter by outlining some of the main parameters and concepts of Fraser's justice theory, before demonstrating how these inform the different papers that make up the thesis.

The Parameters of Justice

In her work, Fraser (1997; 2003; 2009) presents an integrated framework comprised of several social justice theory systems which offer different but interlinked conceptions of (in)justice. Fraser's (2009) quasi-Weberian democratic theory of justice is based on drawing an analytical distinction between the ideal-typical categories of recognition (of cultural difference), redistribution (of economic goods), and (political) representation. Her theory links "a social-theoretical analysis of subordination to a moral-philosophical account of injustice", where she prioritises the critique of institutional injustice in the effort to establish the terrain on which subjective justice can be fairly pursued (Fraser

2007: 305). As noted by Fraser (2007), while the specific normative content and meaning of justice can vary somewhat based on different approaches and contexts, a broader justice framework is needed to outline the parameters necessary to assess the terms of the contestation over justice in order to settle the content.

The normative core of Fraser's justice theory is the notion of parity of participation, without which justice cannot be achieved. Participatory parity "requires social arrangements that permit all (adult) members of society to interact with one another as peers" (2003: 36). Misframing, misrecognition, maldistribution, and misrepresentation are forms of injustice and obstacles to parity of participation. Each of these concepts is further examined below.¹⁴

Misframing occurs when "a polity's boundaries are drawn in such a way that they wrongly deny some people the chance to participate at all in its authorized contest over justice" (2009: 62). In terms of evaluating allegations of misframing, Fraser proposes the principle of "all subjected", meaning that "all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it" (2009: 65). Fraser describes misframing as being akin to the loss of what Hannah Arendt termed "the right to have rights" (Arendt 1973 cited in Fraser 2009: 19). Frame setting, therefore, is among the most consequential of political decisions, since it determines who can participate in the justice process.

For Fraser, the concept of recognition is based on politics of difference. It entails equal recognition of different groups in society – for example based on gender, race, or sexuality – where equal respect does not depend on assimilation to majority or dominant cultural norms (Fraser 2003). Misrecognition, therefore, is a form of injustice which denies people the requisite standing because of institutionalised hierarchies of cultural value (2009: 60). Importantly, misrecognition for Fraser is "an institutionalized social relation, not a psychological state" and is "[i]n essence a status injury" (1997a: 280).

Another conception of justice is that of redistribution, which is rooted in the economic structure of society. The structural injustice of maldistribution is connected to the Marxist concept of class, whereby ideal-typical socio-economic divisions are traceable to the political economy (Fraser 2003). Maldistribution occurs when the unequal distribution of economic resources prevents people from

¹⁴ The concept of mis/representation is not used in this study, so I will not be outlining its meaning and function here.

interacting with others as peers, and can result in “a vicious circle of cultural and economic subordination” (1997: 21).

While Fraser draws these distinctions for analytical purposes, she emphasises that the different types of injustice can, and often do, intersect in the real world (Fraser 2007). Specifically, Fraser identifies gender and race as bivalent collectivities which are both rooted in the political economy and in cultural values and therefore require remedies of both recognition and redistribution (Fraser 1997). In order to distinguish between justified and unjustified claims for recognition, Fraser proposes using “participatory parity” as an evaluative standard. This firstly requires claimants to show that they are being denied participatory parity by the institutionalisation of majority cultural norms; and secondly, that the practices for which claimants are seeking recognition do not themselves deny others participatory parity (Fraser 2003: 41).

Furthermore, Fraser (1997) identifies two types of available remedies for these ideal types of injustice: affirmation and transformation. Affirmative strategies aim to redress injustices by correcting inequitable outcomes of social arrangements without changing the underlying social structures that generate them, and thereby highlight group differences. Transformative strategies, meanwhile, aim to redress injustices by restructuring the underlying framework, and deconstruct group differences (Fraser 1997). In the context of redistribution, the example of an affirmation approach, as described by Fraser, is when the liberal welfare state utilises its power to reallocate existing goods to specific groups. This can however generate misrecognition, as it strengthens group identities as welfare recipients. Socialism, on the other hand, offers a transformative restructuring of relations of production and blurs group differentiation, which can help remedy some forms of misrecognition. While favouring the transformation approach, i.e. the deconstruction of group differences and a socialist political economy (Fraser 1997), Fraser has later acknowledged that “[r]eforms that appear to be affirmative in the abstract can have transformative effects in some contexts – provided they are radically and consistently pursued” (Fraser 2007). I now proceed to discuss how Fraser’s conceptualisations inform the different papers which make up this thesis.

Justice in Context

In papers I and II, the focus is on the legal status and rights of victims in the criminal justice procedure. In Paper I, I use Carol Bacchi's (2009) Foucault-inspired critical policy analysis of argumentation for and against strengthening victims' status and rights in Danish and Norwegian legal policy documents. This approach relies on the notion that by asking how "problems" are represented in policies, "it becomes possible to probe underlying assumptions that render these representations intelligible and the implications that follow for how lives are imagined and lived" (Bacchi and Goodwin 2016: 6). In the paper, I focus on how the "problem" of complainants' rights is constructed, and find that arguments for and against strengthening the rights of complaints are largely based on different interpretations of legal principles and assumptions about victims' needs and interests. Arguably, this allows the principles of social justice to be applied to the question of victims' status and rights.

In Paper II, I analyse victim-survivors' critique of their lack of legal standing as witnesses in the Icelandic criminal justice procedure, resulting in their limited procedural rights. Based on this critique, and drawing on Nordic feminist legal scholarship (Robberstad 1999; Niemi-Kiesiläinen 2001a), I proceed to construct claims of injustice and subject them to Fraser's evaluative standards of "all subjected" (2009) and "participatory parity" (1997). Firstly, I analyse victims' lack of legal standing in the context of Fraser's concept of misframing, and ask whether the laws on criminal procedure wrongly deny victims the chance to participate at all in its authorised contest over justice. I then proceed to apply the principle of 'all subjected', and ask whether victims can be considered subjects to the governance structure of the criminal justice system and therefore have moral standing as subjects of justice in relation to it. Secondly, I analyse the limited procedural rights afforded to victims in the context of misrecognition, and ask whether they are denied the requisite standing as a result of institutionalised hierarchies of value within Icelandic legal culture. I then proceed to apply the principle of "participatory parity" 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. Thirdly, I analyse whether victims are subject to maldistribution and thereby prevented from interacting with others as peers in the criminal justice procedure. Here, the main

focus is on access to legal representation, without which it is all but impossible for victims to exercise their legal rights.

