

Communications of autonomy and vulnerability in criminal proceedings

Abstract: In some high-profile Swedish cases on violence in intimate relationships, policemen and judges have been blamed for missing important aspects of the victim's vulnerable situation and the ongoing violence, and indirectly causing the death of the women victims. When these types of cases encounter the criminal justice system, two seemingly opposites are confronted: autonomy and vulnerability. In determining whether a penalty should be imposed, autonomy is vital, in the sense that freedom and rationality of the bounded individual is fundamental for criminal responsibility. Violence in intimate relationships, on the other hand, is clearly related to the vulnerability of the individual exposed to the violence. This vulnerability represents something contextual, where power relations are crucial, and is also connected to its structural context. I argue that a move towards a vulnerable subject as a starting point would affect the criminal justice system. This concept assumes a potential for all humans to experience vulnerability during a life span, and does not prevent autonomy. In the judgments explored in this article, this view is already reflected when it comes to the positioning of the defendant, who is seen as highly autonomous, at the same time as his vulnerable situation is taken into account in determining the penalty. However, the communications regarding the victim does not include these nuances. A move towards establishing a more accurate definition of subject in this field of law, the vulnerable one, would emphasize an awareness of a more complex notion of the subject and be more consistent with the embodiment of the everyday individual encounter with the criminal justice system.

Keywords: criminal legal subject, autonomy, vulnerability, communication, violence in intimate relationships

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1 Introduction

In recent decades violence in intimate relations has garnered considerable attention in both media and legal doctrine in Sweden. The demand for state responsibility and prevention of this violence has been strong and loud, especially in the last five to ten years (e.g., Amnesty 2010) As in many other legal systems, this violence had not been an explicit issue for the criminal justice system until some thirty years ago; until then it was considered more or less a private matter.¹ Gradually the attitude towards public interference in intimate relation has

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changed, both within and outside the legal system. At the moment public authorities, such as the police, social services and the courts, are being heavily criticized. For example in some high-profile cases policemen and judges have been blamed for missing important aspects of the victim's vulnerable situation and the ongoing violence, thus indirectly causing the death of the women victims. In this article I analyse one of these cases in order to highlight what kind of notion of autonomy and vulnerability that is communicated within the criminal justice system.

When these types of cases encounter the criminal justice system two seemingly opposites are confronted, autonomy and vulnerability. In determining whether a penalty should be imposed, autonomy is vital, in the sense that freedom and rationality of the bounded individual is fundamental for criminal responsibility (Lacey 1998). Violence in intimate relations on the other hand is clearly related to the vulnerability of the individual exposed to violence. This vulnerability represents something contextual where power relations are crucial and is also connected to its structural context (Andersson, 2011, 2009; see also Niemi-Kiesiläinen, 2004; Smart, 1995; Fineman and Mykitiuk, 1994; MacKinnon, 1989). Thus there is a clash between autonomy and vulnerability. I analyse how this clash is communicated in criminal proceedings. I use the concept of the vulnerable subject advocated by Martha Fineman (Fineman 2008). It is used as a theoretical approach as well as a methodological tool.

The vulnerable subject entails both autonomy and vulnerability, so I find it useful to transcend the conflict between autonomy and vulnerability and to study how the notion of autonomy and vulnerability is communicated in criminal proceedings. My aim is to explore the construction of vulnerability and autonomy in relation to the individuals confronting the criminal legal system. As an example in which autonomy and vulnerability are crucial issues, I have chosen a case of lethal violence in an intimate relationship. I analyse the legal treatment of the individuals involved in the four judgments associated with this case, in particular how the individuals' vulnerability is constructed in relation to autonomy, and vice versa.

In the following section, I present my theoretical approach to the criminal legal subject, followed by my analysis of how autonomy, the base of criminal responsibility, and vulnerability, which needs criminal legal protection, is communicated in the analysed judgments. I end up with a discussion on communications of autonomy and vulnerability in criminal proceedings.

