

Lund University
Sociology of Law: European Law
Master's thesis (RÄSM02)
Spring 2014

From Intuitional to Commonsensical Conceptions of Rape

- A critical discourse analysis of gendered norms in legal decision-making behind a veil of objectivity

Mikael Silfors

Supervisor: Professor Håkan Hydén



Abstract

The persistently high annual numbers of rape in Sweden and numerous legal amendments following internal critique, prove the legal response to be ineffective for the subjects of the protection of the law. Viewed in combination with the prevalence of detrimental conceptions of sexuality and rape, this actualizes questions regarding the potential for and shape of influences on the decision-making actors of law adjudication processes. This study explores the objectivity constructed in cases of rape, raising critique of its function as a veil under which non-legal discursive influences gain leeway beneath the image of flawless procedural conduct. While demanded through criminal procedure law to eliminate the influence of such factors, these practices thereby open for its intention's antithesis. Using critical discourse analysis, techniques of objectivity are analyzed through the images and voices presented in the shape and content of verdicts of rape. A theoretical framework of Bladini's theorization of objectivity and Baudrillard's concept of simulacrum allows for insight into the spacious room created for legal interpretations and reframing. This space is thereafter targeted for further analysis of regularities in what is attributed and dispossessed of meaning, with emphasis on decisive factors, in light of Andersson's and Hydén's theorizations of rape and norms, respectively. The study shows two legal discursive orders on rape, separated by the occurrence of a preceding relationship between the parties. Following such findings, a structural alternative to the Hydénian conception of individual norms is presented, influenced by discourse theory to explain shared linguistic manifestations of normative expectations.

Keywords: Criminal processes, critical discourse analysis, gender, legal decision-making, norms, objectivity, rape, simulacrum.

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1. Introduction

“By applying critical discourse analysis, what is perceived as natural, neutral or necessary can be brought out in a new light and what is going on in the objectivity’s shadow becomes visible.”¹

Moa Bladini

Objectivity is a paramount determinant to the legitimacy of the justice system, with its influence principles of due process, equality and legal certainty, viewed as a component ensuring equal treatment and predictability of the law. Objectivity pursued through the positivist understanding of legal professionals where descriptive, interpretive or decision-making processes generate the same answer regardless of actor is misleading. By removing both the actor and its influences from the visible embodiment of the decision-making of the law adjudication process, and disregarding the impact of the individual’s empirical framing of the event, the view has implications by enforcing difference between decision-makers, while the resulting image is achieved in line with its ambition, appearing to be free of individual or structural normative influence. It contributes to the conception of the existence of a “right answer”, and legitimizing the answer it presents as the only one. While momentarily problematic for the regulatory needs, that is, the actual effectiveness for the subjects of protection of the law in general, the problems are amplified further for vulnerable or marginalized groups who are subject to detrimental social views or norms.²

Sexual violence and rape especially, has in recent history been subject to intense legislative change, with increase the women’s protection from rape and changing social norms. Despite such measures, gendered social views regarding rape still place responsibility on the victim and there are few positive crime statistical changes. Based on data from The Swedish National Council for Crime Prevention’s annual publication of national safety from 2013, the most recent available statistics, an estimated 36000 rapes were committed, out of which 16% are reported, which in turn lead to indictments in 3% of the cases, in the end resulting in

¹ Bladini, Moa. *I objektivitetens sken: en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål*, Gothenburg: Makadam, 2013. pp. 33. [my translation]

² Diesen, Christian et al. *Likhet inför lagen*, Stockholm: Natur och Kultur, 2007.

convictions for 2%.³ The percentage of informants who stated that they had been victims of rape has been stable over the last ten years, while the decreasing level of reports continued to decline. The level of acquittals increased from 21% in 2004, to 28% in 2006, to 34% in 2010, with 36% being the most recent figure of 2012, contrasted to a 5% average of other crimes of violence.⁴ Thus, the amount of rapes has been stable over time, with a decreasing number of reports and increasing number of acquittals. Inconsequence among courts in similar cases is an indicator of extra-legal norms influencing the law adjudication process.⁵ With county differences of indictments ranging from 10% to 53% and studies showing clear difference in court reasoning, further insight into the space created for influence and what such norms may entail is necessary.⁶

A study of the law adjudication process may also reveal traces of the related issues and places the important norm-creating function of law at center of the analysis. Norms regarding rape play a central role in the occurrence of, as well as social and legal reactions to rape. A perception of “real rape” in law has previously been argued to be exported to society, reproducing gendered conceptions of sexuality and maintaining the frequency of the crime. Despite numerous amendments, courts are reoccuringly criticized for placing responsibility on the injured party. With respect to this role of the court and the complaints against it, it would seem studies of the discursive and normative order of the law adjudication process is also vital to the understanding of other events and processes in society.⁷

1.1 Aim and research questions

The thesis aims to explore problems of social norms and individual intuition influencing the decision-making in law adjudication processes of rape, how such influence is hidden from verdicts, the embodiment of the discursive event of the decision-making, and how the result

³ BRÅ, *Brott i nära relationer – En nationell kartläggning*, rapport 2014:8, Stockholm: Lenanders Grafiska AB, 2014. Färdeman, Emelie, Hvitfeldt, Thomas & Irlander, Åsa, *Nationella trygghetsundersökningen 2013 - Om utsatthet, otrygghet och förtroende, Rapport 2014:1*, Stockholm: Brottsförebyggande rådet, 2014, pp.48.

⁴ Olsson, Frida. *Strukturerad bevisvärdering eller ren gissningslek? En studie av tingsrätternas bevisvärdering vid våldtäkt år 2012*, Lunds Universitet, 2013. & Tures, Ewa & Rosencrantz, Ebba. 'Friande våldtäktsdomar ökar kraftigt', *DN*, 2012-03-25.

⁵ Hydén, Håkan (2008) 'Using Law as a Model – Different Approaches to the understanding of normative decision making', in *Contributions in Sociology of law – Remarks from a Swedish Horizon*, Hydén & Wickenberg (eds.) Lund: Media-tryck pp. 25.

⁶ Kero, Julia, *Få anmälda våldtäkter till åtal*, SVT nyheter, 2014-02-14.

⁷ Bergenheim, Åsa, 'Gränsen för det otillåtna Om synen på våldtäkt i Sverige 1950–2010', in *Antologi sju perspektiv på våldtäkt* Uppsala: Nationellt centrum för kvinnofrid, pp. 15 & 28.

could be legitimized as the “right answer” because of potential interpretive space and obscurification established by the way objectivity is constructed within the texts.

The subject of the study is based on the linguistic turn, arguing for the significance of the language to human worldview, setting the borders for what decisions are acceptable and even possible to make, how correspondence between fact and law can be legitimized and how statements of events can be interpreted.⁸ As the concept of objectivity is juxtaposed the concept of critical discourse analysis, the influence of what appears as commonsensical is highlighted, and light is given to the way pursuits of facts and truth may lead elsewhere or the alternatives to its interpretation.

The study is not primarily concerned with the results of the decision-making, that is, if the suspect shall be acquitted or convicted of the alleged crimes in the studied material. Instead, it focuses on the way the form and content of the verdict gives the decision-making actor room to give or remove meaning to different factors in the representation of the reality of the event, and the regularities of the decisive factors of such decisions. These allow for deeper understanding not only of what influences decisions besides the law, but how the process of influences changes in it. This aim will be reached by answering the two following research questions:

1. Does the objectivity within the discursive order of law adjudication processes of rape open for influence of extra-legal structural norms?

This will in turn be answered by pursuing these sub questions:

- What voices and stories are manifested in the verdicts and how do they contribute to the image of objectivity?
- Does the content of the voices’ stories contribute to an image of objectivity?

2. What is the image of such norms?

This will in turn be answered by pursuing these sub questions:

- What patterns of decisive factors can be perceived in the studied material?

⁸ Kress, Gunther. ‘From Saussure to Critical Sociolinguistics’, in *Discourse Theory and Practice: A Reader, The turn Toward a Social view of language*, Wetherell, Margaret, Taylor, Stephanie & Yates, Simeon J. (eds.) London Sage, 2005.

- In what way does the legitimization of the interpretation within the order produce a gendered image of the event, the injured party and the suspect?

1.2 Disposition

This thesis is segmented into 4 chapters, each with several sub-chapters. After having presented the aim and research question of this thesis, the next and final part of chapter 1 will present relevant fields of research, position this study in relation to them and present how it can contribute in their development of knowledge. Chapter 2 presents the theoretical and methodological framework from which presumptions are made and the analysis is performed. It also explains the selection of material and the delimitations of the study. The four sub chapters of chapters 3 make up the analytical parts of the thesis. Initially chapter 3 provides an overview of the image of objectivity established through the format of the studied verdicts, followed by an analysis of how their content contribute to the same, based on deep reading of the material. The third and fourth parts of the same chapter contains an analysis of the two separate discursive orders establishing norms in the verdicts, separated on basis of previous relations between the injured party and the suspect. Chapter 4 ends the thesis with a discussion of the findings which aims at drawing conclusions from such findings and placing them in light of previous and future research.

1.3 Research overview and contributions

With a background in the humanities' human rights studies and social science's sociology of law, in which linguistic and societal approaches are more important than the legal, my contribution can be positioned some distance from the jurisprudential texts which to a great extent inspired it. Where the field of critical legal studies is inspired by a transverse furrow of sociological and linguistic tools, while it stays in the internal field of law and its practice, this thesis can be understood as a study in the opposite direction, moving along the social and linguistic path in meeting with jurisprudence.

This thesis builds upon findings in two primary disciplines, in sociology of law and jurisprudence, the latter mostly constituted by work within the schools of critical legal studies

and feminist legal studies. While jurisprudence provides a richer landscape of research with several studies more empirically entrenched in the subject, the former offers a way into methodological and theoretical questions that help to broaden the inductive and internal work of the legal scholars. Even though theoretically relevant research is conducted outside the Swedish contextual scope of this study, the context specific nature of the law and discourse offers limited generalizability across legislative borders. As such this thesis predominantly builds on and contributes to research on Swedish law in empirical terms. A more stringent empirical background also allows for a deeper and more refined contribution to the field from the studied context.⁹

Questions of discriminatory norms and behavior have a rather rich presence ranging from legal studies of criminal law and criminal procedural law to profession oriented research of courts and judges. While this study is not to be placed in such fields, it still touches several issues discussed in them. Some studies of structural discrimination on basis of gender are especially notable, including Monica Burman's dissertation in which she studies sexual violence and the ability of criminal law to create gender equality.¹⁰ Eva-Maria Svensson has also contributed to feminist knowledge of law, partly through her dissertation with the thesis that the gender-neutral traditions of law makes the relevance of gender invisible, and through a wide corpus of later work, ranging from challenges to women legal professionals to the importance of paying attention to what is excluded from law.¹¹ Maritha Jacobsson and Stefan Sjöström's comparative study on the trustworthiness and responsibility attributed to victims of rape in relation to male victims of assault is another influential piece in the field.¹² Other related and prominent contributions include Helena Sutorius and Anna Kaldal's study of assessments of evidence and criminal proceedings of sexual violence, where plaintiffs are asked irrelevant questions of their respectability. Katrin Lainpelto's dissertation on "support

⁹ See for example de Carvalho Figueiredo, Débora. 'Representations of rape in the discourse of legal decisions' in *Systemic Functional Linguistics and Critical Discourse Analysis* Young, Lynne & Harrison, Claire (eds.) Continuum: New York, 2004, where critical discourse analysis is utilized to draw archetypes of rape from British verdicts, and Lindroos-Hovinheimo, Susanna. *Despairing Justice and the Ethics of Legal Interpretation*, Helsinki: Lindroos-Hovinheimo, 2011.

¹⁰ Burman, Monica. *Straffrätt och mäns våld mot kvinnor: om straffrättens förmåga att producera jämställdhet*, Uppsala: Lustus förlag, 2007.

¹¹ Svensson, Eva-Maria *Genus och rätt - En problematisering av föreställningen om rätten*, Lustus förlag, Uppsala, 1997. See also Svensson, Eva-Maria. *Exploiting the Limits of Law - Swedish Feminism and the Challenge to pessimism*, Åsa Gunnarsson, Eva-Maria Svensson, Margaret Davies, (eds.). Aldershot: Ashgate, 2007. Svensson, Eva-Maria. *Is there a future for Scandinavian Women's Law?* In Ruth Nielsen, Lynn Roseberry and Christina D. Tvarnø (eds.): *Scandinavian Women's Law in the 21st Century*, DJØF Publishing, 2007.

¹² Jacobsson, Maritha & Sjöström, Stefan. 'Believing and blaming the victim: Comparing rape victims with male assault victims' *The Normative Anatomy of Society. Relations between norms and law in the 21st century* in the 21st century', 2012.

evidence” showing how the existence and application of such evidence primarily surfaces in criminal proceeding involving alleged sexual misconduct, bringing light to an inconsistent application, leading to differing outcomes from the same circumstances, is another example.¹³

Among the most important works for this thesis is Ulrika Andersson’s dissertation *Hans ord eller hennes*, on how victims of crime are constructed through the selection of questions of which they are allowed to be asked, and its implication for placing their ability to express objection rather than potential force or violence by the defendants. While part of the analysis takes influence from and overlaps with her study, the cases used in the dissertation are in the time of this writing 15 years old, with parts of its findings being dated, calling for a renewed analysis for contemporary insight. Moreover, where her analysis was internal, the analysis in the present thesis will approach gendered norms with emphasis on the objectivity they are presented through. Finally, neither any preceding theories of norms nor the definition thereof were discussed in the study.¹⁴

Andersson’s dissertation has continuously inspired additional work on assumptions in cases of rape. One such example is Ulrika Svallingsson’s *För allas lika olika - cripteoretiska avslöjanden av den faktiska människans frånvaro i straffrätten*. Using crip theory in an analysis of sexual behavior, Svallingsson finds that the rational normate in legal practice is not representative for behavior of the regulated. Where her article questions the way the court pays to little attention to the influence of structural positions between the parties of the case, this thesis instead aims questions to what extent such factors affect the decision-making process in the relation between the regulated and the legal professionals of the court.¹⁵

The study also builds on and aims to contribute to critical studies of objectivity, even if legal research on the procedural demands of it is scarce. Most notable in this category is Moa Bladini’s dissertation on the ideals of objectivity within discourses of criminal cases and legal professionals within such discourses cover their assumptions, values and responsibility over processes under a guise of objectivity. This image of objectivity is maintained internally through positivist discourse within legal studies and is legitimized externally through

¹³ Sutorius, Helena & Kaldal, Anna, *Bevisprövning vid sexualbrott*, Stockholm: Nordstedts juridik, 2003, & Lainpelto, Katrin. *Stödbevisning i brottmål*, Malmö: Jure förlag, 2012.

¹⁴ Andersson, Ulrika. *Hans (ord) eller hennes?: en könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp*. Bokbox Publishing, 2004.

¹⁵ Svallingsson, Ulrika: 'För allas lika olika - cripteoretiska avslöjanden av den faktiska människans frånvaro i straffrätten.' *Juridisk publikation* särtryck ur häfte 2/2013.

verdicts.¹⁶ More conceptual critiques of objectivity can be found in the works of Håkan Andersson, a legal scholar with a penchant for linguistic critiques of legal discourse, or Christian Diesen, studying issues of structural discrimination to the concept of equality before the law with criminological and social psychological influences. None of these are related to rape and while Andersson writes of Baudrillard, such theorization is not operationalized in response to any empirical material.¹⁷

The present thesis is also part of the field within Sociology of law developing ways of understanding norms and its relationship with law and society. Similarly to the discipline of legal studies, there is reason to be careful in generalizing findings and theorizations across legal boundaries, even if they are not as dire. However, several scholars based in Sweden have a prominent position in research on norms, such as Matthias Baier, Patrik Olsson, Håkan Hydén and Måns Svensson.¹⁸ Hydén is a main influence in the theoretical framework of the present thesis, having worked with the legal awareness through norms and change in response to them as well as effects of social dissent.¹⁹ Karl Dahlstrand is another example, notably over-bridging the common socio-legal distinction between internal and external views of law through the concept of norms, with special importance to the present study through arguments of critical theory and discourse analysis.²⁰ Finally, there is a rich international field researching the interaction between law, society and norms. Most of these serve as foundation to much thought to which critical questions for new theory can be directed. These include for example Teubner and Lainpeltos. Others, including Posner and Cooter disunite notions of norms from law, primarily as separate sociological mechanisms of control without insight into to the reciprocal influence of the two.²¹ Finally, and most importantly, none of these works engage deeply with questions of sexual violence and objectivity.