In Paper III, I explore victim-survivors' experiences of justice in the context of administrative procedures as well as informal justice practices, including those inspired by community accountability processes. Here, I show that, for victim-survivors, being subjected to sharing social and geographical spaces with the offender in the aftermath of sexual violence can be mapped on Kelly's (1987; 1988; 2012) continuum of sexual violence. Moreover, I draw on McGlynn and Westmarland's (2019) notion of kaleidoscopic justice, which attempts to capture the plurality and fluidity of the meaning of justice for victim-survivors and is comprised of the following elements: consequences, recognition, dignity, voice, prevention and connectedness. Based on my data, I suggest that the notion of connectedness, or belonging, can be further developed by considering the importance of (re)claiming space for victim-survivors. Space, in this context, 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 (re)claiming of space is a part of victim-survivors' ability to exercise their "right to everyday life" (Beebeejaun 2017) in the aftermath of sexual violence. This right to everyday life is akin to Fraser's (2003) parity of participation in social life. Victim-survivors' inability to go about their everyday lives as it relates to their family, social network, place of education or work, and society at large due to fear of being subjected to sharing social and geographical spaces with the offender in the aftermath of sexual violence is a form of misrecognition. Being denied *de facto* freedom of movement is, therefore, a form of status subordination.

In Paper IV, I examine the justice potential of stand-alone civil tort lawsuits to meet victim-survivors' justice interests. Legal scholars have pointed out that from the perspective of victim-survivors, there are a number of advantages to this legal option, including the fact that the plaintiff is a full legal subject with the same procedural rights as the defendant and, importantly, that the standard of proof is lower than in a criminal case (Perry 2009; Godden 2013; Swan 2013). From the perspective of Fraser's social justice framework (1997; 2003), a civil tort suit therefore allows for greater parity of participation between the plaintiff and the defendant than in criminal law. However, civil tort suits are considered to be private lawsuits, which entails that survivors have to pursue such cases at their own financial risk, and impecunious defendants are also a real concern. Here, I argue, for the need to recognise the larger pattern of sexual violence as a form of gender-

based discrimination and the limited ability of criminal law to address it, which also has detrimental socio-economic consequences for survivors. Using Fraser's (1997; 2003) terminology, this is a case of misrecognition and maldistribution which can be remedied by affirmation and redistribution. Affirmation, here means acknowledging the limited ability of criminal law to recognise cases of sexual violence; and redistribution means that the state eliminates survivor's financial risk of pursuing civil tort lawsuits by offering free legal aid, and guaranteeing, at least to a degree, the amounts awarded by the courts. However, to avoid further misrecognition of victim-survivor's in the form of accusations of preferential treatment, the question becomes one of whether this remedy could be applied to all cases pertaining to serious violations of bodily integrity.

Although the participants in this study often described extensive pecuniary and non-pecuniary losses as a consequence of the violence done to them, they were ambivalent towards pursuing and accepting monetary compensation, which they understood as "dirty money". Moreover, many felt that pursuing monetary compensation would put their credibility at risk. In order to understand these findings, I use Fiske and Tetlock's (1997) concept of taboo trade-offs which applies when we exchange profane material goods for sacred values such as honour, love, and justice, whereby we risk moral judgement. In this context, moral judgement amplifies social myths about what constitutes "real" rape and "real" victims (e.g. Ehrlich 2001; Dinos et al. 2015), and serves to undermine survivors' credibility, and limits their de facto access to compensation. The paper further addresses the issue of survivors' justice interests (Daly 2017; McGlynn and Westmarland 2019) and shows that while a favourable verdict in a tort lawsuit is understood as an important form of recognition, it does not fulfil survivors' justice interests in terms of bringing about offender responsibility. In order to address the problems of taboo trade-off and rape myths, and to better meet survivors' justice interests, I again suggest using Fraser's remedies of affirmation and redistribution (1997; 2003). If, as described above, the state were to guarantee amounts awarded, the state could proceed to offer the wrongdoer a debt discount if the person successfully completed a specially designed offender accountability programme. However, the question remains as to whether such a hybrid private/public justice model has the potential to change the social meaning of money in this context.

In this thesis, therefore, I use Fraser's theoretical framework to lay out the ideal-typical parameters of social justice, within which more nuanced and specific theoretical conceptualisations of the meaning of justice are applied and developed in different contexts. Such an approach entails the decentring of criminal justice in the collective imagination in terms of the meaning of justice in cases of sexual violence. Moreover, in order to gain a better understanding of the content of survivor-centred justice, the thesis also pays attention to the exploratory and informal practices victim-survivors use in order to gain a sense of justice.

Methodology

As noted in the introduction, the aims of this 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 consists of two sets of data. Paper I is based on a critical policy analysis of Danish and Norwegian legal policy documents. Papers II, III and IV are largely based on interviews with people in Iceland who had been subjected to sexual violence, which were analysed using Thematic Analysis. The data and the methods used are further discussed in this chapter. I also conducted a series of interviews with researchers, victim-survivors, and practitioners within the criminal justice system in Norway. While this material does not feature explicitly in the papers, it provided important background information for my thesis, as will be further explained below. Finally, I will reflect on some of the ethical issues that arose in relation to conducting this research.

Analysis of Legal Documents

In Paper I, I conduct a comparative legal policy analysis using Bacchi's (2009) WPR approach, which is a Foucault-inspired poststructural method of analysing policies in an effort to make politics visible. The data used in Paper I consists of preparatory works accompanying legislative amendments pertaining to the status and rights of victims in the criminal procedure in Norway and Denmark. The documents used for this analysis include both early and later stages of preparatory works. The early stages of the preparatory works are reports based on deliberations and legislative recommendations by the Standing Committee on Administration of Criminal Justice of the Danish Ministry of Justice (*Justitsministeriets*

Strafferetsplejeudvalg) and the ad hoc commission appointed by the Norwegian Ministry of Justice and Public Security. In Denmark, two separate reports were produced: the first addresses the legal position of complainants in rape cases (Betænkning 2005), while the second addresses the position of complainants more generally (Betænkning 2006). In Norway, one report was produced to address the position of complainants more generally (NOU, 2006). The later stages of preparatory works consist of the actual explanatory texts accompanying the legislation.

The premise of Bacchi's WPR approach is that by asking how "problems" are represented in policies, it becomes possible to reveal the underlying assumptions that render these representations understandable (Bacchi and Goodwin 2016). Following Bacchi's (2009) guiding questions for analysis, I focus on how the problem of complainants' participatory rights is represented in these preparatory works, and particularly how these problem representations are possible by identifying the assumptions that underpin them and the discourses that shape them. In addition, I analyse what remains unproblematised in the problem representations (Bacchi and Goodwin 2016).

