9 Empowered or protected?

The ‘problem’ of complainants’ rights in Danish and Norwegian preparatory works on criminal procedure

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Introduction

The demand for and move towards improved rights and legal representation for complainants in criminal cases in the Nordic countries may be traced back to the efforts of the 1970s women’s movement. Concerns over the mistreatment of complainants within the criminal justice system, particularly in cases of rape, led to the introduction of the complainant’s lawyer (CL). In 1980, Denmark became the first country to introduce the CL model, whereby complainants in cases of rape were afforded the right to have a state-paid lawyer appointed to guard their interests. The right to a CL was later expanded to include other types of sexual violence cases, cases of physical violence and other serious crimes directed against the person (Brienens and Hoegen, 2000, pp. 218–219). The CL model was subsequently taken up by the other Nordic countries.¹ However, as I will discuss in more detail in the next section of this chapter, complainants’ legal status and rights are significantly stronger in Finland and Sweden than they are in Norway, Denmark or Iceland.

In the mid-2000s, both Norway and Denmark enacted legislative amendments to strengthen the position of the complainant in the two countries’ laws on criminal procedure. While Norwegian complainants were afforded participatory rights and stronger legal representation in court, this was largely not the case in Denmark. In this chapter, I will conduct a comparative analysis of the Norwegian and Danish legal policies that underpin the legislative changes in the two respective countries, using Carol Bacchi’s (Bacchi, 2009; Bacchi & Goodwin, 2016) ‘What’s the problem represented to be?’ (WPR) approach. I will explore how the ‘problem’ of complainants’ participatory rights and stronger legal representation in the criminal procedure is constructed, shaped and represented in policy documents, and how complainants in cases of sexual violence are construed.

Complainants’ status and rights in Nordic criminal procedures

The legal status and rights of complainants in criminal procedural law are considered to be stronger in civil law countries than they are in common law countries, although these rights can vary between different jurisdictions (Brienens &

Hoegen, 2000; Doak, 2005). While the term ‘Nordic law’ is widely used when emphasising the considerable similarities between the laws, legal systems and legal cultures of the Nordic countries (Husa, Nuotio, & Pihlajamäki, 2008), complainants’ legal status and rights in criminal cases have historically been significantly stronger in Finland and Sweden than in Denmark, Norway or Iceland (Robberstad, 2002).

Today it is possible to discern three different models on the status and rights of complainants in the Nordic countries: (1) the Finnish/Swedish model, where complainants have the right to obtain party status, with the accompanying rights; (2) the Danish/Icelandic model, where complainants have the legal status of witnesses, with certain special but limited rights; and (3) the Norwegian model, which falls between the other two, where complainants have the status of witnesses but with more extensive rights, including certain participatory rights (Ertzeid, 2007).

Since the publication of Anne Robberstad’s PhD thesis in law titled *Between Duel and Inquisition: The Basic Structure of Criminal Procedure in Light of the Role of the Complainant* (1999), Norway has led recent Nordic discussions on the legal status and rights of complainants. Robberstad, a former CL herself, presents an historical analysis that reveals how the status and rights of complainants in Norwegian law have weakened over the centuries and she makes a forceful argument for strengthening their rights. In 2001, the Norwegian government commissioned Robberstad to conduct a comparative legal analysis of the status and rights of complainants in the Nordic countries with a view to propose legislative approaches to strengthening their positions in procedural law. In November 2002, Robberstad presented her report, titled ‘Contradiction and Dignity’ (2002), at a seminar organised by the Nordic Council of Ministers. At the seminar, which was attended by legal practitioners from the Nordic countries, Robberstad proposed that complainants should be afforded the right to become parties to criminal cases if they so wish (Nordic Council of Ministers, 2004). Her work has subsequently informed legislative deliberations in Norway and Denmark. These deliberations are the focus of analysis in this chapter.

Method

I analyse the legal policy documents using Bacchi’s (2009) WPR approach, which is a Foucault-inspired poststructural method of analysing policies in an effort to make politics visible. 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 & Goodwin, 2016, p. 6). Following Bacchi’s (2009) guiding questions for analysis, I focus on how the problem of complainants’ participatory rights is represented, and particularly how these problem representations are possible, by identifying which assumptions underpin them and which discourses shape them. In addition, I will analyse what remains unproblematised in the problem representations. Using a comparative approach is helpful for this purpose,

as doing so enables the identification of the production of contrasting problematisations (Bacchi & Goodwin, 2016, p. 23).

Finally, I will pay attention to the effects of particular problem representations. Bacchi and Goodwin (2016) have identified three different types of effects: *discursive effects* draw our attention to how particular problem representations limit what can be thought and said, while *subjectification effects* highlight how ‘subjects’ are implicated in problem representations and how they are specifically produced; finally, *lived effects* refer to how discursive and subjectification effects translate into people’s lives.

I analyse the preparatory works that have accompanied the legislative amendments pertaining to the status and rights of complainants in Norway and Denmark, including early and later stages of preparatory works. The later stages of preparatory works are the actual explanatory texts accompanying the legislation. The early stages are reports based on deliberations and legislative recommendations by (1) the Standing Committee on Administration of Criminal Justice (SCACJ) of the Danish Ministry of Justice (*Justitsministeriets Strafferetsplejeudvalg*), and (2) an ad hoc commission (henceforth ‘the Commission’) appointed by the Norwegian Ministry of Justice and Public Security. The legislation enacted (or not) in both countries is closely based on the recommendations found in the reports published by the SCACJ and the Commission; these reports are thus the main focus of my analysis. In the case of Denmark, two separate reports were produced: the first addresses the legal position of complainants in rape cases, while the second addresses the position of complainants more generally (see Betænkning, 2005, 2006). In Norway, only one report was produced to address the position of complainants more generally (see NOU, 2006).