¹⁶ Bladini, 2013.

¹⁷ Andersson, Håkan, 'Juridisk verklighetsbild - realitet eller simulacrum', *JT* 2000-2001, pp. 897ff and Diesen, Christian et al, *Likhet inför lagen*, Stockholm: Natur och Kultur, 2007.

¹⁸ See for example Baier, Matthias *Social and Legal Norms*, Ashgate Publishing Limited, 2014, and Olsson, Patrik. *Legal Ideas and Normative Realities. A case study of children's rights and child labor activity in Paraguay*. Lund Studies in Sociology of Law, 2007. Lund: Media-tryck, Lunds universitet.

¹⁹ Hydén. 'Using Law as a Model – Different Approaches to the understanding of normative decision making', and Hydén, Håkan & Svensson. Måns 'The Concept of norms in Sociology of law in *Contributions in Sociology of law – Remarks from a Swedish Horizon*, Hydén & Wickenberg' (eds.) Lund: Media-tryck 2008.

²⁰ Dahlstrand, Karl, 'Non-Pecuniary (idealistic) Damages in Tort – How to break up the Distinction between and Internal and External view of Law' in *Contributions in Sociology of law – Remarks from a Swedish Horizon*, Hydén & Wickenberg (eds.) Lund: Media-tryck 2008.

²¹ Posner, Richard A. *Law and Social Norms*. Cambridge, Massachusetts, and London, England: Harvard University press, 2002, and Posner, Richard A. & Rasmusen, Erik B. 'Creating and enforcing norms, with special reference to sanctions', in *International Review of Law and Economics* 19, 1999. Cooter, Robert D. 'Three

The field of research from Sociology of law on topic of norms is developed further in the following chapter (chapter 2) in the deepened presentation of the theoretical and methodological framework utilized in the thesis.

2. Methodological and theoretical framework

The purpose of the study as well as the current developments within the research fields concerning constructions of, and influences by, norms in discursive practices have largely demarcated what set of theories are required and which methods are feasible in order to fulfill the aims of the thesis. Utilizing a type of critical discourse analysis and grounding the study in a social constructionist theory of science is both pertinent and valuable to studies of constructions in legal discourse, as shown by much of the works within critical legal studies, such as Andersson, Bladini and Burman, as well as recommended by Dahlstrand.²²

This chapter will initially present the meta-theoretical foundation of the study, followed by descriptions and justification of the selection of overarching theories of discourse and norms. The more specific theoretical tools of objectivity and gendered norms governing the analysis, as well as the methodological procedure are thereafter laid out in two separate parts. The chapter is concluded by a brief reflection on language in the material as well as motivation of the selection and delimitation of the same.

2.1 Social constructionism

The various methodological and theoretical developments within the critical discourse analysis build upon a social constructionist epistemology and assumptions that the social world is constructed.²³ Social constructionism is negatively demarcated in its critical relation towards the positivist idea of rationally processing of systematic gathering of sensory experience as the only source of valid knowledge and realist theories of knowledge, arguing

Effects of Social Norms on Law: Expression, Deterrence, and Internalization', 79 *Or. L. Rev.*1, 1999. See also Hetcher, Michael & Opp, Karl-Dieter *Social Norms*. New York: Russel Sage Foundation, 2001.

²² Bladini, pp. 33, Andersson, Ulrika, pp. 39, and Dahlstrand, pp. 105.

²³ Mertz, Elizabeth. 'A New Social Constructionism for Sociolegal Studies', *Law & Society Review*, Vol. 28, No. 5, Symposium: Community and Identity in Sociolegal Studies, 1994, pp. 1260ff.

for the possibility of objectively perceiving the real world as it is.²⁴ While there is no definition of social constructionism, Viven Burr argues that an approach corresponding with a set of traits is to be defined as social constructionist. The traits can be summarized as a view of knowledge as a historically and culturally specific result of human systematization of the world, produced through social practices, which constitute truths with varying effects on social life. Because knowledge requires interpretation of sensory experiences, and such interpretative processes are determined by the preceding categorization and impressions of the interpreting subject, the result of the interpretation is not objective or exact. The interpreting subject and in large, human knowledge, is affected by historical and cultural factors, leading to a perception of phenomenon as essential or immutable. With respect to the human inability to directly or objectively observe an external reality, knowledge is instead perceived as a result of social processes. In other words, the meaning of what is defined as reality, as well as what is perceived as true and false, is constituted by language and discourse.²⁵ Finally, different knowledge leads to differing social behavior, both at micro and macro level. This includes the way social groups or persons categorized in different ways are treated. In light of these factors, subjects are not perceived as autonomous subjects in their relation to their context. Instead, human actions, experiences, awareness and thoughts are largely constituted by the linguistic and discursive context in which they are situated.²⁶

2.1.1 Indeterminacy and law as practice

From the above expressed theoretical position follows a critique of the legal positivist idea of systematic processing leading to a right answer in the connection between the case and the present legal position. The existence of absolute epistemologically determinant law is under heavy critique in both sociology of law and legal studies, as well as in the theoretical strands of both legal positivism and legal realism, even if the postulated causes differ. In other words, a wide range of scholars question whether it is possible to deduce the current legal position, even if it actually ontologically exists, as every social situation does not have a corresponding regulation.²⁷ This concept is often described as epistemological indeterminacy. This notion of

²⁴ Burr, Viven, *An Introduction to Social Constructionism*, New York: Routledge, 1999, pp. 10ff, and Bladini, pp. 31f.

²⁵ Burr, Viven, *Social constructionism*, London: Routledge, 2003, pp. 2-5.

²⁶ Winther Jørgensen, M., Phillips, L., & Torhell, S. *Diskursanalys som teori och metod* / Lund: Studentlitteratur, 2000.

²⁷ Brand, Jeffrey, *Philosophy of Law: Introducing Jurisprudence*, New York: Bloomsbury Academic, 2014.

indeterminacy targets the access to rules, questioning nothing of the limits of or influences on the agents applying the law.²⁸

The legal realist critique of legal positivist's undivided attention to the rules of law, emanating in a notion of law as practice, makes possible a broadening of the understanding of the way the steps of conversion from an allegedly criminal event, through the process of adjudication into a sentence, make several internally and legally correct verdicts possible.²⁹ From this perspective, the norms and behavior of the legal actors, the framing of events during the main hearing, and the way the evidence is processed can all affect the outcome. Sociological studies of legal decision-making have shown that the legal decision-making is often a deductive, rather than inductive process. It is not an open exploration of all presented evidence to form a thesis, but the testing and reshaping of a preconceived idea of the outcome against such evidence. While the judge is to avoid being influenced by intuition in their decision-making according to procedural law, it is nonetheless often presented as a main tool of reaching "the right answer".³⁰ Quantitative studies showing structural discrimination in legally flawless decisions, indicating conscious or unconscious pursuits of non-legal normative aims, and the high amounts of reports of questionable proceedings indicate that there is a problem behind the objective surface of law.³¹ Even among proponents of absolute determinacy, problems arise here because of acceptance of a "wrong answer". Studying the discursive event of legal decision-making and the norms it includes is useful as they will have a structural influence on the outcomes of decision-making, in light of these factors. This will be developed further in chapter 2.5 on objectivity and the analysis of the thesis.

²⁸ See for example: Kress, Ken, 'A Preface to Epistemological Indeterminacy', 85 *Nw. U. L. Rev.* 134, 1990. D'Amato, Anthony, *Pragmatic Indeterminacy*, 85 *Nw. U.L.* 1, 1984. Madry, Alan R. 'Legal Indeterminacy and the Bivalence of Legal Truth', 82 *Marq. L. Rev.* 581, 1999. Lipkin, Robert Justin, 'Indeterminacy, Justification and Truth in Constitutional Theory', 60 *Fordham Law Review.* 595, 1992. Hydén, Håkan. *Normvetenskap*, Lund: The Department of Sociology, Lund university, 2002, pp. 131, and Kutz, Christopher L., 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law', 103 *Yale L.J.* 997, 1993.

²⁹ Strömholm, Stig. *Rätt, Rättskällor, Rättstillämpning*, Stockholm: Nordstedts, 1991.

³⁰ Bladini, pp. 365, Eklöf, Per Olof, Moban, Robert & Bylund, Torlef., *Rättegång, häfte III* 6th ed, Stockholm: Dordstedts förlag, 1994 and Eklöf, Per Olof, Moban, Robert & Bylund, Torlef., *Rättegång, häfte IV* 6th ed, Stockholm: Dordstedts förlag, 1995. Mellin, Michael. 'Domare visar inte bättre resultat än andra på sanningsbedömningar - oavsett HD:s praxis', *Dagens Juridik*, 2014-03-20, & Nordh, Robert. 'Det mest betydelsefulla verktyget vid bevisvärdering är trots allt domarens intuition', *Dagens Juridik*, 2013-09-02.

³¹ Diesen.

2.2 Discourse as theory and method

With reference to the differing uses and theoretical implications of the term discourse in various strands of discourse analysis, it is useful to clarify its use in the present thesis. The definition of discourse in this setting is broader than the general use in semantics, signifying the concept of debate or conversation through any means in any context. The use of the term within the theorization of the critical discourse analysis used in this thesis is influenced by its foucauldian understanding.³² This view, where knowledge and power are central and intertwined concepts, can be linked to social constructionist understanding of knowledge as constituting reality, as the limits of acceptable speech and action as well as possible thoughts and truths.³³ Knowledge is connected to power through its effect on social behavior and the way it limits thoughts and sets the boundaries of acceptable and deviant behavior. Given the fact that discourse entails the creation of and influence on subjects, the interaction between subjects, the relation between texts, their writers and receivers as well as relation between writers and receivers themselves, the context plays a central role in discourse analysis. Foucault argues that discourses are complex, ever changing and may simultaneously indicate different positions, leading to difficulties in finding a clear overview thereof.³⁴

Taking the above into account, the role discourse analysis plays in the present thesis can be summarized into the notion that knowledge of social and cultural structures of thought and values can be found through observing such discursive practices. When placed in the context of legal analysis, one could recapitulate it through the distinction from the internal legal methodology, in search of what Håkan Andersson describes as an “underlying finished legal reality”, whereas a discourse analysis brings understanding to how the “surface plane of law” is constructed and legitimized. Turning the gaze towards the linguistic aspects of the law adjudication process makes visible the patterns of regularities which legitimize and change the law.³⁵ There are still, however, different aims, approaches as well as meta-theoretical positions in the theorization of discourse analysis. Among the more noticeable distinctions within the field is the question of how deeply locked subjects are within their discursive

³² Foucault, Michel, *L'Archéologie du savoir*. Paris: Éditions Gallimard, 1969 & Foucault, Michel. *Vansinnets historia under den klassiska epoken*. Stockholm: Arkiv, 1986.

³³ Weiss, G & Wodak, R (eds.) *Critical Discourse Analysis. Theory and Interdisciplinarity*, Chippenham and Eastborne: Palgrave Macmillan, 2007, pp 10ff.

³⁴ O'Farrell, Claire. (2005). *Michel Foucault*. London: SAGE, 2005.

³⁵ Andersson, Håkan. 'Rättens narratologiska dimensioner - interaktion och konstruktion', in *Interaktiv rättsvetenskap*, Gräns/Westerlund (eds.), Uppsala: Åbo 2006, pp. 14.

contexts and the level at which they are able to affect their surroundings. Chantal Mouffe and Ernesto Laclau, who are influential in analyses of the political, stand towards one end of these positions, arguing that it is impossible to make a distinction between discursive and non-discursive dimensions and that discourse entirely constitutes the subject.³⁶ It is however reasonable to believe that subjects has a possibility of changing their discursive order. Norman Fairclough's conception of discourse and its relation to the subject is a dialectic, three dimensional model, where the discursive order constitutes the subject, but the order is also constituted by subjects and non-discursive social practices.

A second and decisive distinction among the directions within discourse analysis is the state of their methodological guidelines and foundations. Given its more extensive and clearly structured methodology as well as theoretical tools for analysis embedded with its method, Fairclough's critical discourse analysis is better suited and more helpful in understanding the relationship between norms and legal decision-making from a large amount of verdicts. This is also illustrated by Bladini's and Andersson's effective use of methodology influenced by Fairclough in their dissertations, which in turn have influenced this thesis.

2.3 Critical discourse analysis

As described above, Fairclough's critical discourse analysis contends that it is important to not only incorporate text into ones analysis. Language too, is described as a social practice to be analyzed. Similarly to the theorization of Foucault, the relationship between language and power is central. The analysis makes it possible to study how social power relations are constituted, changed or perpetuated through the prevailing truth-claims among competing ways to describe and understand the world. The analysis focuses on asymmetrical relations of power between subjects of a discursive event prevailing and potential inequalities in their ability to control how texts are produced, distributed and consumed in a given context.³⁷

In Fairclough's model of a discursive event, a dialectic and three dimensional model is drawn, made up of the text, discursive practices, and social practices, which can be described as the specific context. A discursive practice is the description or representation of a phenomenon in

³⁶ See for example: Laclau, Ernesto & Mouffe, Chantal. *Hegemonin och den socialistiska strategin*. Gothenburg: Glänta, 2008.

³⁷ Weiss & Wodak, pp 1ff.

light of the purposes and norms which affect a practice, such as the adjudication process. The purposes and norms which are leading the practices make up a shared frame of reference and experiences which, as stated above, governs what can be said and done. The discursive practices of the adjudication process are thus governed by the norms and rules within it.³⁸ The relationship is characterized as dialectic by way of describing how the discursive practices constituting the production of the text, constitutes the social practices, but is also constituted by it. In other words, the situations, social structures and institutions in which texts are generated, shape the discursive practice, but the discourse also influence the context in which they take place.³⁹ The order is perceived through analyzing what the dominating discourse is in a specific context and time. Thereby, one can also explain potential changes dependent on conflicting positions, that is, if the discourse shows instability by contradicting itself through what is termed atypical discourses.⁴⁰

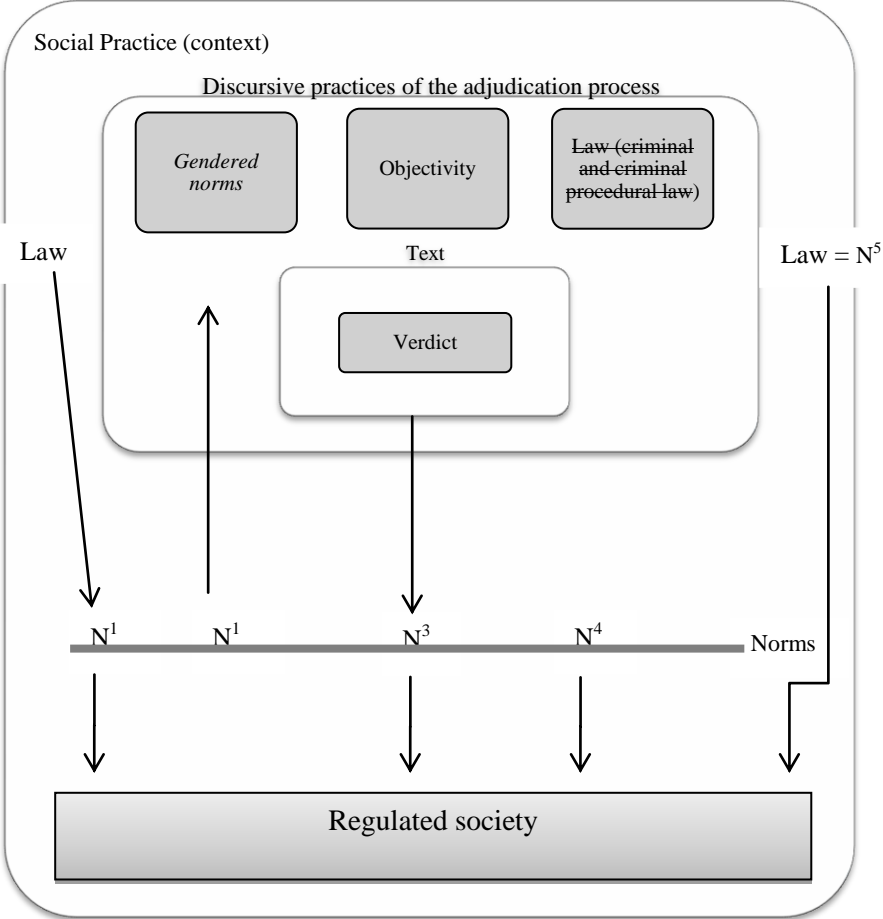


Figure 1, The external view of law, based on Fairclough, modified using Hydén’s model of norms.

