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## **Maybe he didn't intend to rape her**

**- A critical discourse analysis of the district courts conceptualization of the defendant in rape verdicts**

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Master Thesis (RÄSM02)  
Spring 2017



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## **Abstract**

Previous research show, people interpret others through their pre-understanding and stereotypical beliefs. Rape crimes are periodically debated in the Swedish media. The debates often elucidate laws incapability to manage the complexity of rape, focusing on the women as the injured party. The purpose of this study is to highlight the Swedish district court's conceptualization of the defendant in rape verdicts. This study illuminates if and how the district court argue about the characteristics of the defendant, and if there are any differences in the district court's conceptualization in regards of the defendant's background and social position. Fairclough's critical discourse analysis is used in order to examine the rape verdicts. The identified discourses of the 46 analysed rape verdicts, settled by the district court of Malmö and the district court of Helsingborg, have been analysed through Bourdieu's concepts of social class, symbolic violence and symbolic capital. Furthermore, the content of the discourses has been highlighted through theories of masculine domination and feminist legal theory. Foucault argues, discourses produced by institutions maintain inequalities in society, in line with this, Bourdieu claim that the state exercise symbolic violence. In the light of this, discourses, produced and reproduced by the district courts, have the power to uphold inequalities in society. The results of this study indicate that the district courts reproduce masculine domination and male identities. The district courts assessments are influenced by stereotypical beliefs of both male and female behaviour.

Keywords: defendant, discourses, district court, masculinity, rape, rapist

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## **1. Introduction and Research problem**

Law and the legal decision-making is often discussed and debated in the Swedish media, on social media, on a political level and, also between individuals. Sexual assault and rape is one of the most iniquitous offences, which cause strong emotions in society. According to The Swedish National Council for Crime Prevention (Brå), 6720 rape offences were reported during 2016 (Brå 2017). The court's argumentation about the victim in rape verdicts has been strongly criticised during decades, not only in Sweden but also in other European countries and outside Europe. The critique of the decision-making in rape verdicts generates societal questioning of the Swedish justice system. The critique is in a high degree based on how the victim is treated during the legal proceeding. The defendant's perspective is not debated in the same amount.

In my Bachelor thesis (Fischer 2015), I aimed to highlight the Swedish judiciary of the district courts view of the injured party, as a woman, in rape verdicts. The results showed that the Swedish judiciary reproduce patriarchal conceptions, where the man is the norm. In other words, the courts reproduce inequalities between men and women in society i.e. women's right to freedom is limited. Furthermore, the judiciary has a very difficult, but mostly, important role trying to determine if it is the injured party or the defendant who is telling the truth. There is often a lack of evidence regarding rape cases, which leads to one word against another. In cases, where the victim is severely injured, it is more likely with a conviction (Diesen & Diesen 2010, p. 330).

In order to orientate in the world and deal with stimuli given to us from our environment, we categorize the world (Nelson 2006, p. 55). This also includes that we categorize people we meet in order to simplify the information given to us based on what we objectively can perceive. These categorizations are automatic and consist of stereotyping and prejudice, as a part of the cognitive efficiency (ibid., p. 56). The automaticity of stereotyping does not necessarily mean that the person endorses them; additionally, it is very difficult to control the awareness of

the process. The attempt to avoid the automatic stereotyping, often result in the opposite effect (Nelson 2006, p. 55, and; Bless, Fiedler & Strack 2004, p. 26-27). Research show, it is possible to avoid the automaticity of stereotyping, if we are asked to think in egalitarian ways, at least for a little while (Nelson 2006, p. 82). With this in mind, law claim objectivity, the judiciary consists of human beings, and even if they have special education, I argue, we can assume that their cognitive ability does not distinguish from average citizens.

Previous research indicates, the Swedish justice system reproduces inequalities between people based on gender, culture, ethnicity etc. (Fischer 2016 & Lindholm & Bergvall 2006, p. 39). Inequalities and discrimination based on any type of an individual's characteristic are, in general, unacceptable in Sweden. Despite this, it is an on going progress at many different levels in society (Lindholm & Bergvall 2006, p. 39).

This thesis focuses on the Swedish judiciary of the district court's conceptualization of the defendant in rape verdicts, which will cast some light on what the judiciary seems to focus on in their decisions. 98 per cent of the suspects in rape crimes are men, with this in mind I aim to elucidate rape verdicts where the defendant is a man (Brå 2015, p. 12). As I mentioned previously, much of the focus regarding rape crimes and rape verdicts is directed towards the victim, and the justice systems treatment of the injured party during the judicial process. Now, I would like to concentrate on the treatment of the defendant. The treatment of the defendant is as important as how the judiciary treats the injured party. I argue, this goes hand in hand, since the treatment of the injured party also affects the defendant and vice versa.

### **1.1. Aim and Research Question**

The aim of this study is to elucidate the conceptualization of the defendant in the decision-making of the Swedish judiciary of the district courts in rape verdicts. The identified discourses within the judiciary's understanding of the defendant will cast light on *if* and *how*, the conceptualization of the defendant produce or reproduce discourses and the possible normative effects in society. Law claims objectivity; therefore, it is highly important to scrutinize the Swedish judiciary's argumentation about the defendant in rape trials.

- How are discourses produced and reproduced by the Swedish judiciary of the district courts conceptualization of the defendant in rape verdicts?
- Are there any differences in the Swedish judiciary of the district courts conceptualization of the defendant in the light of the defendant's background and if the defendant has a vulnerable position in society?

### **1.2. Connection to socio-legal research**

Law is not only considered as a form of social control in modern societies, law also has a function as a method of the government to induce social change (Vago 2012, p. 18-20). With this in mind, laws decision-making constitutes frames of behaviour within society. The courts understanding of both the injured party and the defendant mirrors societal beliefs, but it also constitutes norms in society. There is already a great amount of previous research elucidating and explaining how discourses are produced; however, discourses produced or reproduced by the Swedish judiciaries in their conceptualization of the defendant in rape verdicts is not highlighted in the same extent. Socio-legal research and Sociology of Law are interested in the interaction between law and society. The aim of this study is to examine the district courts conceptualization of the defendant in rape verdicts, which raises the basic element of socio-legal research; the function of law as an instrument of social change, how law mirrors societal beliefs, but it will also examine the duty of objectivity within the rape verdicts. The duty of objectivity is



one of the most important principles within the Swedish system of law. I will introduce you to the duty of objectivity in the next chapter.

### **1.3. Delimitations**

This study only covers rape verdicts settled by the district courts, according to Swedish rape law Chapter 6 § 1, Penal Code (2013:365), and no other sexual offenses. Furthermore, both the defendant and the injured person are adults pursuant to Swedish law, i.e. 15 years old. According to The Swedish National Council for Crime Prevention (Brå 2015, p. 10 & 12), the majority of the suspected offenders regarding rape crimes are men, i.e. 98 per cent and 96 per cent of the victims concerning adult rape are women. In the light of this, this study only cover rape verdicts where the defendant is a man and the victim is a woman.

### **1.4. Disposition**

The first chapter introduce the aim and research questions and its connection to socio-legal research, furthermore, the delimitations of the study is described. The second chapter describes the legal framework and defines what a rape is in accordance with the law; additionally, the duty of objectivity is illuminated. The third chapter casts some light on previous research relevant to this study. Chapter four introduce the chosen method, the analytical procedure of the study, data collection, and validity, reliability and generalizability. Ethical considerations are also discussed in this chapter. The fifth chapter describes the theoretical framework. Chapter six illuminates the analysis and results of this study. The final seventh chapter describes the conclusions of this study.

## **2. Legal framework**

The aim of this study is not to evaluate or decide, if the decisions made by the district court are correct or not; this study is focused on the conceptualization of the defendant. In other words, the aim of this study is to elucidate what may have influenced the assessment of the verdict. Bearing this in mind, I argue, it is of importance to cast some light on the legal framework, which provides the basis of the decision-making settled by the Swedish judiciary.

### **2.1. The definition of a rape**

The analysed verdicts, within this study, cover rape verdicts according to the Swedish rape law Chapter 6 § 1, Penal Code (2013:365). I do not analyse the verdicts in relation to the law; therefore, I do not find it important to present the law in its entirety. Thus, I intend to describe what a rape is, according to the rape law, by using similar words and expressions in English.

Rape is when someone through threats and/or violence forces a person to intercourse or a sexual act comparable to intercourse against his or her will. Beyond threats and violence, the perpetrator could have utilized that the victim was in a particularly vulnerable situation such as sleep, psychological disorder, serious fear, intoxication, etc. In cases where the perpetrator has shown particular recklessness, brutality, used severe violence or serious threats, he could be convicted of aggravated rape.

For an act to be considered as a crime, the act has to fulfil the objective and subjective necessary prerequisite. The objective necessary prerequisite constitutes the description of the crime stated in the current legislation. Additionally, in order to be punished, the defendant has to meet the subjective necessary prerequisite, which means that he or she committed the crime with intent (*dolus*) (Leijonhufvud & Wennberg 2009, p. 31-32). It is only the state that has the permission to penalise the citizens of Sweden, which brings a significant responsibility of an objective assessment (Zetterström 2012, p. 44).

## **2.2. The duty of objectivity**

As I mentioned above, the court has to settle their decision-making on the basis of objectivity; this is stated in the Constitution of Sweden. According to the Constitution of Sweden, Chapter 1 § 2 (RF 2010:1408), shall all public power be exercised with respect and equality for all humans; additionally, the public power shall also be exercised with respect of all humans right to freedom and dignity. Further, the public shall counteract discrimination of humans on the basis of sex, colour, national or ethnic origin, linguistic or religious affiliation, disability, sexual orientation, age or other circumstances of the individual as a person. The Constitution of Sweden, Chapter 1 § 9, describes that the courts have to respect all humans' equality before the law, objectiveness, and impartiality of the Swedish judiciary. Exceptions, from what is stated above, can be made in accordance with Chapter 2 § 13, which states that legislation or other regulations may implicate inequalities between men and women if the provision intends to achieve equality.

I argue, the definition of the necessary requirements for the court's decision-making includes the Swedish judiciary not only has the knowledge and experience of the legal system and legislation, but also, they should have great knowledge of psychological aspects and biases. As I mentioned earlier, all humans categorize people we meet on the basis of stereotypes and prejudice. The knowledge about these biases could reduce, in part manifestly, the automatically stereotyping as long as we are aware of them. Although, previous research, by contrast, shows that the knowledge also could increase this automatic activation of biases (Nelson 2006, p. 55-56, 87 & Bless, Fiedler & Strack 2004, p. 26-27). However, it is of importance that the Swedish judiciary has the ability to ignore these types of cognitive efficiency, in order to fulfil the duty of objectivity. To analyse and illuminate the district court's conceptualization of the defendant is therefore highly essential.

### **3. Previous Research**

In the following, I aim to highlight previous research relevant to this topic. I argue it is of importance to shed light on previous research examining potential biases and stereotypical characteristics, which could influence the decision-making in rape trials, regardless of the country and the current legal system where the study is conducted.

#### **3.1. Juror biases and rape myths**

As the judiciary are humans they also get influenced by their environment and society, this prejudice may have an impact on their decision-making. Sokratis Dinos et.al. (2015, p. 46) argue that jurors in Europe are more likely to be influenced by rape myths in their decision-making, than in the US. In an American study, Meagen M. Hildebrand and Cynthia J. Najdowski (2015, p. 1077) examines how the rape culture, e.g. rape myths and sexual objectification of women, affects jurors judgements in rape trials and argues that jurors who are exposed to rape culture are more likely to base their decision-making on these biases. Two studies, conducted by the Australian Institute of Criminology, show that jurors cannot make objective judgements in rape trials because their decisions are based on and influenced by their own attitudes, experiences, expectations, biases, and stereotypical beliefs about victims and knowledge about rape (Taylor 2007, p. 6). I argue that the conceptualization about the “real rape” also influence how the “real defendant” is characterised.