The reports are generally structured to include the following: an introduction, with the committees’ mandates; a detailed overview of the current legislation; a review of what is considered relevant material, such as the outcome of consultations/hearings, previous reports and legislation in other Nordic countries; the committees’ deliberations, considerations and suggestions; and finally legislative proposals. As will be discussed in more detail below, the Norwegian report is more expansive, as it also includes a discussion of the practical experiences of criminal justice procedures from the other Nordic countries, the outcomes of consultations with complainants and their next of kin, and a discussion of EU and UN policy and legislative developments.

Finally, the report excerpts presented in the following analysis have been translated from Danish and Norwegian to English.

Backgrounds to Norwegian/Danish legal policy procedures

The Norwegian and Danish policy processes have both similarities and differences. As discussed in the introduction to this chapter, the legislative developments to date to strengthen complainants’ rights in Norway are largely based on Robberstad’s work (1999; 2002). Robberstad (1999) has shown how the main

obstacle for strengthening complainants' procedural rights, particularly their participatory rights, in the west Nordic context has been the interpretation of the equality of arms principle, which is related to the notion of fairness enshrined in Article 6(1) of the European Convention on Human Rights on the right to a fair trial. Equality of arms is often broadly defined as 'the requirement that a balance of fairness is maintained between parties' (Summers, 2007, p. 105). Robberstad (1999) has shown how, in the Norwegian context, the equality of arms principle has been interpreted to mean a requirement of equality between parties, without explaining what is actually meant by equality in this context. This interpretation has led to the common assumption that the two parties, the state and the accused, have to be equally strong – a scenario that has been partly exasperated by the conceptualisation of the trial as a form of battle or a sporting game in Norwegian legal discourse (similarly to the Anglo-American legal discourse) and that the two teams must have the same number of players. She critically notes that this conceptualisation is also encouraged by the metaphorical term 'equality of arms' in reference to military battle. Robberstad (1999) coined the term the 'balance illusion' to critique the notion that affording complainants party status in the criminal case, along with accompanying participatory rights, is equivalent to a 'two against one' scenario, thus jeopardising the equality of arms principle. Based on her review of the interpretation of this principle in the case law of the European Court of Human Rights, Robberstad concludes that the equality of arms principle does not preclude the strengthening of the rights of complainants, as long as the defendant's rights, for example to be heard and to raise objections, are upheld.

Niemi-Kiesiläinen (2001) has argued that although Robberstad's (1999) work was not presented in a feminist theoretical framework, it is underpinned by a feminist understanding of the subject matter. Niemi-Kiesiläinen points out that the metaphor of the trial as a duel or a game has obvious gendered connotations when analysed against the backdrop of the traditional roles and attributes assigned to men. She further notes that the use of such gendered metaphors makes the system more outlandish to ordinary people, and particularly women, even though the legal arrangement of the criminal justice system itself might not be gendered. And, since women are more likely to enter the criminal justice system as complainants than as accused, they are the ones who become excluded from the 'game'. Finally, the legal status of a witness implies a more passive role, which can easily be associated with traditionally ascribed 'feminine' attributes (Niemi-Kiesiläinen, 2001).

In that sense, the strengthening of the legal position of complainants in the Norwegian and Danish contexts is informed by feminist knowledge practices. Indeed, the legislative amendments in Norway were enacted on 7 March 2008 and were presented as a gift to women from the Norwegian government on 8 March, International Women's Day (Robberstad, 2014). In the case of Denmark, the impetus for initiating the policy process may be traced back to September 2003, when the Danish Association for Women's Rights (*Dansk Forening for Kvinderet*) held a conference on rape where the question of how

to strengthen the legal status of complainants in rape cases was debated. Following that conference, the parliament asked the Ministry of Justice to suggest measures to improve the position of complainants in rape cases (Betænkning, 2005). The Danish policy process was informed by Robberstad's work via the Nordic Council of Ministers.

Now let us turn to the composition of the committees charged with reviewing complainants' legal positions. While the Danish Minister of Justice charged the ministry's SCACJ with conducting the review (Betænkning, 2005; 2006), the Norwegian Ministry of Justice and Public Security appointed the ad hoc Commission noted earlier to do the same (NOU, 2006). The composition of these committees was fairly similar, however, as they both comprised seven legal practitioners from the criminal justice system, including judges, prosecutors, practising lawyers and police representatives. In terms of the differences, the Danish SCACJ additionally included a legal scholar and a ministry representative, while the Norwegian Commission included one representative from an NGO who is well known in Norway for advocating for increased procedural rights for complainants and their next of kin. Nordic ad hoc commissions have traditionally been characterised by broad interest representation, although a recent analysis has shown that academics increasingly make up a substantial proportion of commission members (Christensen & Holst, 2017). In this case, however, there was not much difference between the member composition of the Danish SCACJ and the Norwegian Commission, which indicates that criminal procedural law in these countries is largely understood to be the domain of expert legal practitioners in the criminal justice system, with only minimal, if any, representation from extra-legal stakeholders.