The findings reported in Paper I enable the conceptualisation of Paper II. More specifically, Paper I informs Paper II in that it shows how interpretations of the legal principles of criminal procedure differ between Nordic jurisdictions, which entails that the laws of criminal procedure can, to a degree, be expanded and developed to better meet victim-survivors' justice interests.

Qualitative Interviews with Victim-Survivors

The data used in papers II-IV is largely based on interviews with victim-survivors of sexual violence. I decided to use a semi-structured interview framework, as this promotes a focused yet conversational communication which allows for collecting information about events, opinions, interpretations and meanings (Ellsberg and Heise 2005).

When developing the semi-structured questionnaire, I decided to focus on five overarching themes: 1) What happened after the violence: how did the participants process what had happened to them and how did it affect them; who did they tell about what happened; and how did they experience the reaction from family members, friends, and professionals within different institutions; 2) How

did they experience or perceive the criminal justice system: did they report what had happened to the police, and why or why not; and how did they experience the criminal justice process and the outcome of the case, or, if they had not reported the case, how did they perceive the criminal justice system; 3) What are their thoughts and experiences in relation to different justice strategies such as tort law, restorative justice, or individual or grass-root initiated strategies; 4) What does justice mean to them in relation to their experience; and 5) How do they experience or perceive public discussions about sexual violence and justice.

While it is always difficult to say how many interviews should be conducted, it is recommended that for a large thematic analysis study such as a PhD project, the number of interviews should exceed 30, especially if they are the sole data source (Clarke et al. 2016: 229). In this study, I conducted 35 interviews with people who had been subjected to sexual violence in Iceland – 32 women and 3 men. The criteria for participation were that participants: 1) were aged 18 years or over, and 2) self-identified as having been subjected to sexual violence.

Participants were primarily recruited through lawyers of victim-survivors; trauma psychologists; Stígamót - Education and Counseling Center for Survivors of Sexual Abuse and Violence, an NGO which offers counselling for survivors of sexual violence; and select Facebook groups. In addition, the study was also introduced to and/or advertised with the following NGOs which advocate for minority rights: Tabú, which provides an informal space for self-identifying disabled women; W.O.M.E.N., Women Of Multicultural Ethnicity Network; and the National Queer Association. The interviews were conducted between January and March 2015 and in January 2017. Most of the interviews took place in a private office at Stígamót, an education and counselling centre for survivors of sexual abuse and violence in Iceland; one took place at a participant's workplace office, and two were conducted via Skype.

The age of the participants ranged between 19 and 67 years, and the average age was 37. The age of the participants at the time of the violence ranged from early childhood to 42 years. Participants were asked what kind of violence they had been subjected to, but were free to choose which experiences they wanted to talk about. Participants described a range of different types of violence. Twenty-one participants described having been subjected to rape and three to attempted rape. Fourteen participants described having been subjected to sexual abuse as children. Two participants described experiences of sexual harassment. Three participants described technology-related sexual violence, such as being filmed

during sex and having images of them distributed without their consent. One participant talked about her experiences of prostitution, which she understood as having been subjected to sexual violence. In some cases, participants talked about specific incidents of violence, while in other cases they talked about on-going abuse, either in terms of several incidents or over an extended period of time. The offenders responsible for the violence were men and boys, except for one girl and one woman. They included 11 family members, seven partners or boyfriends, 14 friends or acquaintances, four professionals (such as police officers and teachers), and four strangers.

As noted, most of the participants were women, although three were men. These men had all been subjected to sexual violence as children and had not talked about the violence to anyone until years later, as adults. This is consistent with research showing that boys are significantly less likely than girls to tell others about the abuse at the time it occurs, and take significantly longer to discuss their experiences later in life (O'Leary and Barber 2008). In none of these cases had the violence been reported to the police. All of the participants were white with an Icelandic background, and only one participant indicated having a non-heterosexual identity. While studies have shown that people with disabilities are more likely to be subjected to sexual violence than the general population (Mitra et al. 2011), none of the participants had observable physical or marked intellectual disabilities. However, many participants talked about suffering from, or having suffered from, anxiety, depression, and other PTSD-related symptoms. Some participants also talked about receiving or having received disability benefits, which was in many cases in relation to the consequences of the violence and other injustices they had been subjected to. Therefore, in spite of a relatively inclusive recruitment strategy, the participants are a somewhat homogenous group in terms of ethnicity and nationality, gender, and physical and intellectual abilities. The lesson learnt here is that more targeted efforts would have been needed in order to recruit a more diverse group of participants.

To analyse the interview data, I used the tools of Thematic Analysis (TA), as outlined by Brown and Clark (2006; 2013). They understand TA as a foundational method for qualitative analysis, and describe it as “a method for identifying, analysing and reporting patterns (themes) within data” (Brown and Clark 2006: 79). TA is considered a flexible method of analysis, as it is not tied to a pre-existing theoretical framework; does not require a commitment to produce a fully developed theoretical analysis; and is compatible with both essentialist and

constructionist paradigms. At the same time, it is important to conduct thematic analysis in a consistent and clear way for the analysis to be of good quality.

Following the TA process, I transcribed the interviews, familiarised myself with the data, and generated both semantic and latent codes which I developed into themes, keeping in mind my research questions (see Clarke et al. 2016). In the three papers which are based on the interview data, I developed the following themes: the criminal justice procedure as an unjust procedure (Paper II); the importance of space in understanding justice outside the criminal justice system (Paper III); and embedded ambivalence in the context of monetary compensation for the harm of sexual violence (Paper IV).

One of the more important aspects included in the questionnaire which I have not directly addressed in any of the papers is that of restorative justice. The main reason for that is that none of the participants in Iceland had experienced restorative justice, and there is limited knowledge on the subject in the Icelandic context. According to the prosecution authorities in Iceland (RS 8/2017), prosecutors do not have permission to direct cases of sexual violence to a restorative justice process.

Validity and Transferability

There are limitations in using Thematic Analysis as a tool for analysis. While it is flexible, it is also vulnerable to influence by the beliefs and values of the researcher, as indeed qualitative research is generally. In addition, the findings only relate to the context in which the data was gathered, and cannot be directly generalised beyond those settings (Riger and Sigurvinsdottir 2016). It is however important to note that one cannot measure qualitative research with the tools of quantitative research. Reliability, i.e. the possibility to generate the same results when the same measures are administered by different researchers, is for example not appropriate for judging qualitative research methods (Braun and Clarke 2013: 279). However, it is possible to think about reliability more broadly in terms of “trustworthiness” or “dependability” of qualitative methods of data collection and analysis (Braun and Clarke 2013: 279).