#### **3.2. Race of the defendant**

Torun Lindholm and Sylvia Bergvall (2006, p. 41) argue that our expectations based on our pre-understanding of a social group influence the interpretation of the behaviour of a member of the specific group. Social categorisation is a fundamental attribute that humans use while they orientate in a social context. Although, it is possible to deliberately hold back this automatically activated stereotypes of other group members but only if we are aware of our pre-understanding and the stereotypes it contributes to and, that there is enough time

to delimit the activation (ibid., p. 42 & 47). Lindholm and Bergvall (2006, p. 46) illuminates' previous research, which shows that Swedish students associate other ethnic group members with negative characteristics: criminal, violent/dangerous and unreliable. Those characteristics could, in this case, influence how eyewitnesses interpret the severity of e.g. an act of violence. In the light of this, Lindholm and Bergvall studied if the ethnicity of the witnesses and perpetrator had an impact on the perceived severity of the crime. The results showed that the testimony, and the witnesses considered the crime more severe in the cases where the perpetrator belonged to another ethnic group than the witness. Furthermore, they argue that the implementation of this could be that ethnic minorities have a disadvantage when they commit a crime (ibid., p. 56-57).

Historically in American rape cases, black male defendants are treated more harshly than white male defendants (Wriggins 1983, p. 113). Most of the research that has been explored in this section has collected data through mock jurors or through participants who have read rape trial transcript (or vignettes) and rated the guilt of the defendant; additionally, the respondents have been asked to recommend a sentence. Field (1979, p 277) argues, the race of the defendant have a great impact on the (white) jurors decisions, black defendants received harsher sentences than white defendants. I argue, Field's results may have been affected by inter-group and intra-group biases. Alina Korn argues, Arab participants assigned more responsibility to a victim involved in inter-group relationships, on the contrary, Jewish respondents "attributed more responsibility to a victim involved in intra-group relationships" (Korn 2009, p. 255). Additionally, male participants did not attribute as much responsibility to the perpetrator as female participants did (ibid., p. 258). Other studies show, the race of the defendant, i.e. black or white, does not influence the white juror decisions as significant as the interracial bias (black defendant/white victim, white defendant/black victim) (Hymes et.al. 1993).

Johan Kardell (2006, p. 94) argues, “when it comes to crimes against life and health, liberty and peace, all groups of foreign individuals, apart from Swedish born non-European individuals, are at greater risk to be sentenced to prison, compared with individuals of Swedish background” [my translation].

Furthermore, Tove Pettersson (2006a) investigates if offenders of foreign origin are discriminated in reports of rape, aggravated assault and personal use of drugs. The results show, individuals of foreign origin is more often sentenced to imprisonment in comparison with offenders of Swedish origin regarding aggravated sex crime (ibid., p. 132). Pettersson (2006b) has also highlighted the Swedish district court and the argumentation of the defendants cultural, religious and ethnical background. The study shows that there is not a significant argumentation based on those characteristics within the verdicts. However, the Swedish district court does reproduce discourses of “the other” which the witnesses, defendant and injured party produce (ibid., p. 177).

Christian Diesen (2006, p. 192) argues that the perpetrator’s character influence how the police prioritize reported crimes. In cases where the perpetrator or suspected is of another ethnic origin, he or she has more difficulties in defend him- or herself. Furthermore, the threats that the crime involved tend to be interpreted as more severe, if the perpetrator is a foreign national. Regarding rape verdicts, Diesen (2006, p. 199) highlights, 47 % of the defendant’s in all of the verdicts in the district courts in Sweden during 2003 were of foreign descent. Prosecution is more common in cases where the victim is of Swedish origin and the defendant of another ethnic origin; conversely, prosecution is more rare in cases where the defendant is Swedish and the victim is of foreign descent. In the district court of Stockholm during 2003, in 18 of the 23 of the defendants in rape cases were of foreign descent, in 15 of 23 led to conviction while 1 of 5, were the defendant was Swedish, led to conviction (ibid., p. 205).

### **3.3. Characteristics of the defendant and rape**

Simon Ekström (2003, p. 209) argues that during 1946-1950 the Swedish investigators pursuing a case were dependent upon the extent to which the man corresponded to the stereotype of rapist. The more the defendant seemed to fit the stereotype, the greater the chance was that he would be found guilty (ibid., p. 210). Abnormal, dangerous, capacious sexuality, incorrigible criminality and mental instability are some of the characteristics of the stereotype of a rapist (ibid.). Both the defendant and the women as victim are “[...] victims of the myth of ‘real rape’” (Diesen & Diesen 2010, p. 332).

A conviction is more likely to occur in Sweden when the “suspects [comes] from a minority background, were unemployed and had consumed alcohol”, which reflect stereotypes of the rapist (Lovett & Kelly 2009, p. 100). In a Swedish study, the participants read one of four vignettes of rape scenarios and answered questions about the victim and the perpetrator’s blame. The study found; the participants attributed more blame to the perpetrator, than to the victim (Strömwall, Alfredsson & Landström 2013, p. 257). Furthermore, the participants blamed the victim more in the unacquainted rape scenarios. This result contradicts previous research. Other research shows that the motivation of the offender affect the participant’s blame attributions. Offenders motivated by violence were more blamed, than offenders motivated by sex (Mitchell et. al. 2009, p. 1570). Additionally, the scenarios which included violence-motivated offenders were more likely to be described as rape by the participants (ibid., p. 1572). This is in line with the concurrence of the victims is not questioned in Swedish courts, when the rape is characterised by violence and unknown offender (Sutorius & Kaldal 2003, p. 169).

Further, Swedish studies show that females tend to consider the scenario as a rape more than men did (Strömwall, Landström & Alfredsson 2014, p 66). Additionally, females blamed the perpetrator more than males, when the perpetrator had a previous conviction (ibid., p. 65). The perpetrators

socioeconomic status may influence the jurors or judiciary and their decision-making in rape trials. Katherine A. Black and David J. Gold (2008) found gender differences in their participant's judgements of the blame attributions of the offenders. The male participants assigned more blame to the perpetrator with a lower socioeconomic status (bus driver) than the perpetrator with a high socioeconomic status (doctor); on the contrary, women attributed more blame to the victim raped by the bus driver (*ibid.*, p. 122).

Helena du Réés (2006, p. 273-274) argues that social class and social affiliation influences the court's interpretation of the defendant's and the injured party's credibility. In cases where the judiciary and the defendant, or injured party, belongs to the same social class, du Réés argues, it is more likely for the judiciary to understand the situation of the defendant or injured party.

A suspected individual who deviate, alternatively, to be perceived to deviate, from what is understood as "Swedish" regarding, language, behaviour, external attributes/looks and opinions, can be assessed as less credible and easier be perceived as guilty to the crime [my translation] (du Réés 2006, p. 275).

The language the defendant use while he or she presents his or her statement of the event affects the credibility of the defendant (du Réés 2006, p. 274-275). In other words, a poorly used language is not an advantage for the defendant.

### **3.4. Masculinity**

Lena Gemzöe (2014, p. 84) argues, gender inequalities are socially constructed on the basis of our pre-understanding of what we understand as typically male or female. Previous research, about rape and rape verdicts, is to a great extent from a perspective of the injured party as a female. Ulrika Andersson (2004, p. 265) highlights that the court of appeal reproduces discourses in rape verdicts on the basis of a heteronormative perspective, meaning women's bodies are open and available; therefore, the injuries of the victim is required in order to hold the defendant responsible for the crime. Ekström (2002, p. 162) argue that, in the



middle of the 20th century, it was easier for a male defendant to disqualify himself as the rapist, than for women to be considered as a rape victim. If the male defendant was regarded as punishable were based on his social status. In addition, if he had a high degree of social status he was more likely to be found not guilty. If his past were included by criminality, abuse or mental illness, he could be considered as more punishable.

Tal Peretz (2016, p. 35) argues, the definition of women's social existents and female stereotypes also affects the pre-understanding of men, men's social existents and masculinity. Similarly to femininities is that masculinities and masculine ideals are socially constructed (ibid., p. 36). Masculinity is often about men's bodies and men's aggression; it is because of his uncontrollable desires men rape women (Connell 1996, p. 69). Previous research shows that there are no significant differences between men and women regarding temperament, characteristics or intellect (ibid., p. 71). Despite this, Peretz (2016, p. 36) highlights in his article Messerschmidt's research results were he argues "that the [sexual] violent boys all viewed violence as a crucial characteristic of masculinity, and used it as a 'masculine resource' when their masculinity is challenged and other avenues to reaffirm it are denied". Further studies show, in accordance with Messerschmidt's findings, that young men "force young women to have sex in order to affirm their status as men and protect themselves from harassment and emasculation from male peers" (Fahlberg & Pepper 2016, p. 676).

Several scholars point to the patriarchal system, wherein men use sexual violence as a tactic to maintain their dominant position over women (Fahlberg & Pepper 2016, p. 673ff). It is not only in regards to women that men have a desire to maintain their position in the patriarchal society, thus men also has to sustain their dominant position against other men.

In addition to providing individual men with a tool for attaining social status, sexual violence is also a means for protecting the patriarchal order and for maintaining socially organized power relations among men (Fahlberg & Pepper 2016, p. 675).

Rape myths about black men who sexually violate white women and white men who assault black women have become a tool for white men to maintain racial inequalities where white men have the dominant position (Fahlberg & Pepper 2016, p. 677). With what I have presented in mind, I argue, that the socially constructed characteristics of masculinity are deeply anchored in the minds of both young and adult men.

### **3.5. Media**

The relationship between the victim and offender, and the characteristics of the rape scenario mirrors the court's judgements. Simon Lindgren and Ragnar Lundström (2010) analysed Swedish media's portrayal of the offenders and victims in four much-publicized cases of sexual assaults and rapes committed in Sweden. Their study highlighted that media tends to construct the offender as the "outsider" who attack the "inside victim" (ibid., p. 323). Furthermore, offenders that are, at first glance, seen as "normal" are soon attributed deviant behaviour, the victims of these offenders is portrayed as ideal victims (ibid., p. 322 & 315). On the contrary, when media portrays the offenders as members of a youth gang or subculture the victims is reported in a context where they "voluntarily" entered certain risk milieus and environments (ibid., p. 313 & 319).

Much of the research I have presented above focuses on inequalities between individuals with different ethnical background and the difficulties for non-Europeans to defend themselves during the legal process. Stereotypical beliefs about the real rape often focus on the victim. However, previous research show that, at least between the years of 1946-1950, the Swedish judiciary sentenced defendants who lived up to the stereotype of a rapist to a much higher degree, than those who did not. I argue that this is of great importance to follow up.

Researchers have highlighted that the ethnicity of the perpetrator affects how severe witnesses perceive the crime. However, other research shows that cultural, ethnical and religious background is not discussed by the district court although the judiciary reproduce discourses that the defendant, witnesses and the injured party produce. This is a really interesting aspect that I intend to elucidate in this thesis. The defendant's social affiliation influences the decision-making. Masculinity and men's aggression is according to the research, I have presented, linked to each other. Sexual violence could be considered as a tool in order to maintain the patriarchal system. Maybe, in the light of media's portrayal of the defendant, men's aggression and desire of sexual violence is a way to discountenance and stress the abnormal characteristics of men who rape women. However, this would leave us with a wrong description of who rape women, and especially a mistaken understanding of the problem considering sexual violence. As I already mentioned, much of the research highlights the links between guilt and ethnicity, but also other discourses produced and reproduced about the defendant. I would like to contribute to this field by analysing *how* the district courts conceptualize the defendant. Furthermore, the research I have illuminated in this chapter has an important role in regards to the chosen method and how discourses are identified.

## **4. Methodology**

This study is based on a qualitative approach, which is an interpretive research tradition (Bryman 2011, p. 340). Furthermore, it takes the approach of a case study. This chapter will introduce the chosen method, analytical procedure, data collection, the validity, reliability and generalizable of this study. Further, it will highlight the ethical considerations taken during the process of this study.

### **4.1. Social constructionism**

This study is based on Norman Fairclough's critical discourse analysis in order to fulfil the aim and purpose, which is stated above. Discourse analysis is based on the social constructivist view, which takes the perspective of a socially constructed reality (Winther Jørgensen & Phillips 2000, p. 11-12). Discourse analysis, as a method, can be used in order to highlight power and identities, which is of interest in regards of the aim of this study. Furthermore, the use of language is the most central according to this method and focuses on how language can contribute to the study of social phenomenon (Bergström & Boréus 2012, p. 354). I have chosen this method in order to understand the district courts conceptualization of the defendant in rape verdicts. Vivien Burr (2003, p. 3-4) argues that individuals interpret the world on the basis of their prejudice, which is discursive and affected by our history and culture. Law claims objectivity but, what I just mentioned, the Swedish judiciary has difficulties to uphold its objectivity as it consists of individuals, with their personal interpretation of the world, that affirm a judgement. Discourses contribute to examining reality and social phenomenon as the use of language mirrors individual's interpretation of the reality and, upholds, reproduces, shapes and organises the social reality (Winther Jørgensen & Phillips 2000, p. 15 & Bergström & Boréus 2012, p. 354). With this in mind, my personal pre-understanding also influences this study. Therefore it is important that I distance myself in order to accomplish some form of objectivity (Winther Jørgensen & Phillips 2000, p. 93).