The mandate of the committees was similar, in that both were charged with reviewing the legal position of complainants in procedural law, with a view to improving their position; however, there were also some differences. The Norwegian Commission's mandate was to suggest 'how' the procedural position of complainants could be strengthened (NOU, 2006, p. 13), and if increased rights should apply generally to all complainants or only complainants in certain cases, such as cases of sexual violence and other cases of violence. The Danish SCACJ was charged with assessing 'if' there was a 'need' for legislative improvements (Betænkning, 2005, p. 11). The SCACJ's mandate was based on a parliamentary decision, the primary concern of which was to strengthen the position of complainants in cases of rape. The Minister of Justice also asked the SCACJ to assess the need for improvements in the context of criminal cases more generally. In comparing the mandates, one could argue that a clearer political will existed in Norway to enact meaningful legislative changes in order to strengthen complainants' legal position than was the case in Denmark.

That said, both policy processes were informed by external consultations. Previous to the appointment of the Norwegian Commission, a hearing had been conducted on Robberstad's (2002) report in which she had suggested affording complainants party status in criminal cases. A total of 64 responses were received. Of those who took a clear position on the issue of affording complainants full party

status, 23 were against and 21 supported the suggestion. The responses showed a clear dividing line between victims' organisations and other interest groups, who supported the proposal, versus members of the criminal justice system, in particular the courts and the prosecution authorities, who did not (NOU, 2006).

Prior to the work of the Danish SCACJ, the Ministry of Justice sent a detailed questionnaire to 42 institutions and organisations. The questionnaire included questions both on how the then-current procedural laws worked in practice for complainants in rape cases and on whether a need existed to improve their rights, including the active rights of their CLs. The ministry received a total of 38 responses, the majority of which were from courts and police precincts and three lawyers' associations; the ministry also received responses from a rape crisis centre and two NGOs that provide support to victim-survivors of rape and other crimes (Betænkning, 2005). In short, the responses from the criminal justice system generally did not recommend strengthening complainants' participatory rights, and only one NGO suggested that complainants should be able to join the criminal case and thereby obtain party status (Betænkning, 2006). Based on the results from both the Danish and Norwegian consultation processes, it is clear that the main resistance to affording complainants and their CLs increased rights to participate in the court procedure primarily comes from the majority legal community within the criminal justice system. These results also indicate that the community of victims' organisations and other interests groups in Norway is larger and more robust than it is in Denmark.

Finally, several additional differences between the policy procedures should be mentioned. The Norwegian Commission was also mandated with assessing the needs of complainants for party rights. The Commission therefore conducted 15 meetings with complainants (and their next of kin) about their experiences with the criminal justice system. The mandate also requested that the Commission conduct country visits to Finland and Sweden to assess how complainants' party rights functioned in practice in those countries. The Norwegian Commission also drew on international and domestic legal and extra-legal sources in its report, including EU and UN laws and policies, as well as socio-legal and victimological research (NOU, 2006). The Danish SCACJ, in contrast, did not conduct any consultations with complainants and did not conduct country visits to Finland or Sweden; instead, the group largely relied on domestic legal sources.

Legislative results of the Norwegian and Danish policy processes

Given the varied and detailed legislative amendments resulting from these policy processes, it is impossible to provide a full account of them in this chapter. Instead, I will endeavour to summarise some of the main changes, with an emphasis on complainants' participatory rights and the rights of their lawyers in court.

In the case of Norway, the legislative changes included the following: (1) the clarification and spelling out of certain rights that were previously only implied by the complainants' legal standing in terms of civil claims, such as access to case documents during police investigations; (2) the right to comment on evidence presented in court (via their lawyers), as well as to provide final comments in court; and (3) the provision of additional rights unrelated to party status, such as the right to be informed about how the case is progressing in the criminal justice system. The order in which the complainant and the accused give their testimony in court was also changed. Before, defendants gave their testimony first, and so complainants were not permitted to sit in court and listen to their testimony, as doing so could affect their own testimony. Now, complainants give their testimony first, and they can therefore sit in court for the duration of the whole trial (Robberstad, 2014).

Some rights were only afforded to complainants to be exercised by their lawyers, such as the right to submit supplementary evidence and to ask supplementary questions of defendants, witnesses and experts in court once the prosecutor and the defence lawyer have concluded their questioning (Robberstad, 2014). But complainants were not afforded full party rights, such as the right to appeal. In this case, the majority of the Commission members found that complainants should not be given rights that would allow them to influence the question of guilt and the question of penalties, as they felt that such rights should solely be in the hands of the state (NOU, 2016).

In an effort to evaluate the effects of these legislative changes, Dullum (2016) recently interviewed 18 people who work within, or in relation to, the criminal justice system in Norway and asked them about their views on the matter. According to the research participants, complainants are now better represented and better prepared for criminal cases than before. In addition, they felt that the new participatory rights also seemed to aid in the restoration of self-respect and healing among complainants and that criminal cases themselves had acquired a more humane character. Participants' opinions differed on the question of whether complainants' rights had come into conflict with the rights of the accused, depending on their position within the criminal justice system. The majority of the participants, however, felt that complainants' increased rights had contributed to solving cases and had not been detrimental to the legal certainty of the accused. Exceptions included when the CL had taken on the role of an additional prosecutor and in cases with several complainants (and therefore several CLs) and one accused.