³⁸ Weiss & Wodak, pp 10f.

³⁹ Fairclough, Norman. *Discourse and social change*. Cambridge: Polity, 1992, pp. 73.

⁴⁰ Winthersen Jörgensen & Phillips, pp. 75ff.

My model and analysis of discursive events of the adjudication process is influenced by Bladini's use of critical discourse analysis. She draws the external producing model of law, in which verdicts make up the part of the text, as dictated by discourses of objectivity and legal rules. However, this model is lacking in light of the results of her own study, where she finds that legally impeccable decisions still, when placed in conjunction indicate structural discrimination. This shows that whatever norms that influences such decision-making is hidden in the text behind objectivity. Yet even if it is impossible to know for certain how much and when the aspects influencing the process of decision-making are influential, they are not completely invisible, as these factors are presented through the verdict, and in turn, the production of the text. The influential aspect is in my model described as gendered norms.⁴¹

In further distinction to the focus and model of Bladini, the present thesis ignores the legal position, with its discursive effects on the decision-making making the background of the verdicts. This is not done in order to deny their centrality as constitutive discourses. Instead, the focus is placed on aspects of gendered norms and objectivity as they both are influential to the process and verdict regardless of changes to the legislation and however much the practice is deemed flawless from a legal perspective. This is also supported from the Hydénian notion of the legal professional as working in the empirical, rather than the legal.⁴² As such, discourses of legal studies and established penal law, criminal process law, and other applicable branches of law are not necessary to answer the aim of the study. Delimiting the study from different discourses is common in the method and practices by both Andersson and Bladini, as well as necessary in order to get a deeper insight into the studied material.

To summarize, the present model consists of Fairclough's model of the text, surrounded by law adjudicating discursive practice inspired by Bladini, surrounded by the context, which is to be filled with a sociological theory of social practice, made up of Hydén's theory of norms. This final factor in the model amends it further by highlighting the constituting interactions with reference to Hydén's model of law, norms and society and the way they are interrelated. If there is a dominating way of speaking and writing, there is also a dominating intersubjective understanding of the definitions and divisions involved in the term, and a norm

⁴¹ Bladini, pp. 356ff. See also: Goodrich, P. (1987) *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*. London: MacMillan.

⁴² Hydén, *Using Law as a Model*, pp. 29.

regarding what expectations the actors of the law adjudication processes are subject to in their actions and how they view rape.⁴³

The tools and parts of the discursive order will be presented more thoroughly, under chapters 2.4 to 2.6, which present the theory and method required to gain insight into how objectivity is constructed in the format of the text and how norms are established through the way images of the events and parties are constructed.

2.3.1 Methodological considerations of legal discourse

While interviews with judges could be argued to be required to fully perceive the individuals believed expectations, the informants would only tell what they want to tell about their reasoning, and it is unlikely that the governing norms would surface more than in the verdicts. The normative shown through discursive limits and orders could fill the role. It may be impossible to find explicit statements of influence from what norms are embedded in the process of the decision-making, but besides being an argument in itself for a study of objectivity, it is important to note that the language presenting and discursive order controlling such decisions is not indiscernible, and in light of previous research, contains implications for the image drawn of women and sexuality. Similarly to norms, discursive orders can be conflicting and stand in contrast with one another, however, dominant discursive orders are to be considered limits to what norms can influence and indicate norms that are prevalent.⁴⁴

Ruth Wodak argues that it is useful to be well versed in the discursive context one analyses. While not analyzed from the perspective of a legal studies or a legal professional, the external perspective of Sociology of law brings the potential of perceiving and understanding what, as Bladini argues, may be hidden from a legal scholar due to their legal positivist aims, embedded in their education, of attempting to find the current legal position.⁴⁵

A common epistemological conception within Sociology of law is to make a distinction between knowledge in law and knowledge of law, or internal and external perspectives of

⁴³ Hydén, *Using Law as a Model*, pp. 23.

⁴⁴ Andersson, Ulrika, 263ff.

⁴⁵ Wodak & Meyer, pp 65. Bladini, pp. 43f.

law.⁴⁶ Indeed, this distinction is common for many objects of study within many fields. Law is, however, special in the way the external perspective is removed from its practitioners and students in the process of becoming legal practitioners. Tuori argues that facts within legal studies and practice are dependent on legal rules and are perceived through the same. As such legal actors do not aim at providing true descriptions of, or causal processes within, the social reality outside the law, but a normative one, highlighting only what can be given meaning through the perspective of legal discourse.⁴⁷ However, as shown in model 1, will be described further in 2.4, the theoretical questions of norms pursued in this thesis transcend this dichotomization with a perspective of norms working within society, the law, and in between.

2.3.2 Ethical considerations

The most important ethical considerations to highlight in the writing of this thesis can be summarized through the Swedish Research Council's general rule, in that research should not be conducted in a way by which other people are harmed.⁴⁸ In this case, following the rule entails the protection of the integrity of the individuals discussed in the material. Ethical demands of informing affected parties or getting their consent are not applicable in a study where all material used are public documents, available for anyone to access without consent of the individuals targeted by the verdict. Their integrity will still be protected by referring to their position in the verdicts rather than by name, as non-anonymity could lead to possible risks of discomfort and injury.⁴⁹

The protection required by the council does not conflict any other guideline from the Council, made up of demands of writing the truth about one's study, transparency about the methods and results, disclosure of commercial interests and other linkages, examination and presentation of the starting points of the study, avoiding plagiarism and maintaining honesty through referencing, keeping good order in the study, and being fair in the judgment of the research of others.

⁴⁶ Dahlstrand, pp. 91ff.

⁴⁷ Hydén, *Using Law as a Model*, pp. 11ff.

⁴⁸ Gustavsson, Bengt, Hermrén, Göran & Petersson, Bo. *Vad är god forskningsed? Synpunkter, riktlinjer och exempel*, Stockholm: Vetenskapsrådet, 2005, pp. 8.

⁴⁹ Vetenskapsrådet, *Forskningsetiska principer inom humanistisk-samhällsvetenskaplig forskning*, Stockholm: Vetenskapsrådet 2002, pp. 12.

One might note that the concept of truth appears difficult to fulfill at face value, as the theoretical foundation of the thesis rejects the possibility of producing objective truth. The interpretation of truth which I have committed to follows from the Council's own definition and allows for such critical perspectives: "respect for results obtained or for 'truth' can here be expressed as a requirement for the integrity of the researcher. Researchers should try to be critical of their own and others' expectations of what data will show."⁵⁰

2.4 Norms and discourse

Norms plays an especially interesting role within sociology of law with its function of over-bridging Kelsen's conception of law as a hierarchical order of imperatives or 'oughts' and Durkheim's conception of law as a social fact, and as such an "is". Hydén and Svensson define norms in a three-dimensional model, fulfilling Kelsen's "ought" as behavioral instructions and Durkheim's "is" in that "they are socially reproduced, or finally to the individual in that [...] they are the individual's understanding of surrounding expectations regarding their own behavior." While most rules do relate to all three, some norms lack one or more of these attributes.⁵¹

It is reasonable to assume the existence of norms that are manifested beyond the scope of the individual, and it would thus be fruitful to reach a way of tracing such norms. One possible way to develop this individual idea of norms to a structural one is by analyzing the boundaries which governs what norms can be present and what expectations are manifested through discourse. The discursive boundaries of what can be said and done are behavioral instructions, socially reproduced and like the idea of perceived expectations, they indicate an external origin of the norms, or that they are not only created within the individual. As a shared frame of reference and knowledge, the discursive practices not only limit what norms and purposes can be present, but also how they can be interpreted, as perceived expectations can only be understood through language.⁵² A critical discourse analysis is thereby particularly effective for understanding the structural idea of norms.

⁵⁰ Gustavsson, Hermrém & Petersson. pp. 16.

⁵¹ Hydén & Svensson, pp. 131ff, Durkheim, Emile, *The Rules of Sociological Method and Selected Texts on Sociology and Method*. New York: The free press, [1895], 1982. & Marmor, Andrei. 'The Pure Theory in Law', in *The Stanford Encyclopedia of Philosophy* (Winter 2002 Edition), Zalta, Edward N. (ed.), 2002.

⁵² Weiss & Wodak, pp 10ff.

The focus on discourse and norms also makes it possible to draw an alternative to the dichotomization of external, through new models of explaining the dialectic nature of the relationship between the internal law, the external society and the norms in-between, as shown in figure 1 of chapter 2.3. The model does not aim at attempting to portray norms or law as separate from society, but rather aims to make visible how norms lie behind the law and may distort it. In this conception designed by Hydén, law is perceived as standardized politics, and as a system of normative rules, a means of regulating the behavior of the legal subjects in the society it is part of, which harmonize with the Foucauldian understandings of power and discourse used in this thesis.⁵³ According to Tuori, the intersubjective validity of the present law is a result of discourse where the main interventions are made by legislators, judges and legal scholars, with the relative weight of such acts is decided by prevailing doctrine of legal sources.⁵⁴ The problem with this description is how it ignores influence from outside the legal framework, through custom, tradition and general discourse of related themes, norms and actors. Similarly, the law is not the only or necessarily central determinant of the behavior of the regulated. Instead processes of internalizing norms through governmentality, which may or may not correspond with legal rules, often govern the behavior of the legal subjects of society.⁵⁵

Based on a conception in a similar vein and with a similar blindness, Teubner argues that law can fail through a variety of legal situations, out of which “incongruence of law, politics and society” is the most relevant on the topic of norms. This failure occurs when “the regulatory action is incompatible with the self-producing interactions of the regulated system. The regulatory action becomes irrelevant and the law is ineffective as it creates no change in behavior.”⁵⁶ This hypothesis also fits well with Hydén’s idea that law is not only concerned with legality, but also legitimacy and needs to balance them both in order to function. However, as with all Teubner’s theorizations of legal failure, the one mentioned above departs from an assumption that the institutional system in which the regulatory action is practiced still works, without internal inconsistencies. They could, in other words, be categorized as a set of institutional problems. In response to this idea, Hydén claims that social norms may outweigh legal norms in individual cases, jeopardizing the predictability of law. A sign of this is inconsistencies within the external displays of the regulatory actions or legal decision-

⁵³ Hydén, *Using Law as a Model*, pp. 23.

⁵⁴ Tuori, Kaarlo. ‘Self-description and external Description of Law’, *NoFo* 2, 2006, pp. 28.

⁵⁵ Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. NY: Vintage Books. pp. 200ff.

⁵⁶ Teubner, Gunther. (ed.) *Autopoietic Law: A New Approach to Law and Society*, Berlin: de Gruyter, 1983.

making, in other words different outcomes of law adjudication processes and arguments in similar cases.⁵⁷ This could be defined as individual normative problems. Lainpelto's work, described in chapter 1.3, shows how such inconsistencies exist among the regulatory practices in legal practices of rape and the statistics presented by The Swedish National Council for Crime Prevention show extreme difference between geographical areas.⁵⁸

But what happens in a fictional, but in no way implausible situation where problems of extra-legal norms affect the legal practice moving objectively flawless praxis away from the coverage of law and principles of equal treatment from different decision-makers to different regulated subjects, as argued by the school of critical legal studies? This thesis sets out to explore if it is necessary to develop a third category of problems, the structural normative. As described in 2.6, Andesson shows that social norms establishing a preconception of women and their sexualities can be found in the discursive practices of legal decision-makers through verdicts. Because every social problem does not have a corresponding legal rule, legal decision-making is often open for several legal routes of argument and outcomes, dependent on the discursive boundaries of the case and the "common sense" of the judge. In 2.5 Moa Bladini shows how such issues do not need to affect the Hydénian notion of legitimacy of the law, through positivist epistemology found within the discursive contexts of both legal studies and legal practices, covering the norms and causes behind the decision-making under the guise of objectivity.

2.5 Theory of objectivity

According to Bladini, the objectivity of a verdict is established through the format and the content of the text. The format includes the voices used in the verdict and the way their authors or instigators are presented. The format is in this case, as the expression of the law adjudication process and a state agency, important because of its role in establishing authority to the arguments and has the possibility to decontextualize the author into an objective, position-less all-seeing voice, or what Donna Harraway calls the god trick.⁵⁹ In other words, the first part of the analysis of objectivity deconstructs the verdicts through Bladini's

⁵⁷ Hydén, *Using Law as a Model*, pp. 25.

⁵⁸ Lainpelto, Färdeman, Hvitfeldt, & Irlande, pp. 48ff.

⁵⁹ Bladini, 360ff.

theorization of form and voices in its initial stage to see if and how the existence of the legal professional is rendered invisible.⁶⁰

It also hides any influence of historically and culturally specific aspects on the life experiences of the judge, which according to Eklöf, one of the leading scholars in Swedish legal studies, is a central tool for the judge. The same can be argued for the intuition, which as argued by Eklöf among others, is useful where logical arguments are not enough.⁶¹ The legal sociologist Wilelm Deflem summarizes the problem of this idea:

“Precedents are not just given, for they are selected by judges on the basis of their conceptions of right and wrong. These normative conceptions often remain unspecified and unconsciously influence judges’ opinions. Legal judgments purporting to be logical are often mere dogmatic principles, the specific origins of which are overlooked.”⁶²

Continuing, Deflem further describes issues of the perception of objective neutrality of the individual decision-maker behind the objectified court:

“Legal reasoning and decision-making is anything but a neutral application of principles and is instead affected by dozens of biases on the part of legal professionals that depend on the personal ethical-political values they hold and the characteristics of the socio- structural context in which they were formed. Not only are judges and lawyers influenced in their conduct by their ideological and political commitments, the law masks this condition of value-bias by positing neutrality and justifying legal outcomes in terms of a formal application of statutes and precedents to specific cases.”⁶³

Bladini’s analysis departs from Eva-Maria Svensson’s logic of delimitation, in which a concept or phenomenon is identified through negatively associated counterparts. In other words, they are defined through dichotomizations by what they are not, leading to the simplification of the world, where its complexities and many central factors of understanding are rendered invisible. This partly refers to the concept of objectivity itself. It is defined as a lack of subjectivity. Thus, any expressions of experience are reduced in favor of perceived facts, drawing a seemingly uncomplicated scenario. Bladini refers to the image of a machine producing yet another sentence, where its actors are rendered invisible, making it seem like

⁶⁰ Harraway, Donna. *Simians, Cyborgs, and Women – The Reinvention of Nature*, New York, Routledge, 1991, pp.188f.

⁶¹ ⁶¹ Bladini, pp. 365, Eklöf, Moban, & Bylund, *Rättegång, häfte III* 6th ed. Eklöf, Moban & Bylund. *Rättegång, häfte IV* 6th ed, Mellin & Nordh.

⁶² Deflem, Mathieu. *Sociology of law: Visions of a Scholarly Tradition*, Cambridge: Cambridge University Press, 2008, pp. 99.