2 A vulnerability approach to the criminal legal subject

The traditional notion of the legal subject assumes that this subject is competent, able to negotiate, and can make rational choices. This is also the case with the criminal legal subject, which is supposed to be autonomous, free, and rational – characteristics that form the basis of criminal legal justice, legitimizing its use of repressive power in relation to the individual. There is a difference, however. Free and rational choices are usually respected and have positive connotations in most contexts, because they are based on autonomy and competence in general (see Ramsay, 2012: 94). But within criminal law, making a free choice could also be to act in a way that is condemned by society through criminalization, society's most repressive reaction to its citizens' behaviour. Furthermore, a choice in the criminal legal context usually causes someone else's harm. In other words, criminal behaviour causes vulnerability. Thus there is a link between the autonomous choice of the criminal legal subject to act in a way that causes someone else's vulnerability, and to vulnerability itself. In the

¹ For example, in 1982 the prosecution rule for non-aggravated assault not committed in a public place was changed and indication from the victim or special reason for prosecution in the public interest was no longer needed. This change was of particular importance for the possibility to prosecute violence in intimate relations.

following I will explore this connection between autonomy and vulnerability in the criminal legal process. This is a highly important question, crucial to the notion of the criminal legal subject; it has not been discussed much, although several scholars have highlighted and questioned the traditional notion of the subject in criminal law, as well as in human rights and law in general (See e.g., Grear, 2010; Niemi, 2010; Naffine, 2002; Lacey, 2004; Lacey, 1998; Naffine and Owens, 1997).

As a basis for my analysis, I apply Martha Fineman's theory of the vulnerable subject to the field of criminal legal justice and use it as my methodological approach. Instead of taking for granted the autonomous subject presupposed in criminal law, I question it by using the vulnerable subject proposed by Fineman. It is my intention to transcend the conflict between autonomy and vulnerability mentioned above. The vulnerability thesis was largely developed as a criticism of the notion of autonomy central to the view of the *liberal legal subject* (Fineman, 2004, 2008; see also Fineman and Grear, 2013). Taking as a point of departure the idea that vulnerability should be understood as universal and constant, and as such inherent in the human condition, Fineman proposes that the vulnerable subject should be used as the heart of social and state responsibility. The areas of law she refers to are mainly family law, social law and labour law. Here I make an attempt to use the vulnerable subject as an approach to the criminal legal process. Fineman talks about our personal and social lives being "marked and shaped by vulnerability" and that a "vulnerability analysis must have both individual and institutional components" (Fineman, 2008: 10). I agree with this idea and believe it will help to move away from focusing on individuals to instead putting more focus on institutions (Fineman, 2008: 21). Using the vulnerable subject as a starting point in the criminal process also implies an awareness of power relations, allowing us to take structural factors into account. This might shed some new light on cases and improve the individual's chances of making demands for legal protection. When a specific situation is explicitly connected to structural aspects of power, such as gender inequality, this may have a positive effect on legal practice. The chances of noticing that the individual is vulnerable would also be improved. The following analysis of how vulnerability is handled in relation to lethal violence within the criminal legal process will be an example of how individuals are "positioned differently within a web of economic and institutional relationships" and how our vulnerabilities have great differences at the individual level (Fineman, 2008: 21). The criminal legal process shapes the individuals involved in the proceedings in certain ways. By studying the courts' reasoning and arguing, I analyse how the defendant and the victim are positioned in relation to the courts' interpretations and communications of autonomy and vulnerability.

3 Autonomy and vulnerability in a case on lethal violence

As just discussed, criminal legal responsibility is built upon the autonomy of the defendant (Lernestedt, 2010, p. 37). However, Swedish law does not focus on accountability in the construction of criminal responsibility; anyone who is 15 years old or older could be charged with a crime and held responsible. Instead, questions concerning accountability are relevant in the choice of sanction and the assessment of the penalty. In principle, a severe mental disorder prevents imprisonment (Bennet and Radovic, 2014, p. 7f). This means that issues of mental illness and other vulnerability questions are dealt with in the court's sentencing and can be studied in the judgments. In this chapter, I present four judgments, all of which relate to a very notable Swedish case of a woman's murder. These are two judgments from Malmö District Court, one judgment from the Court of Appeals in Skåne and Blekinge, and one judgment from the Supreme Court of Sweden. The legal treatment of this case and the public

authorities' handling of it in general have been severely criticized.² The criticism has to do partly with questions related to the penalty the defendant should have received or other actions that could have been taken, in light of the defendant's mental status and his ability to control his actions – in other words, his autonomy. In addition, attention has been drawn to the (lack of) protection of the plaintiff and inability of the authorities to recognize her vulnerable situation.

These issues on autonomy and vulnerability are central in the documents and I analyze the courts' communication of how the plaintiff and the defendant are positioned in relation to vulnerability and autonomy. Particularly I study the way the courts reason and argue in their sentencing and assessment of the penalty.