## **4.2. Critical Discourse Analysis**

Discourses interlink language and action, action is dependent on language and, language limits our thoughts, which generates a reduced capacity of action (Bergström & Boréus 2012, p. 354). Discourse analysis is nearly related to power and the configuration of power, as this method highlights the practice of discourses and how these can contribute to uphold and maintain unequal power relations i.e. between men and women, social classes or ethnical minorities and majorities (Bergström & Boréus 2012, p. 354 & Winther Jørgensen & Phillips 2000, p. 69). Discourses reproduce and construct relations of power, conversely, discourses challenge and redistribute these relations (Lange 2005, p. 177-178). The critical discourse analysis aims to highlight the discursive practice and its role in maintaining unequal power relations, in order to contribute to societal change and equality (Winther Jørgensen & Phillips 2000, p. 69). Therefore, discourses produced and reproduced by the district court is important to illuminate.

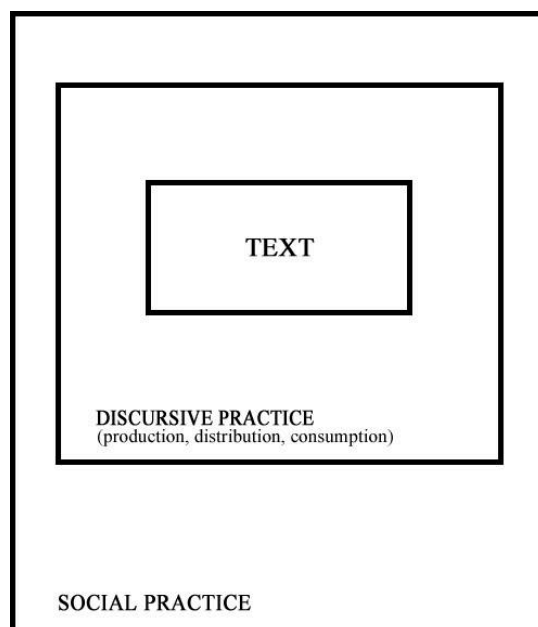
This approach is seeking to change the status of and attitudes to the inhibited social classes; therefore, the critical discourse analysis can not be regarded as politically neutral (Winther Jørgensen & Phillips 2000, p. 70). There is an obvious unequal configuration of power between law and individuals in society regardless of the individual's position relative to law, i.e. victim, defendant, witnesses or "bystander". Discourses reproduced by law contribute to societal beliefs, the reproduction of stereotyping and preconceptions about rape and the offender, as well as the victim.

Discourse analysis often aims at discovering how social identities such as gender and race, (power) relations and systems of knowledge are signified, constituted and constructed (Banakar & Travers 2005, p. 136).

In the view of this, I argue the importance to examine the district courts conceptualization of the defendant in rape verdicts.

### 4.3. Fairclough's Critical Discourse Analysis

In the following, I will introduce Fairclough's critical discourse analysis, which is described and summarised by Göran Bergström and Kristina Boréus (2012) and, Marianne Winther Jørgensen and Louise Phillips (2000) in their respective books. Discourses reproduce and change social practises and structures such as the configuration of power, simultaneously; social practices and structures constitute discourses (Winther Jørgensen & Phillips 2000, p. 71). Unequal relations of power maintains as discourses reproduce and constitute social relations (Bergström & Boréus 2012, p. 374). Discourse is the use of language, in order to understand the power of discourses and, the analysis to examine a larger social context, the discourses have to be integrated with social practice (ibid., p. 375). According to Fairclough, it is important to systematically analyse texts although the text analysis has to be combined with a social analysis in order to elucidate discourses as both constituent and constituted (Winther Jørgensen & Phillips 2000, p. 71-72). Furthermore, he argues, all linguistic usage is communication subdivided into three dimensions, which is the framework for the analysis: text, discursive practice and social practice (ibid., p. 74).



*Fairclough's three-dimensional model (Fairclough 1992, p. 73).*

I chose Fairclough's three-dimensional model as the method of this study. In the following I will describe the three levels of this three-dimensional model in more detail.

#### **4.3.1. First dimension – text level**

In this first dimension, the discourse analyst focuses on the characteristics of the text. The grammatical structure and vocabulary of the text are crucial since the analysis takes its standpoint within the linguistics (Bergström & Boréus 2012, s. 375). The text level seeks to elucidate how discourses are constructed within the text (Winther Jørgensen & Phillips 2000, p. 87). I aim to analyse quotations, according to Bergström and Boréus (2012, p. 406), quotes are often used within critical discourse analysis.

Fairclough introduces several tools in order to carry out the analysis and, two of those tools that I want to cast some light on are; modality and transitivity. Transitivity mainly focuses on the ideological consequences of how the text is presented. By doing this, transitivity is interested in how an event or process is connected with the subject or object, i.e. if the text describes an event or process as a consequence of the actions of an agent, or if the agent is excluded and the text only describes the event or process as an isolated incident. This is important regarding the question of responsibility for the effects of a social phenomenon or the actions of an agent (Winther Jørgensen & Phillips 2000, p. 87). It is hard to imagine a rape verdict where the agent, i.e. the defendant, is excluded since the event is dependent on the acts of the defendant. Therefore, it is interesting to analyse the district courts understanding of the defendant in rape verdicts.

The modality within the text focuses on how and in what way the author presents his or her assertion. The author's degree of agreement with his/her statement influences the receiver's interpretation of the assertion. Statements like "I think it's hot outside", "it's hot outside", and "maybe it's hot outside" are different ways an author could express him- or herself. The discourses and its construction

of knowledge and social relations are influenced by the author's degree of agreement with the assertion, i.e. the chosen modality affects the discourses. The author's degree of agreement also affects if the statement is presented as the truth of knowledge, in other words; facts (objective modality), or if the author states that the text is his or her own interpretation and perception (subjective modality) (Winther Jørgensen & Phillips 2000, p. 87-88). The legal system claims to be and should be, objective in their decision-making. This analysis will show whether the district court is objective or if they make their decisions on the basis of their pre-understanding or stereotypical beliefs. The district court's conceptualization of the defendant is an assessment of the information given to them, they make their decision on what they argue is facts and the truth, i.e. they claim objectivity.

#### **4.3.2. Second dimension – the discursive practice**

The second dimension, discursive practice, focuses on how the text is produced and consumed (Bergström & Boréus 2012, p. 376 and; Winther Jørgensen & Phillips 2000, p. 85). The discursive practice identifies the discourses and, in what way the discourses are constructed. Fairclough aims to identify the interdiscursivity and intertextuality of the discourses.

Interdiscursivity aspires to identify which discourses the text is based on (Winther Jørgensen & Phillips 2000, p. 86). A high degree of interdiscursivity contributes to change, while a low degree of interdiscursivity reproduces the established relations of power or other social phenomena (ibid., p. 87). Intertextuality casts some light on how the text reproduces already existing and produced texts and how it relates to those texts. Therefore, I aim to relate the identified discourses to previous research. It is not possible to avoid using words that other authors have never used before (ibid., p. 77). Intertextuality highlights the exchange of history and future in the sense that newly produced texts is based on old texts and, together the texts influences societal change (ibid., p. 78). The foundation of societal- and cultural change is the reproduction and challenges of already produced texts (ibid., p. 132).



As mentioned above, the reproduction of discourses influences societal change, at the same time, power relations limit societal change. For example, do agents, governments and authorities set the frame of the agent's access of the discourses (Winther Jørgensen & Phillips 2000, p. 78). The identified discourses found in the verdicts of this study may indicate if law maintain or challenge current relations of power.

#### **4.3.3. Third dimension – the social practice**

The third dimension focuses on the broader social practice where the discourses are analysed and integrated into a social context (Bergström & Boréus 2012, p. 377 & Winther Jørgensen & Phillips 2000, p. 90). Fairclough argues that it is necessary to highlight how discourses are constructed and maintained, and also how the discourses relate to previously produced discourses. Further, in this third dimension, social practice, it is possible to critically review the discourses influence on ideology and power (Bergström & Boréus 2012, p. 377). In order to examine the power and ideology of the discourses, the analysis can also include non-discourses (ibid., p. 377 & 398). In the light of this, sociological theory is necessary because discourse analysis is not sufficient in order to elucidate the social practice; the analysis takes almost a macro-sociological perspective (Winther Jørgensen & Phillips 2000, p. 75 & Bergström & Boréus 2012, p. 378).

As stated above, Foucault's notions of discourses in combination with Bourdieu's concepts of symbolic capital, symbolic violence, social class and theories of masculine domination will constitute the theoretical framework of the analysis of the social practice. It is in this third dimension the study finds its conclusions, does the discursive practice maintain, reproduce or hide unequal societal power relations? Does it challenge the societal belief as a step towards societal change and development? The third dimension aims to elucidate the political, ideological and social consequences of the discursive practice (Winther Jørgensen & Phillips 2000, p. 90). Foucault argues that discourses are produced and reproduced by institutions, i.e. the district court, which, influences societal beliefs and relational

aspects among people in society. Bourdieu and theories of masculine domination casts some light on the content and effects of these discourses, in other words, the district court produce and reproduce societal beliefs.

#### **4.4. Analytical procedure**

In order to get an overview of the collected verdicts I started the analysis with a brief reading of all the 46 rape verdicts. After this first reading I divided the verdicts of acquittals and convictions. This division contributed to the understanding of the conceptualization of the defendant in regards of the judgement. However, the collected verdicts turned out to be unequally divided with 15 acquittals and 31 convictions. The aim of this study is not to particularly examine the final judgement, thus I argue it is of importance to cast light on it.

During the analysis I have followed Fairclough's three-dimensional model. In the first dimension I read the verdicts thoroughly and marked interesting quotes, which generated codes. It is preferable to code the material during the analysis (Bryman 2011, p. 523). The different codes later generated themes, i.e. discourses. The reading of the verdicts showed that not only the district courts understanding of the defendant was of importance since interesting information was given of all the parties involved. In the light of this I have read the verdicts as one text and not only the courts argumentation. In regards of previous research and how we interpret our environment through stereotypical beliefs, I argue, all given information is of importance in the analysis of the rape verdicts.

Due to the lack of space I have not been able to present all the analysed quotes, therefore I chose to highlight the frequency of the themes in a table. Further, I have not described the context of the verdicts thus, I argue, the quotes fulfil the aim of this study. In the first dimension I have presented a few quotes representing the different themes, however the analysis implicates all the quotes of the thematisation. All the case numbers of the verdicts are presented in the bibliography for those who are interested.

In the second dimension the identified themes have been analysed in relation to previous research. The thematisation is analysed in a wider perspective and elucidates how the court produce and reproduce discourses. The second dimension also contributes to the meaning of the identified discourses.

In the third and final dimension I analysed the discourses through the theoretical framework of this study. Foucault's notion of discourses cast light on how discourses maintain inequalities in society (Winther Jørgensen & Phillips 2000, p. 20). Social class, masculine domination and feminist legal theory illuminate the content of the discourses. I aim to describe this in more detail in the next chapter of theoretical framework.

#### **4.5. Data Collection**

I intend to analyse rape verdicts settled by the district court of Malmö and the district court of Helsingborg in order to fulfil the aim and purpose of this study. All Swedish citizens have the right to obtain access to public documents according to The Freedom of the Press Act, Chapter 2 § 1 (TF 1976:954). The definition of a public document is stated in TF Chapter 2 § 3 (2002:907), which mean that the document can be read, monitored or be perceived with other technical resources. Furthermore, the document has to be stored or available to the authority, i.e. in order to fulfil the criteria of a public document it has to be established or received by the authority in accordance with Chapter 2 § 6 and § 7 (1976:954). In accordance with the Secrecy Act Chapter 15 § 4 (1982:183) and TF Chapter 2 § 14 (1982:939), the authority has to hand out the document that is requested as long as the document is not covered by confidentiality.