⁶³ Deflem, pp. 192.

they have had no influence over what is expressed, written and left out. In the second part of her analysis, she examines the voices' strategies of legitimization of their portrayls in the content of the voices. Instead of recreating a similar study and in order to fulfill the aim of the thesis, I make use of her findings and the way it opens for further analysis of simplification and portrayal into images, taking influence from Håkan Andersson's legal use of Baudrillard.

In the second stage of this thesis, the effects of the voices and what they present are analyzed through Baudrillard concept of simulacrum to highlight how reality is represented and whether reality is in fact needed. While not specifically intended for legal analysis, legal reasoning is a prime example for Baudrillard theory of simulacrum and its reading of linguistic constructions may contribute greatly to understanding how an advanced and complex portrayal of a reality is replaced by a constructed reality. As described by Håkan Andersson, "The legal story must include, convey and legitimize a picture of a reality - something that happened, something that exists - and a picture of a rule or measurement plan with decisive normative necessary requisites that justifies that certain legal effects will occur."⁶⁴

The way the selective parts of witnesses' memories are brought forward by legal professionals and reconstructed into the legal story story can be studied to find what techniques are used to present the "right" portrayal, reminiscent of the idea of the "right" answer. To solve the legal problem, the decision-makers of the court need to simplify and adapt both the law and the reality using techniques of delimitation and relevance-making, made possible by the reconstruction of the story. Through this reconstruction, they are molded into rethorical tropes, with different limits and possibilities from the reality discussed within the verdict, which they are meant to represent. In addition to the fact that potential true representations are uncertain, Baudrilliard argues that the questions of whether they actually coincide with the reality are irrelevant in the face of the way they are related to, regardless of such connections. The theorization of the process of simulacrum draws up four stages. The first founded in reality or so called pure representation, followed by the second stage, where the image masks and distorts reality. In the third stage, the image masks any absent references to reality. Finally, the fourth stage entails an image which has no relationship to reality whatsoever. This is termed "hyperreality" as it allows discussions relative to it without any requirements of a connection to reality. When this stage is reached, images of the outside world, in this case the

⁶⁴ Andersson, Håkan, 'Juridisk verklighetsbild – realitet eller simulacrum?' in *Juridisk tidsskrift*, 2000-01, pp. 902

event and the parties, as well as concepts related to them such as guilt, insight, will or sexuality can thus also lead their own lives without connection to the original reality. The terminology can distort the facts and values they once portrayed, and which has grown to be central to the outcome.⁶⁵

Håkan Andersson argues that the concept can reveal how legal processes pushes forward a simplified representation of any of the levels to more easily justify the rule's application, and non-application to the case in relation to a “right” albeit still simulated image. I argue that such are to be taken for granted on the same basis as the same argument as to the idea of the single right answer. For this study, it is instead used to more deeply explore its implications for the image of objectivity and how it leaves open the legitimization of a certain legal solution.⁶⁶

2.6 The gendered legal subject

Ulrika Andersson argues that a norm exists in connection to the behavior of victims of sexual crime, where such victims “are expected to express their position towards the event”. The terminological use of norms or any theories thereof are not discussed, but her use can be understood as signifying the discourse in law in practice and its discrepancy with law in the books. While the law places emphasis on the violence of the perpetrator, the ruling norm within the practice is based on a “standard” conception of rape, where the victim in some way objects.⁶⁷ If not, the victim is expected to provide an acceptable explanation as to why they did not resist. In light of this, one can argue that a social problem and legal rule of the perpetrator’s violence is translated into a question of her expression of will. An assault is to be considered acceptable as long as the victim does not protest or resist. The perpetrator is by this idea freed of responsibility. This reproduces a perception of the victim’s body as open and without limits, while their sexuality is presented as available and passive. In other words,

⁶⁵ Andersson, Håkan. 'Postmoderna och diskursteoretiska verktyg inom rätten', in *Juridisk metodlära*, Korling, Fredric & Zamboni, Mauro (eds.) Lund: Studentlitteratur, 2013. pp, 358f. See also, Baudrillard, Jean. *Simulacra and Simulation*, University of Michigan Press, 1994.

⁶⁶ Andersson, Håkan. 'Juridisk verklighetsbild – realitet eller simulacrum?', pp. 903.

⁶⁷ Olsson, Lena, 'Porträtt: Ulrika Andersson, nydisputerad jurist', *Nationella sekretariatet för genusforskning*, 2004-09-04.

the image of the victim of rape in criminal law is consistent with the image of a patriarchal conception of a woman.⁶⁸

Andersson uses feminist theory of gender relations and the shape of the normate in sexual relations, with an emphasis on Judith Butler's heterosexual matrix. The matrix is a hegemonic power relation placing heterosexuality and male gender identities and expressions and what is associated with them in dominance through language, culture and politics. It sets the framework for the institutional, including science and law, conceptions of gender as well as that of social factors of stereotypes and customs of how the subject is supposed to behave. The congealing process through these factors leads subjects to believe sex to be "a natural inner truth", compelling society to believe in its necessity and naturalness and maintains a gendered binary and coherent pattern of oppositional desire.⁶⁹

It is important to remember that the discourse, and thus the norms, that can be found in the verdicts do not exist in vacuum. Andersson's interpretation and utilization of the heterosexual matrix fits well with social conceptions of women's and men's sexuality, "regular sex" and rape in of Sweden. It is often argued that the crime of rape is often perceived as an uncommon and extreme phenomenon, even if only about 6 percent of committed rapes contain elements of assault. The perception includes that only certain deviant men are capable of rape and only certain deviant women are truly capable of being raped. The prevalence of this idea continues, even if numerous studies establish that rape occurs among all demographics. The social conceptions of rape can be referred to a similar argument as presented in the work of Andersson of stereotypical conceptions of the sexuality of men and women and what "standard sex" looks like.⁷⁰

Several studies indicate that the general social view perceives rape as a social problem despite being prone to changing interpretations of the term. There are, however, reservations when a woman acts in some way before the rape, including her choice of clothing, consumption of alcohol, potential preceding acts of intimacy or a lack of resistance. A majority have had little

⁶⁸ Andersson, Ulrika. *Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp* Malmö: Prinfo, 2004, pp. 263.

⁶⁹ Andersson, Ulrika, pp. 21, and generally, Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity*, New York: Routledge, 2006.

⁷⁰ Wendt, Maria, 'Mellan normalitet och avvikelse Forskning om sexualförövare och framväxten av praktisk behandling', in *Antologi sju perspektiv på våldtäkt Nordiskt centrum för kvinnofrid rapport 2010:02*, Uppsala: Nationellt centrum för kvinnofrid (NCK), Uppsala universitet, 2010, Pp. 140.

or no confidence in the legal system's ability to handle the problem. The image is conflicting however, as only a minority argues for each of these factors.⁷¹

The three primary discourses in Andersson's study of the discourses of the law adjudication process are the injured party's expressions of will, the technical evidence and the sexual character of the act. As the discursive order and its dividing factors have changed, the study places emphasis on different central themes, adding violence and intent. The present analysis is structured after the separate orders found through the analysis. Andersson's study includes atypical discourses, or discursive events which are rare or stand in direct opposition to that of the order, which as stated above indicates a discursive order in flux.⁷² The shape of the central themes has also shifted within the present study. This is developed further in the analysis of sub-chapter 3.2. Analytically, this part examines regularities in the content of the verdicts, including what circumstances are assumed, what the decisive factors of the outcomes are and what reasons are given for the selection of relevant evidence, lifting details which are examined to note what distinctions are made in decisive factors. Through this, decisive differentiations, in other words, arguments, values or norms, which circulate a case and which can be used to motivate solutions can be made visible. From there it is possible to find intertextual patterns of argumentation among the principles and requisites of what Håkan Andersson calls the surface, for how narratives can be created, valued, changed and developed. In other words, it is done in search of the decisive factors, including what they are and how they are portrayed.⁷³

2.7 Material, selection and delimitations

The primary material of this study is made up of 12 verdicts from finalized judicial proceedings of rape, attempted rape and aggravated rape in Swedish courts of appeal from December 2013 to March 2014, where the victim is over 15 years old. The delimitation of age is important to stay within the same legal framework, as those below 15 falls under the section

⁷¹Bergenheim, pp. 3ff, & Amnesty, *Var går gränsen? En attitydundersökning om våldtäkt*, Stockholm: Amnesty, 2008.

Carlsson, Lisa & Persson, Elin. *Våldtäktsmyter En undersökning om studenters attityder kring våldtäktsmyter*, thesis, Örebro University, 2008, pp. 30. Ericzon, Michael, Engvall Pär & Rydén Tobias. *Ungdomars attityder kring våldtäkt*, thesis, University of Skövde.

⁷² Andersson, Ulrika. pp. 265.

⁷³ Andersson, Håkan. 'Postmoderna och diskursteoretiska verktyg inom rätten' pp. 361.

of law for “rape of child”, with a high risk of a separate discourse affected by conceptions of children, thus risking the depth and quality of the discourse analysis.

Studies of verdicts are often considered useful, as they make up the main discursive export product of legal decision-making and, according to Bladini, of the legal system as a whole. Some scholars within discourse analysis, such as Van Dijk argues that studies of legal text is useful because law constitutes, produces and reproduces as well as gives voice to the general discourse of society. While this sweeping description obscures important discursive and normative relations between law and society, it is still valid, in its highlighting of what knowledge such analyses bring.⁷⁴

Verdicts from courts of appeal are more interesting than their lower and higher counterparts, as they in a classical sense are law-creating to a higher extent than district courts, gain more attention from society and are often considered to hold a higher quality of testing evidence than the lower instance. In contrast to the Supreme Court they are also law adjudicating, offering deeper insightful into the way law is practiced.⁷⁵ The verdicts have been selected equally from all six courts of appeal and randomly over all four months of the period, but no two verdicts from the same court and month, in order to get an overreaching insight through total and contemporary, yet long term representation, without being affected by months where one or more courts did not finalize a case.

The geographical spreading is especially important in light of the prominent statistical differences of indictments between Swedish courts. According to the most recent report from 2010 to 2012, only 20% of the reports led to indictment, with sharp differences between counties, ranging from 52% in Södermanland County to 10% in Västerbotten.⁷⁶

The verdicts from a court were each assigned a number in chronological order, and a random number generator was then used to sample the verdicts.⁷⁷ The verdicts from that month were then removed before assigning the remaining verdicts new numbers for the randomized sampling of the second verdict from the same court. A document has been filed with records of the results of the randomization and the court numbers.

⁷⁴ Dijk, Teun A. Van. ‘The study of Discourse’ in *Discourse as Structure of Process. Discourse Studies. A Multidisciplinary Introduction*, Volume 1, London: SAGE Publications, 1997, 2ff. & Bladini, pp. 18f.

⁷⁵ Elofsson, Niklas. *Skiljemäns uppdragsöverskridande och handläggningsfel En analys med utgångspunkt i klandrade skiljedomar under perioden 1999–2009*, master thesis, Uppsala University, pp. 42.

⁷⁶ Kero, Julia, ‘Få anmälda våldtäkter till åtal’, *SVT nyheter*, 2014-02-14.

⁷⁷ The generator is available at Urbaniak, Geoffrey. C., & Plous, S. *Research Randomizer* (Version 4.0) [Computer software], 2013. Retrieved on June 22, 2014, from <http://www.randomizer.org/>.

62 cases in total were finalized over the sampled period, with 22 from Svea Court of Appeal in Stockholm, 6 from Göta Court of Appeal in Jönköping, 6 from the Scania and Blekinge Court of Appeal in Malmö, 16 from the Court of Appeal for Western Sweden in Gothenburg, 8 from the Court of Appeal for Southern Norrland in Sundsvall and 4 from the Court of Appeal for Northern Norrland in Umeå.

While the sampling utilized statistical method, the selected verdicts are to be considered an excerpt from the studied discursive order, rather than a generalizable selection in a quantitative sense. A scope of 12 verdicts from the courts of appeals was selected to be large enough to give a reasonable overview of the discourse with applicability of the discourse verdicts outside the studied scope, while at the same time making close reading of the material possible. The study also includes the 12 preceding verdicts from the district courts for further understanding of the court reasoning as the courts of appeal relies on and references to such verdicts.

2.7.1 On language and translation

Definitions as well as legal and linguistically specific implications of language are of central importance in discourse analysis. The primary material is written in Swedish, and while no translation is needed for conducting the analysis of the text, there is still need for defining terminology to a greater extent when presenting the analysis in the present text. This will primarily be done through the use of the Glossary for the Courts of Sweden, in order to utilize translations that are sanctioned by and found within the analyzed legal system. Swedish words and terminology for which English counterparts offer inadequate possibilities for translation will be written out in Swedish in the corresponding reference, followed by a brief explanation.⁷⁸

According to Karin Widerberg, translation across borders of language, culture and context always leads to some level of rephrasing and shift in the assumptions and loading embedded in the word or phrase. For example, even if the English terminology specified in the Glossary for the Courts of Sweden is sanctioned or official, they may carry different connotations. Thus, it is important to note that the translated words and paragraphs are to be understood as

⁷⁸ Domstolsverket. *Glossary for the Courts of Sweden - Swedish/English English/Swedish*, Jönköping: Domstolsverket, 2014.

representations of the Swedish legal discourse to make sense of them, rather than an implicit argument that a discourse can be handled in any language from any perspective as long as it is translated. The analysis is therefore conducted in light of Swedish implications of wordings, rather than English ones, even if the connotation or loading is absent in the latter.⁷⁹

3. Analysis

In this chapter, the discursive orders manifested in the verdicts are analyzed through critical discourse analysis. Because it would be almost impossible to reach a deeper analysis while presenting of the reasoning of each court from each verdict, the orders are instead described using quoted examples. These are followed by potential atypical discourses, in other words, discourses which occur only once and potentially conflict with the order. The results from these analyses will then be discussed and summarized in the following chapter.

3.1 The veil of objectivity

The text of the verdicts establishes objectivity in two ways, through their content and through their form. In line with the methodology of the study, the analysis of both aspects will be conducted through perceiving and interpreting trends among the discursive events to find a discursive order.

3.1.1 Objectivity through form

The verdicts show a striking similarity to Bladini's study of the voices within verdicts of cases of assault. Using the terminology of her study, all four voices are present in the verdicts, including the objectified voice, the ethically responsible voice, the invisible voice and the separate human voice. The objectified voice is embodied in the heraldic symbol of each respective court, both courts of appeal and district courts, giving the text institutional authority, as well as in the verdicts and the way the arguments refer to the court, as if the

⁷⁹ Widerberg, Karin. "Translating Gender". *NORA. Nordic Journal of Feminist and Gender Research*, no 2, 1998.

finding is made by the court rather than the individuals present there. The following figure is an illustration of the heraldic symbol taken from the first verdict of the Court of Appeal of Western Sweden. The second and literary expression of the objectified voice will be presented towards the end of this part as it is connected to the statements presented by other voices.



HOVRÄTTEN FÖR
VÄSTRA SVERIGE
Avdelning 2
Rotel 25

DOM
2014-03-31
Göteborg

Mål nr
B 1197-14

*The heraldic symbol of the Court of appeal for Western Sweden.*⁸⁰

The ethically responsible voice, that of the judge, and consequently the authority within the verdict, is not present and does not forward any descriptions, decisions or reasoning, but rather just signs the documents after they are done. Similarly to this paragraph from the first verdict of Svea court of appeal, all verdicts are concluded by presenting the group of judges who have reached the decision described by the objectified voice.

“In the judgment have participated Senior Judge of Appeal Jan Öhman, the Judge of Appeal Daniel Thorsell, acting associate judge Anna Spinell, rapporteur, and the lay judges Peter Laine and Siv Enström.”⁸¹

This is, outside of verdicts where one or more judges are dissident, the only time they are mentioned. Thus, one cannot follow who states what in the testing of evidence or the telling and legitimization of the legal narrative. This is instead all forwarded by the invisible voice, much like the majority of text of the verdict, including the narration of the stories of the parties and witnesses and presentation of claims. The invisible voice is in many ways the archetype of Donna Harraway’s god trick. It removes the decision-maker from the affected parties of the case and makes itself invisible, thereby creating a false sense of an all-knowing and all-seeing positivist gaze, without influence from the preconceived ideas and assumptions of the parties. The voice does not only render the persons in the verdict invisible, but also their roles in the proceedings. The questions leading to the story of the parties and witnesses, and thus establishing what may be brought into the legal story, are not accounted for. The

⁸⁰ B 1197-14 Court of appeal for Western Sweden.