While the SCACJ did take note of the more progressive legislative developments in Norway, as well as the extensive rights complainants have in Finland and Sweden, the committee's suggestions were considerably more limited. When considering the rights of complainants in rape cases and other cases of sexual violence, the SCACJ's main point of departure was to ensure that complainants were 'better protected' (Betænkning, 2005, p. 13). The legislative amendments did include additional informational rights to ensure that complainants would receive guidance on their rights, especially in terms of their rights to

legal representation, when reporting a case to the police. The amendments also included increased access for the CL to view case documents pertaining to their clients during the investigation stage, which now not only included their clients' police testimonies but also their medical records (Amendment to the Danish Administration of Justice Act, no. 558, 24 June 2005). This access is still more limited than in Norway, where CLs have more general access to case documents. The SCACJ considered whether the CL should have the right to object to questions about a complainant's previous sexual history but decided against this idea to ensure that the CL would not be involved in any questions regarding the evidence in the case. In the bill, however, which was passed in 2005, CLs were given the right to object to such questions, based on recommendations from the Ministry of Justice.

The question of whether complainants should have the right to give testimony in court before the accused – and thereby be able to observe the court proceedings – has been discussed extensively in Denmark (see Betænkning, 2006, 2010, 2014). Although the SCACJ has now provided draft legislation where complainants are afforded the right to give their testimony before the accused, the group did not endorse it (Betænkning, 2014); no such amendments have been enacted to date. In 2010, the Danish Standing Committee on Procedural Law (*Retsplejerådet*) also finalised a report that included legislative amendments to strengthen the legal position of complainants on the basis of their civil claims (Betænkning, 2010), but those proposals have also not been enacted to date.

The legislative changes proposed by the SCACJ are considerably more limited than those proposed by the Norwegian Commission and are primarily composed of small adjustments, with the aim of providing more protection for complainants. Unlike the case in Norway, the SCACJ thus did not propose the affording of complainants (via their lawyers) the right to submit and comment on evidence; nor the right to ask questions of the accused and witnesses in court. In the analysis below, I will explore the different problem representations and underlying assumptions that underpin these different legislative outcomes.

Norway: Empowering rationally motivated female citizens and ensuring the rule of law

In the Norwegian report, the 'problem' of complainants' participatory rights in court and stronger legal representation is typically represented in the form of such rights being lacking, in particular for certain groups of complainants. For the case of increasing complainants' rights, the underlying assumptions first include that such amendments would ensure the ongoing rule of law, which would otherwise be in jeopardy, and second that such rights would empower complainants and counteract their experiences of secondary victimisation.

The excerpts below highlight the first assumption underpinning the problem of complainants' lack of rights, i.e. that this lack jeopardises the rule of law. The discourses of citizenship, modernisation and social change are all evoked, thus shaping the problem representation.

In a modern society, the individual's right to receive information about cases that concern them, to be able to object to information submitted by others and be able to express their views, is considered a basic condition for a good case procedure that provides a sense of security.

(p. 16)

Social conditions, legal thinking, and people's expectations and education levels have changed significantly. ... Today, citizens have higher demands than before to receive information and have something to say in cases that affect them. Criminal cases are no exception.

(p. 124)

If complainants' rights are not strengthened, the legal system can become out of step with people's understanding of the law. Over time, this will lead to a weakening of the trust that the legal system depends on.

(p. 16 and 124)

Nested within the problem representation is the notion that the criminal justice system is somehow exempt from the processes of modernisation and social change. Given that the results of the consultation process in Robberstad's (2002) report showed that resistance to affording complainants party rights overwhelmingly came from the majority community of legal practitioners within the criminal justice system, there is reason to assume that they are the ones who are primarily being addressed here. The discursive effects of this problem representation serve to warn the majority legal community that not strengthening complainants' rights will undermine citizens' trust in the legal system, which can be understood as a threat to the rule of law. These processes of modernisation and social change are also typically represented as entailing a set of changing factors, including social conditions and education levels. Although it is not entirely clear how these factors are qualified, the implication seems to be that they have improved.

In relation to these social changes, coupled with recent legal thinking and legislation, citizens are typically represented as having higher expectations vis-à-vis their relationship with the state. One of the subjectification effects produced by this problem representation is that complainants are represented as citizens first – as opposed to only victims of crime – and that the state has certain duties towards its citizens, such as ensuring that citizens' are able to have a say in matters that affect them in order for them to feel secure. Arguably, the implicit subjectification effects also include that these increased rights are primarily understood to be for the benefit of those citizen-complainants who enjoy good social conditions and higher education levels, as opposed to those who live in poorer social conditions with lower education levels.

Another example of the problem representation is also related to the notions held by the majority community of legal practitioners within the criminal justice system. The report states:

The complainants' legitimate interests in having the state solve the case and assign punishment to the guilty person cannot be confused with a wish for revenge. The Committee's investigation shows that the complainant has interests in the case on completely different grounds than revenge. ... (Besides, doing so would be rather illogical, as having stronger rights does not increase complainants' possibilities for revenge.).