The history of the case was that the woman had been threatened by her husband for some time. They got divorced and in connection with the separation, he was charged and convicted of wrongful detention after having had her locked in the house; he was sentenced to one year in prison. On that occasion he had overpowered her, bound her with handcuffs and cable ties, locked her up and put her on the floor next to the gun cabinet where he kept three rifles. The woman managed to talk herself out of this threatening situation by telling him that she was ready to make another attempt to live with him. The prosecutor in the subsequent trial had asked the court to keep the man in custody until the judgment became final, but the court chose to let him go, while waiting for him to serve his sentence. Two months later, he attacked her again and this time he killed her in front of their children. At this time there was also a dispute over custody of the children. The woman, who had told her friends and family she was certain her ex-husband would kill her one day, had been in hiding in a sheltered accommodation with the two daughters in the central parts of a city in the south of Sweden. The 47-year-old man managed to find out where they lived, and attacked the woman with a bayonet when she and the children came out into the street. The 39-year-old woman was killed by blows to the chest and stomach.

The District Court that decided the first case about unlawful detention did not think the risk that the man would continue to commit crimes against the woman was of such concern that there was reason to keep him in custody, and therefore chose to let him go. No further justification was given. However, the court stressed that the woman's detention was not brief and that the act caused the woman both physical and, above all, mental suffering, and was a violation. Furthermore, there was no reason to suspect that the defendant suffered from a severe mental disorder of such a nature that it would preclude imprisonment (JDC1, 6-7). Accordingly, the court in this first judgment positioned the plaintiff as vulnerable. Her vulnerability was caused by the defendant, who was deemed to have acted completely autonomously. However, in deciding whether she was in a potentially vulnerable situation in relation to her ex-husband after her detention, the court decided that was not the case.

In the murder trial that followed, the defendant admitted to manslaughter; he claimed that owing to the state of his mental health, he had no control of events and was in need of psychiatric care. However, the District Court found the man guilty of murder (JDC2). The core issue in this trial as well as in the higher courts was whether the man should be sentenced to life imprisonment or a fixed-term sentence. The District Court sentenced him to life imprisonment, while both the Court of Appeals and the Supreme Court sentenced him to 17 years in prison (NJA, 2013, s. 376; see also BRÅ, 2014:6).

There are certain circumstances that recur in the courts' argumentation. In all three instances the defendant's *determination* and *accuracy* are stressed. This indicates that in view of the court, he acted autonomously. Furthermore, both the District Court and the Court of

² E.g. <http://www.sydsvenskan.se/opinion/aktuella-fragor/ett-rattssamhalle-kan-inte-tolerera-att-hotade-personer-dodas/> Article in a Swedish newspaper titled in English: A modern state cannot accept that threatened persons are killed.

Appeals found there were no mitigating circumstances in relation to this murder. Instead the vulnerability of the victim is stressed when the aggravating circumstances are described. The Court of Appeals stated:

The deed has been completely unprovoked. As the district court stated, the defendant has shown great cunning by, contrary to a contact prohibition, finding out where the plaintiff and her children lived and identifying their habits. This knowledge has enabled him to commit the murder. The deed was particularly ruthless in that it was directed against a related party. The plaintiff was in a particularly *defenseless position* as a result of the defendant having rushed towards her without warning and overtaken her. The defendant carried out the attack with substantial brutality with a bayonet. The deed was done in a public place. (JCA, NJA 2013 s. 376, 386, emphasis added)

This, the defendant's autonomously committed attack was found to have been aggravated in relation to the plaintiff's vulnerability.

Only the Supreme Court emphasizes both the defendant's autonomy and vulnerability. In the following, where the Supreme Court concludes that the accused was determined to kill the victim, the court establishes the defendant's *autonomy*:

No other conclusion can be drawn other than [the defendant] had *decided* to kill [the plaintiff] (JSC, 13, emphasis added).

The court continues:

The Supreme Court bases this conclusion on the fact that the defendant's conduct was characterized by *speed* and *determination* and that he, when he approached [the plaintiff], had not first tried to start a conversation with her, but instead immediately thrust the bayonet into her body at two vital points and then, seemingly quiet, awaited her death without calling for help (JSC: 13, emphasis added).

In spite of the fact that his acts in the quote above are seen as expressions of rationality, implying autonomy, the court later in the judgment stressed how the defendant has been affected by the divorce that took place earlier, establishing the defendant's *vulnerability*:

The *crisis that he experienced* when [the plaintiff] moved from their home sparked, as has been mentioned in the preceding [], a *deep depression with significant negative consequences* for himself, including losing his job (JSC, 14, emphasis added).