⁸¹ B 10020-12 Svea Court of Appeal. It is important to note that the sentence is equally grammatically incorrect in the original Swedish sentence of the verdict.

following two quotes, the first from Göta court of appeal and Southern Norrland respectively, show how the invisible voice presents witness statements as complete stories.

“[The suspect] has in the Court of Appeals stated: [the injured party]’s mood swings ‘terribly’. She can be really sad after having previously been very angry. She is strong and can protect herself; she works with horses after all. It has happened before that they had “reconciliation sex” They may have quarreled until they went to bed and still had sex. She has previously received bruises after he held her while they had sex.”⁸²

“[Witness 2]: [The suspect] returned the car less than a month after they had quit the workshop but he does not know exactly when. The car and [the suspect] were already at the workshop when he came there the present day. He then drove [the suspect] to the train. He wanted to sit and talk a bit longer but [the suspect] said that it was the last train.”⁸³

Without filling in the questions that lead to their framing or what details are included, thereby not showing what was excluded gives the story a stronger image of being all-encompassing. The next two quotes from the same verdicts illustrate the discursive form of the summary of the statements, similarly to the above forwarded in an objective tone by the invisible voice. The summary introduces to the courts legal story, which will be presented by the objectified voice in the valuing of the evidence. This strengthens the image that it is the only possible conclusion, again removing both traces of human agents in the process and rendering the importance of their influence invisible, contributing to the objectified machinery of which Bladini writes.

“For what took place August 10, 2013, both [the injured party] and [the suspect] have stated that there was physical violence in the initial stage of the kitchen and hallway, but their description of what happened there differ. Similarly their stories differ when it comes to what happened in the living room. [The suspect] has stated that it was a case of voluntary sexual intercourse while [the injured party] has stated that she was forced into sexual intercourse.”⁸⁴

“The injured party may very well be remembering incorrectly regarding what color the moped had or have been mistaken regarding other details without it precluding [the suspect] as the perpetrator. The injured party’s statements do not however bind [the suspect] or his moped to

⁸² B 2570-13 Göta Court of Appeal. The Swedish “ju” is here translated to “after all”. While the terms are not interchangeable, they represent a similar informal emphasis and appeal to common sense.

⁸³ B141-14 The Court of Appeal for Southern Norrland.

⁸⁴ B 2570-13 Göta Court of Appeal.

the crime scene. Nor is the moped tied to the crime scene by the tire imprint even if it gives some support to that [the suspect]'s moped may have been at the scene.”⁸⁵

As described, the summary leads up to the second expression of the objectified voice, expressed as if written by the Court of Appeal as an institution. This is exemplified by the first verdict of Svea Court of Appeal, followed by the second verdicts of Göta and Southern Norrland. The first illustrates how the individuals of the court are made invisible through the objectified voice, but also discusses the arguments of the individuals in the lower instance in a similarly objectified manner.

“The Court of Appeal fully shares the district court's assessment of what is established in the case and thus joins the district court's conclusions of the liability component. The Court of Appeal also shares the district court's assessments regarding choice of penalty and damages. The District Court's verdict should therefore not be changed.”⁸⁶

The following expressions of the voices demonstrate the way the objectified voice values what is presented and presents arguments in support thereof.

“The explanation that [the suspect] hence has presented does not in a satisfactory way explain the fact that his sperm was detected in the crotch part of the panties. Above all, the explanation means that [the injured party] would have saved a pair of stained panties to later be able to untruthfully impute [the suspect] a criminal act. His explanation comes to this background across as so unlikely that it can be left without regard.”⁸⁷

“The Court of Appeal, like the district court finds that the plaintiff's story receiving such assistance by forensic evidence and what they aim heard the witnesses indicated that her story could be the basis for the assessment of guilt. Hereby the indictment is proven and [the defendant] shall be sentenced for the rape.”⁸⁸

The separate human voice is only present when one or more of the judges are dissident and takes on an entirely different form than the objectified and invisible voices. The arguments are presented either in third or first person, the first being a retelling of the separate human by the invisible voice and the second the voice of these parties themselves. Included are what factor the dissidents disagree with and why. The voice makes visible the form's impact on

⁸⁵ B141-14 The Court of Appeal for Southern Norrland.

⁸⁶ B 10020-12 Svea Court of Appeal.

⁸⁷ B 1676-13 Göta Court of Appeal.

⁸⁸ B 124-13. The Court of Appeal for Southern Norrland. The Swedish phrase “åtalet är styrkt” does not have an official translation.

objectivity as a contrast to the objectified and invisible voices, coming forward as subjective and human, where its opposite is the objectified and objective majority.

“Lay Judge Rolf Kjell is dissenting and argues: [...] It has in my opinion not clearly enough come forward what happened. There are also differing statements from the preliminary investigations and at the main hearing about what happened. Taking into account what is now stated, I believe that it is not with a satisfactory degree of security established that [the defendant] acted against the injured party as has been specified in the indictment. I therefore dismiss the prosecution for attempted rape. In other matters I agree with the majority.”⁸⁹

“The lay judges Christina Breilin and Ulla-Britt Gidemalm are dissident regarding prosecution paragraphs 1 and 2 and argues: The by [the defendant] submitted alibi evidence is not convincing and in other respects we adhere to the district court’s assessment of the indictment in these parts. The district court’s verdict should therefore be affirmed.”⁹⁰

In the third person retelling, this subjective position is not manifested through the arguments of the persons themselves, but rather through the phrasing by the invisible authoritative and objective majority.

“The lay judge Olle Bergstedt is dissident regarding the prosecution paragraph 1 and considers the injured party’s details along with what has otherwise been found constitutes sufficient evidence. He would therefore judge according to the indictment and determine the sentence to the imprisonment of two years and six months, and award the injured party additional damages by 85 000 kr.”⁹¹

The roles of the voices and the relationships between them all fit well into Bladini’s phrasing of the court as an objective machine pulling forward another verdict from the components presented to it.

As shown above, the events of the crime are usually presented twice in the verdicts, first in the main hearing and then a second time in the testing of evidence. Even though the first delivery includes several and often conflicting stories of parties and witnesses, constructed through the evidence and questions asked, their statements are merged into one. In line with Bladini’s theorization, the phrasing also makes it seem as if they are speaking freely, while they are in fact lead by the legal actors in the process.⁹² This includes both what is told and

⁸⁹ B 332-13 The Court of Appeal for Northern Norrland.

⁹⁰ B141-14 The Court of Appeal for Southern Norrland.

⁹¹ B 4856-13 Svea Court of Appeal.

⁹² Bladini, pp. 245f.

how it is presented, making up a central part of the way the main hearing unfolds. This responsibility of the outcome of the discursive event is hidden. The second is the legal story of the event, where the court forwards the legal truths it has found after testing the evidence. What is said but not given legal meaning is left out. These selections of what version of the events are brought forward, but also how they are presented, are not used to find a single answer for the verdict, but to legitimize it and renders all alternatives and traces of human impact on the outcome invisible. How this is done will be developed further in the following sub-chapters of the analysis (3.2 and 3.3).

3.1.2 Objectivity through content

The way objectivity is established through the content of the verdicts is largely affected by the voices used to present it. As the objectified and invisible voices are the primary narrators of the verdicts, they are also the most central to this part of the study.

In contrast to Bladini's findings of the narrative of the crime being limited to the criminal act alone, what leads up to the crime is also included. As such, the simplified story and the objectivity established by bringing the event into a vacuum without time or space is disrupted. At the same time, another factor of the reductive story-telling of the discursive event influences the objectivity.⁹³ As described above the form of the verdicts allow for a reoccurring retelling and rephrasing, including and excluding parts of the statements and events in the court room. Thus, there is much room for influence of actors in the main hearing by deciding what is given importance and what questions are ignored, how it is interpreted and shaped. The content of the verdict opens not only what rules are chosen in Hydén's upper section of the legal proceeding, that of law, but also the lower social and empirical level.⁹⁴

The image law presents needs to include and legitimize representative images of the empirical reality, the facts of what happened or "is", and normative arguments with decisive factors arguing for why a legal response should follow the event it handles and rules in response to. This is where Baudrillard simulacrum enters the picture.

The content of the experiences of parties that are deemed trustworthy can be understood as the first stage of the representation, as it is these, rather than an actual representation of

⁹³ Bladini, pp. 347.

⁹⁴ Bladini, pp 356ff.

everything that happened that is tried in the court. This is in Baudrillard's words a "pure" representation of those events, a representation which never surfaces within the court or its following verdict. The way questions are asked, framing the story's depth and the duration of the event and out of utility leaving details without the illuminating light of a leading question then distorts and masks parts of the story. As stated above, this is rendered invisible by the lack of presence of the actors within the verdicts, in favor of the image of a positivist objectivity where all actors are interchangeable to reach the same "right" answer, making up the second step of the process. The third step, where the references to a reality are hidden is actualized when the actors start to translate the statements into a legal story.

Simulacrum is created as both the empirical images of the event and the legal terminological images are turned into tropes. The court creates facts by how it tells the story, what circumstances are presumed, what is inserted into the legal story and what is left out in response to the discursive order of rape. Here, factors which were a great part of the event and influenced the actions of the parties, but makes the search for an answer more complex, are left without meaning to the reasoning of the court, in favor of simple deciding factors selected in response to an archetypical case. Because of the legal discourse's positivist foundation, looking for the universal and identical, rather than differences, the image presented is certainly easier to comprehend, but also less connected to the events it represents.⁹⁵ The relation to these archetypes will be discussed further in the next part of the analysis.

The creation of simulacrum is not only actualized in the transfer from an event through the statement process into the understanding of the event from the way it fits into the mold of the discursive order, adding or removing facts, such as relations of power expressed in the statements which may be difficult to argue for, described in the next part of chapter, but may also take place in the epistemological arguments of the court. One such example is the way "reality" is constructed through the arguments of a reassessment of the credibility of the injured party and the assessment of the suspect's intent in the second case of the court of appeal of Western Sweden. In this case the fact that the prosecutor had not put forward the mentioned text conversation between the parties is also held against the, by the court considered as highly trustworthy, injured party, in response to a statement from the untrustworthy suspect arguing that the injured party showed more interest in it:

⁹⁵ Andersson, Håkan *Juridisk verklighetsbild* pp. 909. It is also studied extensively in Bladini, for example illustrated in pp. 356.

“In this case it is added that [the victim] additionally has stated that the injured party in the unreported conversation has been significantly more sexually interested than he was in the reported conversation and also to a significantly greater extent than what the injured party himself admitted. The fact that the conversation is not complete therefore brings that the injured party’s statement must be assessed with greater caution than what otherwise could have been the case.”⁹⁶

Here, the use of “admitted” implies that the claim of the suspect, whose statements are not used as basis for the assessment in the legal story, is assumed to be true. The specific lack of support evidence is also made important when a question of earlier expressions of will, which are not a legal requisite, are actualized for the assessment of the event, despite the court arguing that it is supposed to be inconsequential:

“The court of appeal agrees that the sexual right to self-determination entails that the person who declines a sexual invitation should be respected, regardless of what contacts that previously have occurred between the parties. At the same time, what has preceded a sexual intercourse may have significance for the assessment of the act and the intent of the suspect.”⁹⁷

Thus, the created fact of the event-preceding conversation, which even if it were to be representation of events would be inconsequential, has a direct impact on the factors that are taken into account in the invisibly reductive “overall assessment” of the simulcratic legal story. The created fact is furthermore based on a presumption of evidence over which the injured party has no control and which he therefore is unable to disprove. This could be understood as the result of a reversed simulcratic event, where the image of the terminology is adapted, rather than the represented reality, as explained by Andersson. In this image, the trope of trustworthiness is made to include all actors, where one’s actions in the process have bearing on the assessment of the other. Through these associative moments creating linguistic understanding the way the legal story is framed and reality is constructed affects the assessment and thus outcome in different directions.⁹⁸

This also highlights an essential factor in the discursive order, in other words, of the image of objectivity and freedom from discursive norms in general within the law adjudication process of rape and of the many other discursive intersections between knowledge and power. That the power which governs the events through prohibitions, differentiations and divisions is not

⁹⁶ B 4384-13 The Court of Appeal for Western Sweden. “Medgav”.

⁹⁷ B 4384-13 The Court of Appeal for Western Sweden.

⁹⁸ Andersson, Håkan. ‘Postmoderna och diskursteoretiska verktyg inom rätten’, pp. 348.

raised as power and interest, but as a pursuit towards truth and fact. Thus to see the order and its power, one needs to look at the regularities which govern the discourse.⁹⁹

3.2 Orders under the veil

The regularities of decisive factors within the discursive practices of rape can be divided into two separate orders. The often perceived as primary order in light of social norms, yet minor in terms of crimes and verdicts, is largely reminiscent of the idea of “real rape” within international discourses of rape, signifying an assault by an unknown or brief and distant acquaintance. This is contrasted by the more numerable order where the parties are either acquaintances or in a close and potentially sexual relationship.

3.2.1 Assault by an unknown perpetrator

The violence, supported by the reliability of the stories and how they relate to technical evidence and potential witnesses is the primary decisive factor within the first order. The reoccurring emphasis on this factor forms a pattern which indicates what aspect of the rape is given most meaning within the discursive order. For example, in the second verdict of Southern Norrland, the violence is the obvious decisive factor to the conviction of the suspect. The court refers to and joins the reasoning of the district court, which states:

“It is thus found that [the suspect] through violence forced the injured party to intercourse. It is also found that he through violence forced her to endure a sexual act – penetration of her vagina with the fingers – which with regards to the nature of the violation and the other circumstances are comparable to sexual intercourse.”¹⁰⁰

The reasoning of the court of appeals is the only one to signify the event in question using the term “assault rape” among the verdicts, without any terminological basis in penal law to do so, thus placing the case in an informal category.¹⁰¹

“Other sanctions than prison cannot come to question. The violence which has been practiced has admittedly not been a very serious offense but can still be described as an assault rape.”¹⁰²

⁹⁹ Andersson, Håkan. 'Postmoderna och diskursteoretiska verktyg inom rätten', pp. 353.

¹⁰⁰ B 1024-13 The Court of Appeal of Southern Norrland.

¹⁰¹ B 1024-13 The Court of Appeal of Southern Norrland.

After presenting the finding of violence, the court leaves questions of intent and any expressions or feelings of will of the injured party without comment.

Another example of violence as the primary decisive factor in assault rape is the first case from Southern Norrland. The court of appeal changed the verdict of the district court, acquitting the suspect on the first indictment count and changing the classification of the crime of the second. Like the other verdicts of the order none of the indictment counts brought out the expression or internal feeling of will of the injured party. In addition, the first count did not bring up the intent of the suspect in any of the instances, but rather emphasized the violence of the assault.

“Regarding this indictment count, nothing has been forwarded which gives reason to question [the injured parties]’s statement. She has thus been exposed to a sexual assault in the way she has described. The question is whether it is shown that [the suspect] is the perpetrator.”¹⁰³

The suspect was acquitted due to lacking technical and support evidence binding the specific man and moped to the scene as new alibi evidence had been forwarded in the court of appeal. It also emphasized uncertainty in light of the fact that the injured party never saw his face and spoke of a moped of different color in her statement than the moped belonging to the suspect, factors which were downplayed in the district court.

