



# 'A Witness in My Own Case': Victim–Survivors' Views on the Criminal Justice Process in Iceland

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## Abstract

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 article, 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, the article draws on interviews with 35 victim–survivors of sexual violence in Iceland. The interviews are presented against the backdrop of Nordic legal thinking and are interpreted in the context of Nancy Fraser's democratic theory of justice. On the basis of the findings, I argue that assigning complainants the role of witnesses constitutes a case of misframing that results in misrecognition throughout the criminal justice process.

**Keywords** Nordic law · Parity of participation · Procedural justice · Sexual violence · Victim–survivors

## Introduction

With the development of the modern criminal trial, the state took over the representation of the victim–survivor<sup>1</sup> to such a degree that in many jurisdictions they were denied the right to fully participate in trials and thereby pushed out of this arena (Christie 1977). In many jurisdictions, the criminal case is now conceptualised as a dispute between the state and the accused, with the victim–survivor being assigned

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<sup>1</sup> Generally, I will be using the term victim-survivor in this paper when referring to people who have been victimised. This is discussed further in the terminology section at the end of this introduction.

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the status of a witness to a crime against the state (Doak 2008). Since the 1970s, the increasing attention has been directed at the marginalisation of victim–survivors in the criminal justice process. In response to the inadequate treatment of victim–survivors within the criminal justice system, much international victimological research has focused on how victim–survivors experience the criminal justice process, framed in terms of their level of satisfaction with the criminal justice system (e.g. Laxminarayan et al. 2013; Felson and Pare 2008; Erez et al. 1997; Erez and Bienkowska 1993). These studies have predominantly been based on quantitative data and less research has focused on what satisfaction and fairness mean to the people involved in legal proceedings (cf. De Mesmaecker 2014; Holder 2015). Since the 1990s, research on victim–survivors’ experiences of the criminal justice system has drawn heavily on procedural justice theory (Lind and Tyler 1988) which holds that in interactions with authorities, the perceived fairness of the process may be more important than the favourability of the outcomes themselves. This research has shown 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). One concept that is related to procedural justice is that of secondary victimisation, which refers to the negative societal reactions that victims may experience in the aftermath of a crime, which may then be experienced as a further violation of their legitimate rights (Montada 1994). Secondary victimisation occurs when people who have been victimised experience victim–blaming, insensitive comments and statements that minimise the harm they have experienced (Orth 2002). Victim–survivors of sexual violence in particular have been found to experience secondary victimisation, often feeling blamed, doubted and revictimised (Campbell and Raja 1999). Discussions of the legal and policy implications of such findings often centre on the notion of the procedural *needs* of victimised persons and on how, and to what extent, those needs should be transformed into rights (e.g. Goodey 2005, 127; APAV 2016). Within a human rights framework, some scholars have then argued for extending the rights of victim–survivors within the criminal justice process in order to better meet their needs and counteract their experiences of secondary victimisation (Wemmers 2012; Wolhuter et al. 2009).

In the common law context, in which victimised persons have the legal status of witnesses with limited or no procedural rights, Holder (2017) has identified two main policy responses that aim to give recognition to victimised persons. One approach conceptualises the victim–survivor as an outsider in relation to the criminal justice process but as having the right to services such as reparation, compensation, and financial and therapeutic assistance. The second approach involves limited participatory opportunities such as witness protection, victim impact statements and submissions to parole boards. Holder, however, argues for a third approach that involves the re-centring of the state as a duty-bearer in relation to both the victimised person and the accused. This approach is based on the notion that both victim–survivors and the accused are citizens who should be considered equal before the law, with states being obliged to treat citizens equally. However, in the Anglo-American context, the issue of participatory rights for victim–survivors in accusatorial criminal

justice systems remains controversial (Manikis 2015). Edwards (2004), for example, has argued that victim–survivors are not in a position of inequality vis-à-vis the state in the criminal justice process, and moreover, that victim–survivors should not be granted participatory rights and legal representation merely because the defendant is afforded such rights (p. 972). In civil law countries, victim–survivors' procedural rights have traditionally been stronger than in common law systems (Doak 2008). However, these rights vary considerably between different civil law jurisdictions. This means that many of the common law debates on victim–survivors' procedural rights also resonate in the context of certain civil law countries as will be discussed further in this paper in the context of the Nordic legal systems.

In this paper, I employ a socio-legal approach to explore the question of victim–survivors' procedural rights in the Nordic context. I ask whether the prevalent legal arrangement, whereby victim–survivors are assigned the legal status of witnesses in criminal cases, with limited procedural rights, is a just arrangement. In order to answer this question I first discuss the legal status and rights of victim–survivors in Iceland in the context of Nordic law and legal debates. Secondly, I will present a thematic analysis of interviews conducted with 35 victim–survivors of sexual violence in Iceland on their views and experiences of the criminal justice process. Since I understand the views and reflections of the participants to be primarily embedded in their sense of right and wrong, as opposed to their needs and levels of satisfaction, I will be interpreting the findings in the context of Nancy Fraser's social justice theory (1997; Fraser and Honneth 2003; Fraser 2009).

A note on terminology: As has been pointed out by van Dijk (2009), for example, the term victim is etymologically derived from the Latin word for sacrificial animal and evokes connotations of being passive and helpless. Feminists have objected to the use of the term on this basis since passivity and helplessness are traits that have traditionally been associated with being female. Instead feminists prefer the term victim–survivor, which has been used to underscore the coping capacity and resourcefulness of women and others who have been victimised (McGarry and Walklate 2015). From a legal perspective, however, the term complainant is used during the criminal justice process since a person is not considered to have been victimised until the accused has been found guilty. In this paper I will primarily be using the term victim–survivor when referring to people who have been subjected to crimes. However, when referring to complainants in the context of Nordic legal jurisdictions, I will introduce and use the relevant legal terms.