The 3<sup>rd</sup> of February, I emailed the district court of Malmö and the district court of Helsingborg and requested 30 rape verdicts in accordance with Swedish rape law Chapter 6 § 1, Penal Code, established from 2017 and backwards, from each court. The 7<sup>th</sup> and the 8<sup>th</sup> of February I received 30 verdicts from Malmö and 25 from Helsingborg. In total I received 55 verdicts by both district courts. 9 of these

verdicts didn't fulfil the criteria's of this study, since those verdicts covered child rape, sexual violence of children, both the injured party and the defendant were of the same sex and, two of the verdicts covered the rape law according to the previous wording before the 1<sup>st</sup> of July 2013. 15 of the verdicts are verdicts of acquittal and 31 convictions, thereby; the analysed verdicts are not equally divided between acquittals and convictions. However, this is not a juridical study and the aim of this study is not to analyse the decision of the rape trial. Although if the defendant were found guilty or not is interesting to notice in regards of the conceptualization of the defendant. The unequal division of convictions and acquittals could be explained with that the prosecutor does not take legal proceedings in cases s/he doesn't believe have a good chance to lead to a conviction. Thus, this is not what I aim to focus on in this study and I cannot make a statement on the reasons behind this unequal division.

#### **4.6. Validity, Reliability and Generalizability**

The reliability of a study tells us if the results are the same, if the study would be replicated, or if the study, and thereby the results, has been influenced by other factors such as temporary or random conditions (Bryman 2011, p. 49). A high degree of reliability means that the results of a study can be replicated regardless of the researcher. Bergström and Boréus (2012, p. 405-406) argues, reliability could be a bit problematic concerning discourse analysis within the field of social sciences. Furthermore, they highlight the importance of a detailed explanation of the implementation of the analytical procedure in order to enable for future researchers to achieve the same results. In this thesis, I have described the application procedure in as much detail as possible in order to facilitate the ability to replicate this study and its results.

In qualitative studies, one can make a distinction between external reliability and internal reliability. Internal reliability means that all researchers within a team of scientists have decided how the interpretation of the material should be made

(Bryman 2011, p. 352). External reliability means what I have described above, i.e. if the results of a study can be replicated.

However, there are further problems regarding replicating results, especially within social sciences since social environments and social conditions are constantly changing (Bryman 2011, p. 352). The fact that discourse analysis also reflects the researcher's interpretation of the world contributes to a lower degree of the reliability of the study. It is important that the researcher tries to distance from his or her own pre-understanding but also, it is crucial that the researcher is aware of his or her standing point (Winther Jørgensen & Phillips 2000, p. 28-29). I argue that it is impossible to achieve complete objectivity. This means that it is difficult to replicate results from different researchers with different backgrounds, experiences and pre-understandings. With that said, the results of this study has been analysed through my interpretation. Since I have presented the analytical procedure and how I have interpreted the material and discourses as clear and in as much detail I thought was possible, I have raised the reliability of this study. My description of the interpretation and the discourses would facilitate for future researchers to understand and get as close as possible to my starting point and interpretation, which would increase the reliability of this study (Bryman 2011, p. 352).

Validity means that the researcher investigates what was intended to, i.e. observes and identifies what he or she was alleged to examine (Bryman 2011, p. 352). This study aims to examine the district courts conceptualization of the defendant in rape verdicts; therefore, I have requested the analysed verdicts from the district court of Malmö and the district court of Helsingborg. Regarding validity, one can also, similar to reliability, make a distinction between internal- and external validity.

Internal validity means that there is a significant connection or correspondence between the observations the researcher has made and the theoretical ideas

(Bryman 2011, p. 352). The results of this study are examined and analysed together with the results of previous research and the theories presented in this thesis, in order to give a better understanding of the identified discourses. It is of importance to present the discourses in some form of context to increase the credibility, and thereby the validity, of the results (Winther Jørgensen & Phillips 2000, p. 123). The transparency of the study also increases the validity of the results. Critical discourse analyses often use quotes, which benefits the transparency (Bergström & Boréus 2012, p. 406). In this study, I have analysed quotes in a greater extent than isolated words, in order to get a better understanding of the district courts view of the defendant.

External validity refers to if the results of the study are generalizable in different social situations or environments, which could be hard to achieve in case studies, such as in this thesis (Bryman 2011, p. 352). However, I argue, despite the difficulties regarding the generalizability of the results, that it is possible to further analyse the results in a wider perspective, such as the third dimension of the method in this study. Even if this study could be considered a case study it is important to say something about the possible consequences of the discourses in society.

The ability of the analysis to explain, develop and come up with new ideas also increases the validity (Winther Jørgensen & Phillips 2000, p. 123). I have, as mentioned above, discussed the results in a context of previous research and theory in order to get a deeper understanding of the discourses and their potential or conceivable effects in society.

#### **4.7. Ethical Considerations**

Rape verdicts are public documents and, in most of the cases, the personal data of the injured person is restricted. I aim to anonymise the personal data of the victim in the cases where it is not restricted. Furthermore, the personal data of the defendant and potential witnesses will also be anonymised in order to fulfil the ethical principles of confidentiality, which is relevant for this study (Vetenskapsrådet 2002, p. 12). Within all research, according to the Scientific Council, one foundational principle of ethics is to protect individuals from psychological or physical harm, humiliation or indignity (ibid., p. 5). In order to fulfil the purpose and aim of this study, there is no need to produce the identities of the persons involved in the verdicts.

Verdicts are public records and are available to read and take part of for the public. With that said, I also would like to raise the fact that it is of no interest for me and the aim of this study to produce or reproduce the identities of the persons involved within the verdicts. One could discuss the necessity to do an ethical review of the procedure of this study. With what I have now described above and together with that the aim of the research is to illuminate the districts courts conceptualization of the defendant and the verdicts as a text, not the persons involved I took the decision not to send my research proposal for an ethical review.

## **5. Theoretical framework**

In this chapter I aim to describe the theoretical framework of this study. The chosen theories elucidate the societal influence of discourses produced by the legal system and the content of the identified discourses.

### **5.1. Social class and symbolic capital**

The French sociologist Pierre Bourdieu (1995, p. 16) argues that differences between groups only exists in relation to each other. The differences occur within the social room and the agents or groups positions is dependent on four fundamental powers, which are economic capital, cultural capital, social capital and symbolic capital (ibid., and; Bourdieu 1989, p. 17). Economic capital is the most obvious capital constituting economical resources. Cultural capital refers to education and family and, symbolic capital is the resources and contacts an individual have through the membership in a particular group (Bourdieu 1987, p. 4). Symbolic capital is the total volume of the various capital that an individual are considered to have; further, these capitals has to be recognised as legitimate by the other individuals of the social room (Bourdieu 1989, p. 17). In other words, characteristics have to be considered as valuable by other agents (Bourdieu 1995, p. 97). With this in mind, one specific characteristic could be recognized as legitimate in one social room and in another social room, the same characteristic is not perceived as legitimate or valuable.

Symbolic capital is a very important concept to have in mind through the analysis of the verdicts. Witnesses, the injured party and especially, in this case, the defendant has to present themselves in a certain way in order to get accepted and trusted in the eyes of the district court. I argue the district court could be recognised as a closed social room. The Swedish judiciary use its own specialised language and interpret the defendant, injured party and witnesses' statements through their own internal mechanisms (Smart 1995, p. 73). Additionally, I argue that it is important to keep in mind that it is also the judiciary's individual interpretations that influence the decision-making of the district court. Symbolic



capital is a set of resources that could give a group their dominating position in relation to other groups. Resources and access to higher social rooms are important in order to defend the dominant position in society of the group (Järvinen 2007, p. 266). The conceptualization of the defendant and of course also the injured party could, in the light of this, mirror how the district court contributes to social distances between groups in society. I argue that the district court can be seen as a superordinate social room which influences, but also controls how individuals in society should live their life, and most certainly the decisions settled by the district court sets the norms within society.

The overall importance of Bourdieu's sociology is that it shows how social inequalities are culturally sustained through power relations directed towards human bodies and dispositions that reproduce structure divisions (Carrabine et al. 2009, p. 124).

According to Bourdieu, social class does not exist in a vacuum, he argues that social class is created and constructed by differences in the social room (Bourdieu 1995, p. 23). The positions of the agents or groups of agents, which I mentioned above, are also dependent on what Bourdieu calls habitus (ibid., p. 18). Habitus is characteristics, resources, social conditions and tastes that associate practices and recourses of an agent or a group of agents. How we interpret the world and our environment is dependent on our habitus, "the construction of social reality is not only an individual enterprise but may also become a collective enterprise" (Bourdieu 1989, p. 18). This is because the construction is based in the structural constraints of the world they live in. Habitus helps humans to orientate in the social world. Through the habitus, individuals are able to classify not only themselves but also others (ibid., p. 19). This is in line with, what I highlighted in the chapter of previous research, our categorisation of our environment i.e. our pre-understanding and prejudice of other people and groups of people. Habitus not only helps us to orientate it also decide what we understand as good or bad although this interpretation is individual (Bourdieu 1995, p. 19). The decision-making by the courts is firstly dependent on the law that decides whether the

event is a crime or not. What is important to have in mind at this stage is that the event the district court has in front of them in the court, already has been recognised as a crime by the prosecutor. The task of the district court is to decide whom of the defendant or injured party is telling the truth or not. Not to forget, the district court also decides if the alleged act actually was a crime and, of course, what crime, in the frame of what the prosecutor had claimed. Habitus and symbolic capital could influence the decision-making. It is important not to forget that the persons of the judiciary of the district court, and any other court, regardless of their education, is still human individuals who interpret their surroundings in a not so very different way than you and me, and everybody else. The societal categorisation of social class is a product of habitus and organising structures. Social identities are confirmed by differences, further, Bourdieu (1993, p. 300) argues that these differences could be recognised through binary opposites (high/low, rich/poor).

Agents who live very separate and different lives have often less in common and the social space between these groups of agents contributes to the construction of social classes (Bourdieu 1987, p. 5). The concept of habitus could be considered as a form of instrument of power since it is through our habitus, i.e. our norms, values, etc., we make judgements of our environment and the individuals within it. The positions of others and also one's own place is reproduced through the lack of understanding of other groups as a result of the social distance (ibid.). The way we interact with individuals that we consider is a member of another group could, according to Bourdieu (1987, p. 5), be implicated with arrogance. However, reproducing social positions subjected to one's own or others habitus are in many cases an unconscious process. Thus, I find it important to stress and examine if the Swedish judiciary, in this case, the district courts of Malmö and Helsingborg, tend to make difference of the defendant's in the light of who he is as a person or, using the concepts of Bourdieu, depending on his habitus and symbolic capital, i.e. social class. Further, I find it interesting to also take notice of the information given about the injured party within the verdicts. Using Bourdieu's concepts

habitus, symbolic capital and social class, this study should also include how the district court may have interpreted the habitus of the injured party and whether the district court may have found her as a member of “their own group” or not. I argue the interpretation of the injured party could affect the positioning in the social room of the defendant made by the district court. The decision-making in rape verdicts is very much dependant on understanding, i.e. the district court’s understanding of both the defendant and the injured party. As Bourdieu told us, the lack of understanding could lead to arrogance, even if the arrogance is unconscious, and lack of understanding and arrogance reproduce social distances.

Bourdieu (1995, p. 19) stresses that these differences of how we perceive and assess are translated into symbolic distinctions, which is connected to our behaviour. How we behave, our lifestyle and status generate differences and differential distance to other groups who do not share the same characteristics, Bourdieu (1989, p. 20) calls this the social space, which he argues often is a symbolic space. According to Bourdieu, “class inequalities are socially reproduced” by what he defines as symbolic violence (Carrabine et. al. 2009, p. 124). As I mentioned above, the district court and its decisions has the power to influence societal beliefs. Bourdieu (1995, p. 98) argues that it is the state, in this thesis the district court, which has the symbolic power to make divisions within society. “The juridical capital is an objectified and codified form of the symbolic capital [...] which follows its *own logic* [...] [my translation]” (ibid.). Symbolic capital comes in many forms but the judicial capital could give its holders authority to get governmental power which Bourdieu calls an objectified symbolic capital, granted by the state (ibid., p. 101-102).