“The injured party may very well remember incorrectly regarding what color the moped had or have been mistaken regarding other details without it ruling out [the suspect] as the perpetrator. The defendants statements alone does not, however, bind [the suspect] to the crime scene. Nor is the moped bound to the crime scene through the tire imprint even if it gives some support for that [the suspect]’s moped may have been on the scene.”¹⁰⁴

“The in the court of appeal forwarded alibi evidence further means that it cannot be ruled out that [the suspect] was not in [the city] at the specific time. Overall, the court of appeal finds that is has not been placed beyond reasonable doubt that [the suspect] committed the act.”¹⁰⁵

The second count, in which the suspect was found guilty of attempted rape in the district court, was changed as it relied on the guilt in the count regarding the question of the suspect’s intention to rape the second injured party after he had hit her. Because what took place was deemed as sexual molestation and assault, less serious crimes, and the court argued that there

¹⁰² B 1024-13 The Court of Appeal of Southern Norrland.

¹⁰³ B 141-14 The Court of Appeal of Southern Norrland.

¹⁰⁴ B 141-14 The Court of Appeal of Southern Norrland.

¹⁰⁵ B 141-14 The Court of Appeal of Southern Norrland.

was no evidence that the man intended to rape the second injured party. The district court forwarded its findings, which the court of appeal adheres to, as follows:

“It is thus found that [the suspect], on the time and place that the prosecutor has stated has attacked [the second injured party] by attempting to grab her in the neck without getting a real grip but came to hit her here, at the same time that he brought his hand in between her legs and tried to break, through her onto the ground.”¹⁰⁶

“Some other reasonable explanation – seen in light of how [the suspect] acted in the event of indictment count 1 and what has been put forward regarding his strange behavior – of that [the suspect] tried to throw her to the ground but that he did this with purpose to force [the second injured party] to intercourse or a different sexual act which with reference to the nature of the violation is comparable to intercourse. It is further found that [the second injured party] resisted and that this is what resulted in that [the suspect] discontinued his attack.”¹⁰⁷

Despite accepting the other factors, the court of appeals places the guilt of the preceding act as the deciding factor in the question of the intent of the evidence. While agreeing that what happened must have been done with intent, his intent to do more cannot safely enough be established, despite using her statements as the basis for the act, finding that his initial violence and molestation were intended, and agreeing with the district courts finding that he stopped his attempts because of her resistance.

“The court of appeals adheres to the assessment of the district court that [the second injured party]’s statement can serve as the basis of the assessment of the case and that it thereby is found that [the suspect] has acted in the way that is claimed in the prosecutor’s statement of the criminal act as charged.”¹⁰⁸

“That the injured party can have experienced the event as an attempted rape is easily understood. Because [the suspect] was acquitted from the indictment regarding rape, the event under indictment point one cannot be taken into account at the assessment of what intent [the suspect] could have had with his actions. In these circumstances the court of appeals find that it is not from [the suspect]’s actions with sufficient safety can be established that he had intent to force [the second injured party] to intercourse or another thereby comparable sexual act. The action can therefore not be established to compose an attempted rape. What is clear is that [the suspect]

¹⁰⁶ B 141-14 The Court of Appeal of Southern Norrland.

¹⁰⁷ B 141-14 The Court of Appeal of Southern Norrland.

¹⁰⁸ B 141-14 The Court of Appeal of Southern Norrland.

used some violence towards [the second injured party] and put his hand between her legs and that this must have happened intentionally.”¹⁰⁹

Thus, it would seem that the discursive order has changed from the situation of Andersson’s study in 1999. The studied verdicts indicate a change from the reoccurring explicit or implicit requirements of the injured party proving that the act happened against her will and that the injured party had adequately expressed that the perpetrator acted against her will, without legal support from criminal law. Andersson’s finding that victims are expected to attempt to resist in a “regular situation”, arguing for non-existent or a too low level of resistance as a reason to understand the act as less of an assault is not present in this order. Nor is this present as the point of departure where the injured party is in a position where they are unable or too scared to react. As soon as violence or threatening situation is considered proven in the situation of an assault, it also assumed the act was committed with intent. The stronger emphasis on the uncertainty of the intent of the suspect as a decisive factor, rather than the violence, appears to be an atypical discourse in the order. The dominant discourses of free will from Andersson’s study are thereby replaced by the atypical discourse of violence, which in turn as an atypical discourse is replaced by intent.¹¹⁰ This final factor has an even greater influence on the second discursive order, which will be discussed in the next part.

3.2.2 Acquaintances or closer relationships

The verdicts in which the parties had an earlier relation had more in common with the findings of Ulrika Andersson. The acts of the injured parties before and at the time of the event are attributed importance and the injured party is thus through the process established as partially responsible for the act. Not only is the relationship between the suspect and the injured party presented, but also discussed in relation to the event, indicating the conception that a potential relationship between the parties and the shape thereof is relevant to the assessment of criminal liability and that suspects in the second order are less likely to have intent. This is also supported by the shift in decisive factors. In these cases, the factor is rather to what extent the suspect had any intent to rape the injured party including if they were aware of the fact that the victim did not want to have sexual contact. The reasoning of the court

¹⁰⁹ B 141-14 The Court of Appeal of Southern Norrland.

¹¹⁰ Andersson, Ulrika pp. 232.

creates an understanding of the latter factor as a question of what expressions of will have been forwarded by the injured party.

Thus it is a relation where the woman is understood as open until saying no, rather than all attempts at such contact is to be understood as rape until the victim gives some expression of will. This order, and thus discursive norm, is applicable in all cases where the story is framed as if the man, from some undefined circumstance, might interpret the situation as open for sexual contact. Despite a shift from resisting as a way to prove that the act was against the injured party's will, the implications remain the same where the discourse of the second order has turned toward questioning to what extent the intent of the suspect can be proven.¹¹¹

One such case is that of the second verdict of Svea court of appeal, where occasional positive expressions of will lead the court to accept that the suspect must have assumed that the injured party consented. The questions of intent and "awareness" are also the central decisive factors in two convictions of attempted rape, even though the court uses the injured party's statements as basis for the assessment, stating that violence took place during the events in question.

"The for the question of guilt decisive circumstance of if [the suspect] should be sentenced for the actions in indictment count 1 as well as indictment count 3 is if [the suspect] has realized that the intercourse the [date 1] happened against the injured party's will (indictment count 1) as well as that the injured party was not interested in having intercourse with him the [date 2]."¹¹²

"Also in this part the court of appeal agrees to the district court's assessment of indictment count 1 that it cannot be ruled out that [the suspect], with the parties sexual togetherness both physically and in text-conversations among others had experienced and which the district court has accounted for in its verdict as point of departure, can have assumed that the intercourse this time too happened with the injured party's consent."¹¹³

Note that concept of rape, besides the question of intent, is not defined by violence, explicitly in the quote above and implicitly in the attempted rape of indictment count 3. This is especially important in contrast to the previous order, as the injured party, whose statements were established as the basis of the assessment, told the court of violent treatment preceding and during the event. It appears as if earlier affirmations or expressions overrule later violence, and expressions of will such as running away, shouting "no" and "please [suspect], stop". The

¹¹¹ Andersson, Ulrika pp. 202.

¹¹² B 4856-13 Svea Court of Appeal.

¹¹³ B 4856-13 Svea Court of Appeal.

uncertainty of the intent would also be questionable in light of her statements of him saying that she should do what he wanted or it would get worse, that it did not matter what she wanted, that no one would believe her if she reported him because they had previously been role playing violently and, after the act, that this was a call for help from him. In the reasoning of the district court, to which the court of appeal adheres, it is found that the injured party had been crying and said no, placing emphasis on the expressions of will. The suspect's relation of domination to the injured party and idea that sexual relations are necessary for the relationship to work to benefit the son is also noted. Despite this, the earlier sexual text messages, and more notably, the later sexual contact, are the decisive factors as the court to dismiss the indictment:

“That there for [the suspect] exist a series of disturbing circumstances, e.g. that he did not even want to accept that the suspect said no and cried as well as that that he afterwards apologized is not enough to lead to another assessment.”¹¹⁴

The second indictment count had fewer uncertainties regarding the intent, as it had not been preceded by expressions of will, but the reasoning of the court was limited by the suspect admitting that he knew the injured party was unwilling to have sex with him at the time.

“The court of appeal has in its verdict accounted for the reason for that [the suspect] must have realized that the injured party was not interested in having intercourse with him [date 2]. To this it is added that [the suspect], in the hearing in the district court, has stated that he was aware that the injured party was not interested in having sex with him at the specified time.”¹¹⁵

The first verdict of the Göta court of appeal is another case that places the emphasis on the suspect's intent, again understood as a question of whether he knew that he was forcing a sexual act against the will of the injured party, thus having established that the injured party was indeed forced in a violent and dominating manner. The injured party's statement of physical violence preceding the crime is central in the verdict.

¹¹⁴ B 4856-13 Svea Court of Appeal. The dictionary translates the term used into appeal, which in its context would not make sense. The terms disturbing or troublesome are more in line with the use here. It can also be noted that the use implies a meaning similar to “försvårande” or “aggravating”, but without its legal connotations. The use is reminiscent of the use of “allvarlig” or “severe” instead of the legal term “aggravated” in cases of domestic violence to mark awareness of the serious nature of an event, but without actualizing higher penalty levels, discussed by Hermansson, Sofia, *“Parternas förhållande har varit stormigt” – en studie av formuleringar i svenska hovrättsdomar om grov kvinnofridskränkning och våldtäkt i nära relationer utifrån ett genus- och rättighetsperspektiv*, thesis, Lund University, 2012.

¹¹⁵ B 4856-13 Svea Court of Appeal.

“Thus the court of appeal finds that [the injured party]’s statement on the violence she has been exposed to wins support from the other investigation. Regarding the question of whether the intercourse happened voluntarily or not it should be considered that [the injured party], who directly after the event when home to [witness 1] has told [witness 1] that she had been both assaulted and raped.”¹¹⁶

“Besides this the Court of Appeal holds that [the injured party]’s statements win support from [the suspect]’s behavior. If it would have been a case of a voluntary sexual intercourse, so called reconciliation sex, [the suspect]’s behavior afterwards appears very strange. He has *partly* exited the house when [the injured party] and [witness 1] came back to retrieve [the injured party] things, *partly* fetched a rifle which [witness 2] later found him with *and partly also* in response to [witness 2]’s question about what he did with the rifle said it was just as well that he shot himself. The Court of Appeal considers that [the suspect]’s behavior speaks for that he was well aware that limits had been exceeded.”¹¹⁷

Thus, the violence is initially established. Thereafter, the will, central in the Swedish term voluntary, of the injured party is presented to decide if the violent intercourse constitutes rape.¹¹⁸ In what follows, her expressions of will are left without regard. Her will in the “voluntary” is instead determined based on his intent, which is assessed from his behavior after the event. Interestingly, the “awareness” of “lines being crossed” after the event is here used interchangeably with the legal term intent at the time of the event. The district court’s verdict, of which the court of appeal’s verdict is based argues in a similar way, but defines the “awareness” as “intent”.

There are two atypical discourses in the verdicts of Skania and Blekinge, emphasizing different factors, yet bearing some similarities. In the first verdict of the court, an uncharacteristic amount of attention is paid to the internal will of the suspect, especially in light of the fact that the statements include no expressions thereof.

“According to the court of appeal the injured party A’s statements should be used as basis for the assessment also under this indictment count. Through her statement, and because it with reference to what has been proven occurred in the laundry room and on the way from the

¹¹⁶ B 2570-13 Göta Court of Appeal.

¹¹⁷ B 2570-13 Göta Court of Appeal.

¹¹⁸ The Swedish term for voluntarily, “Frivilligt” is made up “free” and willingly”, implying the active will of the subject.

laundry room is obvious that [the suspect] has realized that the intercourse took place against the injured party's will, the indictment for rape is proved."¹¹⁹

The fact that the injured party did not express any will through verbal or physical resistance and undressed herself is not brought forward as reason that he would be unaware. Thus, expressions of will are unimportant in the decision, the injured party's will is the factor determining the forced intercourse and his intent is decided by his violence.

The second verdict of Skania and Blekinge concerns an event which can be categorized in the second order. The injured party and the suspect do not know each other, but the former follows the latter to his home where she states that she was exposed to threats and a violent rape to which she makes loud resistance and of which she immediately reports. Neither in the brief verdict of the court of appeal nor in the more detailed verdict of the district court, which is joined by the former, the term intent is written out and the will of the injured party is not mentioned. Instead, the trustworthiness of the injured party and support evidence are mentioned as the central decisive factors in the court assessment, without mentioning anything from the statement or evidence themselves as decisive. However, much attention is given to the violence described by the victim and her actions afterwards. The emphasis on support evidence is untypically heavy compared to the other verdicts in the order, illustrated by the way the suspect is not found guilty of threats without support from any other evidence.¹²⁰

3.3 Orders, archetypes and ignorance

In summary, the order shows signs of instability, with atypical exceptions from the discursive order, indicating potential shifts in some direction. Despite this, two orders are still distinguishable. As mentioned above, the decisive factors of the arguments and legitimization of have changed from the question of expressions of will, in the first order into questions of violence and in the second to the intent of the suspect. In spite of the shift, the intent of the second order may still actualize the expression of will of the injured party. These orders show the outline of a reoccurring archetypical narrative, serving as framework to delimit the reasoning of the court. These findings support the narratological theorization of Håkan

¹¹⁹ B 3407-13 Scania and Blekinge Court of Appeal

¹²⁰ B 2612-13 Scania and Blekinge Court of Appeal.

Andersson arguing, that the actors in law adjudication processes require some level of archetypical narratives in order to legally make sense of an event.¹²¹ Because reasoning in line with these archetypical narratives requires less argumentation, or may even be used instead of it in legal questions in order to legitimize a verdict, one might speak of a norm, that is a discursive imperative to reason in a certain way based in a certain model, subject to the idea of how the event of the case and its procedure usually happens.¹²² In other words, the norm regarding the actions of the legal decision makers also contains, or acts in response to, alongside, a social norm regarding rape in itself and what it constitutes. This idea of the norm will be defined more thoroughly in the discussion. The shift from Ulrika Andersson's expression of will, with its implications for the woman's perceived bodily openness and sexual passivity, to Håkan Andersson's atypical discourse of violence and intent does not preclude the creation of the same image, as the injured party is not only partly responsible for being exposed to what took place during event and making sure that it was not, but the suspect's responsibility is non-existent as long as he is unknowing.

These archetypes delimit the legal picture from factors that are essential to the event and motivate the lifting or downplaying of aspects, as well as the creation of new factors and circumstances or removal of others, as made possible by the objectivity explained in 3.1, creating a different picture altogether. This can include everything from the events in themselves, to the links between chains of events and how they are understood in relation to other factors. One of the more notable factors in this is the attentiveness to threatening situations or the relations of power between the parties. The referred verdict of Uppsala district court in the second verdict of Svea court of appeal is the only case where reoccurring factors of oppressive relationships, implicit or explicit threats of violence, or expressions of intent to rape are brought from a more trustworthy injured party into the legal story. It still only served as an introduction to the event, without any following reasoning of the objectified voice and without explicit mentioning as to whether the decision makers brought it into the "cumulative assessment" of the verdict's legitimization.¹²³

Bladini argues that criminal law decontextualizes the criminal event from preceding events and the relationship between the victim and perpetrator through a wish to avoid difficult social ethical positioning. The genders and structural situation of the parties are ignored, in

¹²¹ Andersson, Håkan. 'Rättens narratologiska dimensioner - interaktion och konstruktion', pp. 22.

¹²² Svallingsson, pp. 305.