## **Victim–Survivors' Legal Status and Rights in Nordic Law**

Within comparative law, Nordic law has either been regarded as a sub-category of civil law or as a legal family of its own. While the term Nordic law is used when emphasising the considerable similarities between the law, legal systems and legal cultures of the Nordic countries, a distinction can be made between the West Nordic (Denmark, Iceland and Norway) and the East Nordic legal traditions (Finland and Sweden) (e.g. Husa et al. 2008). This distinction has politico-historical explanations and is of importance when it comes to the legal status and rights of

victim–survivors in criminal cases. In the East Nordic legal systems, victim–survivors can obtain full party status in the criminal case as auxiliary prosecutors with full participatory rights.<sup>2</sup> This is not the case in West Nordic jurisdictions, however, where victim–survivors have the legal status of witnesses, as is the case in the common law countries. 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). The rights this affords victim–survivors differ however between the Nordic countries, as will be discussed below. One characteristic of the Nordic jurisdictions is the right of victim–survivors of sexual violence, and other serious offences, to the services of an independent legal counsel (ILC) who is a lawyer paid for by the state. Denmark was the first country to establish the ILC model in 1980, followed by the other Nordic countries.<sup>3</sup> The role of ILCs differs between the Nordic jurisdictions, however, in that it is tied to the legal status and rights of their clients (Robberstad 2002).

While the Nordic legal systems were previously described as being inquisitorial, they are today generally based on adversarial principles (Brienen and Hoegen 2000; Joutsen et al. 2001). However, this adherence to adversarial principles is largely tempered by the inquisitorial notion that the aim of the criminal justice process is to shed light on the case and to reveal the substantive truth (Brienen and Hoegen 2000). This differs from the common law tradition which adheres to the notion of procedural truth, based on the belief that the best way to uncover the truth is by testing witnesses' accounts by means of confrontation. This approach to establishing the truth is understood to be particularly re-traumatising for vulnerable victim–survivors, especially in cases of sexual violence, when they are cross-examined in court (e.g. Hunter 2017). Further, while common law systems often have strict rules regarding the submission of evidence, the Nordic jurisdictions apply the principle of free evaluation of evidence and there are generally no rules on the admissibility of evidence (Brienen and Hoegen 2000; Joutsen et al. 2001).

In summary, in spite of the similarities among Nordic laws and legal systems, the status and rights of victim–survivors differ greatly, as does the conceptualisation of their role in the criminal justice process.

### **The *Brotapoli* in the Icelandic Criminal Justice System**

In Icelandic, the legal term for the complainant is *brotapoli* which literally means the one who has suffered and/or endured a violation. The term thus both includes an acknowledgement that one has been violated but also contains a sense that one has endured and persisted.

There are three court instances in Iceland: District Courts, the Appeals Court, and the Supreme Court. It was not until 1 January 2018, however, that the Court Laws (no. 50/2016) were enacted that established the Appeals Court. Prior to this,

<sup>2</sup> See Wolhuter (2010) for a discussion of German and Swedish procedural law in cases of rape trials.

<sup>3</sup> The ILC model was introduced in Norway in 1981, Sweden in 1988, Finland in 1997, and Iceland in 1999.

the Supreme Court had also served as an appeals court. There is no jury system in Iceland but expert lay-judges are appointed under certain circumstances.

The current Laws on Criminal Procedure (no. 88/2008) stipulate the status and rights of the *brotapoli*. The *Brotapoli* has the legal status of a witness but can file a civil claim for damages in conjunction with criminal proceedings (adhesion procedure) and has legal standing in terms of this claim.<sup>4</sup> The criminal court then decides on both the criminal and civil liability of the offender. However, if the accused is not convicted, the civil claim is not considered.

Emergency services for victim–survivors of sexual violence are located at the University Hospital in Reykjavík and include a forensic examination, free psychological counselling and legal aid. Generally, services outside Reykjavík are not so well-integrated but hospitals are provided with sexual assault evidence collection kits in order to conduct forensic examinations. Victim–survivors who turn to the University Hospital in Reykjavík are thus offered legal counselling before they take the decision to report the case to the police (Antonsdóttir and Gunnlaugsdóttir 2013). Reported cases of sexual violence are either investigated by the Sexual Offences Unit of the Reykjavík Metropolitan Police or by investigative units at police departments in smaller towns in rural Iceland.<sup>5</sup> According to the Laws on Criminal Procedure (no. 88/2008), police interviews of suspects and witnesses, including the *brotapoli*, are to be audio- and video-taped if possible. In cases of sexual violence, completed investigations are sent to the District Prosecutor. If the prosecutor finds that the evidence in the case is sufficient or that the case is likely to result in a conviction, charges are issued, otherwise the case is closed.

In 1999, amendments to the Laws on Criminal Procedure (no. 36/1999) led to considerable improvements in the rights of the *brotapoli*. In cases of sexual violence and other serious crimes the *brotapoli* was afforded the right to be appointed an ILC. Moreover, a new chapter was added to the laws on criminal procedure listing the rights of the *brotapoli*. Chapter V of the current Laws on Criminal Procedure (no. 88/2008), stipulates that the *brotapoli* is to be informed if the police investigation is discontinued, is entitled to an explanation for this decision and has the right to appeal the decision to the prosecution authorities. The *brotapoli* is also to be informed if charges are issued and of the final decision in the case. In addition, if charges are not issued, the prosecutor is obliged to provide a short explanation for this decision if requested by the *brotapoli*. In cases concerning sexual offences, and other serious cases, the police have a duty to appoint an ILC for the *brotapoli* if the *brotapoli* so wishes. In cases where the *brotapoli* is under the age of 18, the police are always required to appoint an ILC. The role of the ILCs is to safeguard the interests of their clients and to provide them with support, and also to prepare

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<sup>4</sup> The adhesion model is commonly found in Germanic, Romanic and Nordic jurisdictions (Brienen and Hoegen 2000).

<sup>5</sup> In cases of suspected sexual abuse of children under the age of 15, the Children's House provides child-friendly, interdisciplinary and multi-agency services, with different professionals working under the same roof to investigate suspected sexual abuse (Icelandic Government Agency for Child Protection n.d.).

and file compensation claims. During the police investigation, the ILC is always allowed to be present when their client gives testimony.<sup>6</sup> While the ILC cannot ask the *brotapoli* questions during police questioning, she or he can make suggestions to the police that their client should be asked about specific issues. During the police investigation, the ILC only has the right to view case documents that pertain to their client and that are necessary to protect their client's interests. This usually refers to the *brotapoli*'s police testimony and the *brotapoli*'s medical records. If charges are issued and the case goes to court, the ILC has the right to obtain a copy of all case documents and is allowed to share them with their client. The ILC has the right to be present at all court proceedings in the case. The ILC cannot ask questions of those who give testimony in court but can make a suggestion to the judge that their client should be asked about specific issues or, similarly, that the defendant or witnesses should be asked about specific issues, as long as these only pertain to their client's compensation claim. ILCs are only allowed to verbally express themselves in court in relation to their client's compensation claim or procedural issues that pertain specifically to their client.