The state could be seen as the bank of symbolic capital, which is given to persons who works in the name of the state e.g. judges and lay judges. Public actions and discourses have a symbolic impact, since it is exercised by individuals employed by the state and protects the interests of the state (Bourdieu 1995, p. 103). The district courts decisions are public documents, and through its symbolic capital it

contributes to produce “socially guaranteed social identities” or legitimate groups. The state, e.g. the district courts, has the authority to produce what a person is in regards to his or her “legitimate social definition”, the state has the official power to categorize its citizens – man, women, rapist, victim etc. The publication of the district court’s decisions, i.e. the state’s exercise of power, is according to Bourdieu (1995, p. 103-104) the legitimate symbolic violence. The district courts understanding of the defendant, the injured party and their decisions, generates societal beliefs of what a rape is, who the rapist and victim are and their characteristics. Public persons, i.e. the Swedish judiciary, must at least aspire to present their personal viewpoint as the societal legitimate, i.e. universal viewpoint, in their decision-making (ibid., p. 112).

Through the system of symbolic, the state produce and reproduce different habitus, e.g. right and wrong, norms and social frames, and thereby differentiates and make distinctions between individuals and groups. Additionally, the state contributes with their tools of construction to reproduce identities and groups within society (Bourdieu 1995, p. 106). One of the most important distinctions, in order to produce social order in societies with a low degree of differentiation, is the distinction between men and women (ibid.).

## **5.2. Masculine domination and feminist legal theory**

Masculine domination is, according to Bourdieu, one of the most distinctive results of symbolic violence. Symbolic violence is an unobtrusive form of violence, that is difficult to notice and to define, exercised symbolically through including- and excluding mechanisms of groups or, through the lack of understanding of others (Bourdieu 1999, p. 11). Habitus is closely influenced by gender and is based primarily on differences of the bodies were the masculine body are considered to have valuable characteristics which substantiate the dominant position of men (ibid., p. 19ff).

The division between men and women is perceived as natural within the social room and, men and women see themselves through what is typically male or female. However, differences are socially constructed, despite the biological differences between the sexes, there are no natural differences since the masculine domination is exercised through symbolic violence (Bourdieu 1999, p. 36-37).

[T]he whole set of socially constituted differences between the sexes tends to weaken as one moves up the social hierarchy and especially towards the dominated fractions of the dominant class [...] (Bourdieu 2010, p. 383).

Typically feminine and masculine behaviour are social constructions, based on biological differences that generate social differences (Bourdieu 1999, p. 37). Symbolic violence is not limited to only cover psychological violence, as physical violence could be seen as an effect of symbolic violence. Rape, abuse and sexually abused women, is the result of symbolic physical violence. The attempts to clear men's violence against women contribute to a wider meaning to the already established inequalities between men and women (ibid., p. 48). Further, Bourdieu argues, inequalities between men and women and masculine domination constantly reproduces by institutions, i.e. the district court, and individuals who exercise physical and symbolic violence.

Women are victims of the societal characteristics of the "submissive women", concurrently men are also victims of the characteristics of the "dominant male" (Bourdieu 1999, p. 63). R. W. Connell (2003, p. 59ff) highlights previous research and argues that there are no significant differences between men and women regarding intelligence, characteristics, cognitive ability etc., and that there are no psychological differences between sexes as groups. Despite this, and in line with Bourdieu, Connell (2003, p. 69) posits that gender relations are socially reproduced on the basis of distinctive bodily characteristics. I argue, that Bourdieu's concepts of symbolic capital and social class can be analysed through what is considered typical male and female, the more the individual lives up to the expectations of the socially constructed gender identities the more they are

attributed with symbolic capital, which influences their position in society, i.e. their social class. Gender and class are “structuring forces that affect: how people behave, how others react to and define that behavior, who has the power to define and label behaviors, and, how law and law enforcement are organized and focused to control behavior” (Lynch 1999, p. 4-5).

Men are often characterised as aggressive and with a high degree of physical strengths, which of course is based on their body as men are often taller and have more muscles than women, conversely, women are expected to be caring and with less physical strengths (Connell 2003, p. 46). However, as Ekström (2003, p. 210) highlighted in his research, men who prove to have a violent background, mental illness or abuse were more often found guilty within the rape verdicts of 1946-1950. I argue that this is a result of how the court interprets the defendant’s symbolic capital. Further, these characteristics are not accepted in society, the social distance between the court (and its judiciary) and the aggressive and addictive defendant is very far. Even if men are expected to be more aggressive than women, I argue, it is not accepted to be violent against others, certainly not if the violent person have an abuse. Additionally, the dominant class are more likely to constitute the groups who control the legal process (Lynch 1999, p. 18).

The less powerful a person in terms of race, class and gender, the more likely that person is to be subjected to the controlling power of the law (and vice versa). And, the less powerful the class, gender and race to which a person belongs, the more likely behaviors common to that groups will be treated as criminal (and vice versa) (Lynch 1999, p. 18).

Women are also victims of social class and status within the system of law. Women with less social status have more difficulties to defend themselves in the court, contrary to women with a high degree of social status (Sutorius & Kaldal 2003, p. 173). Ekström (2003, p. 160) posits that women’s trustworthiness is based on the cultural normative notion of the “good girl”. With this in mind, women’s social status is influenced by cultural norms of how women are expected

to behave, in the same way, as there are societal expectations of men. This is in line with that young drunken women are less likely to be trusted by the court (Diesen & Diesen 2013, p. 43). Carol Smart (1989, p. 26-27) argue that “law reflects cultural values about female sexuality” and reproduce the phallogentric culture which implies masculine domination. The questioning of the women as the victim and during the whole legal process of a rape trial is, according to Smart (1989, p. 35) “a process of disqualification (of women) and celebration (of phallogentrism)”.

Bourdieu (1993, p. 300) argue that social identities are identified through binary opposites. Smart (1989, p. 33) is pointing in the same direction claiming that one is subordinated the other, e.g. truth/lie, active/passive, rationality/emotionality. The difference between Bourdieu and Smart is that Bourdieu talks about social identities in general terms. Smart, on the other hand, argues that the subordinated one of the binary opposites is associated with women. Feminist legal theory claims that law constructs gendered identities and patriarchal relations where the man is the norm, by laws perspective of the phallogentric culture (Smart 1995, p. 78).

### **5.3. Foucault’s notion of discourses**

As an attempt to describe the district courts societal influence on social identities, symbolic capital and, thereby social class, I aim to highlight Foucault’s notion of discourses. Both Bourdieu and Foucault elucidate power relations and the exercise of power. Bourdieu argues, power is an organised and institutionalised power, Foucault, on the other hand, claims that discourses, i.e. language and text reproduced by institutions, constitute the exercise of power. I argue that Foucault and Bourdieu together could help me to describe how the district courts produce discourses and how these discourses make an impact in society. Together, they contribute to our understanding of social relations (Connell 2003, p. 83).

Foucault argues that discourses produced by institutions, i.e. in this thesis the district court, exercise power, produce and reproduce power relations, by claiming that the discourses are produced and supported by law (Foucault 1993, p. 6 & 8). Discourses, produced and reproduced by institutions, have the power to transform and ignore other forms of discourses (ibid., p. 13). Who gets the power to speak and what s/he is allowed to talk about is limited by discourses (ibid., p. 7 & 26). Discourses with a high degree of status claim the truth, the status of the discourse is dependent on the field it is produced in, and Foucault illuminates how science claims to produce the real knowledge, i.e. the truth. In comparison to other knowledge, science has more status and is able to exercise power over other discourses produced by a field with less status. Law is not science but it has taken a higher position from other discourses (Smart 1989, p. 9). With laws claimed objectivity in mind, I argue, claiming objectivity also includes the claim to have the tools to settle the truth, the verdict claim to have established who told the truth and how the event really took place. Law “claims to have the method to establish the truth of events” (ibid., p. 10).

Legal decisions is an important framework of what should be considered right or wrong, and the societal belief is that “the legal system does dispense justice”; by doing this, we also give greater attention to the court’s pronouncement of guilt, than to the defendant who claims his innocence (Smart 1989, p. 11). I argue, symbolic capital and social class could help us to understand the content of this unequal division of the status of the spoken word. Further, discourses produce what is considered to be the norm of behaviour or personality (habitus and symbolic capital). Additionally, discourses define what is perceived as undesirable behaviour (these differences is fundamental to understand social distance) (Smart 1995, p. 49).

Foucault (2002, p. 103-104) argues, power is not an institution or structure, nor is it some selected individuals ability to exercise power; Foucault claims, power is everywhere. According to Foucault, “power is the name of a complex strategic



situation in a given society [my translation]” (ibid., p. 104). Power always meets resistance because the distribution of power is not definite, and the power relations are the result of inequalities in society (ibid., p. 103-104). Discourses can, except the written or spoken word, also be non-verbal (Hunt & Wickham 1994, p. 8). With this in mind, even if the district court doesn’t pronounce how they perceive the trustworthiness of the defendant, or him as a person, the information given about him in the verdict could create a discourse in relation to the outcome of the trial. The inequality, between the status of the district courts and the status of the defendant, could generate the societal belief and stereotype of “the real rapist”.

Discourses impose themselves upon social life, indeed they produce what is possible to think, speak and do (Hunt & Wickham 1994, p. 9).

Foucault gives an understanding of the power of discourses produced and reproduced by the district court and, that discourses have a great impact on in what we believe. I argue, Foucault’s notion of discourses is in line with Bourdieu’s symbolic violence even if these theories are epistemologically different. The concepts of Bourdieu and theories of masculine domination help me to elucidate the content of the discourses.

## **6. Analyse and results**

In this chapter I aim to present the analysis in accordance with Fairclough's three-dimensional model. The verdicts has been analysed as a whole text. I argue, important information concerning the defendant also is given beyond the specific argumentation of the district court. Furthermore, it could be argued that the given information, which the district court not have rejected are in some way implicated within their assessment. Due to the lack of space within this thesis all of the analysed quotes have not been presented. Therefore, I have presented a table in order to highlight the frequency of the information and conceptualization given through the 46 rape verdicts. This generates that the analysis of the quotas also implicates quotes that is not presented in conjunction with the analysis.

## 6.1. First dimension – text

<b>46 Rape verdicts settled by the district court of Malmö and the district court of Helsingborg</b>	<b>15 Verdicts of acquittal</b>	<b>31 Guilty verdicts</b>
Culture, masculinity and attitudes towards women	1	7
Language, the defendant's difficulties to understand or to be understood	1	5
The injured party were in a particular vulnerable situation when the event took place		9
The defendant changes his statements through the legal process	2	7
The defendant's statements is according to the district court realistic and credible	6	5
The defendant's statements are not realistic or detailed, appears to be a lie or construction, i.e. low credibility	2	15
The injured party is characterised with mental illness, abuse or were affected by drugs or alcohol at the time of the event	11	6
The district court find alternative explanations of the defendant's excuse or behaviour to the injured party after the event	4	
The district court highlight the absence of injuries of the injured party	3	
Severe violence	1 (according to the injured party)	8
The district court find reasons for the injured party to falsely accuse the defendant	4	1
The defendant states reasons for the injured party to falsely accuse him	1	13
The defendant is violent, mental ill, have drug abuse or a criminal background, or were affected by drugs or alcohol at the time for the event	3	17
The defendant is much older than the injured party	1 (my assumption)	2
The details of the defendant's statements is according to the district court remarkable		4
The defendant's excuse or behaviour after the event is perceived as an "evidence" of his guilt		5
The district court finds no reasons for the injured party to falsely accuse the defendant		13
The defendant deny everything		2
The defendant admits the crime		1

## **6.1.2. Guilty verdicts**

### **6.1.2.1. Attitudes towards women**

According to [defendant 2] there is a difference between a girlfriend and a fiancé. You don't touch the fiancé until you are married. You can go out and have sex with a girlfriend. He would not consider touching or having sex with his fiancé (B 2592-16, p. 37).

According to the district court the lack of consequence and other remarkable details – such as in the initial interrogation it was noted that he said that his wife not really wanted to but that it was not a problem, he can have sex with his wife against her will and that he understood she didn't want to have intercourse as she screamed and made resistance – this could not only depend on [the defendants] being in chock or being misunderstood, misinterpreted at the interrogation (B 6331-16, p. 12).