Validity, i.e. that the research shows what it claims to show and accurately captures “reality”, is problematic in qualitative research as the emphasis is often on multiple realities. Ecological validity, however, is a type of validity which is

most applicable to qualitative research, and refers to “whether the context of data collection resembles the real world context ... and ... whether the results can be applied to real world settings” (Braun and Clarke 2013: 280). Moreover, while statistical generalisability does not generally apply to qualitative research, it is relevant to ask whether the findings are transferable to other groups of people and contexts (Braun and Clarke 2013). As described above, the findings of this thesis are largely based on the experiences of white women of Icelandic background, without physical or intellectual disabilities. While there are themes in my findings which are likely to be relevant for other groups as well, the findings are not directly transferable to other groups of people.

Another tool to assess the quality of qualitative research is member checking. Member checking refers to having research participants validate the analysis (Braun and Clarke 2013). In cases where I used a substantial part of individual participants’ accounts, I invited those participants to comment on the way in which I had presented their experiences and made adjustments based on their feedback (see Paper III). As further discussed in the section on ethics below, I also conducted a series of presentations on the preliminary results of the study at an educational and support centre for survivors of sexual violence to solicit their feedback, which contributed to the fine tuning of the final results.

Additional Research Material

In the initial phases of this research project, I intended to include a specific focus on the Norwegian criminal justice process and the Norwegian Mediation Service. For that purpose, I conducted interviews with victim-survivors (9), victim lawyers (6), police (1), prosecutors (2), judges (4), and mediation facilitators (2). While these interviews were not systematically analysed and explicitly used in the papers, they served to deepen my knowledge of the Norwegian system and contributed to the conceptualisation of papers I, II and IV.

Ethical Considerations

Given that the subject matter of the interviews with research participants concerns difficult life experiences, I have been particularly mindful of my ethical engagement throughout the research and writing process. Here, I will reflect on some of the ethical issues that emerged.

The study was approved by the Ethical Review Board to ensure that the structure of the research and technical issues related to the handling of the data was in line with the ethical guidelines in the field.¹⁵ According to the National Bioethics Committee in Iceland, ethical approval was not required.¹⁶ According to correspondence with a representative of the Norwegian National Research Ethics Committees, the Swedish Ethical Approval was considered sufficient. Participants' anonymity has been carefully protected. The data was stored on a hard disk which was kept in a locked safety box at the Department of Sociology of Law at Lund University. When quoting participants in the papers, I have either included a short description based on their gender and age or given them fictive names.

Participants received a letter informing them of the purpose of the research and also signed a statement where they formally consented to participating in the study. They were informed that they could withdraw from the research at any point or until the results were published. Given that the topic of the study concerns difficult life experiences, participants in Iceland were advised to turn to Stígamót, and to the Dixi Resource Center in Norway, if their participation caused them any discomfort or distress. These NGOs offer free counselling services for people who have experienced sexual violence. As far as the author is aware, none of the participants sought assistance after the interviews; however, most participants had already been in counselling, or were in counselling, and so they might have discussed issues related to their participation with their own psychologist or counsellor. None of the participants withdrew from the study.

When asking participants about their experiences in relation to traumatic life experiences such as sexual violence, there is a risk that participants maybe re-victimised by re-experiencing the trauma (Lee and Renzetti 1990). One thing which is important when conducting interviews in this context is to affirm that it

¹⁵ Ethical Review Board in Lund, Dnr 2015/348.

¹⁶ The National Bioethics Committee of Iceland, Reference Number: VSNb2015080026/03.01.

is always the participant's choice what they choose to disclose or not (Campbell et al. 2009). Since I was primarily asking about people's experiences of (in)justice in the aftermath of sexual violence, I decided that I would also tell participants at the beginning of the interviews that they did not have to tell me about the violence itself in any detail if they did not wish to do so. Here, I thought I was being a sensitive researcher; however, in one of the interviews, I found that by putting emphasis on this issue, I might have been sending the wrong message. Midway through the interview, the participant was explaining the consequences of the violence on her life. When intending to move onto a more detailed discussion of the violence itself in order to better explain what she was saying, she said: "I can just tell you exactly, even if you perhaps don't want a detailed (account)..." I realised that I had not done a good job of conveying my intentions, and that she had understood that I didn't want to hear about the violence she had been subjected to. I felt quite mortified, and proceeded to better explain my intentions. One of the things I felt I learned when reflecting on this miscommunication after the interview is that difficult life experiences can be a lonely burden to bear, as there are not many places where people feel comfortable talking about them in a meaningful context. From this, I learned the importance of showing the right amount of sensitivity as opposed to being oversensitive, which is the fine line one has to tread when talking to people about traumatic experiences.

Iceland has a small population of just over 360,000 people. Conducting research in such a small environment raises its own set of ethical considerations. As I have both been active in the feminist community in Iceland and have conducted research on sexual violence before, I was familiar with some of the professionals who assisted me in recruiting participants for this study. Moreover, three of the participants are acquaintances of mine, and a few participants have later become acquaintances of mine in relation to the policy work I have subsequently conducted. As has been pointed out, it is important to reflect on the power dynamic between researcher and participant in this context (Kvale 2006; Jacobsson and Åkerström 2012). In the early feminist literature, the qualitative interview was promoted as caring and empowering; however, feminist researchers later pointed out its exploitive potential. In the effort to create a relationship of empathy and trust, the risk of manipulation can also increase, and creating rapport by "faking friendship" may involve an instrumentalist approach to human relationships (Kvale 2006: 482). Based on my experience, however, these "relationships" are rather based on a mutual recognition of the importance of

improving social and legal conditions for people who have been subjected to sexual violence, and so are perhaps best described as being allies in the search for justice. However, I have paid close attention to my motivations as a researcher/human being and, I believe, been mindful of my ethical engagements with people who have participated in the research.