(p. 126)

The Commission's report refers to Ertzeid (2005), who analysed the responses the Ministry of Justice received on the hearing process conducted on Robberstad's (2002) suggestions. In analysing the responses against affording complainants full party status, Ertzeid found that the responses were often grounded in the notion that affording complainants increased rights would entail 'an illegitimate legal acceptance of revenge', since complainants' motivations for participating in criminal trials are understood as being informed by feelings of revenge (Ertzeid, 2005, p. 110). The problem represented in the report excerpt above is the notion that strengthening complainants' rights could be used as a vessel for complainants' illegitimate feelings of revenge. In counteracting this argument, the Norwegian Commission emphasised the representation of the complainant as having legitimate factual and legal interests in the case. The subjectification effects of this argumentation entails that the complainant is represented as being guided by rational (as opposed to emotional) motivations. In the legal realm, emotions have long been understood as being subjective, partial and impervious to reason and therefore of having a destabilising effect on the rule of law (Bandes & Blumenthal, 2012). This construction of the rational complainant motivated by factual and legal interest thus has the discursive effect of rendering complainants as legitimate actors in the eyes of the law. Conversely, those who might want to deny complainants increased rights on the basis that they might be able to exert their feelings of revenge through the criminal justice system are represented as harbouring illogical thoughts.

Another assumption underpinning the problem representation is that of complainants' secondary victimisation within the criminal justice system, as captured in the following excerpt from the report:

For complainants, [strengthening their rights] can also be of great importance for their sense of self-esteem. In cases concerning serious integrity violations, the strengthening of the complainant's status can be necessary to avoid that the criminal case is experienced as a new violation or a continuation of the violation.

(p. 125)

Here, secondary victimisation is, partially or at least for some complainants, represented as being caused by a lack of rights or lack of empowerment; rights are also arguably represented to be equal to empowerment. This discursive reasoning is in line with certain knowledge strands within victimology, where

some have argued that an important component in preventing or minimising secondary victimisation and in empowering complainants is to increase their procedural rights, particularly in cases of sexual violence and other serious integrity violations (Wolhuter, Olley, & Denham, 2009).

So what are the lived effects of these policy suggestions? While all complainants are recognised as having legitimate interests in criminal cases, these interests are only converted into rights for specific groups of complainants, largely based on efficiency and cost arguments. Those represented as being most in 'need' of such rights are those who have suffered serious 'integrity violations', which 'cause major physical, mental and social harms' (p. 130). Per the recommendation of the Committee, complainants in the following crimes were afforded these new rights: sexual offences, serious physical violations, violations of restriction orders, forced marriage, violence in close relationships, human trafficking and genital mutilation (Norwegian Government Bill no. 11 [2007–2008], pp. 29–30). The lived effects of these laws hence affect complainants differently based on the type of crime they have been subjected to. Other than cases of serious physical violations, most complainants in these types of crimes are women and girls, sometimes with a foreign background and sometimes victimised by someone they know or are related to. The subjects produced, therefore, are largely women who have been subjected to sexual and other gender-based violence and who are to be empowered through these legislative amendments. As noted earlier, however, the majority of the Commission's members did not recommend giving complainants full party status. The report states that one member of the Commission, and the only representative from an NGO, thought that for her part, complainants should be afforded full party status. The report quotes her as saying that, despite this opinion, she is 'in doubt whether the Norwegian legal community is ready for such comprehensive reform' (NOU, 2006, p. 132).

Denmark: Protecting vulnerable rape victims and preserving the rule of law

In the Danish reports, contrary to the Norwegian report, the 'problem' is represented to be affording complainants participatory rights in court and stronger legal representation – particularly complainants in cases of rape and other sexual offences. The underlying assumptions are first that such rights would only serve to further victimise complainants, and second that such rights would jeopardise the rule of law.

The predominant representation of complainants in the Danish reports is that of traumatised rape victims (Betænking, 2005, p. 51), which is also the main reference point in considerations of increased rights for complainants in general (Betænking, 2006, p. 73; 2014, p. 66). This view is captured in the following excerpt:

[It should be] acknowledged that complainants in rape cases are in a very vulnerable position. This is because the rape victim, by the nature of the

case, has to give testimony and be examined in relation to a very sensitive matter. ... Complainants in rape cases, who in principle are witnesses like any other witnesses, can easily come to feel that they are the ones being prosecuted. As a complainant in a rape case, it can therefore be particularly traumatising to go through the procedure.

(Betænking, 2005, p. 51)

The crime of rape in this case is construed as particularly sensitive, and the criminal justice procedure is assumed to unavoidably retraumatise complainants. Arguably, both complainants and the crime of rape are implicitly construed as being incompatible with the criminal justice procedure. The effect produced by this problem representation is that complainants' subject positions become firmly rooted in both their primary and secondary victimhood. They are even described as easily taking on the subject position of the accused, which, in relation to the state, is considered to be in a very vulnerable position.

In the following excerpt, the SCACJ considers what might happen if CLs should have the right to ask complainants, and/or defendants and other witnesses, questions in court about other aspects of the case than only the compensation claim:

... this could influence the role of the CL in the process in an unfortunate way. This could – also unintentionally – lead to a more aggressive approach by the defence lawyer towards the complainant and their credibility. According to the Committee's opinion, it is against this background that there is good reason to exclude the CL from tasks that pertain to the evidence of the accused's guilt.

(Betænking, 2005, p. 71)

Something like this would not be in the real interests of the complainant.