The reasons for the limitations placed on the role of the ILC can be found in the preparatory works accompanying law no. 36/1999, which were also reiterated in the preparatory work published in connection with the more recent Laws on Criminal Procedure (88/2008). In the comments on Article 46 it is stated:

As was clearly noted in the preparatory work accompanying law no. 36/1999, it has to be ensured that the existence of the ILC will not lead to the curtailing, more than absolutely necessary, of the procedural equality before the court which the accused is guaranteed in Article 70(1) of the Constitution and in Article 6(1) of the European Human Rights Convention, according to law no. 62/1994 (translation mine).

Here, procedural equality is a reference to the "equality of arms" principle, which is considered to be related to the notion of fairness (Summers 2007). The right to a fair trial is enshrined in Article 70(1) of the Icelandic constitution and in Article 6(1) of the ECHR.<sup>7</sup> As I will discuss in more detail below, in Iceland, as well as in Denmark and Norway, the equality of arms principle has been argued to constitute the main obstacle to strengthening the rights of victim-survivors. It should be noted, however, that according to the new Coalition Agreement (30 November 2017), the Icelandic government has pledged to improve the position of the *brotapoli* in the criminal justice system as part of a more extensive effort to improve services for victim-survivors of sexual violence.

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<sup>6</sup> Of all rape cases reported to the police in Iceland in 2008 and 2009, ILCs were present during their clients' police testimony in 80 percent of the cases (Antonsdottir and Gunnlaugsdóttir 2013).

<sup>7</sup> Article 70(1) of the Constitution of the Republic of Iceland (33/1944) stipulates: Everyone shall, for the determination of his rights and obligations or in the event of a criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law. A hearing by a court of law shall take place in public, except if the judge decides otherwise as provided for by law in the interest of morals, public order, the security of the State or the interests of the parties.

## The Role of the *Målsägande* in East Nordic Law

Criminal procedure in Finland and Sweden has preserved what has been described as an almost premodern legal arrangement in which the complainant is considered a party to the criminal case (Niemi-Kiesiläinen 2001). In Swedish and Finland-Swedish the legal term for a complainant in a criminal case is *målsägande*. Having its roots in old Swedish, *målsägande* literally means the one who owns the case, or more specifically, the owner of the word/speech, who has the right to speak and be heard. The concept therefore implies a position of power and refers to someone who is demanding her or his right (Lindstedt-Cronberg 2011: 53).

In Finland, the laws on criminal procedure were not modernised in the nineteenth century as was the case in many Western European countries. The criminal procedure reform of 1997 saw some changes to the status of the *målsägande* but by that time there was already considerable awareness of the importance of the rights of victim–survivors and for this reason their formal party status was not revoked (Niemi-Kiesiläinen 2001).

According to the Finnish Code of Judicial Procedure (4/1734) and the Swedish Code of Judicial Procedure (740/1942), the *målsägande* can obtain party status in a criminal case either by joining the criminal case as an auxiliary prosecutor (*biträda åtalet*) or by filing a private (compensation) claim in conjunction with the criminal case. The *målsägande*'s procedural rights in the criminal trial, i.e. to submit evidence and ask questions of the defendant and witnesses, may stem either from their legal standing in relation to the private claim or their party status as auxiliary prosecutors. Further, the *målsägande* has the right to pursue a private criminal case if the prosecutor does not issue charges, discontinues a prosecution or chooses not to appeal in cases where the accused is found not guilty. According to the Finnish Code of Judicial Procedure (4/1734) and the Swedish Law on Independent Legal Counsel (1988: 609), the *målsägande* in cases of sexual violence and other serious cases also has the right to have an ILC appointed, which allows these groups of *målsägande* to exercise their party rights (see Robberstad 2002 for a more detailed comparison and discussion).

The preparatory works accompanying the Swedish Code of Judicial Procedure (740/1942) do not specify the reasons why the *målsägande* should have the right to join the criminal case as an auxiliary prosecutor. However, according to Swedish legal doctrine, the main function of this right is to provide the *målsägande* with the opportunity to have control over the way in which the prosecutor presents the charges. It further functions to give the *målsägande* an opportunity to present alternative charges and evidence if she or he does not agree with the way the prosecutor presents the case. In addition, the ability of the *målsägande* to participate in the proceedings, and to have a say in relation to the question of guilt, is deemed to have symbolic value and is also thought to ensure that the *målsägande* has a voice in the process. In practice there is considerable variation in whether or not different *målsägandes* choose to join the criminal case. Some courts have reported that this is unusual while others say that it happens relatively often (SOU 2013).

A Norwegian committee charged with reviewing Norwegian law in relation to victim–survivors' rights arranged meetings with legal practitioners in Sweden and

Finland to better understand how the participation of the *målsägande* works in practice. Based on reports from legal practitioners in Sweden, it is rare for a *målsägande* to join the criminal case as an auxiliary prosecutor unless she or he has an ILC, with such lawyers being appointed in cases of sexual violence and other serious crimes. Some reported that it is important for the *målsägande*'s healing process to be able to actively participate in the criminal case, especially in cases of violence against women. In the case of Finland, the *målsägande* is generally considered a party to the criminal trial, irrespective of whether she or he formally joins the case and the *målsägande* is thus seen as an integrated part of the criminal justice process. The *målsägande* is mostly present in court throughout the trial and usually ask some questions. Both in Finland and Sweden, the *målsägande*'s participation in the trial is understood to be helpful in clarifying the course of events since she or he is often thought to know the details of the case better than the prosecutor. The *målsägande* may for example ask important questions via their lawyer which the prosecutor may have failed to ask and/or may correct statements that have been deemed incorrect. In Finland it was further noted that the truth cannot come to light unless the *målsägande* is an active part of the case (NOU 2006). In practice, the participation of the *målsägande* is therefore understood to serve to complement the role of the prosecutor.