He told her to do as he said and if he wanted sex he should have it (B 5738-14, p. 5).

These quotes are statements of the defendant, what the injured party have stated, or the district court's argumentation. However, I argue that these quotes are interesting in the light of the absence of these types of statements within the exculpatory verdicts. Additionally, the quotations above highlights the defendant's attitude towards women, which I argue, could have made an impact on the district court's understanding of the defendant as a person.

Furthermore the district court argues that [the defendant's] view of the injured party, even if it could be partially cultural, speaks against the trustworthiness of his statements (B 2592-16, p. 49).

The district court states, the defendant's attitude towards women could be partially cultural. The district court reproduces the stereotypical belief of "others" whom have a view of women that the Swedish society does not share.

### **6.1.2.2. Particular vulnerable situation**

The district court concludes that [the defendant], even if slightly intoxicated, must have understood that [the injured party] were in a particular vulnerable situation and incapable of consent to intercourse (B 6975-15, p. 20).

Furthermore he must have realised that she could not have been able to enshrine her sexual integrity because of sleep and intoxication (B 4180-15, p. 14).

[The defendant] offered [the injured party] the main part of the alcohol she consumed during the evening and spent the major part of the evening and night with [the injured party]. Thereby he had full knowledge of [the injured party's] condition that the act has been committed with intention (B 4460-15, p. 11).

In light of [the injured party's] intellectual disability shown in both speech and behaviour, [the defendant] must have realised that [the injured party] had an intellectual disability and that she in [the defendant's] apartment were in a helpless condition, which he in an inappropriate way took advantage of (B 6765-10, p. 10).

Within the guilty verdicts the district court illuminates the injured party and her situation and the defendant's knowledge of her particular vulnerable situation, in a much greater extent than in the verdicts of acquittal. The district court argues, the defendant should have understood the situation of the injured party, even if he was slightly affected by drugs and/or alcohol. I argue, these statements shows, the defendant was not drunk (or drugged) enough to fail to note the situation of the injured party. This leaves us with that if the defendant was drunk enough at the time for the event, he could have missed or misunderstood her situation, thereby whether she agreed or not to intercourse. According to the district court, the defendant should be well aware of the situation of the injured party in cases where the defendant has participated in the situation of the injured party by offering her alcohol. Intoxication, sleep and intellectual disability are conditions that constitute a particularly vulnerable situation. These conditions, I argue, are severe situations that a great number of the victims of rape do not "fulfil". This shows the complexity of rape crimes and the difficulties to be regarded as a "real" victim. The injured party has been considerably drunk, and has not been able to protect her sexual integrity in many of the convictions.

### **6.1.2.3. Language**

Even if [the defendant] had a lack of knowledge in the Swedish language he could not have misunderstood that [the injured party] rejected intercourse since she repeatedly expressed stop and no in conjunction with crying, tried to escape him by pressing her body towards him and stamp on his foot with her heel (8325-14, p. 8).

He has said that the statements he made during the interrogation with the police are not right and that the police must have misunderstood him since there was no interpreter present (B 2422-14, p. 20).

The district court argues, the defendant should have understood that the injured party didn't agree to intercourse, despite his insufficient knowledge of the Swedish language. In the light of this, the district court does not open up for alternative interpretations of the injured party and her will, especially not because of the defendant's lack of knowledge of the Swedish language. Further, I argue, the district court does not consider the defendant's statements of him being misunderstood due to his poor Swedish.

#### **6.1.2.4. The credibility of the defendant and lies**

In the main hearing he has stated in main parts different information than what he told during the police interrogation. His explanation do not convince at all (B 2478-14, p. 8).

It not possible to disregard that [the defendant] initially denied all sexual actions, even if you cant put to much weight to the statements since it can be a defence when you are accused with severe crime and thereby deny all involvement by instinct (B 3807-13, p. 7).

[The defendant] has tried in different ways to answer all questions asked. He has also tried hard to explain discrepancies in his statements, his explanations have made his statements contradictory and difficult to understand than plausible and probable (B 7179-14, p. 11).

The analysis of the guilty verdicts in this first dimension show that it is of importance that the defendant's statements are consistent, thus, this tends to vary in one case to the other. The district court argues that a denial of the defendant could be regarded as a reaction of defence for intuitive reasons. The defendant's explanation of why he changed his statements through the legal process doesn't convince the judiciary at all. With this in mind, according to the district court, the assessment of the reasons why the defendant changes his statements vary regarding its credibility.

If the defendant really make an effort trying to answer all question he been asked, the district court could find this behaviour disturbing and argue that it is not convincing. Inexplicably actions, contradictory, incoherent, implausible, less credible, blatantly false and irreconcilable statements are considered less credible

and the trustworthiness of the defendant's statement diminishes. Further, in some cases the district court argues, the defendant's statements appear to be retrospective. In the light of this, the defendant's statements almost need to be considered as pure lies in order for the district court to lower the trustworthiness of him and his statements.

[The defendant's] statement is rather meagre, especially when for him embarrassing details comes to light. The district court claim that the injured parties statements are trustworthy (B 3565-13, p. 4).

He has given contradictory statements about no meaning no and his statements depend, according to the district court, solely on which answer is the most fitting to the questions asked (B 368-14, p. 12).

[...] the wealth of detail seems remarkable considering the time passed since the occurrence and that the intercourse, according to [the defendant] statements, were unforced (B 1227-12, p. 10).

The analysis shows, a detailed statement could be considered remarkable to the district court, in regards to the time that have passed since the event, or if the defendant were affected by drugs when the event occurred. A detailed statement is in some cases considered as a trustworthy statement, but in other convictions an "overly detailed" statement is questioned by the district court, i.e. a detailed statement should not be perceived as unlikely. Brief, meagre and the absence of details lower the trustworthiness of the defendant within the guilty verdicts. Thus, this could also be considered by the district court as a natural explanation in the light of the defendant's attitude to the crime he has been charged with.

#### **6.1.2.5. The injured party in the guilty verdicts**

She has been depressed since many years and she have had problems of drug abuse (7179-14, p. 3)

[...] statements from the injured party and from those working at the home [for homeless women, my remark] where she lived speaks for that the injured party tried not to use amphetamine but she used cannabis (B 368-14, p. 3).

By [the injured party's] statements it is clear that [she] had no interest in sexual intercourse with [the defendant], he made her to follow him to his apartment and she lacked the ability – to what was to come – to defend her sexual integrity, depending on her intellectual disability (B 6765-14, p. 9-10).

The district court doesn't discuss the psychological health or if she has got problems with drug abuse in regards of her trustworthiness within the convictions. The district court illuminates the fact that it was not possible for the injured party to enshrine her sexual integrity in regards of her intellectual disability, which I argue isn't very remarkable. Thus, this argumentation shows the fundamental attitude to how rape cases should be assessed. It is quite obvious that a person with an intellectual disability have difficulties, or is incapable to enshrine her sexual integrity. However, it does highlights what is required to be considered a rape crime, if this kind of apparent circumstances is required for the district court to be convinced, that the injured party did not agree to what she claims she has been subjected to. Moreover, the district court finds that the injured party has been depressed, that she had addictions, or that she has not had panic attacks since she started with her medication. In only one of the cases, the injured party have an on going abuse of cannabis and trying to refrain from amphetamine.

#### **6.1.2.6. Excuses and the defendant's behaviour after the event**

[...] the text messages [the defendant] sent to the injured party after the event. All speaks for [the defendant] have had sexual intercourse with the injured party against her will. His explanations of the text messages are incongruous and are disregarded (7179-14, p. 12).

[The injured party] described that [the defendant] directly after the event showed regrets by banging his head in the wall mumbling: - "what have I done". The district court finds no reason to doubt the statement (B 10192-15, p. 8-9).

I argue, the district court interprets apologies from the defendant, or that he show regret after the event, as a confession, since he must have been aware, at least after the event, of what he have caused her. If the district court finds the defendant's explanation of why he sent her the text messages incongruous, they also ignore this in their assessment.



### **6.1.2.7. Violence**

During the assessment of the penal value of the crime the district court takes into account that it is an assault rape, taking place in the room where [the injured party] should have the right feel secure in (B 7387-14, p. 11).

Considering the fact that he threatened her with a gun there could be no doubt that [the defendant] realised her non-consent to sexual intercourse (B 4303-13, p. 23).

The condition given above implies that [the defendant] at the time of the deed have shown particular recklessness and brutality. The deed shall therefore be judged as aggravated rape (B 11601-14, p. 20).

Assault rape, threats with deadly weapon, particular recklessness, brutality and aggravated rape are some of the words that the district court use in their description of the crime in some of the convictions. In other cases, the analysis of the district court's description of the crime in some cases show that the violence the defendant have used against the injured party where severe, which according to the court, indicates the non-consent of the injured party. In one of the convictions, the defendant states that the injured party didn't kiss him back and instead turned her head away from him. In another conviction, the defendant said, "she was acting like a dead fish". In the light of this, those statements are obvious signs of that the injured party didn't consent to what she were exposed to.

### **6.1.2.8. Reasons for the injured party to lie about the event**

Initially it should be noted that [the injured party] didn't know [the defendant] and that there are no reasons for her to state an assault that didn't happened, especially since she lacked prior sexual experience and obviously find the sexual theme very embarrassing (B 5534-15, p. 10).

Furthermore the district court excludes that [the injured party] staged the rape because of regrets (B 2422-14, p. 21).

The district court notice during the initial assessment that [the defendant] not only during the sessions has given several different motives of why [the injured party] falsely accused him, my remark], his stated motives are so improbable, except the notion that the injured party wanted money, they are disregarded (B 368-14, p. 11-12).

[...] the separation and custody battle of their daughter or at least where the child should live after the separation. This the district court argue is a course for caution when evaluating the injured party's statements (B 6331-16, p. 11).

The district court discusses if there are any possible reasons for the injured party to falsely accuse the defendant of rape. In cases where the defendant and injured party didn't know each other, it is more difficult according to the court, to find reasons for the injured party to lie about the rape. In about half of all the convictions, the district court cannot find any reasons for the injured party to falsely accuse the defendant. In one of the convictions, the district court finds it very hard to believe that the injured party have made up and fabricated everything. Thus, in another case, the district court doesn't find it unlikely that the injured party falsely accused the defendant in order to get damages, i.e. money. I argue this argumentation is based on the district court's stereotypical belief of the injured party who is an addict. Custody battles and separation between the parties could, according to the court, influence the injured party to falsely accuse the defendant of rape. Therefore should her statements be valued with certain cautious. If the injured party doesn't have any previous sexual experience and together with the absence of reasons for her to falsely accuse the defendant the district court find it implausible for her to lie about the rape.

#### **6.1.2.9. False accusations stated by the defendant**

It's all about the damages. She had problems with her boyfriend, and wanted money (B 10353-13, p. 11).

He suspects the injured party was policewomen on a mission of investigation that night. The fact that they had sex was probably depending that her feelings for him took over. Afterwards, she in first hand wanted to frame him for possession of narcotics, but she had not evidence enough for a conviction, she then tried to sentence him for rape (B 10528-14, p. 12).

He was not masked during the intercourse. He don't know why two women claims he was masked during the two events he his charged with, but the massage salons were close and the women together requests 150 000 SEK in damages. Maybe this is the explanation (B 3524-14, p. 9).

[The defendant] has given a motive of why [the injured party] has accused him with rape, it is because she hates him and that she has instituted a custody battle after the event (B 5738-14, p. 9).

In almost half of the convictions the defendant find reasons for the injured party to falsely accuse him of rape. Damages, revenge, regret, feelings of shame and custody battles are some of the reasons that the defendant states. The defendant states obvious irrational reasons in two of the guilty verdicts. In one of these cases the defendant said that the injured party were a police who let her feelings for him take over. In the other case of irrational reasons of false accusations, the defendant argue, a possible reason for her to falsely accuse him is that she got tape in her hair. I argue, those reasons stated by the defendant, lower the trustworthiness of the defendant and all of his statements.

#### **6.1.2.10. The defendant of the convictions**

Thus he did not do it [find a job, my remark] and therefore he had to beg (B 4381-15, p. 7).