After the interviews, several participants indicated or explicitly stated that the reason they were participating in the research was to assist in the effort to find ways to improve socio-legal responses to survivors of sexual violence. I took this to heart, and these wishes have partly guided my approach to the research project, where I largely take a constructive approach to the subject matter. I have also regularly presented preliminary findings at Stígamót – Education and Counseling Center for Survivors of Sexual Abuse and Violence, where I have received feedback from survivors and survivors’ advocates. In addition, I have disseminated the research findings as they have developed, both in academic and public forums, and have written a few opinion pieces for the media. Subsequently, I have submitted a commissioned policy paper on ways to strengthen the legal status and rights of victim-survivors of sexual violence in the criminal justice procedure, as well as their access to compensation, to the Prime Minister’s Steering Committee on Comprehensive Responses to Sexual Violence in Iceland. On the basis of these proposals, the Minister of Justice has requested the Standing Committee on Legal Procedure to prepare a bill.

Summary of Papers

Paper I

Empowered or Protected? The “Problem” of Complainants’ Rights in Danish and Norwegian Preparatory Works on Criminal Procedure

In the mid-2000s, legislative amendments were made in Danish and Norwegian criminal procedural law to strengthen the rights of complainants in cases of sexual violence, and other cases of serious violations. However, while in Norway complainants were afforded participatory rights and stronger legal representation in court, in Denmark this was largely not the case. In order to understand how these two Nordic countries could reach such different conclusions, I conduct a critical policy analysis of the policy documents underpinning these different outcomes. In the paper, I use Carol Bacchi’s (2009) “What’s the Problem Represented to be?” (WPR) approach, which is a Foucault-inspired poststructural approach, to analyse policies in an effort to make politics visible by asking how “problems” are represented in policies. The aim of this paper is therefore to identify how the “problem” of complainants’ increased participatory rights and stronger legal representation is represented in the respective policy processes.

The findings of the paper suggest that in Denmark, the policy process was largely left up to the (expert) legal practitioners, while in Norway, the ad hoc commission charged with deliberating the question of strengthening complainants’ rights included a representative from the NGO community. Furthermore, in Denmark, the policy documents were characterised by the use of domestic legal sources. In Norway, however, the policy documents included domestic and international, legal and extra-legal sources. Among these were feminist-informed legal analysis, victimological knowledge, and knowledge practices from other countries. I therefore argue that the Norwegian policy process also introduced “subjugated knowledges” (Foucault 1980 cited in Bacchi and

Goodwin 2016), or knowledges that challenge the centrality of traditional legal knowledge.

Moreover, the findings in this paper further highlight that in both the Norwegian and the Danish sets of policy texts, the main assumptions underpinning the problem representations are premised on the notions of secondary victimisation and the rule of law. Also, in both problem representations, the complainant that is being discussed is female, given that the main emphasis is placed on complainants in cases of sexual violence. However, there is a stark difference between the way in which the problem representations are discursively addressed. In the Danish reports, complainants' subject position is represented as being rooted in their primary victimhood where increased rights, in a hostile courtroom, will only lead to their further victimisation. This representation is shaped by a protection discourse whereby the complainant is protected from the possibly harmful consequences of having rights. In the Norwegian report, however, the complainant is represented as a citizen first – a rational, yet vulnerable citizen who has been subjected to a crime and is in need of empowerment through rights to be able to guard their legal and factual interests in the criminal procedure. I argue that the lived effects of only affording complainants the subject position of the vulnerable victim, as in the case of Denmark, does not take into account that complainants have complex subject positions, needs, and capacities. The Norwegian report, on the other hand, allows for a more multifaceted representation of complainants by emphasising their status as citizens first who have varying degrees of strength and agency.

Finally, I find that in both sets of preparatory works, the problem representation is tied up with the notion of the rule of law. In the Norwegian preparatory works, increasing complainants' rights is represented to guarantee the ongoing rule of law, as it ensures that the law is not out of step with the public's understanding of the law. However, in the Danish preparatory works, increasing complainants' rights, which also translates into a larger role for their lawyer, is constructed to be to the detriment of the rule of law, as it is interpreted to pose a threat to the objectivity principle and to potentially upset the accused's perception of fairness.

Paper II

“A Witness in My Own Case”: Victim-Survivors' Views on the Criminal Justice Process in Iceland

Arguments in favour of strengthening the rights of victim-survivors in the criminal justice process have largely been made within the framework of a human rights perspective, and with a view to meeting their procedural needs and minimising their experiences of secondary victimisation. In this paper, however, I ask whether the prevalent legal arrangement, whereby victim-survivors are assigned the legal status of witnesses in criminal cases, with limited if any rights, is a just arrangement. In order to answer this question, I interviewed 35 victim-survivors of sexual violence in Iceland and subsequently conducted a thematic analysis of the interviews (Braun and Clarke 2006; Clarke et al. 2016). I presented the interviews against the backdrop of Nordic legal thinking and interpreted the findings in the context of Nancy Fraser's democratic theory of justice.

In the paper, I discuss how participants generally felt that being assigned the legal status of a witness in what they perceived to be their own case was absurd. Given that the crime had been committed against them, and given the profound impact of the case process and its outcome on their lives as moral beings and on their worldview, the general sense was that they should be an integral part of the case procedure if they so wished.

In order to make sense of their views and experiences, I draw on Fraser's normative framework of social justice, the core concept of which is parity of participation. Fraser offers an integrated framework comprised of several justice theory systems which offer different but interlinked conceptions of justice, including misframing, misrecognition, and maldistribution. Moreover, I apply Fraser's proposed standards to evaluate whether allegations of injustice are justified. To aid in this assessment, I also draw on the previously outlined conceptualisations of the legal status, rights and the role of the victim in Nordic legal thinking.

In applying the notion of misframing to the Icelandic criminal justice system, I ask whether victim-survivors are subject to the criminal justice process, i.e., whether they have legitimate interests in the process and the outcome of the case. Based on legal reasoning from the other Nordic countries, it is clear that victim-survivors have legitimate factual and legal interests in the procedure and outcome

of the criminal case. In short, I therefore argue that denying victim-survivors the right to have legal standing in their criminal cases is wrong and constitutes a case of misframing.

In order to distinguish between justified and unjustified claims for recognition, Fraser proposes using “participatory parity” as an evaluative standard. This firstly requires claimants to show that they are being denied participatory parity by the institutionalisation of majority cultural norms; and secondly that the practices for which claimants are seeking recognition do not themselves deny others participatory parity. Based on Nordic (feminist) legal reasoning, 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.

On the face of it, the charge of maldistribution does not therefore apply in these cases, although it may generally apply to criminal cases if victim-survivors do not have access to free legal aid. It is important to note, however, that while the role and status of the defence lawyer is well established within the field of legal education and the legal profession, this is not the case with regard to victims’ lawyers. However, a discussion of the implications of this difference lies beyond the scope of this paper.