Research and policy debates regarding the rights of victim-survivors in Sweden have mainly focused on their need for support and assistance (Wergens 2014, 290–291). The strengthening of the rights of the *målsägande* in the context of criminal procedure has largely been viewed as a non-issue since the *målsägande* already has extensive participatory rights (Träskman 2011). However, a proposal has recently been made to revoke the right of the *målsägande* to join the case as an auxiliary prosecutor in the context of a broader effort to streamline the criminal justice process and clarify the roles of the parties. It was argued that although the *målsägande* would no longer have the right to adjust the indictment, they would still retain most of their participatory rights via their legal standing as parties to the private (compensation) claim. The proposals are based on the notion that the *målsägande*'s interests in the criminal justice process are primarily related to the possibility of obtaining compensation (SOU 2013; Ds 2015). The proposal has as yet not been enacted.

### **Increased Rights for the *Fornærmede* in Norwegian Law**

In Norwegian, the legal term for the complainant is *fornærmede*. The verb to *fornærme* means to come too close and so the *fornærmede* is the one who has been approached too closely.

Historically, in the West Nordic countries the *fornærmede* has been afforded the legal status of a witness as is the case in common law countries. The main argument made against affording the *fornærmede* in the West Nordic countries increased procedural rights is based on an interpretation of the equality of arms principle, which is in turn related to the right to a fair trial [Robberstad 1999; Betænking 2005, 2006; Icelandic Law on Criminal Procedure (88/2008), preparatory works].



The core issue at stake here is that strengthening the *fornærmede*'s procedural rights could jeopardise the accused's right to a fair trial in that it could upset the balance of power between the prosecutor and the defendant within the bipartisan legal system. In the Nordic context it has been argued that this could potentially create an unfair situation of 'two against one' (Robberstad 1999). This argument has also been made in the common law context, where the concern is that affording victim–survivors participatory rights could give the appearance that the bipartisan accusatorial system is 'out-of-balance' (Doak 2005, 298).

The Norwegian legal scholar Anne Robberstad (1999) has criticised this traditional interpretation of the equality of arms principle, referring to it as the 'balance illusion'. Robberstad has shown that this interpretation is based on an underlying notion of the trial as a form of duel, battle or a sports match in Norwegian legal discourse, as indeed in Anglo-American legal discourse, in which the two teams must have the same number of players and be equally strong. Based on her review of the interpretation of this principle in EHRC case law, Robberstad argues that the equality of arms principle does not preclude the strengthening of the *fornærmede*'s procedural rights as long as the principle of the defendant's right to be heard and to object is upheld (*audi alteram partem*).

Drawing on Robberstad's (1999, 2002) work, the procedural rights of the *fornærmede* in Norway in cases of sexual violence and other serious crimes were strengthened considerably by way of an amendment to the laws on criminal procedure in 2008 (5/2008). The rights afforded to the *fornærmede* include: the right to meet with the prosecutor before the trial; the right to be present in court when the accused gives his testimony (which meant that the order of the presentation of testimony was changed and the *fornærmede* now gives her testimony first); the right to participate in the trial via their ILC, i.e. to submit evidence and put questions to the defendant and witnesses; and the right to address the court by way of a victim impact statement. Even prior to the 2008 legislative changes, the *fornærmede* had the right to view police documents during the police investigation as long as this was not deemed detrimental to the investigation (Robberstad 2014). The Committee charged with preparing the legislative proposals, did not, however, recommend affording the *fornærmede* the legal status of a party to the criminal case. The main argument against affording the *fornærmede* full party status was that the Committee did not want the *fornærmede* to have the right to appeal on the grounds of the sentence; and a majority of the Committee did not want the *fornærmede* to have the right to appeal on the grounds of the question of guilt. The Committee majority found that while party status could be of symbolic importance for the *fornærmede*, it is not very important in practice. At the same time it was considered an important matter of principle that the *fornærmede* should not be made a party to the criminal case. One member of the committee dissented from this majority view, saying that she felt that the *fornærmede* should be afforded party status but that she was nonetheless "in doubt whether the Norwegian legal community is ready for such comprehensive reform" (NOU 2006, 132).

Importantly, in the early preparatory work conducted in connection with the Bill, the Committee charged with preparing the legislative proposals found that those who have been subjected to a crime have "clear and legitimate interests in the criminal

case” which are of both a “factual and legal nature” (NOU 2006, 16). The Committee further stated that the *fornærmede* has legitimate interests in both the case being solved and the guilty person being held to account. In addition it argued that:

[The fact t]hat *fornærmedes* have justified interests in the criminal case, entails that *fornærmedes* also have a legitimate need to protect those interests during the case procedure (NOU 2006, 126).

The Committee agreed with Robberstad’s argument that affording the *fornærmede* participatory rights did not undermine the accused’s rights to be heard and to defend himself. They also made a point of rejecting the conceptualisation of the criminal trial as a sports match in which the teams have to have the same number of players and noted that “[i]n a criminal case there are no ‘winners’” (NOU 2006, 17). Instead they stressed that “the goal of the criminal case is to come to the correct conclusion while safeguarding everyone’s rights” (NOU 2006, 17). This can be understood as a (re)affirmation of the inquisitorial notion that the aim of the criminal justice process is to solve the case and reveal the material truth.

In addition to establishing that *fornærmedes* have legitimate factual and legal interests in the criminal case, the Committee also framed their argument for strengthening *fornærmedes*’ participatory rights as a question of their rights as citizens. The Committee argued that in a modern society it is considered good practice, and a part of a trustworthy state procedure, that citizens are able to object to and have a say in matters that affect them, and that criminal cases are no exception. It argued further that strengthening the position of the *fornærmede* in the criminal justice procedure is about affording the *fornærmede* rights that the accused already has (NOU 2006, 16–17). Holder (2017) argument for the re-centring of the state as a duty bearer in relation to both survivors and the accused, with the state being obliged to treat citizens equally, can be said to resonate well with the overall framing of the Norwegian legislative changes.