(Betænking, 2006, pp. 73–74)

The discursive effect of this hypothetical scenario serves to warn against strengthening complainants' legal representation, as the assumption is that doing so would only lead to the further traumatising of complainants, particularly in cases of rape. These subjectification effects construct defence lawyers as aggressive, and, given that this aggressive approach might also be unintentional, it also indicates that their aggression is unpreventable and, in a sense, uncontrollable. In turn, the complainants, and their credibility, are represented as the main targets for this aggressiveness. Given that rape cases are generally understood to be characterised by a lack of evidence, complainants' credibility is often understood to be their most important asset in a case. While one of the Danish reports states that complainants can have legitimate factual and legal interests in criminal cases (2006, pp. 68–69), indicating that complainants might therefore have a need for increased rights to protect those interests, the report introduces a new concept of complainants' 'real interests', as noted in the excerpt. The problem representation in this case is thus shaped by a paternalistic discourse in which complainants'

real interests are to be protected from stronger legal representation, as such representation would only lead to the undermining of their credibility and them being subjected to further victimisation.

At least two factors are left unproblematised in this problem representation. First, as noted earlier, complainants' subject positions are represented as being akin to those of the accused in terms of their vulnerability in the criminal procedure. But while accused persons are afforded full party rights in criminal cases to defend themselves throughout the criminal justice procedure, that is not the solution presented for complainants. On the contrary, they are represented as being better protected if they *lack* such rights. Second, the defence lawyer's aggressive approach is represented as being uncontrollable but there is no mention of the role of the judge in this context in ensuring a fair court process. Therefore, the courtroom, which is a public place presided over by a judge, is represented as an uncontrollably hostile place for the complainant.

The second assumption underpinning the problem representation is that complainants' participatory rights and stronger legal representation could jeopardise the rule of law. In the Danish reports, one of the main obstacles to strengthening complainants' positions concerns the objectivity principle, according to which the prosecution authorities and the police are duty-bound to be impartial in their work, and that charges should only be issued if the prosecution authorities find that the charges will lead to a conviction (Betænkning, 2005, p. 64). The argument is that CLs cannot be expected to adhere to the objectivity principle, as their role is not to be impartial but rather to guard the individual interests of their clients (Betænkning, 2006, p. 72). The report further states that, according to the law, the prosecution authorities must make sure that:

... those who are guilty are held to account and [that] those who are innocent are not prosecuted. This principle applies to all aspects of the case, including when exercising particular party rights such as questioning witnesses. This arrangement is a central part of the rule of law and of society's protection against vigilantism.

(Betænkning, 2006, p. 72)

In this case, an implicit connection is effectively established between complainants' stronger legal representation and vigilantism (i.e. the objectivity principle serves to protect society against vigilantism), and affording complainants party rights is represented to be in conflict with the objectivity principle. One could argue that complainants' party rights hence are represented to possibly entail the undermining of the rule of law. The way in which increasing complainants' active rights is thought to jeopardise this fundamental principle of objectivity is portrayed as follows:

Such an arrangement could create lack of clarity in relation to the roles of the prosecutor and the defence lawyer, in that the complainant, or the CL, could appear as an additional prosecutor.

(Betænkning, 2006, p. 72)

This can partly be perceived as a form of disparity, where there are ‘two against one’, and partly as a complication of the process where there would be two parties who would each in their own way pursue the same case. Such an arrangement could also, in the absence of the objectivity principle on the part of the complainant, lead to a shift in focus in terms of the presentation of evidence, whereby information that is not necessarily relevant for the criminal case will be sought or introduced.

(Betænking, 2006, p. 73)

There is a nebulous and suggestive quality in the way in which a warning discourse is used to represent complainants’ stronger legal representation as posing a potential threat to the objectivity principle. First, stronger legal representation for complainants is represented to possibly lead to *lack of clarity* in terms of the roles of legal actors, it could be *perceived* as a complication of the process, and it could lead to the submission of *unnecessary* evidence. Second, the equality/balance discourse is used to represent complainants’ participatory rights as a destabilising agent – hence giving the *appearance* that there are two against one.

One of the benefits of conducting a comparative policy analysis is that such an analysis can reveal what remains unproblematised in a given problem representation. In the Norwegian report, for example, having stronger legal representation for complainants is not represented as going against the objectivity principle. In short, the objectivity principle is represented to be better protected if the prosecutor does not have to both pursue the case on behalf of the state and safeguard the interests of the complainant but can leave the latter to the CL (NOU, 2006, p. 103). In addition, the Norwegian report, drawing on Robberstad’s (1999) critique of the ‘balance illusion’ discussed earlier, also does not represent complainants’ participatory rights as undermining the accused rights, as the accused still has the same rights as before. The equality discourse is thus used to argue in favour of affording complainants’ rights, since this is a matter of affording complainants some of the rights that accused people already have (NOU, 2006, p. 17 and 128).

To conclude, the Danish report notes that, given the ongoing developments in relation to strengthening complainants’ positions, including the more progressive legislative developments in Norway, there is ‘no reason to believe that the developments pertaining to the complainant have reached an end point’ (Betænking, 2006, p. 69). Arguably, this view indicates the committee’s effort to hold on to a traditional legal arrangement while simultaneously realising that they are likely fighting a losing battle.

Concluding remarks

As I have shown in this chapter, a stark contrast is notable between the problem representations in the respective jurisdictions of Norway and Denmark. In Norway, the ‘problem’ is represented to be that complainants, particularly in

cases of gender-based violence, lack participatory rights and stronger legal representation. In Denmark, the 'problem' is represented to be affording complainants such rights, particularly complainants in cases of rape and other sexual offences.