In addition, the fact that despite the prior assessment of rationality and determination, it was proven that the defendant has a disorder that led to his inability to control his actions. All this demonstrates insufficient autonomy:

The defendant's complaint that, due to a *mental disorder his ability to control his actions was impaired*, thus does not appear to be unwarranted. The penalty for the act is thus lower than it otherwise would have been (JSC: 16, emphasis added)

The defendant had to take medication for his mental problems. And the medical treatment that was necessary because of his mental illness "increased" his autonomy, in the view of the court. Thus paradoxically his mental illness not only caused his vulnerability. The Supreme Court:

The medical treatment the accused had undergone the period before the act, according to the statement have been party to that he became more *vigorous and uninhibited*. He was considered to have had a sustained understanding of reality at the time of the deed. (JSC: 15, emphasis added)

Regarding the plaintiff's situation, the Supreme Court emphasized only her vulnerability:

The defendant abused the victim's *defenceless position* and *difficulty in defending* herself. The victim was afraid that the defendant, even though he had a restraining order, would attack and kill her – but she did not think this would happen if the children were present. What the defendant is guilty of is an insidious, public attack on an *unsuspecting person who had no opportunities* to escape (JSC: 13, emphasis added).

It is interesting to note, however, that the plaintiff's vulnerability is not positioned in relation to the defendant's attack on her, or his previous behaviour against her. Instead, she is positioned as being in a defenceless position and as an unsuspecting person herself.

Nowhere in the judgment is the plaintiff's autonomy or potential autonomy communicated.

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Therefore it is obvious that the defendant and the plaintiff are positioned differently in relation to vulnerability and autonomy in these judgments. As for the assessments of the responsibility of the defendant, both autonomy and vulnerability are referred to in the argumentation. As for the plaintiff, on the other hand, only her vulnerable situation is stressed. For example, typical signs of autonomy as her ability to contact the women crisis center and live hidden, at the same time taking care of her children, do not seem to be relevant at all in these criminal proceedings.

This is highly interesting, because at least in theory, criminal legal responsibility is built upon the full autonomy of the defendant. As noted earlier, according to Swedish law, criminal responsibility means that anyone who is 15 years old or older can be charged with a crime. Issues of vulnerability are therefore dealt with when deciding the penalty. This means that issues of mental illness and other vulnerability questions could be discussed explicitly in the judgments. And as I have shown, this is the case in the analysed documents.

It is clear from the analysis above, however, that neither the defendant who is presumed to be autonomous nor the victim who is primarily considered as vulnerable is all that clear-cut. Both parties are imparted with autonomy and vulnerability. One important difference is of course that the victim is preferably constructed as vulnerable in the judgments, whereas the defendant is assessed in relation to both autonomy and vulnerability.

I claim this is deeply problematic, primarily in that it prevents the public authorities from comprehending the vulnerability of the victim. Regarding the defendant, it seems the focus on autonomy in theory does not hinder taking into account issues of vulnerability in practice, at least according to this small study. However, from the perspective of the plaintiff, the singular focus on vulnerability is a severe flaw, and could actually be one of the reasons for the bad decision to not keep the defendant in custody in the first case – something that could have prevented the defendant from killing the plaintiff. I believe that the predominant notion – of the plaintiff being primarily vulnerable, unable of rational and capable decisions – prevents the courts from fully assessing a seriously vulnerable situation such as the one in this case, where the information from the plaintiff herself about her certainty that the defendant was going to kill her was not taken seriously enough. It was as if helplessness and fear were considered part of her everyday vulnerability – or, even worse, that she was not rational enough to perceive a serious threat.

I would argue that a move towards a vulnerable subject as a starting point for the criminal justice system would affect this practice. The vulnerable subject does not entail a helpless individual without capacity to make rational decisions. On the contrary, as mentioned above, the thesis of the vulnerable subject does not stress that vulnerability is an ever-present human attribute. Rather, there is a potential for all humans to experience vulnerability during

a life span. In the judgments explored in this article, this view is already reflected when it comes to the positioning of the defendant, who is seen as highly autonomous while at the same time as his vulnerable situation is taken into account in determining the penalty. However, as shown here, the positioning of the victim does not include these nuances. In my view, a move towards establishing a more accurate definition of the subject in this field of law, the vulnerable one, would emphasize an awareness of a more complex notion of the subject and be more consistent with the embodiment of the everyday individual encounter with the criminal justice system (Gear 2010).

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