It is important to note, however, that the notion of the “citizen victim” has been criticised for not taking account of the fact that many vulnerable and marginalised victim–survivors are not necessarily citizens (Goodey 2005, 139). Although in preparatory documents for the Norwegian legislation, the *fornærmede* is in general recognised as having legitimate interests in criminal cases, these interests were only converted into rights for specific groups of *fornærmede*, largely on the basis of arguments of efficiency and cost. According to the Norwegian Criminal Procedure Act (25/1981), these include: sexual offences, serious physical violations, violations of restriction orders, forced marriage, violence in close relationships, human trafficking and genital mutilation. The *fornærmede* in cases involving these crimes is understood to have been subjected to particularly serious violations that cause major physical, mental and social harms (NOU 2006, 130). Thus in practice, participatory rights in Norway are granted to certain groups of *fornærmede* based on the type of crime to which they have been exposed and not their citizenship status.

In a recent study, Dullum (2016) conducted interviews with eighteen professionals working either in or in connection with the criminal justice system in Norway

in which she asked them about their experiences of the new legislation.<sup>8</sup> Dullum found that there appears to have been a cultural shift in the way in which *fornærmedes* are perceived. The research participants talked about how *fornærmedes* are treated with respect in court, that they are better prepared than before and that they feel more secure. Participants also felt that criminal cases themselves had become more humane. In particular, the participatory rights afforded to *fornærmedes*, such as the right to sit in on the whole trial, were contributing to the restoration of their self-respect and to the healing process. There were no indications that strengthening the rights of the *fornærmede* had led to a weakening of the rights of the accused. There were also few indications that having a more active ILC has led to any sort of an imbalance, except in cases where the ILC becomes too actively involved and in cases where there are several *fornærmedes*, and therefore several ILCs, and a single accused person (Dullum 2016).

In 2014 the Norwegian Ministry of Justice and Public Security appointed an ad hoc Commission to formulate a new Code of Criminal Procedure. While the Commission's mandate noted that there was no need to make changes to the rights of the *fornærmede*, given the recent legislative amendments, the Commission has nonetheless recommended several changes (NOU 2016). In the hearings process following the publication of the Commission's report these changes have been criticised for weakening the status and rights of the *fornærmede* (and their next of kin). Robberstad (Hearing Statement, 2 June 2017), for example, argued that the proposed changes would include: the weakening of *fornærmedes'* right to be present during the trial; the revoking of their right to comment following the testimony of each witness and the submission of each piece of evidence (although their lawyer would still retain the right to ask questions); and the revocation of their right to make final comments after the closing arguments.<sup>9</sup> The new code on criminal procedure has not yet been enacted.

## Methods and Findings

This paper is based on interviews with 35 white Icelandic individuals who have been subjected to sexual violence, 32 women and 3 men. The criteria for participation were being 18 years or over and self-identify as having been subjected to sexual violence. Participants were recruited through lawyers of victim–survivors; trauma

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<sup>8</sup> The research participants included 3 judges, 2 prosecutors, 3 ILCs, 2 lawyers who both worked as defence lawyers and ILCs, 2 representatives from the police and 6 representatives from different organisations, in particular victim organisations.

<sup>9</sup> Other major legislative changes proposed by the Commission are to revoke the *fornærmede's* rights to initiate private criminal prosecutions (which is currently allowed in some cases) and abolishing the possibility of accused persons being found liable to pay damages after being acquitted of the crime. Currently in Norway, a civil claim filed in the criminal case is assessed independently of the outcome of the criminal case. It is, therefore, not uncommon that an accused person who has been acquitted of the crime is simultaneously found liable to pay damages on the basis of the civil claim, since the burden of proof is lower in the civil than in the criminal case.

psychologists; NGOs who offer counselling for survivors of sexual violence; NGOs that advocate for minority rights such as those of women with disabilities, women of foreign origin living in Iceland and LGBTQIA people; and select Facebook groups. 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 of age. The type of violence described by the participants included rape (21), attempted rape (3), child sexual abuse (14), sexual harassment (2), technology-related sexual violence (3) and being bought in prostitution (1).<sup>10</sup> The offenders responsible for the violence were men and boys with the exception of one girl and one woman. They included family members (11), partners/boyfriends (7), friends/acquaintances (14), professionals (4),<sup>11</sup> and strangers (4). Of the 35 participants, seventeen had reported cases to the police, of which three had done so twice. The status of these 21 cases was as follows: no charges issued (7), accused acquitted (3), accused found guilty (4), cases still pending (7). In the seven cases still pending, the status was as follows: investigation stage (3), awaiting an appeal following a guilty verdict in the district court (4).

The study was approved by the Swedish Ethical Review Board. A semi-structured interview guide was constructed around several themes, one of which focused on how participants experienced or perceived the criminal justice system and its different stages, and how they understood the current legal arrangements whereby criminal cases are primarily understood as a dispute between the state and the accused. I conducted the interviews between January and March 2015 and in January 2017.<sup>12</sup> I then transcribed the interviews and conducted a thematic analysis (Braun and Clarke 2006; Clarke et al. 2016) in which I familiarised myself with the interviews by reading and re-reading them, after which I generated initial codes and then developed themes. I then translated the quotes presented in this paper from Icelandic to English.

## A Witness in My Own Case

Generally, participants found it absurd or surreal that the *brotapoli* was assigned the legal status of a witness. As one woman in her early twenties said: “you are only a witness in your own case, it’s a bit kind of silly that you have no ..., some kind of ... you know, you don’t get to know what is going on” (1). Some participants did not know that the *brotapoli* was assigned the status of a witness in the criminal justice process. When they were asked what they thought about this legal arrangement, many raised their eyebrows in a questioning manner or shook their heads and often

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<sup>10</sup> According to Article 206 of the Icelandic Penal Code (19/1940), it is illegal to buy sex. The law was enacted in 2009.

<sup>11</sup> The term “professionals” refers to individuals who occupy positions of authority in relation to the victim-survivors such as police officers or teachers.

<sup>12</sup> 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.

found it difficult to comprehend what they found to be “completely unnatural” (13). As one woman in her late twenties said:

I didn't know that it was like that, that it was just like: ‘No sorry, you just witnessed that you were raped’, and, you know this just doesn't compute, that you are only a witness you know ... (11).