¹²³ B 4856-13 Svea Court of Appeal.

her case as violence against a gender-less person. Despite this idea, the event is still affected by gendered ideas of the victim, the perpetrator and factors surrounding the event. Some factors are deemed too difficult to take into account, such as oppression, while others such as the perpetrator's conceived idea of women and "normal sex" are not. While it could be argued that the perpetrator's perception and experience is relevant to try their responsibility and guilt, where the victim's is not, it nonetheless creates a false image of being able to ignore such factors. Not only does the structural oppression exist in the same lived world as the crime, but, as argued by Bladini, the convergence of the law's normative claims of "ought" with the facts of "is", such difficult questions are actualized, whether it is done consciously and expressively or not.¹²⁴

Andersson's thesis that the legislation is interpreted based on a patriarchal notion of sexuality can be complemented using Franke's argument that identifying sexuality only in actions that are explicitly sexual, assuming them to be representations only of sexual desires, with support of Wegerstad's argument of perceiving it only as the pursuit of the individual's sexual outcomes, complements. This leads to the conclusion that the court is blind to sexuality as a tool of power and how it causes "unreasonable" behavior, which falls outside the archetypical narratives and norms of the court.¹²⁵ This includes cases where the injured party does not, as the discourse of Ulrika Andersson and by extension my findings demand, "adequately convince" the suspect that they do not want to take part in a sexual act because of violations, humiliations, shame, or complex behavior patterns based on relations of power.¹²⁶ As Svallingsson argues, "the consequence of an individual being perceived to have a certain level of self-determination and is assumed to reason in line with the norm, but in fact acts along other evaluation parameters, leads to unequal relations of power between mentally fully functional and non-fully functional, in love and not in love, inexperienced and experienced made invisible."¹²⁷ In the context of this thesis, the impact of the preceding oppression, including threats of harming themselves, the injured party or their children, as well as using superior physical strength to do what they want are doubtlessly factors that affect the power

¹²⁴ Bladini, pp. 359.

¹²⁵ Franke, M., Katherine, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations, Surrey, 2009, pp. 30 & Wegerstad, Linnea, 'Om erotik, makt och sexualbrottens sexualiteter', in *På Vei: Kjønn og rett i nord*, Gothenburg/Stockholm, 2011, pp. 274.

¹²⁶ Andersson, Ulrika, pp. 279.

¹²⁷ Svallingsson. pp. 305.

between the parties.¹²⁸ To disregard them in favor of a more harmonic comprehensive image leaves an image to which the legal answer is relate, which is far removed from the actual event.

4. Concluding discussions

From the perspective of the law adjudication process as legitimization rather than a mechanical process of finding the “correct answer”, objectivity does not change the content of the decision-making or individual influence from the outcome, but only the way it is framed. Even if one disagrees with any level of indeterminacy of law, the objectivity is problematic in that it legitimizes the reaching of a “wrong answer”. As the discursive order of the law adjudication process does not make visible individual positions and interpretations in light of the socio-cultural background of the individual, lacking what Harding defines as strong objectivity, and makes it possible to reframe both the event and the way it is to be related to law even if one perceives the “correct answer” of law is entirely clear. That the order legitimizes such procedural aspects as normal or necessary may lead to a shift of the previously clear a legal position in less desirable ways. The situation of gendered norms as extra-legal may in response to the structural nature of the norm lead to a situation where the practice is established as the legal position through its practice.¹²⁹ This is one of the key aspects of Ulrika Anderson study. In conjunction with the study of objectivity, it becomes clear that the norms of the legal response to rape and defining what rape itself constitutes, embedded in the discourse can also affect individual outcomes beyond this position.¹³⁰

Interestingly, this weakness in the determinacy of legal outcomes is reinforced by one of the main measures that aim to diminish it, as the criminal procedural law calls for the God trick. As argued by Bladini, the adjudicating process needs to *appear* to be objective. In other words, the space for influential, discriminatory and harmful norms is opened by law. The fact that this objectivity is not a result of the decision of the individual judges does not lessen its impact on the process.¹³¹ Similarly, the evaluation of evidence is also regulated, with demands of it being without arbitration, intuition and subjective conceptions. This contradicts both

¹²⁸ See for example, B 4856-13 Svea Court of Appeal & B 3407-13 The Scania and Blekinge Court of Appeal.

¹²⁹ Bladini. pp. 354.

¹³⁰ Andersson, Ulrika. Pp. 260ff.

¹³¹ Bladini, pp. 355.

what is described by legal sociologists as the process in which legal decision-making is made, and the recommended procedure of legal scholars whose positions are influential in Swedish law school. If, as instructed by Eklöf among others, judges are to trust their instinct, basic conceptions of rape, associated with gendered assumptions of sexuality will heavily influence the process as well as its outcome. It is especially interesting in light of the sociological arguments of decision-making as an inductive two step process where the judge first finds a position, then tries to find whether it is legally valid, allowing the event to be framed to correspond with several solutions.

It is also noteworthy that the reduction of facts which does not correspond with the legal discursive boundaries of the crime as well as the objectified and brief argumentation is contradictory to what is expected of a trustworthy party, emphasizing a personalized, experience oriented and emotional statement in order to be trustworthy. Thus what is required of the judge would be considered a lie if the text was produced in the function of a party or witness statement.¹³²

In contrast to Bladini's findings of the narrative of the crime being limited to the criminal act alone, what leads up to the crime is also included. As such, the simplified story and the objectivity established by bringing the event into a vacuum without time or space are disrupted. This might be done, not because the crime of rape is intended to be discussed in a more objective manner, but because the different frames simplifies the situation in both cases as the sexual history creates opportunity for distinctions, whereas preceding relations make the understanding of the context surrounding assault more difficult, as argued by Bladini. In this case however, what might be described by Bladini as portraying a more objective image, or at least less non-objective, actualizes different influential factors. Above all, the image that a person cannot be raped, or at least carries additional responsibility in order not to be, if said person has a relationship with the perpetrator.

This shows that deciding to be objective or to not be affected by subjective ideas does not lead to a situation where one is not. As argued by Harding and Bladini, reflection at the very least is required. Without observing one's position in the world, one's view of human beings and the world, one cannot see one's own values, they are invisible and can thus affect thoroughly. However, this is most likely not enough. At the heart of the problem is a discursive order and structural norm regulating not only the behavior of legal professionals in processes, but also

¹³² Bladini, pp. 371.

the action of the regulated. A perception of where rape is wrong, but a perception where only some perceived categorizations of forced sexual acts are considered to be rape, a perception where it becomes rare and extreme. The defining factor being a question of whether the perpetrator knew that he was forcing a sexual act against the will of the injured party, thus having established that the injured party was indeed forced. In once again turning to the imagined proponent of legal determinism, one might add that what is usually regarded as the legal position, among scholars in search of such, places more emphasis on violence and force than expressions of will. This establishes that the discursive order which evidently affects the outcomes of the studied processes by moving the decision-making away from such a position, fails to provide the intended answer from law in response to rape.

Another theoretically and empirically more notable difference from Bladini's dissertation is the present thesis' finding that the representation created by courts is not presented as objective in its depiction of its event, but creates a simulcratic reality which allows for discussing legal solutions and understandings that lacks a relation to the actual events they originally represented and which may become far removed from it. This especially becomes a problem in the meeting with archetypical narratives of how a rape usually takes place and how law usually responds, setting a frame separate from what may be the actual circumstances of the event. This leads back to and magnifies the problem of Bladini. The reality which the answer is legitimized in response to cannot be controlled or criticized because it is reductively presented as objective.

As discussed in the chapter on norms, it would be useful to develop a theory of norms that are manifested beyond the scope of the individual, and it would thus be fruitful to reach a way of tracing such norms. This norm would have to fulfill both Kelsen's "oughts" as behavioural instructions, and Durkheim's "is" in being socially reproduced, and finally, what sets it apart from the individual norm, as a group in society's collective understanding of surrounding expectations regarding their own behavior. Through the analysis, a structural norm was identified by analyzing the boundaries which governs what conceptions could be present and what expectations were manifested through the regularities of discourse. The discursive boundaries of what can be said and done are behavioral instructions, socially reproduced and like the idea of perceived expectations, they indicate an external origin of the norms, or that they are not only created within the individual. As a shared frame of reference and knowledge, the discursive practices not only limit what norms and purposes can be present, but also how they can be interpreted, as perceived expectations can only be understood through language.

The discursive orders of rape not only establishes a linguistic framework for how the judges are to what constitutes the act of rape with reference to traditional conceptions of women's bodies and sexuality, but also moves these actors to rule in response to this framework. The norm is strengthened by a discursive imperative to reason in a certain way based in a certain model, an archetype departing from the idea of how the event of the case and its procedure usually happens and necessary to make sense of the presented event. These archetypes generate the legitimization of a legal answer as well as reproduces norms and perceptions entrenched in them. In other words, the norm regarding the actions of the legal decision makers also contains, or acts in response to, alongside, a social norm regarding rape in itself and what it constitutes.¹³³

In a view where the law adjudication process is perceived as an open process of legitimization rather than the pursuit of a "right answer", which is incredibly difficult to find, the normative climate of what can be said and done is highly valuable. Based on the discourse theory of Fairclough, the norms can be contradictory if they are in flux, and while greatly constraining to what is possible and acceptable to the behavior of the decision-maker, it is possible through creative language techniques to deviate from the norm, just like a discourse. Again predicting a critique of indeterminacy, in light of the findings regarding objectivity, this enables the view of distinctions between individual and structural exceptions from the legislation.

Ulrika Andersson's discussion of her findings in relation to Judith Butler and the heterosexual matrix, more recently termed as heterosexual hegemony, beneficially places the legal order within, and in relation to a larger frame of power relations in the society in which the legal process takes place. As described in the theory of the gendered legal subject, the focus on expressions of will portrays women as sexually passive and their bodies as open. The way the expressions of will are given meaning in the present discursive order continues this picture. In difference to Andersson, order also adds the view of male sexuality as being unstoppable, or at the very least to be used freely, as it placing the responsibility for containing it on the victim. It also builds on Andersson's finding of the injured party as only partly responsible for being exposed to what took place during event and making sure that it was not, with the result that a suspect's responsibility is non-existent as long as the person is unknowing. Placing the discourse in relation to a wider perspective of discourse outside the legal sphere also opens for several topics of future research.

¹³³ Andersson, Håkan. 'Rättens narratologiska dimensioner - interaktion och konstruktion', pp. 22.

4.1 From verdict to common sense and other themes for continued research

There is no well-developed theory of how law exports these discursive, rather than individual norms, which can determine when the legal discourse will have what sort of influence, and the work to create such theory is too demanding to fit into these final paragraphs. There are, however, still some themes that can be discussed, that are usually described in the exportation of norms in general. This discussion and opening towards future research is almost required as both Fairclough and Hydén draw models of the relationship between how norms, and discourse of law, in this thesis intertwined, relate to society. It is difficult to draw conclusions in relation to these theories from the present findings. However, as Fairclough's model has not been used to decide in what ways discursive orders of legal decisions and the image they construct are exported, besides the fact that the order constitute social practices in line with the general position. The movements of norms in Hydén's model, portrayed in figure 1 in 2.3 harmonizes with ideas that norms can influence the legal process or even become law, and also that they can be created by legal procedure.¹³⁴ Granted that the legal system is part of a general system of norms, where legal rules are norms with specific properties, it is still important to discuss how effectual they are in governing behavior.¹³⁵

Objectivity is often described as a generator of legitimacy of the legislation in the view of the regulated, as well as their following of law.¹³⁶ While there are academic critiques of inconsistent reasoning in similar cases, the external image of law adjudication processes still carry a strong image of objectivity, with the idea of the court as an objectified institution reaching the right answer, rather than decision-making individuals legitimizing one possible solution, as discussed above. This could also explain the emphasis within social discourse on legislation, rather than processes and norms. In other words, the court and the concept of the legislation it uses are deemed legitimate, but the current form of the latter is perceived to require a change.

In the theoretical view of this thesis, however, such changes may not lead to their intended results. The discourse brings forward images of the cases' facts, assumptions and coherence

¹³⁴ Hydén, *Normvetenskap* pp. 131.

¹³⁵ Bergenheim, pp. 15 & 28, Niemi-Kiesliäinen 2004, s. 169 och Andersson 2004, s. 37.

¹³⁶ Dworkin, Ronald, *Law's Empire*, Cambridge, Massachusetts: Belknap Press, 1986, pp. 1f. Robinson, Paul H., "Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform". *Faculty Scholarship*, 2009.

with legislations which fit the order, thus controlling everything from wording to thoughts. The actor within the adjudication process does not verify a factual situation or find “the” right answer, but legitimizes a portrayal leading to one of many potential solutions. Over time, verbal techniques may change the discourse, and in turn change what is deemed the “right” answer. In other words, assuming that the calls for a change in legislation are right, the target of its critique is not the only problem. Likewise, the problems of separate orders and gendered norms would not be solved through changing the penal code concerning rape.¹³⁷

It is highly likely that the continuation of the high amount of the crime springs from the reproduction of legal ideas of what actually constitutes a rape. When previous relationships affect the assessment of the event and its outcomes, when the absolute certainty of intent classifies the rape, disregarding violence, forced actions or relation of power, it also affects the image of law. Not only will fewer of the cases of forced sexual acts be deterred by the threat of being caught by the sanctions of the law when its meshes let through many of the cases of rape, but the conception of what actually is a rape is shaped by the way the law treats it. While the social norm unquestionably condemns rape itself, the frame for what the term encompasses is too narrow for the regulatory needs of the injured parties and those who have been raped but either avoids reporting or whose preliminary investigation is closed.¹³⁸ The educative, normating role of law, establishing for example that relationships are irrelevant to the possibility of become the victim of rape is thus rendered nonfunctional by its own inconsistency with this idea, established by the legislative amendment of 1962 to the penal code regarding rape.¹³⁹ In light of the costly process in terms of shame, the reported treatment by actors within the judicial system and high risk of not getting one’s suffering recognized described by BRÅ, the separate orders with different assessments causing more constraints for the legitimization of a guilty verdict, contribute to the declining number of reports in relation to the estimated total amount of rapes per year.¹⁴⁰ Still, a deeper study of the views of the regulated would be required to understand more of discursive shifts in society in response to changes in legislation and legal outcomes. Here Luhmann’s distinction between internal perceptions of what is established law and what the regulated believes is the legal position would be required to get a clearer image. In this perspective, it is also important to recognize the differences between the norms governing behavior and the idea of the law. As Hydén

¹³⁷ Andersson, Håkan. ‘Postmoderna och diskursteoretiska verktyg i rätten’, pp. 360f.

¹³⁸ Cooter, pp. 19.

¹³⁹ Rosén, Ulla. *Kriminaliseringen av våldtäkt inom äktenskapet – En granskning av 1962 års brottsbalk och dess bihang*, thesis, University of Växjö, 2009, pp. 38ff.

¹⁴⁰ Lainpelto, Färdeman, Hvitfeldt, & Irland, pp. 48, and Posner & Rasmussen, pp. 370ff.

explains, law is not necessarily the primary and rarely a direct influence on the behavior of the subject.¹⁴¹ Finally, it is also vital to remember that despite the distinction, actors within law are part of society. Similarly, because neither actors nor legislation exist independently from one another, their perceptions and the present legal discourse are affected by preceding legislation and the conceptions embedded within them. From these broader social and historical perspectives, legal discourses not only reflect society's perception of gender, sexuality and rape, but also participate in the reproduction of them.¹⁴²

It is not unlikely that the women are ungendered in decontextualization of the crime, then regendered under objectivity. This causes norms and conceptions of women to affect the determination of the crime as argued by Burman on domestic violence.¹⁴³ The objectivity explored in this study could hide such positions. However, the one case where the injured party is a man is part of the same discourse of uncertain intent. The reasons could be many, including the structural answer that the gendered influence on legal framing of rape is instilled in the view of the event, regardless of who the injured party of the specific case is. A related line of thought could be questions of how different masculinities can be traced within the discourse, evoking thoughts of Raewyn Connell's or Paul Horton's theorizations of how homosexuality or sexual weakness can be viewed as less masculine. This is, regardless of path of inquiry a question that deserves additional research.¹⁴⁴

Finally, questions of how structural norms reflecting gendered images of sexuality and rape deserve more research, as well as objectivity in decision-making processes generally. Deviations from the "right answer", for scholars in search of such can reasonably be ascertained by means of a combination of CDA and a dogmatic approach to the law to see what is not covered. Even among those who are uninterested in a legal position, the findings do not mean that law accepts everything. It would be interesting to know more of what its boundaries are regarding the space under objectivity. Also, how can we perceive officials and what do we do with the prevalent discourse on neutrality in the face of both individual and structural biases? With this conception of rape being established as the discursive order and structural norm, the Foucauldian concept of regimes of truth, or discourses treated as common sense, given special importance. This is especially interesting in light of critical perspectives of law as structurally

¹⁴¹ Luhmann, Niklas. *Autopoiesis*, Copenhagen, 1992 & Hydén, 'Using law as a Model', pp. 23.