Paper III

Injustice Disrupted: Experiences of Just Spaces by Victim-Survivors of Sexual Violence

Given the limitations of the criminal justice system to address cases of sexual violence, feminist scholars are increasingly exploring alternative approaches to justice. In this paper, I ask: What is the role of space in the way victim-survivors of sexual violence can experience justice outside of the criminal justice system? Can an understanding of space help us develop justice responses to sexual violence? Interviews were conducted with 35 victim-survivors of sexual violence in Iceland. Using thematic analysis (Braun and Clarke, 2006; Clarke et al., 2016), the notion of space and its relationship with justice was identified as the focus of the study. In order to conceptualise these findings, I build upon Liz Kelly’s (1987;

1988; 2012) concept of the continuum of sexual violence, and McGlynn and Westmarland's (2019) concept of kaleidoscopic justice.

Many participants described feelings of profound fear and anxiety in cases where offenders remained in or re-entered their life space in some way. Moreover, when the offender is a family member, friend, fellow student, colleague, or someone in their immediate surroundings, this can have wide-ranging consequences for their psychological and physical well-being, family relations, and educational and socio-economic status and opportunities; and can in turn severely limit their agency and freedom of movement, as well as their social, educational, and economic relations and opportunities. Depending on the context, participants faced with limited familial, social, and institutional resources usually had to surrender or negotiate spaces in order to avoid the offender. Consequently, the offenders' ongoing intrusion into their spaces was found to severely impact their socio-spatial relations and what Beebejaun (2017) refers to as their "right to everyday life". In order to conceptualise these findings, I build upon Kelly's (1987; 1988; 2012) concept of the continuum of sexual violence in order to capture the range and extent of injustices experienced by victim-survivors of sexual violence, in terms of both being subjected to sexual violence and dealing with its aftermath.

In the paper, I further highlight four accounts where participants who had greater access to resources, networks, and institutional mechanisms were able to use different socio-spatial strategies. In these four accounts, the women concerned were able to challenge the offenders' ongoing intrusion into their life space. In order to hold on to their family relations, friends, education, and/or job, they fought to protect and (re)claim their space. This claim to space is understood as a just claim; indeed, some of the women invoked the rights discourse to justify their claim to space and their right to everyday life. Drawing on the concept of the continuum of sexual violence, I suggest that participants' experiences can be conceptualised on a continuum of injustice. To the degree that participants were able to create what I call "just spaces", they gained a sense of belonging, empowerment, and freedom, which I suggest can be understood as disrupting this continuum of injustice.

The creation of just spaces that are sustainable enough is facilitated by "those who count" in a given context, based on the interrelated building blocks of experiential justice identified in kaleidoscopic justice, i.e. consequences, recognition, dignity, voice, prevention and connectedness. Moreover, I suggest

that the spatial aspect of this type of intervention in the continuum of injustice is closely connected to the importance of belonging, or connectedness. (Re)gaining a sense of belonging entails exercising our right to everyday life, whereby we make space our own by moving through it as a part of our embodied everyday practices. Through this (re)claiming of space, we are able to inhabit our bodies and the world and to expand our horizon of possibilities in order to exercise our freedoms. Therefore, an understanding of the importance of existential and socio-geographical space for victim-survivors, and its connections to in/justice, should inform the development of alternative justice responses to sexual violence.

Paper IV

Compensation as a Means to Justice? Sexual Violence Survivors' Views on the Tort Law Option in Iceland

Given the limited ability of criminal law to deliver conventional justice in cases of sexual violence, survivors are increasingly exploring non-traditional ways of seeking justice. While civil claims cannot be considered a non-traditional legal option, limited attention has been paid to the potential of tort law to address the harm of sexual violence. Based on interviews with 35 victim-survivors of sexual violence in Iceland, this paper considers the following questions: How do victim-survivors understand monetary compensation? How can tort law meet victim-survivors' justice interests? Using thematic analysis (Braun and Clarke 2006; Clarke et al. 2016), the following themes were developed: "dirty money but only fair", "risking credibility", and "a different kind of justice".

The findings suggest that it can be important for survivors to receive recognition of and compensation for the financial loss incurred in relation to the often extensive consequences of the violence. However, putting a price on what had been done to them and the harm it had caused was often considered by survivors as ridiculous at best and offensive at worst. This indicates that monetary compensation and the harm of sexual violence are not only cognitively incommensurable, but also constitutively incommensurable. Many participants associated monetary compensation with being paid off, viewing it as "dirty money" or "blood money". Monetary compensation can, therefore, be understood as devaluing the harm of sexual violence and as a taboo trade-off (Fiske

and Tetlock 1997), and can transform the meaning of the violence into transactional sex or prostitution.

Some participants also worried about pursuing compensation for fear of being stigmatised and accused of lying about the sexual violence for monetary gain. Moreover, for many participants, pursuing monetary compensation was associated with risking their credibility – the most valuable asset of a “real” victim according to legal practice. There is therefore an understanding among survivors that pursuing monetary compensation can risk social and legal judgement, degrading their moral standing, which feeds into social myths about how “real” victims behave (Ehrlich 2001; Temkin and Krahé 2008; Edwards et al. 2011; Deming et al. 2013; Dinos et al. 2015). This serves to undermine their de facto access to compensation for their often extensive pecuniary and non-pecuniary losses.

The Icelandic Minister of Justice has currently under review proposals which, if enacted, would afford survivors the right to legal aid to pursue civil claims whereby the state would, in part, guarantee the amounts awarded. Such a state-funded tort law option could no longer be conceptualised as privatising the harm of sexual violence, but rather as a public/private hybrid option. While such a policy could send a normative signal about the appropriateness of this legal option, the question remains of whether it has potential to counteract social myths about women reporting sexual violence for monetary gain, or whether it would simply exacerbate them.

The findings of the study also indicate, however, that while a legal decision finding the wrongdoer responsible for the harm done can be important for survivors, it meets their justice interests only in a limited way. As previous studies also indicate, an important component of justice for survivors centres on offender accountability, responsibility, and ultimately the prevention of further sexual violence. It has been suggested that taboo trade-offs can become more acceptable if the money is used for other important intrinsic goods (Sunstein 1993). How, then, can compensation be used as a means to justice? If the above mentioned proposals were enacted, the state would guarantee awarded damages, at least up to a certain amount, in such civil tort suits. This would mean that the wrongdoer is indebted to the state. The paper concludes by suggesting a way in which this debt can be leveraged to incentivise offender accountability and responsibility, whereby the compensation – this taboo trade-off – can acquire a new meaning.