In some of the interviews the discussions centred on the basic arrangement of the criminal justice system, where the understanding is that a criminal case is between the state and the accused with the state being seen as the powerful party (Goliath) while the accused is understood as the weaker party (David) and therefore needs extensive rights to protect himself. In response to this description and metaphor, a woman in her mid-thirties said:

No, I cannot really connect with this ideology because it's not the state that is raped, and it's not David and Goliath, its David and the Little Girl with the Matches in the vast majority of cases ... (2)

Another woman in her early thirties commented dryly: “... it's more like David with a nuclear bomb” (29). Participants generally disagreed with assigning the *brotapoli* the legal status of a witness, or as a woman in her late fifties said:

... the person who has been subjected to a crime is of course not a witness, it's the person who has been violated and she is not some sort of a witness that comes in. I think that there should be much more cooperation with that person. It's her life. (5)

A woman in her mid-thirties drew a parallel between the dissociation many survivors of rape describe experiencing during the offender's perpetration of the crime and being placed in the role of a witness by the law. She said:

... I am not a party to the case so what happened to me is not my concern. And my role is to be a witness, which is unbelievably alienating. You know, talk about an out-of-body experience. You are a witness, which is somehow a concept for an outsider, and then your body is a crime scene. So as a victim-survivor<sup>13</sup> then you disassociate and all that and then the system puts you in this dissociating role ... (34)

A woman in her early thirties said that while she thought it was important that the state has custody of the case to ensure, for example, that *brotapoli* cannot be pressured into withdrawing the charges, it is not fair to leave the *brotapoli* without any rights in the case. She subsequently asked: “Why is [the offender's] legal position higher than mine?” (19). She also continued by describing a different type of legal arrangement that she thought would make more sense:

<sup>13</sup> A note on the translation: The participant used the word *þolandi* which is used in everyday parlance in Iceland, particularly in relation to people who have been subjected to sexual violence. *Polandi* means the one who suffers and/or the one who endures.

Why can't I be a co-issuer of the charges? (...) Why can't the state decide to issue the charges, and stand behind the charges, and I be like a co-owner of a car, my name, and that I have the same rights as the state which would issue the charges? Why not? Now that would be logical.

To summarise, many participants found that being ascribed the status of a witness in a crime that had been perpetrated against them was nonsensical. Many therefore did not agree with the current legal arrangement which frames the crime as a dispute between the state and the accused since they understood themselves, as those who had been subjected to the violation, to be an integral part of the case and of the criminal justice process.

### **The Criminal Justice Process**

Of the 17 participants who had reported their case to the police, 14 participants had relatively recently reported the case, or had done so at some point between 2009 and 2015, and therefore had recent, or relatively recent, experiences of the criminal justice system. The analysis in this section is based on these interviews. These fourteen participants were 18 years or over when they pressed charges, with the exception of one participant who was 15 years of age.

### **Waiting in the Dark**

After giving their testimony to the police, usually in the company of their ILC, participants generally described the process as one of “waiting and waiting and waiting and waiting” and receiving “very little information” about the development of the case. A woman in her early twenties said: “I now had the legal standing of a witness; it was like I had really no right to know what was going on; that was the most difficult part” (12). A woman in her mid-thirties, who had waited for approximately 14 months to then get a letter from the prosecution authorities informing her that they had decided not to issue charges, described her experience in the following way:

... it was very difficult to get a confirmation that they had talked to [the offender] .. and .. this waiting while you have this hanging over you, it tears you up and you somehow can't continue your life. I have often joked that I would be ready to pay a fee just to get a text message once a month, just: 'Hi, we have not lost your case or forgotten about you but there is nothing new.' (34)

She also described how she had carried a document she had received from the Rape Trauma Centre around with her in her bag as it was “the only confirmation that I had that, you know, it wasn't all just my own imagination.”

A woman in her early twenties who had been subjected to sexual violence by her then boyfriend described the fear and anxiety she felt in relation to not knowing whether he had been informed of the charges and when he would be called in for questioning by the police. She described how her ILC had told her that he was

scheduled for questioning at the beginning of the month and how she had experienced a “terrible knot of anxiety” thinking “he is going to find me; he is going to contact me; for sure he is going to tell me.. I don’t know, threaten me or something; I just didn’t know what to expect.” The offender had then tried to contact her via Facebook and had previously also tried to call her and send her text messages that she didn’t respond to. At the end of the month she talked to her ILC, who contacted the police and found out that they still hadn’t brought him in for questioning. She explained how “angry” she had been about not being informed and that she had then had to prepare herself for another week of anxiety. She added: “you know, I of course don’t get to know anything” (1).

Others described how they had tried to guess how the case was developing via other witnesses who were called into testify or even, in high-profile cases, through the media. A woman in her early twenties said: “I read in the media that his detention order was running out and I was terribly stressed.” She explained that she had called her ILC who had said: “I’m trying to figure out what’s going on!” This participant went on to say: “You are in the dark the whole time; you know nothing about what’s going on.” (23)

Some described that their ILCs had regularly contacted the police and kept them updated while others heard little or nothing from their ILCs and had found it difficult to contact them or had not received replies to calls and emails. Participants generally felt that it was important for them to have legal support throughout the process—to have someone who was “going to be with me in this” (1).

### Not Being Informed or Consulted

If the prosecution authorities decide not to press charges, they send a letter to the *brotapoli* explaining their decision. This is often the first time that the *brotapoli* receives any information regarding how the offender had responded to the accusation. The prosecutor’s letter also includes a motivation for why the case was dropped. The four participants whose cases had been dropped described how reading the letter was either “profoundly humiliating” (34) or made them feel “angry” (30) and disillusioned at the criminal justice system and in some cases at society at large. A woman in her mid-forties described experiencing a fundamental crisis of faith, where her “whole world view completely changed”. She said: “This impacted me more than the rape itself.” She saw the letter as an official statement declaring that the perpetrator had been “allowed” to rape her (6). A woman in her mid-thirties described that she had later been raped by another man, but as a result of her previous experience of the criminal justice system she said: “I was determined not to report the case this time around because I wasn’t going to do that to myself, I was not going to go through that again.” (34)

Some mentioned that their lawyers had spoken with the prosecutors and said that the prosecutor had believed them but that the evidence was not sufficient to go to court. While participants took some comfort in knowing that they had in a sense been believed, they emphasised that the general public were not aware of this. They were concerned that in people’s minds the dropping of the charges confirms the offender’s innocence, which by extension must mean that they are lying. One

participant gave an example of how the man who had raped her had used the fact that the case had been dropped as proof that she had been lying about the rape. She said:

For example, one of his friends is an [influential politician], and my friend, who knows him, was once at a party with him when he said to her: ‘So your friend sure is mad to lie about an innocent man like that.’ You know, this was the attitude. [...] I thought that was the worst, society wasn’t even safe and people thought I was lying. (6)

Those participants who had received a letter informing them that the charges had been dropped described how the letter had left them with many questions, comments and objections. Participants pointed out different sections in the letters which made no sense to them. For example, a woman in her early twenties pointed out that the letter stated that it was “undisputed that the *brotapoli* and the suspect had not decided upon a safe word in their interaction to stop the conduct”. She pointed out that this was a “clear” indication that “this was not a case of consensual BDSM sex”. She highlighted another section in the letter, which stated how the accused had responded to her charges. He had said: “If she asked me to stop, and if she meant it, then I always stopped.” Expressing shock and disbelief, she said that this meant that the prosecutor was in effect condoning that it was up to the “[offender] to decide when I meant it.” (1) Participants who received such letters generally made many comments about flaws in the prosecutor’s arguments and also had other objections. However, none had exercised their right to respond to the letter by initiating a complaint procedure. Filing a complaint was often seen as not serving any purpose given what they saw as the biased attitudes of the prosecution authorities manifested in the letters, and because making a complaint would only lengthen a humiliating process that was already experienced as having been unbearably long.

### Excluded in the Trial Process

In those cases where charges had been issued, the participants had differing experiences of how much preparation they felt they had been given. Some had attentive ILCs who had explained the process to them, the layout of the courtroom and the roles of the different actors, while others had received little preparation. In addition, some mentioned that they had found it strange not meeting with the prosecutor before the trial. A woman in her mid-forties said:

I felt myself kind of, I don’t know how to put it into words but I felt a bit like I was watching a case as an outsider. I was not included. I got very little information. I had to, kind of, actively seek information about the status of the case. For example, I never met the prosecutor, never went over the case with him. I thought that was kind of strange. (26)

In Iceland the *brotapoli* is not allowed to listen to the testimony of the accused because the accused gives his testimony first and *brotapoli*, as witnesses, are not allowed to listen to the testimony of others until they have themselves testified.



The six participants whose cases had gone to court generally felt that victims should be able to observe the court case. One participant said: "Of course I would have wanted to sit in court," (12) and two participants said that they would have wanted to observe the case out of "curiosity" (12/23). Some thought it was unfair that the offenders were able to listen to their testimony but they could not listen to the testimony of the offenders, or as one participant said: "I think that if I want to listen to his testimony then I should be able to do that" (19). While participants generally thought that they should be able to sit in court, some had no wish to sit in the same room as the accused. A woman in her early twenties said:

If [the accused] hadn't been sitting there, then I would have wanted to sit in court. So if I had been able to be behind some kind of glass or sit in a way that he wouldn't have been able to see me, then yes I would have wanted to sit in court. [...] that would have been really good somehow, both to see what took place and how he behaved [...] I think that would have helped, although I don't know how. (23)

This sense of not being included as a participant in the court process was also described in another context by a woman in her early twenties who talked about feeling insignificant after having given her testimony in court. She explained that when the examination and cross-examination was coming to an end, one of the judges had concluded by asking:

'Does the prosecutor have anything to add? Does the defence have anything to add? Do the other judges have anything to add? No okay good, then we are done.' But, you know, what about me? Not me, I don't matter, you know, I don't have anything to add. (12)

Participants generally thought that there was "no question" (26) that the *brotapoli* should be a party to the criminal case and be able to sit in court and participate in the trial, and, that it is "completely unnatural that it's not like that" (26).

However, not all the participants talked about wanting more information about the process or to be afforded more participatory rights. One person did not express any desire for either additional information during the investigation of the case or participatory rights in the process. Her case was special in the sense that in only took 3 months for the police to finish their investigation and for the prosecutor to issue charges and the offender to be found guilty in court. In addition, this participant talked about having received the full support of her family and generally having had a positive experience of the police and her lawyer, as well as good support from her psychologist.

To summarise: Many participants talked about how long the criminal justice process had taken, and about not having been given sufficient information during this time. This left them feeling forgotten—that what had been done to them was unimportant. Also, not being updated at key moments of the criminal investigation, such as when the suspect is informed about the police report or when the suspect has been interviewed by the police, meant that they were unable to emotionally and mentally prepare in the event that the offender might contact them.

This also has implications in terms of their being unable to make arrangements for their own security if required. Receiving the letter from the prosecutor stating that no charges would be issued in the case was experienced as a devastating blow to their sense of justice, their credibility, their social standing and their belief in society. This was usually the first time they had received any information about the testimony of the suspect, to which they had serious objections, and in some cases they also had important comments to make regarding the legal interpretation of his testimony. However, none of the participants had filed a complaint to have the decision to drop the charges reviewed since by that time they had lost trust in the process. In cases where charges had been issued, some participants expressed a wish to have been consulted by the prosecutor before the trial and to be given the opportunity to listen to the testimony of the accused in court. However, experiences of not being kept updated, not being consulted and of being excluded were somewhat mitigated in cases where the participants had a diligent and supportive ILC.

## A Case of Misframing and Misrecognition

As was mentioned in the introduction, much of the victimological literature on procedural justice frames the fairness judgments of victim-survivors through the prism of their psycho-social needs and in terms of how satisfied they are with the criminal justice process. However, coming from a socio-legal perspective, and based on qualitative interviews, my understanding of the reflections and reasoning of the participants in this study is rather that they are embedded in a sense of right and wrong. In order to make sense of their views and experiences, I draw on Nancy 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.<sup>14</sup> Moreover, I will 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.

The legal understanding of the criminal case as a dispute between the state and the accused, thus excluding the *brotapoli*, was rejected by most participants. Participants conveyed a sense of 'absurdity' over this legal arrangement. For the law to convert the *brotapoli* into witnesses to the crimes that have been perpetrated against them was understood to be 'unnatural'. One participant drew parallels between the dissociation many survivors of sexual violence experience during a rape and the dissociative role the *brotapoli* are afforded by the law. Given that the crime was committed against them, and given the profound impact of the case process and its

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<sup>14</sup> Fraser's theoretical framework also includes the concept of misrepresentation but this is not useful for my purposes in this paper.

outcome on their lives as moral beings and on their world view, the general sense was that they should be an integral part of the case procedure.