The Social Welfare Board has been in contact with the injured party and her daughter since the current event, as mother and daughter had been placed at a sheltered accommodation. The injured party stated she have been subjected to violence of [the defendant] during their relationship. The daughter has confirmed this to The Social Welfare Board by saying for example “Daddy violent. Daddy scary. Mommy hurt” (B 6331-16, p. 14).

Thus there are some form of psychiatric problems and signs of brain damage and a ADHD diagnosis (B 826-14, p. 22).

At the time for the event at least [the defendant] used amphetamine on daily basis (B 368-14, p. 3).

The analysis of the verdicts show that the defendant is violent aggressive, have psychological problems, living in the margins of the society, addict or have a criminal record in many of the convictions. Further, in some of the cases, drugs or alcohol affected the defendant’s during the event. The district court does not argue about the characteristics of the defendant. Thus I argue, this information influence how the district courts perceive the defendant, as when we meet others we understand and perceive the individual through our pre-understanding and stereotypical beliefs.

### **6.1.2.11. The age of the defendant**

[...] especially not as the criminal act took place in a home where [the defendant] was a guest and that the person who where subjected to the crime were much younger, with no sexual experience, and had reasons to have trust in him (B 5534-15, p. 12).

By the statements from [the injured party] it is clear that she previously have been subjected to [the defendant's] sexual invitation but she have rejected those in reference to the big age difference between them and because [the defendant] was her employer (B 4460-15, p. 10).

The quotes above indicate that the age difference between the parties could influence the judgement of the district court. A big age difference is in the light of the court's statements remarkable and indicates the non-consent of the injured party. The district court also illuminates that the injured party had reasons to trust the defendant or if she have been in some form of dependence on the defendant. I argue that these circumstances lower the credibility of the defendant and increase his blameworthiness in the eyes of the judiciary.

## **6.2. Verdicts of acquittal**

### **6.2.1. Masculinity and attitude towards women**

Thereby, it is not established that it was an attempt rape. The district court gets the impression of a clumsy approach on [the defendant's] behalf, which he gave up when he understood she wasn't interested. If [the defendant] had the intention to rape his wife, he would succeed, according to the district court, because of his greater strength (B 8659-14, p. 24).

I argue, the district court's statement above is important to illuminate since the district court claim that if the defendant really wanted to rape the women, he would have done it on the basis of his bodily strength. This leaves us with a notion of that women are not capable of the required resistance, if the man is fully committed to rape her. In the light of the argumentation above, I argue, that the district court defends the defendant and his intentions.

In the light of the information given about [the injured party] used to let [the defendant] "take sex" against her will, it is not confirmed that [the defendant] had the intention to force [the injured party] to intercourse against her will (B 8659-14, p. 31).

This argumentation is both contradictory and remarkable. The district court indicates that it is accepted that a man “take sex” against a women’s will. Additionally, if this happens frequently it is hard for the man to understand when she really doesn’t want to have intercourse. In cases were she really didn’t want to, it was probably a misunderstanding of the defendant.

### **6.2.2. The injured party were not drunk enough**

[...] considering the police witnesses statements it is clear that the injured party was not intoxicated enough to not being able to express herself, or that she were in a particular vulnerable situation or that [the defendant] have inappropriately taken advantage (B 5139-14, p. 13).

Within the acquittals the district court discusses whether or not the injured party were in a particular vulnerable situation or helpless condition. In these two cases the district court find that she was not as drunk that she couldn’t protect herself. I argue, this argumentation shows, sober women and women that is not in a drunken stupor cannot be raped. Further, if the injured party were relatively sober she could have taken herself out of the situation, if she didn’t consent to intercourse.

### **6.2.3. Does the defendant stick to his statements?**

During the investigation he has given no different statements than what is given in the main hearing in the district court (B 799-15, p. 10).

That the statements differ from what he previous said during the interrogation depends on that the interpreter did not understand him during the first interview and during the second interview the police didn’t listen to him. What he stated in the interrogation about that the injured party had told she didn’t want to have sex, but merely follow her friend home is untrue. He never said so (B 3980-13, p. 9-10).

In regards to the quotes, it is of importance that the defendant doesn’t change his statements during the legal process. Thus, on the other hand, the district court finds it acceptable that the defendant declares two different versions of the event. I argue, it is contradictory that the district court in some cases illuminates, and thereby indicates the importance of the defendant giving a consequent statement through the legal process, in regards of his trustworthiness. While in other cases,

it doesn't seem to be as important. I argue, this could be a result of the district court's lack of objectivity.

#### **6.2.4. The credibility of the defendant in the acquittals**

A main task of the district court is to assess the trustworthiness of the parties; not least the statements of the injured party. When assessing the parties statements it's crucial to note such factors as the stories content as such: e.g. regarding details, logic, clear, vivid, proven truthfulness in important details and free from inaccuracies, contradictions, exaggerations, details hard to explain or doubts in important parts (further reading NJA 2010 p 671) (B 4407-14, p. 14).

In only one of all the analysed verdicts the district court highlight the importance of the assessment of the trustworthiness of the parties involved, but not least the injured party's statements. This argumentation thus indicates that even the defendant's statements should be assessed. In most cases are the injured party and her trustworthiness (together with evidence) of most importance in the judiciary's decision-making, i.e. the defendants statements are not assessed as much as the injured party's in the light of what the courts presents as their basis of their judgement.

[The defendant] claims he was sleeping all night, but added, if sexual intercourse happened, it would have been in consent with [the injured party] (B1959-11, p. 10).

In this case [the defendant] have given a detailed, extensive and vivid statement (B 4407-14, p. 14).

However, even if the courts focus on the statement of the injured party more they do not ignore the defendant's statements. As I have mentioned above, detailed statements increases the trustworthiness of both parties. Thus I argue, on the basis of the quotes above, the injured party's statements determine the trustworthiness of the defendant. This I argue in the view of that the defendant, in one of the cases, states that he is incapable of remembering the event since he slept all night but if something happened, he could assure that it had been preceded by consent. I argue, this statement should have been discussed by the district court since he cannot possible know if he were asleep.

The district court finds [the defendant's] statement about what occurred as a creditable course of event (B 799-15, p. 10).

Furthermore there are no obvious contradictions (B 5139-14, p. 13).

The quotes above shows the importance of the defendant's statements are realistic or, at least, not unrealistic according to the district court. I argue that this is a subjective interpretation, which question the district courts claim of objectivity. The quotes don't describe why the statements were considered realistic.

### **6.2.5. The injured party and mental illness**

Thus it should be noticed that the injured party is diagnosed with bipolar disorder and, according to herself, neglected her medical treatment at the time for the alleged criminal acts. No investigation have been presented by the prosecutor in what way the diagnose can influence a persons interpretation of reality. These circumstances generates that the injured party's statements should be perceived with more caution than normal (B 6191-15, p. 18).

At the time for the incident she was an addict, but she was not intoxicated with something else than her prescribed medicals [...] (B 5124-14, p. 5).

In the vast majority of the verdicts of acquittal, the injured party suffers from mental illness, have had or have an on going abuse, or that she were affected by drugs or alcohol at the time for the event. Additionally, in two of the cases, the injured party had been exposed to sexual violence before, thus the district court doesn't discuss this any further. However, I argue, that the district court, counsel for the defence or the prosecutor do find this relevant to illuminate for some reason.

### **6.2.6. Alternative explanations**

The fact that [the defendant] has sent text messages in which he apologized could indicate that he did assault [the injured party]. Considering the previous messages that [the injured party] sent to him could [the defendant's] explanation that the apology was meant for given wrong age, are more trustworthy (B 5566-14, p. 17).

The text-messages conversation between [witness] and [the defendant] supports that [the defendant] in his opinion has acted wrongly in some way during the midsummers night. The content of the text messages does not contain a confession of crime. The interpretation of the messages [the defendant] sent to [witness] have

to be regarded that it is not clear that [the defendant] understood what the [witness] meant with his messages (B 5407-15, p. 13-14).

The district courts find reasons of the defendant's apology that doesn't relate to a possible rape. I cannot and do not intend to confirm or deny the reasons that the judiciary discuss. Although, I find it interesting that the court accept the defendant's explanation of why he apologized, even if the text messages that were sent before could indicate something else than an apology based on that he knew about the assault he now is charged with. Based on the quote above, there is some uncertainty about the intention of the messages. Despite this, the district court made their judgement of what they found were the most realistic explanation. In the other quote, the argumentation show that the apology has to contain a confession and what the apology was about. Further, the district court argues, the defendant could have misunderstood what he apologized for. I argue, this argumentation indicates that the court defends the defendant.

Later that day, during police report, [the injured party] wrote to [the defendant] on "messenger" accusing him of rape. In answer to this [the defendant] wrote four questions marks, but later wrote among other things "I was to drunk, I didn't mean to". In later messages [the defendant] apologized asking what to do to be forgiven.

[The defendant] stated that he was "choked" by [the injured party's] accusations and he wrote that he was drunk in order to stop [the injured party] writing to him. He thought considering the friendship with [the injured party] that it was stupid of him to follow [her] home and having sex with her and that's why he apologized. Since he knew he did not rape [her] he was not "upset" by the accusation (B 10645-15, p. 10-11).

In the light of this quote, I argue, it is interesting that the district court doesn't discuss the fact that the defendant apologized to the injured party after the event. The absence of discussion indicates the lack of reaction of the defendant, when he was accused of rape, is an acceptable explanation indicating his innocence.

Considering the statements that [the defendant] became nervous when he saw the police and was stopped and the fact that he didn't charge the taxi trip, the district court does not find this remarkable in it's context (B 5139-14, p. 13).



This argumentation also indicates how the district court defends the behaviour of the defendant after the event. I argue, the defendant's behaviour also could have been perceived as a reason to question the defendant's trustworthiness. According to the argumentation above, it is not remarkable that the defendant acts nervous when the police confront him directly after the alleged rape.

The evidence speaks strongly for things happened during [the defendant's] visit to [the injured party] as [he] hasn't told. The statements given by [the defendant] indicate that he has a girlfriend. It is not unthinkable that he, in regards of this condition, didn't want to tell all that occurred during the visit at [the injured party]. Thereby there are many possible explanations to why he made false statements other than that he raped [the injured party] (B 5566-14, p. 14).

Above I highlighted the importance of the consistency of the statements. This quote show the opposite, a behaviour that in other cases had indicated the blameworthiness of the defendant is in this case, according to the district court, not. Instead, the district court finds reasons of why the defendant doesn't tell everything that happened during the event. The district court argue, one possible reason of why the defendant lie is to protect his relationship with his girlfriend, i.e. the court accepts lies if they find a good reason for him not to tell the truth.

### **6.2.7. The defendant of acquittal**

He stated that he earlier had been a suspect of rape (B 1959-11, p. 7).

The referral stated that [the defendant] suffered from stress and worries when the police took him to interrogation. [...] He has suffered anxiety and depression. The reason is the accusations of rape, the prosecution and the feeling of not being trusted (B 4407-14, p. 13).

In three of the acquittals, the defendant has been suspected to other crimes and in one case of rape. In one of the cases, the defendant states his wish for helping other people. Further, it is highlighted that the defendant has suffered from anxiety and depression after he got prosecuted of rape. This is in stark contrast to the other analysed verdicts. I argue, this indicates the trustworthiness of the defendant.

### **6.2.8. The absence of violence**

The medical examination of her body didn't show signs of injuries expected by such treatment. The examining doctor has not found any injuries of [the injured party's] genitals (B 1959-11, p. 11).

The fact that [the injured party] didn't show any injuries after the event and that [the defendant] didn't follow her when she left the bedroom indicates with certain strength that [the defendant] had no intention to rape [her] at the time (B 8659-14, p. 24).

These quotes speak for themselves, the absence of injuries show the absence of violence and dismiss the defendant as an aggressive and violent person. Violence is, according to the legal system, crucial in the judgement of the alleged rape to be considered as a "real rape". Contradictory, the quote below indicates severe violence. However, this is what the injured party stated and she was suffering from mental illness.

He wrapped her face in plastic. She panicked and pinched the plastic at her mouth to be able to breath. She tried to tare away the plastic but he continued to wrap her face. She screamed. [...] He told her he would hang her. She was afraid, screaming at him to stop (B 6191-15, p. 9).