Concluding Discussion

As already noted, this compilation 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. The aims guiding this 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. In this concluding discussion, I will summarise the findings of the papers in the context of the broader aims of the thesis. Firstly, I will discuss how the conditions for social justice can be developed in relation to the legal system. I will then focus on the main findings in terms of the more specific content of victim-centred justice. To conclude, I will discuss the possible implications of a plural justice approach.

Developing Conditions for Social Justice in Relation to the Legal System

Papers I, II and IV include a focus on how to further develop the conditions for social justice in relation to the legal system in cases of sexual violence. Before discussing the findings in the context of civil justice, I begin by presenting the findings in relation to the criminal justice system.

Existing research on the experiences of crime victims within criminal justice systems has largely relied on the use of dis/satisfaction as a measure (Holder 2015). In this context, studies within victimology tend to follow Lind and Tyler (1988) where procedural justice is conceptualised through the prism of victims' psychosocial needs and in terms of how satisfied they are with the criminal justice process

(e.g. Wemmers 2010; Laxminarayan 2012; c.f. Holder 2015). 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 how the criminal justice system works and how their case is progressing; and to be able to participate and have a voice in the criminal justice process (Wemmers 2010; 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 (see Paper II).

In many jurisdictions, victims are afforded the legal status of a witness to the crime committed against them and have limited informational and participatory rights, purportedly so as not to jeopardise the right of the accused to a fair trial. However, opinions on this matter differ between jurisdictions. In Paper I, 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. 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. Moreover, I show how the solution to victims' negative experiences is framed in different ways based on contrasting assumptions about the needs and interests of victim-survivors of sexual violence. Legal policy arguments which are not in favour of 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. 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 Paper II, based on a thematic analysis of interviews with victim-survivors of sexual violence, 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 2001a), I then proceed to apply Fraser's (1997; 2003; 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 is, therefore, a case of misframing.

Secondly, I proceed to apply the principle of “participatory parity” (Fraser 1997; 2003) 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.

Thirdly, I analyse whether victims are subject to maldistribution (Fraser 1997) and thereby prevented from interacting with others as peers in the criminal justice procedure. As long as victims have access to free legal representation, on the face of it, they are able to exercise their rights and are therefore not subject to maldistribution in its narrow sense.

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.

There is no evidence to suggest that procedural parity between victims and suspects/accused will lead to increased rates of conviction. From a victim perspective, the high standard of proof in criminal cases can be understood as a purposefully built-in structural bias in favour of accused persons for the purpose of reining in the punitive power of the state. While in the context of Iceland there is reason to believe that there is ample room to improve police investigations in cases of sexual violence (Antonsdóttir and Gunnlaugsdóttir 2013; Antonsdóttir 2014), discussions on the assessment of evidence and the interpretation of the standard of proof are beyond the scope of this thesis.

In Paper IV, I examine the justice potential of stand-alone civil tort lawsuits in cases of sexual violence. Here, the conditions for social justice in the form of parity of participation (Fraser 1997) are much improved, as the plaintiff is considered a

full legal subject with the same procedural rights as the defendant, and the standard of proof is lower than in a criminal case. However, there are challenges attached to this legal option. Firstly, there is the problem of access to justice, given that civil tort lawsuits are considered private lawsuits where plaintiffs and defendants have to pay for their own legal representation. Secondly, we run the risk of privatising the harm of sexual violence; or as MacKinnon (1979) has emphasised, sexual violence is not only wrong and a personal injury but “a social wrong and a social injury that occurs on a personal level”, and should therefore not simply be treated as a private tort (p. 173).

Here, I argue, it is important to acknowledge sexual violence as a form of gender injustice coupled with, largely, offender impunity, which has detrimental consequences in terms of victim-survivors’ health, well-being, and socio-economic status. In order to remedy these problems of misrecognition and maldistribution, which constitute social injustice, I suggest using Fraser’s (1997; 2003) conceptual toolbox. Applied in the context of the liberal welfare state, I suggest the remedy of affirmation along with redistribution. In this context, this entails ensuring that plaintiffs and defendants in cases of sexual violence are afforded access to legal aid paid for by the state and that the state guarantees, at least in part, the amounts awarded. Such a state-funded tort law option could no longer be conceptualised as privatising the harm of sexual violence, but rather as a public/private hybrid option.

The Content of Justice: Victim-Survivors’ Justice Interests

Given the limitations of the criminal justice system to deliver justice in cases of sexual violence and, moreover, its limited conceptualisation of justice as primarily retributive, victim-survivors, practitioners, and (feminist) scholars are increasingly exploring alternative ways to conceptualise victim-centred justice in the effort to better meet the justice interests of survivors. Papers II and III contribute to the knowledge base of the meaning of justice in the context of civil, administrative, and informal justice processes and practices.

Research on how victim-survivors of sexual violence understand, perceive, and experience justice are limited, but indicate that victim-survivors’ understanding of

justice is more complex and nuanced than what is captured by conventional criminal justice and restorative justice (Herman 2005; Jülich 2006; Holder 2015; Clark 2015; McGlynn et al. 2017). In Paper III, I show how informal justice practices and administrative justice procedures can facilitate victim-survivors to experience a sense of justice by way of (re)claiming their space, or what I suggest calling “just spaces”.

Firstly, I show how many participants described feelings of profound fear and anxiety in cases where offenders remained in or re-entered their life space in some way, thus severely limiting their agency and freedom of movement as well as their social, educational, and economic relations and opportunities. I argue that the way in which survivors described their existential and bodily reactions to being, or anticipating being, in the same place as their offender in the aftermath of sexual violence can be conceptualised on Kelly’s (1987; 1988; 2012) continuum of sexual violence.

Secondly, I draw on McGlynn and Westmarland’s (2019) concept of kaleidoscopic justice, which incorporates justice themes that are of importance to victim-survivors of sexual violence: consequences, recognition, dignity, voice, prevention and connectedness. 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 “those who count” in a given context and who ensure that these spaces are sustainable enough. Those who count can include family members, friends, colleagues, and those in positions of authority.

Thirdly, in my effort to further conceptualise what I suggest calling a “just claim to space”, I reconceptualise Kelly’s (1987; 1988; 2012) 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 or an intervention in this continuum of injustice, whereby victim-survivors can exercise their “right to everyday life” (Beebeejaun 2017) and experience a sense of belonging and freedom. I conclude that community accountability processes 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.

As noted above, Paper IV focuses on the justice potential of stand-alone civil tort lawsuits in cases of sexual violence. In this paper, I show that 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.