Within Fraser's normative framework this amounts to an allegation of misframing. 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 the notion of misframing as being akin to what Hannah Arendt has termed "the right to have rights" (Arendt 1973 cited in Fraser 2009, 19). 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 criminal justice process and the outcome of the case. In the East Nordic countries, this question has historically largely remained undisputed, particularly in the case of Finland, where the *målsägande* has been understood as having a legal interest in the criminal case and its outcome. As acknowledged in the preparatory work that accompanied the Norwegian legislative reforms which saw the strengthening of the *fornærmede*'s participatory rights, there is no doubt that victim–survivors have legitimate factual and legal interests in the procedure and outcome of the criminal case (NOU 2006). This was also acknowledged in the preparatory work accompanying a legislative proposal to strengthen the rights of victim–survivors in Denmark, although no suggestions were made to strengthen their participatory rights (Betænkning 2006). I would therefore argue that denying victim–survivors the right to have legal standing in their criminal cases is wrong and constitutes a case of misframing.

Based on the way in which participants talked about their interactions with the criminal justice process it is clear that they understand themselves as having an interest in the case. They have an interest in knowing what the state is doing with respect to the harm that was done to them. They also have an interest in knowing about certain key aspects of the criminal investigation process in order to assess whether they need to make any personal or security arrangements. Participants also described the prosecutor's decision not to issue charges in the case as having a profound impact on their sense of justice, their credibility, their social standing, their relationship with the state and their world view. They therefore have a clear interest in being consulted before such decisions are made. In cases where charges were issued, some participants expressed the desire to be consulted by the prosecutor before the trial and to be able to listen to the testimony of the accused in court. Again, they have an interest in how the case is handled by the prosecutor, in observing how the accused responds to their accusations and in making comments and asking questions.

As has already been mentioned, the normative core of Fraser's justice theory is 'parity of participation'. Participatory parity "requires social arrangements that permit all (adult) members of society to interact with one another as peers" (2003, 36). One of the obstacles to participatory parity is 'misrecognition'. Misrecognition denies people the requisite standing as a result 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” (1997, 280). 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 (2003, 41). As was noted earlier, in West Nordic law the equality of arms principle has been interpreted to exclude victim–survivors from full participation in the criminal justice process since such participation is seen as potentially undermining the accused’s right to a fair trial. However, Robberstad (1999) has shown that this interpretation has been linked to the notion of the trial as a duel or a sports match in West Nordic majority legal culture—an interpretation that has now been rejected in the legal preparatory work accompanying the 2008 legislative amendments in Norway. Although Robberstad’s analysis is not explicitly feminist, the Finnish legal scholar Johanna Niemi-Kiesiläinen (2001) has argued that Robberstad’s theoretical premise is informed by a feminist understanding of the subject matter. Niemi-Kiesiläinen further argues that the metaphor of the trial as a game or a duel has clear gendered connotations against the backdrop of traditional roles and attributes assigned to men. She argues that while the legal arrangements of the criminal justice system are not themselves gendered, the metaphors used to conceptualise them are, thus making the system more foreign to ordinary people and particularly to women. In addition, women are more likely to enter the criminal justice system as victim–survivors than as accused. They are therefore the ones who have been excluded from the ‘game’ by being afforded the legal status of witnesses, which is a passive role that can easily be associated with traditional ‘feminine’ attributes (Niemi-Kiesiläinen 2001). On this basis, 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.

Given the professionalisation of the criminal justice system, it is clear that for most victim–survivors it is all but impossible to exercise their rights without legal representation. Participants’ negative experiences of the criminal justice process were somewhat tempered in cases where they had felt they had an ILC who had been ‘with them’ in the process—an ILC who had supported and advised them, explained the process and kept them updated as far as possible.

Returning to Fraser’s conceptualisation of justice as parity of participation, another obstacle to participatory parity is ‘maldistribution’. Maldistribution occurs when the unequal distribution of economic resources prevents people from interacting with others as peers (Fraser 2009, 60). In Iceland, the *brotaboli* does enjoy the services of an ILC paid for by the state, albeit only in cases of serious crimes such as sexual violence, just as accused persons have the right to the free services of their defence lawyers. 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 ILCs.

However, a discussion of the implications of this difference lies beyond the scope of this paper.

## Conclusion

As was noted in the introduction, Edwards (2004) argues that victim–survivors are not in a position of inequality vis-à-vis the state in the criminal justice process and moreover that victim–survivors should not be granted participatory rights and legal representation simply because the defendant is afforded such rights. From a current majority Nordic legal perspective, the flaw in this reasoning is that victim–survivors have legitimate factual and legal interests in the criminal case. Also, from a social justice perspective, having subjected the participants' reflections and reasoning to Fraser's evaluative standards, I argue that victim–survivors are misframed and misrecognised in the criminal justice process because they are wrongfully denied parity of participation. Not recognizing 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. For this reason, a legal arrangement whereby victim–survivors are allocated the role of witnesses, and are only afforded limited rights in the criminal justice process, is an unjust arrangement. Therefore, in line with Holder (2017) argument, victim–survivors and accused should have the right to equal treatment before the law.

As Ertzeid (2007) has noted, there appears to be no consensus within Nordic law on the status and rights of victim–survivors within the criminal justice process. Using Fraser's notion of justice, parity of participation is greatest in Finland, and is substantial also in Sweden, where victim–survivors are considered parties to the criminal case and have extensive procedural rights on a par with those of the state and the accused. In Norway, victim–survivors are still afforded the legal status of witnesses but with considerable procedural and some party-like rights. In Denmark and Iceland, however, victim–survivors are afforded the legal status of witnesses with limited procedural rights. Moreover, the question of the legal status and rights of victim–survivors has not been settled in many of the Nordic countries, as is indicated by ongoing legal policy deliberations in Sweden, Norway and Iceland. We have therefore yet to see how procedural justice for victim–survivors will develop within the respective Nordic jurisdictions.

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