In Norway, the Commission's mandate indicated more clearly that political will existed to enact meaningful legislative changes to strengthen the position of complainants (and their next of kin) in criminal procedures. In Denmark, however, expert legal practitioners, largely representing the criminal justice system, were asked to assess if such changes were needed. The Norwegian Commission also included a representative from the NGO community and relied to a much larger extent on multiple knowledge sources, including international and extra-legal knowledge. Therefore, while the policy process in Denmark was largely shaped by traditional domestic legal knowledge practices, the Norwegian policy process also introduced 'subjugated knowledges' (Foucault, 1980, in Bacchi & Goodwin, 2016), or knowledge types that challenge the centrality of traditional legal knowledge, including feminist-informed legal analysis, victimological knowledge and knowledge practices from other countries.

In both sets of policy texts, the main assumptions underpinning the problem representations are premised on the notions of secondary victimisation and the rule of law. But while these premises are similar, the reasoning draws on polar opposite conceptualisations, thus creating contrasting discursive, subjectification, and lived effects. Using a somewhat paternalistic discourse of protection, the Danish reports warn against affording complainants participatory rights and stronger legal representation, assuming that doing so would lead to the further victimisation of complainants and would undermine the rule of law. The Norwegian report, in contrast, includes an empowerment discourse, based on the assumption that having increased rights will counteract complainants' experiences of secondary victimisation and will ensure the ongoing rule of law, which otherwise might be at risk.

These markedly different problem representations produce two different subject positions for the complainant. The Danish reports represent complainants' subject positions as being rooted in their primary victimhood, where having increased rights, in a hostile courtroom, will only lead to their further victimisation. The only subject position offered for complainants is therefore that of the 'victim'. The discursive effects of the way in which the Danish reports represent increased rights for complainants as the 'problem' also produce a certain contradiction: complainants are represented as being too vulnerable to have stronger legal representation, while they would simultaneously pose a threat to the rule of law if such rights were afforded to them. The lived effects of these representations are that neither complainants nor their lawyers are allowed to become active agents during court procedures.

In the Norwegian report, by contrast, complainants are represented as being citizens first – rational yet vulnerable citizens who have been subjected to a crime and are in need of empowerment through having the right to guard their legal and factual interests during the criminal procedure. This subject

position is therefore more nuanced and is, arguably, better captured by the notion of the ‘victim-survivor’. It should be noted that the notion of the ‘citizen-victim’ has been problematised on the basis that many of those who have been subjected to crimes in society are people who are not citizens and are therefore particularly vulnerable and marginalised (Goodey, 2005, p. 139). However, when looking at which groups of complainants were afforded these increased participatory rights and stronger legal representation in Norway, then it is on the basis of the type of crime but not on the basis of complainants’ citizenship status. Therefore, the lived effects of this problem representations does take this scenario into account. Arguably, however, the way in which the Norwegian report ties together social conditions, education levels and expectations for increased rights raises the question of whether these new rights are primarily conceptualised for certain groups of complainants, i.e. people living in good social conditions with higher education levels. We hence have reason to ask if and how these rights benefit people of lower educational and socio-economic status.

As noted above, in both Denmark and Norway, the main resistance to increasing the rights of complainants has come from the majority legal community within the criminal justice system. In Norway, the Commission stopped short of affording complainants full party rights in criminal cases, which the Commission’s only NGO representative explained to mean that the Norwegian legal community was not ready for such reform. The resistance to complainants’ rights in Norway is ongoing and is currently being shaped by the metadiscourses of ‘effectivity’ and ‘legal certainty’.² In 2014, the Ministry of Justice and Public Security appointed a commission to design a new Code for Criminal Procedure in order to address changes in the area of criminality, with a view to ‘meet these challenges and facilitate an effective and legally certain settlement of criminal cases’ (NOU, 2016, p. 93). The commission’s mandate noted that, since the legal status and rights of complainants had recently been reviewed, the ministry assumed that there was no great need to revise those sections of the law. In their legislative proposal, however, the commission recommended several legislative changes to the rights of the complainant (NOU, 2016). During the hearing procedure following the publication of the commission’s report, these changes were criticised for weakening the status and rights of complainants (e.g. Robberstad, 2017). The new code on criminal procedure has not been enacted to date.

Notes

- 1 The CL model was taken up in Norway in 1981, Sweden in 1988, Finland in 1997, and Iceland in 1999.
- 2 Legal certainty (*rettssikkerhet*) refers to the demand that court decisions be fair and predictable. Legal certainty is considered to be a central requirement for the rule of law.