Firstly, I show how many associated monetary compensation with being paid off, viewing it as dirty money or blood money. I therefore argue that monetary compensation and the harm of sexual violence can be understood as not only cognitively incommensurable, but also constitutively incommensurable. Monetary compensation can, therefore, be understood as devaluing the harm of sexual violence and as a taboo trade-off (Fiske and Tetlock 1997) which can transform the meaning of the violence into transactional sex or prostitution.

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 associated with risking 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 – degrading their moral standing – which feeds into social myths about how “real” victims behave (Ehrlich 2001; Temkin and Krahé 2008; Edwards et al. 2011; Deming et al. 2013; Dinos et al. 2015).

Thirdly, while a legal decision finding the wrongdoer 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. As indicated by previous studies (McGlynn and Westmarland 2019), an important component of justice for survivors centres on offender accountability, responsibility, and ultimately the prevention of further sexual violence. Neither tort law nor criminal law provides incentives for offenders to take responsibility for their actions.

It has been suggested that taboo trade-offs can become more acceptable if the money is used for other important intrinsic goods (Sunstein 1993). I therefore suggest a way in which compensation can be used as a means to justice. If the policies discussed above were implemented, whereby the state guarantees, at least in part, the amounts awarded, it would mean that the wrongdoer is indebted to the state. In order to better meet victim-survivors’ justice interests I suggest that

the state incentivise wrongdoers by offering a debt discount if they successfully complete a specially designed offender accountability programme. The question, however, remains of whether such a policy could lend new meaning to this type of taboo trade-off.

Possible Implications of a Plural Justice Approach

Applying a plural approach in the search for justice for survivors of sexual violence entails the destabilisation of the dominant position of criminal justice. Therefore, there is reason to ask: what are the implications of decentring criminal law in the imaginative space of justice accompanied by the proliferation of different formal and informal justice processes and practices?

In Fraser's (2009) theorising about the state of the "Westphalian political imaginary" (p. 4), she argues that the political space which was previously assumed to refer to territorial state and its national citizenry is now being contested. She refers, for example, to issues of immigration, indigenous land claims, global warming, and the "war on terror". In describing the current state of justice at large in a globalising world, Fraser proposes the term "abnormal justice" (Fraser 2008; 2009). Normal justice is understood by Fraser as contestations over justice which nonetheless rest on shared assumptions: "However fiercely they disagree about what exactly justice requires in a given case, the contestants share some underlying presuppositions about what an intelligible justice claim looks like" (Fraser 2009: 48). Abnormal justice, on the other hand, is when contestations about justice proliferate but are increasingly characterised by a lack of the structured character of normal discourse. This is when disputants do not share a common understanding of what justice claims should look like, where to seek redress, the conceptual space within which claims for justice can arise, and which social differences can entail injustices. Fraser argues that "[t]he result is that current debates about justice have a freewheeling character". Without "the ordering force of shared presuppositions, they lack the structured shape of normal discourse" (Fraser 2008: 395).

Fraser's notion of normal/abnormal justice is an analogy of Thomas Kuhn's understanding of normal science: "For Kuhn, science is "normal" just so long as a single paradigm dominates inquiry to such an extent that dissent from it remains contained. Science becomes "revolutionary", in contrast, when deviations

cumulate and competing paradigms proliferate” (Fraser 2009a: 283). Instead of using the term “revolutionary”, however, Fraser chooses to use the term “abnormal”, referring to Richard Rorty’s distinction between “normal” and “abnormal discourse” (Rorty 1981; 1989; cited in Fraser 2009: footnote 3, p. 175). I suggest that Fraser’s concept of abnormal justice helps illuminate and explain the current state of affairs in terms of the amplified calls for justice in cases of sexual violence, and its plural and diverse characteristics and impact.

Using Fraser’s (2009) terminology, the “normal” grammar and discourse for justice in cases of sexual violence has been shaped by the dominant discourse of criminal justice. But what happens when victim-survivors take their claims for justice outside the criminal justice system; when their case is being heard and decided upon by actors outside that system? At present, we are seeing the use of plural formal and non-formal procedures which use different standards of proof, yield different outcomes, and are shaped by different discourses. Here, I believe, Fraser’s concept of abnormal justice can be used to capture a situation where disputants in the contest over justice in cases of sexual violence no longer share the same presuppositions of what justice claims should look like, where to seek redress, and who can decide the outcome.

This can lead to at least a couple of different scenarios. One possible scenario might take the form of a backlash, where the legal system will react by strengthening the dominance of criminal justice. This might take place, for example, through lawsuits, where those responsible for alternative procedures and pathways are put on trial and found liable for defamation or wrongful dismissal. Another possible scenario is that the social development of alternative formal and informal procedures will continue and successfully undermine the dominant position of criminal justice. In this scenario, the impunity that offenders of sexual violence have largely enjoyed could diminish, as perpetrators could increasingly be held to account in some form. If we come to see alternative justice pathways cumulate and competing paradigms of justice proliferate, then we could indeed, to revert to Kuhn’s (1962/1996) terminology, be talking about “revolutionary” justice.

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This compilation dissertation explores how victim-survivors of sexual violence in Iceland experience and understand justice; and how, in a Nordic socio-legal context, 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.

Paper I uses critical policy analysis to investigate how Danish and Norwegian legal policy documents represent the “problem” of victims’ legal status and rights in the criminal justice procedure. The paper finds that the respective problem representations rest on polar opposite interpretations of legal principles and assumptions about victims’ needs.

Paper II explores how victim-survivors experience the criminal justice process in Iceland and analyses the findings in the context of social justice theory. The paper finds that assigning victims the legal status of a witness in the criminal case with limited procedural rights is a form of injustice.

Paper III analyses victim-survivors’ experiences of different non-traditional, formal and informal, justice mechanisms and practices in Iceland. While the meaning of justice is comprised of several factors, the paper highlights how experiences of justice can be connected to notions of space and the ability to exercise one’s freedoms.

Paper IV examines victim-survivors’ views on civil tort claims and monetary compensation in Iceland. The paper finds that pursuing civil claims can be understood as a taboo trade-off and can risk social and legal judgement. In addition, monetary compensation does not align with survivors’ ideas of justice. State intervention is needed to better meet survivors’ justice interests.

In sum, the dissertation contributes to a broad survivor-centred justice agenda which entails the decentring of criminal law in the imaginary space of justice. It also discusses the possible implications of the development of multiple formal and informal justice processes and practices and its revolutionary potential.



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