¹⁴² Niemi-Kiesliäinen 2004, s. 169 och Andersson 2004, s. 37.

¹⁴³ Bladini, pp 358.

¹⁴⁴ Connell, Raewyn & Messerschmidt, James W. 'Hegemonic masculinity rethinking the concept', *Gender & society* 19 (6), 2005, pp. 829 & Horton, Paul & Rydstrom, Helle. "Heterosexual Masculinity in Contemporary Vietnam: Privileges, Pleasures, and Protests". *Men and Masculinities*.14(5), 2011, pp. 542.

indistinguishable from political discourse, as a potential tool for promoting hegemonic interests and the indeterminacy of the law, opening for presumptions of biased, taken for granted rulings. The Foucauldian concept is also useful for further insight into both why the positivist understanding of legal procedure remains influential and the way law establishes these regimes in relation to the social understandings of sexual violence. These opened doors require much further study to discover what else their enquiries can offer. In closing, this thesis ends such explorations, leaving the new cross-fertilization of discourse and Hydéian norms, the structural norm, as well as the convergence of normative archetypes and objectivity.

5. References

Litterature

Andersson, Håkan, 'Rättens narratologiska dimensioner - interaktion och konstruktion', in *Interaktiv rättsvetenskap*, Gräns/Westerlund (eds.), Uppsala: Åbo 2006.

Andersson, Håkan, *Juridisk verklighetsbild – realitet eller simulacrum?* Juridisk tidskrift, 2000-01.

Andersson, Håkan. 'Postmoderna diskursteoretiska verktyg inom rätten', in *Juridisk metodlära*, Korling, Fredric & Zamboni, Mauro (eds.) Lund: Studentlitteratur, 2013.

Andersson, Ulrika. *Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp* Malmö: Prinfo, 2004.

Baier, Matthias *Social and Legal Norms*. Ashgate Publishing Limited, 2014.

Baudrillard, Jean, *Simulacra and Simulation*, University of Michigan Press, 1994.

Bergenheim, Åsa, 'Gränsen för det otillåtna. Om synen på våldtäkt i Sverige 1950–2010' in *Antologi sju perspektiv på våldtäkt Nordiskt centrum för kvinnofrid rapport 2010:02*, Uppsala: Nationellt centrum för kvinnofrid (NCK), Uppsala universitet, 2010.

Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity*, New York: Routledge, 2006.

Carlsson, Lisa & Persson, Elin. *Våldtäktsmyter En undersökning om studenters attityder kring våldtäktsmyter*, thesis, Örebro University, 2008.

Andersson, Ulrika. *Hans (ord) eller hennes?: en könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp*. Bokbox Publishing, 2004.

Bergenheim, Åsa, 'Gränsen för det otillåtna Om synen på våldtäkt i Sverige 1950–2010', in *Antologi sju perspektiv på våldtäkt* Uppsala: Nationellt centrum för kvinnofrid.

Bladini, Moa. *I objektivitetens sken: en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål*, Gothenburg: Makadam, 2013.

Brand, Jeffrey, *Philosophy of Law: Introducing Jurisprudence*, New York: Bloomsbury Academic, 2014.

Burman, Monica. *Straffrätt och mäns våld mot kvinnor: om straffrättens förmåga att producera jämställdhet*, Uppsala: Iustus förlag, 2007.

Burr, Viven, *An Introduction to Social Constructionism*, New York: Routledge, 1999.

Burr, Viven, *Social constructionism*, London: Routledge, 2003.

Carvalho Figueiredo, Débora, de. 'Representations of rape in the discourse of legal decisions' in *Systemic Functional Linguistics and Critical Discourse Analysis*, Young, Lynne & Harrison, Claire (eds.) Continuum: New York, 2004.

Connell, Raewyn & Messerschmidt, James W. 'Hegemonic masculinity rethinking the concept', *Gender & society* 19 (6), 2005.

Cooter, Robert D. Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 *Or. L. Rev.* 1, 1999.

Goodrich, Peter. (1987) *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*. London: MacMillan.

Dahlstrand, Karl, 'Non-Pecuniary (idealistic) Damages in Tort – How to break up the Distinction between and Internal and External view of Law' in *Contributions in Sociology of law – Remarks from a Swedish Horizon* Hydén & Wickenberg (eds.), Lund: Media-tryck 2008.

- D'Amato, Anthony. 'Pragmatic Indeterminacy', 85 *NW. U.L.* 1, 1984.
- Deflem, Mathieu. *Sociology of law: Visions of a Scholarly Tradition*, Cambridge: Cambridge University Press, 2008, pp. 99.
- Diesen, Christian et al. *Likhet inför lagen*, Stockholm: Natur och Kultur, 2007.
- Dijk, Teun A. van. 'The study of Discourse' in *Discourse as Structure of Process. Discourse Studies. A Multidisciplinary Introduction*, Volume 1, London: SAGE Publications, 1997.
- Durkheim, Emile. *The Rules of Sociological Method and Selected Texts on Sociology and Method*. New York: The free press, [1895], 1982.
- Dworkin, Ronald, *Law's Empire*, Cambridge, Massachusetts: Belknap Press, 1986
- Eklöf, Per Olof, Moban, Robert & Bylund, Torlef., *Rättegång, häfte III* 6th ed, Stockholm: Dordstedts förlag, 1994.
- Eklöf, Per Olof, Moban, Robert & Bylund, Torlef., *Rättegång, häfte IV* 6th ed, Stockholm: Dordstedts förlag, 1995.
- Elofsson, Niklas. *Skiljemäns uppdragsöverskridande och handläggningsfel - En analys med utgångspunkt i klandrade skiljedomar under perioden 1999–2009*, master thesis, Uppsala University.
- Ericzon, Michael, Engvall Pär & Rydén Tobias. *Ungdomars attityder kring våldtäkt*, thesis, University of Skövde.
- Fairclough, Norman. *Discourse and social change*. Cambridge: Polity, 1992.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books.
- Foucault, Michel, *L'Archéologie du savoir*. Paris: Éditions Gallimard, 1969.
- Foucault, Michel. *Vansinnets historia under den klassiska epoken*. Stockholm: Arkiv, 1986.
- Franke, M., Katherine, 'Theorizing Yes: An Essay on Feminism, Law, and Desire' in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, Surrey, 2009.

- Haraway, Donna. *Simians, Cyborgs, and Women – The Reinvention of Nature*, New York, Routledge, 1991.
- Hermansson, Sofia, "Parternas förhållande har varit stormigt" – en studie av formuleringar i svenska hovrättsdomar om grov kvinnofridskränkning och våldtäkt i nära relationer utifrån ett genus- och rättighetsperspektiv, thesis, Lund University, 2012.
- Hetcher, Michael & Opp, Karl-Dieter. *Social Norms*. New York: Russel Sage Foundation, 2001.
- Horton, Paul & Rydstrom, Helle. 'Heterosexual Masculinity in Contemporary Vietnam: Privileges, Pleasures, and Protests'. *Men and Masculinities*. 14(5), 2011.
- Hydén, Håkan. 'Using Law as a Model – Different Approaches to the understanding of normative decision making' in *Contributions in Sociology of law – Remarks from a Swedish Horizon*, Hydén & Wickenberg (eds.) Lund, Media-tryck 2006.
- Hydén, Håkan. *Normvetenskap*, Lund: The Department of Sociology, Lund university, 2002.
- Hydén, Håkan & Svensson, Måns. 'The Concept of norms in Sociology of law' in *Contributions in Sociology of law – Remarks from a Swedish Horizon*, Hydén & Wickenberg (eds.) Lund: Media-tryck 2008.
- Jacobsson, Maritha & Sjöström, Stefan. 'Believing and blaming the victim: Comparing rape victims with male assault victims' in *The Normative Anatomy of Society. Relations between norms and law in the 21st century*, 2012.
- Kero, Julia, *Få anmälda våldtäkter till åtal*, SVT nyheter, 2014-02-14.
- Kress, Gunther. 'From Saussure to Critical Sociolinguistics - The turn Toward a Social view of language', in *Discourse Theory and Practice: A Reader*, Wetherell, Margaret, Taylor, Stephanie & Yates, Simeon J. (eds.) London Sage, 2005.
- Kress, Ken. 'A Preface to Epistemological Indeterminacy', 85 *Nw. U. L. Rev.* 134, 1990.
- Kutz, Christopher L., 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law', 103 *Yale L.J.* 997, 1993.
- Laclau, Ernesto & Mouffe, Chantal. *Hegemonin och den socialistiska strategin*. Gothenburg: Glänta, 2008.

- Lainpelto, Katrin *Stödbevisning i brottmål*, Malmö: Jure förlag, 2012.
- Lindroos-Hovinheimo, Susanna. *Despairing Justice and the Ethics of Legal Interpretation*, Helsinki: Lindroos-Hovinheimo, 2011.
- Lipkin, Robert Justin, 'Indeterminacy, Justification and Truth in Constitutional Theory', 60 *Fordham Law review*. REV. 595, 1992.
- Luhmann, Niklas. *Autopoiesis*, Kopenhagen, 1992.
- Madry, Alan R. 'Legal Indeterminacy and the Bivalence of Legal Truth', 82 *Marq. L. Rev.* 581, 1999.
- Marmor, Andrei. 'The Pure Theory in Law', in *The Stanford Encyclopedia of Philosophy* (Winter 2002 Edition), Zalta, Edward N. (ed.), 2002.
- Mertz, Elizabeth. 'A New Social Constructionism for Sociolegal Studies', *Law & Society Review*, Vol. 28, No. 5, Symposium: Community and Identity in Sociolegal Studies, 1994.
- O'Farrell, Claire. *Michel Foucault*. London: SAGE, 2005.
- Olsson, Frida. *Strukturerad bevisvärdering eller ren gissningslek? En studie av tingsrätternas bevisvärdering vid våldtäkt år 2012*, master thesis, Lunds Universitet, 2013.
- Olsson, Patrik, '*Legal Ideas and Normative Realities. A case study of childrens' rights and child labor activity in Paraguay*'. *Lund Studies in Sociology of Law* 19. Lund: Sociologiska institut-tionen, Lunds universitet, 2003.
- Posner, Richard A. *Law and Social Noms*. Cambridge, Massachusetts, and London, England: Harvard University press, 2002.
- Posner, Richard A. & Rasmusen, Erik B. 'Creating and enforcing norms, with special reference to sanctions', *International Review of Law and Economics* 19, 1999.
- Robinson, Paul H., 'Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform'. *Faculty Scholarship*, 2009.
- Rosén, Ulla. *Kriminaliseringen av våldtäkt inom äktenskapet – En granskning av 1962 års brottsbalk och dess bihang*, thesis, University of Växjö, 2009.
- Strömholm, Stig. *Rätt, Rättskällor, Rättstillämpning*, Stockholm: Nordstedts, 1991.

- Svallingsson, Ulrika, 'För alla lika olika – cripteoretiska avslöjanden av den faktiska människans frånvaro i sexualrätten', in *Juridisk Publikation*, No. 2, 2013.
- Svensson, Eva-Maria *Genus och rätt - En problematisering av föreställningen om rätten*, Lustus förlag, Uppsala, 1997.
- Svensson, Eva-Maria (2007) *Exploiting the Limits of Law - Swedish Feminism and the Challenge to pessimism*. Åsa Gunnarsson, Eva-Maria Svensson, Margaret Davies, (eds.). Aldershot: Ashgate.
- Svensson, Eva-Maria. 'Is there a future for Scandinavian Women's Law?' in *Scandinavian Women's Law in the 21th Century*, Ruth Nielsen, Lynn Roseberry and Christina D. Tvarnø (eds.) Aarhus: DJØF Publishing, 2007.
- Sutorius, Helena & Kaldal, Anna. *Bevisprövning vid sexualbrott*, Stockholm: Nordstedts juridik, 2003. Teubner, Gunther. (ed.) *Autopoietic Law: A New Approach to Law and Society*, de Gruyter, Berlin, 1983.
- Tuori, Kaarlo. 'Self-description and external Description of Law', *NoFo* 2, 2006.
- Wegerstad, Linnea, 'Om erotik, makt och sexualbrottens sexualiteter', in *På Vei: Kjønn og rett i norden*, Gothenburg/Stockholm, 2011.
- Weiss, G & Wodak, R (eds.) *Critical Discourse Analysis Theory and Interdisciplinarity*, Chippenham and Eastborne: Palgrave Macmillan, 2007.
- Wendt, Maria, 'Mellan normalitet och avvikelser Forskning om sexualförövare och framväxten av praktisk behandling', in *Antologi sju perspektiv på våldtäkt Nordiskt centrum för kvinnofrid rapport 2010:02*, Uppsala: Nationellt centrum för kvinnofrid (NCK), Uppsala universitet, 2010.
- Widerberg, Karin. 'Translating Gender'. *NORA. Nordic Journal of Feminist and Gender Research*, no 2, 1998.
- Winther Jørgensen, M., Phillips, L., & Torhell, S. *Diskursanalys som teori och metod / Lund: Studentlitteratur*, 2000.

Miscellaneous

Amnesty, *Var går gränsen? En attitydundersökning om våldtäkt*, Stockholm: Amnesty, 2008.

BRÅ, *Brott i nära relationer – En nationell kartläggning*, rapport 2014:8, Stockholm: Lenanders Grafiska AB, 2014.

Domstolsverket. *Glossary for the Courts of Sweden - Swedish/English English/Swedish*, Jönköping: Domstolsverket, 2014.

Färdeman, Emelie, Hvitfeldt, Thomas & Irlander, Åsa, *Nationella trygghetsundersökningen 2013 - Om utsatthet, otrygghet och förtroende, Rapport 2014:1*, Stockholm: Brottsförebyggande rådet, 2014.

Gustavsson, Bengt, Hermrén, Göran & Petersson, Bo. *Vad är god forskningsed? Synpunkter, riktlinjer och exempel*, Stockholm: Vetenskapsrådet, 2005.

Kero, Julia, *Få anmälda våldtäkter till åtal*, SVT nyheter, 2014-02-14.

Mellin, Michael. 'Domare visar inte bättre resultat än andra på sanningsbedömningar - oavsett HD:s praxis', *Dagens Juridik*, 2014-03-20.

Nordh, Robert. 'Det mest betydelsefulla verktyget vid bevisvärdering är trots allt domarens intuition', *Dagens Juridik*, 2013-09-02.

Olsson, Lena, 'Porträtt: Ulrika Andersson, nydisputerad jurist', *Nationella sekretariatet för genusforskning*, 2004-09-04.

Tures, Ewa & Rosencrantz, Ebba. 'Friande våldtäktsdomar ökar kraftigt', *DN*, 2012-03-25.

Urbaniak, Geoffrey C. & Plous, S. *Research Randomizer* (Version 4.0) [Computer software], 2013. Retrieved on June 22, 2014, from <http://www.randomizer.org/>.

Vetenskapsrådet, *Forskningsetiska principer inom humanistisk-samhällsvetenskaplig forskning*, Stockholm: Vetenskapsrådet 2002.

List of verdicts

B 10020-12 Svea Court of Appeal.

B 4856-13 Svea Court of Appeal.

B 2570-13 Göta Court of Appeal.

B 1676-13 Göta Court of Appeal.

B 3407-13 The Scania and Blekinge Court of Appeal.

B 2612-13 The Scania and Blekinge Court of Appeal.

B 1197-14 The Court of Appeal for Western Sweden.

B 4384-13 The Court of Appeal for Western Sweden.

B141-14 The Court of Appeal for Southern Norrland.

B 1024-13 The Court of Appeal for Southern Norrland.

B 874-13 The Court of Appeal for Northern Norrland.

B 332-13 The Court of Appeal for Northern Norrland.