References

General references

- Bacchi, C. (2009). *Analysing policy: What's the problem represented to be?* Frenchs Forest, NSW: Pearson Australia.
- Bacchi, C., & Goodwin, S. (2016). *Poststructural policy analysis: A guide to practice*. New York: Palgrave MacMillan.
- Bandes, S. A., & Blumenthal, J. (2012). Emotion and the law. *Annual Review of Law and Social Science*, 8, 161–181.
- Betænkning. (2005). *Betænkning om forbedring af voldtægtsfres retsstilling*, no. 1458/2005 [On the improvement of rape victims' legal position]. Copenhagen: Danish Ministry of Justice, Standing Committee on Criminal Procedure.
- Betænkning. (2006). *Betænkning om forurettedes processuelle retsstilling i straffesager*, no. 1485/2006 [On complainants' legal procedural position in criminal cases]. Copenhagen: Danish Ministry of Justice, Standing Committee on Criminal Procedure.
- Betænkning. (2010). *Reform af den civile retspleje VI: Behandling af forurettedes civile krav under straffesager (Adhæsiionsprocessen)*, no. 1522 [Reform of the civil procedure VI: The processing of complainants' civil claims in criminal cases (the adhesion procedure)]. Copenhagen: Danish Ministry of Justice, Standing Committee on Procedural Law.
- Betænkning. (2014). *Betænkning om afhøring af forurettede før tiltalte i straffesager*, no. 1549/2014 [On the questioning of complainants before the accused in criminal cases]. Copenhagen: Danish Ministry of Justice, Standing Committee on Criminal Procedure.
- Brienen, M. E., & Hoegen, E. H. (2000). *Victims of crime in 22 European criminal justice systems: The implementation of recommendation (85) 11 of the Council of Europe on the position of the victim in the Framework of Criminal Law and Procedure*. Nijmegen, The Netherlands: Wolf Legal Publishers.
- Christensen, J., & Holst, C. (2017). Advisory commissions, academic expertise and democratic legitimacy: The case of Norway. *Science and Public Policy*, 44(6), 821–833.
- Doak, J. (2005). Victims' rights in criminal trials: Prospects for participation. *Journal of Law and Society*, 32(2), 294–316.
- Dullum, J. (2016). En ny offerposisjon? Om styrkede rettigheter for fornærmede i straffesaker [A new victim position? On stronger rights for complainants in criminal cases]. *Nordisk Tidsskrift for Kriminalvidenskab*, 103(3), 219.
- Ertzeid, A. M. (2005). *Hevn og straff: Studier av hevnenes strafferettslige legitimitet* [Revenge and punishment: Studies on the legitimacy of revenge in criminal law]. Bergen, Norway: Fagbokforlaget.
- Ertzeid, A. M. (2007). Kriminalitetsofrenes stilling [The position of victims of crime]. *Nordisk Tidsskrift for Kriminalvidenskab*, 94(3), 339–349.
- Foucault, M. (1980). Two lectures. In C. Gordon (Ed.), *Michel Foucault power/knowledge: Selected interviews and other writings 1972–1977 by Michel Foucault*. Gordon, C., Marshall, L., Mepham, J. and Soper, K. (trans.). New York: Pantheon Books.
- Goodey, J. (2005). *Victims and victimology: Research, policy and practice*. Harlow, England: Pearson/Longman.
- Husa, J., Nuotio, K., & Pihlajamäki, H. (2008). Nordic law: Between tradition and dynamism. Tilburg Institute of Comparative and Transnational Law working paper no. 2008/10.
- Niemi-Kiesiläinen, J. (2001). Bortom tvekamp och inkvisition. *Journal published by the Lawyers' Association in Finland*, 138, 210–230.

- Nordic Council of Ministers. (2004). *Nordisk seminar om offerets straffeprosessuelle stilling: Oslo, November 2002* [Nordic seminar on the victim's position in criminal procedures]. Copenhagen: Nordisk ministerråd.
- NOU – Norwegian Official Report. (2006). *Fornærmede i straffeprosessen: Nytt perspektiv og nye rettigheter* [Complainants in the criminal process: A new perspective and new rights], NOU 2006: 10. Oslo: Norwegian Ministry of Government Administration and Reform.
- NOU – Norwegian Official Report. (2016). *Ny straffeprosesslov* [New laws on criminal procedure]. NOU 2016: 24. Oslo: Norwegian Ministry of Justice and Public Security.
- Robberstad, A. (1999). *Mellom tvekamp og inkvisisjon: Straffeprosessens grunnstruktur belyst ved fornærmedes stilling* [Between duel and inquisition: The basic structure of criminal procedure in light of the role of the complainant]. Doctoral thesis. Oslo: University Press.
- Robberstad, A. (2002). *Kontradiksjon og verdighet: Komparativ fremstilling av fornærmedes stilling i de nordiske land, med sikte på forslag om styrking av fornærmedes rettigheter i straffeprosessen* [Contradiction and dignity: Comparative analysis of complainants' position in the Nordic countries, with suggestions to strengthen complainants' rights in the criminal procedure]. Report. Oslo: Norwegian Ministry of Justice and Police.
- Robberstad, A. (2014). *Bistandsadvokaten* [The complainant lawyer] (3rd ed.). Oslo: Universitetsforlaget.
- Robberstad, A. (2017). Hearing statement, 2 June. www.regjeringen.no/contentassets/addade5d609e4683a3f6217304df9fc9/annerobberstad.pdf?uid=Anne_Robberstad
- Summers, S. (2007). *Fair trials*. Oxford, UK, and Portland, OR: Hart Publishing.
- Wollhuter, L., Olley, N., & Denham, D. (2009). *Victimology: Victimisation and victims' Rights*. London and New York: Routledge-Cavendish.

Laws

- Amendment to the Danish Administration of Justice Act, no. 558, 24 June 2005
- Danish Administration of Justice Act
- Finnish Act on the Openness of Government Activities 621/1999
- Finnish Criminal Procedure Act 689/1997
- Icelandic Laws on Criminal Procedure 88/2008
- Norwegian Government Bill no. 11 (2007–2008)
- Swedish Act on Public Access to Information and Secrecy 2009: 400
- Swedish Code of Judicial Procedure 740/1942