### **6.2.9. Reasons for the injured party to lie about the rape**

The district court describes how they make their judgement and central factors of the decision-making in many of the verdicts.

[...] in previous case it appears the court very thorough considered circumstances indicating less reliability of the injured party's statements, e.g. personal contradictions between the injured party and the defendant, the injured party's need of an explanation in regards to her family or that the injured party has reasons to falsely accuse the defendant (B 2636-13, p. 9).

The argumentation elucidates the possibility the injured party could have motives to give false information, and that personal contradiction between the defendant and the injured party could be the reason behind the false accusation. I intend to highlight reasons stated by the district court of why the injured party falsely accused the defendant.

During the assessment of [the injured party's] statements, a possible reason for her to falsely accuse [the defendant] of rape, could be some kind of revenge as [the defendant] wrote a letter to The Swedish Migration Board stating that [the injured party] did not live with him, aiming to make her leave the country, has to be considered. Furthermore, another motive for [the injured party] to falsely accuse [the defendant] for rape could be that she was getting better chance to stay in Sweden after their break up (B 2636-13, p. 9-10).

It should also be noted that [the injured party] had an interest in describing the defendant as violent for her parish to motivate breaking up with him, further – without any dependence of [the defendant] – she continued to live with him for a long time even though she stated she was afraid of him (B 8659-14, p. 22).

The district court's statements shows, they try to find possible reasons for the injured party to lie about the rape. In the light of this, it is the defendant whom is the victim of the women's desire of revenge, or that she through the lies about the rape tries to maintain her relationship to somebody or something that is of importance for her as a person.

### **6.3. Second dimension – discursive practise**

#### **6.3.1. The abnormal defendant**

In stark contrast to the verdicts of acquittal, the analysed rape verdicts indicate that the characteristics of the defendant of the convictions are highlighted in a much greater extent. With a few exceptions, the characteristics of the defendant in the verdicts of acquittal are not present. Previous research has highlighted the difficulties of the jurors to put stereotypical beliefs and biases aside in their judgement in rape trials (Taylor 2007, p. 6). Furthermore, our pre-understanding of a social group affects the expectations we have on the individuals included in the particular group. This social categorisation is something all humans do in order to orientate in the world and our environment (Lindholm & Bergvall 2006, p. 41). I argue, the Swedish judiciaries also are influenced by biases while making their judgement of the human standing in front of them. The previous research that I have highlighted in this thesis elucidates inter-group and intra-group biases in the light of race. However, I argue, these inter-group and intra-group biases also could be translated into criminal behaviour, as the group biases is based on

the fact that people tends to attribute more responsibility and give harsher sentences to individuals of the inter-group (Field 1979, s. 277).

Characteristics of the defendant in the convictions could be summarised with the following words: violent, aggressive, mental illness, alcohol or drug abuse, criminal or an individual who lives in the margin of the society. This is in line with Ekström's (2003) findings in his research, studying rape verdicts between the years 1946-1950. He argues, a defendant who lives up to the stereotype of a rapist is more likely to be found guilty (*ibid.*, p. 210). My analyse of rape verdicts, settled 60-70 years later, indicates the same results based on the fact that these types of characteristics of the defendant is more or less excluded in the verdicts of acquittal. The characteristics presented above could also be seen in the light of social class. It is more difficult for the judiciary to understand the defendant's situation if they don't belong to the same social class (du Rées 2006, p. 273-274). This also supports the discussion above considering inter-group and intra-group. The characteristics of the defendant is, for the most part, not discussed by the judiciary of the district courts, thus it is information mentioned within the verdict, which the judiciary has been given. I argue in the light of what has been highlighted above, the judiciary of the district courts is affected by the stereotype of the real rapist.

### **6.3.2. The injured party**

Similar to, but at the same time in contrast to the convictions, the district court's cast light on the characteristics of the injured party in the verdicts of acquittal. The characteristics of the injured party are not as present in the convictions as they are in the verdicts of acquittal. In only one of the convictions, the injured party is characterised with an on going drug abuse. In some of the other cases, it is only mentioned that she have had a drug abuse or been treated for mental illness such as depression or panic attacks. It is not only the defendant who is affected by the judiciary's stereotypical beliefs about a "real rape", since these biases often refers to the pre-understanding of the victim (Taylor 2007, p. 6). The injured party of the

verdicts of acquittal is characterised with mental illness, abuse or that she was drunk or had been taking drugs at the time for the event. Compared to the lack of statements by the district courts about the defendant and how it affects the judgement of him as a person and the trustworthiness of his statements in the convictions. The judiciary seems to find the characteristics of the injured party as a very important part of her credibility. This, I argue, is not only based on the comparison of how detailed the information about the injured party is in the verdicts of acquittal, but also the district court, in several cases, argue that her statements must be evaluated with caution, in light of what has emerged about her as a person. I argue, the characteristics of the defendant affect the judgement of the district court, based on the fact that an abnormal behaviour of the defendant was more present in the convictions. However, this was not something the district court articulated within the verdict. It is thus very interesting that the district court find it important to specifically point out the characteristics of the injured party as crucial in the light of the judgement of her statements.

### **6.3.3. Language**

Diesen (2006, p. 192) argues, a suspect or perpetrator of another ethnic origin has more difficulties to defend himself. I argue, in accordance with Diesen, this could, among others, be seen in the light of the use of language. In one of the verdicts of acquittal, the defendant states that the translator misunderstood what he said during the interrogation. This could be seen in the light of the fact that the defendant's states in three of the cases of the convictions, they have had problems with the translator during the interrogation. Additionally, the district courts argue about the defendant's poor Swedish, in two other cases of the convictions, in regards to their ability to understand the injured party when the event took place. du Rées (2006, p. 274-275) argues, a poorly used language affects the credibility of the defendant. The district court's reject the fact the defendant could have had difficulties to understand the will of the injured party, in regards to that she does not only express herself through words.

#### **6.3.4. Lies**

The analysed rape verdicts of this study show the importance of a consequent statement, i.e. that the defendant doesn't change his statements during the investigation or main hearing at the court or in between. The district court's argumentation of the different statements indicates that the defendant's explanation is dependent on the judiciary's judgement of the trustworthiness of the explanation. Furthermore, the judiciary make an assessment of the probability of the defendant's statements. It is very present within the convictions that the defendant's statements is implausible, contradictory or retrospective, which indicates an conviction is dependent on statements of the defendant that appears to be pure fabrications. This, I argue, should be seen in the light of the lack of these kind of statements within the verdicts of acquittal, were the district court conversely highlight the probability of the defendant's statements, in only a few of the verdicts. Additionally, it is of importance to highlight that it requires pure lies and fabrication in order to disqualify the statements given by the defendant.

#### **6.3.5. Violence**

Previous research has highlighted the fact that it often requires sever injuries of the victim in order to be regarded as a real rape. Andersson (2004, p. 265) argues, the injuries of the victim are crucial in the judgement of the defendant's guilt. Within the verdicts of acquittal, the violence of the alleged offense is close to absent except for one case where the injured party describes a serious violence. However, the district court appears to dismiss these statements in the view of her mental illness. Furthermore, the district courts highlight the victim's lack of injuries in some of the verdicts of acquittal. The violence of the offense is much more present within the convictions. Assault rape, gunpoint, particular recklessness, aggravated rape and brutality are words the district court describes the criminal act in the convictions. Both Mitchell et. al. (2009, p. 1570ff) and Sutorius and Kaldal (2003, p. 169) argues, the offenders motivated by violence, or a rape characterised by violence is more likely to be regarded as a real rapist or

rape. This is also in line with what I have described above in the discourse of the defendant as a violent and aggressive man.

#### **6.3.6. Alternative explanations presented by the district courts**

Within the convictions, the district court finds the text messages the defendant has sent to the injured party saying he is sorry as evidence of that he has committed the crime he has been charged with. The district court finds the defendant's explanation of text messages incongruous, which is in line with my discussion above regarding obvious lies. The most interesting part is actually not that the district courts find these types of text messages as a form of evidence, but that they find alternative explanations for what the messages meant, and the purpose of the defendant to send them in the exculpatory verdicts. In other words, in the convictions, text messages are considered a form of evidence, while an excuse from the defendant has nothing to do with the alleged rape in the verdicts of acquittal. I argue that this gets even more interesting in the light of the lack of argumentation about the defendant's excuse in one of the cases. This could, according to me, only be understood as the district court accepting the defendant telling the injured party that he is sorry, when she just blamed him for rape, in order to get her to stop text him, which is very remarkable in comparison with the convictions.

#### **6.3.7. The credibility of the defendant's statement**

The district court refers to precedents in their judgement of the statements of defendant, but especially of the injured parties statement. However, this thesis does not focus on the district courts understanding of the injured party, therefore, I aim to shed some light on how the district court describes the statements of the defendant. It is remarkable that the district court seems to accept the fact that the defendant in one of the acquittals claims he slept all night and for that reason is incapable to remember what happened. The importance of a detailed statement is less prominent in comparison with the convictions. The district court describes the statement of the defendant in the convictions with words like general explanations

and meagre. A detailed statement is at the same time questioned within the convictions. The district court finds it remarkable in a few of the guilty verdicts that the defendant has been able to give a detailed statement. I argue, this indicates that the district court considers a detailed statement as an advantage in regards to the defendant within the exculpatory verdicts. Conversely, it is not beneficial to the defendant in the guilty verdicts as it could be interpreted by the district court as a sign of falsehood.

#### **6.3.8. False accusations**

The district court finds in some of the exculpatory verdicts reasons for the injured party to blame the defendant with false accusations. In this case, the defendant is a victim of the lies of the injured party. Reasons that the district court find credible in the verdicts of acquittal is retaliation or that the injured party had to make up a lie and falsely accuse the defendant in order to maintain relations with, for her, important people. Within a great amount of the guilty verdicts, the district court argues, they cannot find any reasons for the injured party to falsely accuse the defendant. What I have presented above is an indication of the court's attitude towards women and their belief in women driven by revenge. However, the analysis of acquittals shows, only one of the defendants argues he has been blamed with false accusations in the light of her wish to hurt him. By contrast, the defendant's reasons of why he has been falsely accused are very present within the guilty verdicts. Damages, revenge, regret, feelings of shame and custody battle are some reasons presented by the defendant. I argue, aside from two of the cases where the defendant states incongruous reasons for the injured party to direct false accusations towards him, the district court's and the reasons stated by the defendant is a similar argumentation. The main and obvious difference is who articulated the possible reasons for her to lie.

#### **6.3.9. Culture, masculinity and attitude towards women**

In some of the convictions the defendant states an objectifying attitude towards women. Further, I argue, the attitudes stated by the defendant are an out-dated and



patriarchal understanding of women's role in relation to men. The injured party has also raised some of the statements of the defendant's attitude towards women in the convictions. Fahlberg and Pepper (2016, s. 673ff) highlights, sexual violence against women is a tactic of men in order to maintain the patriarchal system. The fact that the district court doesn't discuss the defendant's attitudes towards women is remarkable. I argue, the district courts had a great opportunity to indicate their position regarding the patriarchal system and condescending attitudes towards women. However, in one of the cases the district court comments the defendant's view of the injured party as partially cultural. Pettersson (2006b, p. 177) stresses, the district courts reproduce the discourse of "the other" produced by witnesses, defendants and injured parties, which I argue, is in line with the labelling of the defendants attitude as "cultural".

Patriarchal attitudes towards women are not as present within the exculpatory verdicts except for a few exceptions. Connell (1996, p. 69) argues, masculinity focuses on men's bodies, aggression and men's uncontrollable desire to rape women. In one of the exculpatory verdicts the district court elucidate the fact that the defendant had raped the injured party if he had wanted to in regards of his bodily strengths. This statements is similar to the discourses Andersson (2004, p. 265) found in her study, the court reproduce a heteronormative perspective, arguing women's bodies are open and available, the lack of injuries indicates the innocence of the defendant. Additionally, as mentioned above, sexual violence is a tool in order to maintain the patriarchal system. The district court stresses, the defendant had managed to rape her if he had wanted to, which I argue, include what Connell (1996, p. 69) highlighted about the stereotype of men with uncontrollable desires. The district court argues, in the same verdict, in the light of the fact that the injured party allowed the defendant to have sex with her against her own will. It is problematic to determine if he intended to rape her at this particular time. This is an important argumentation in the view of what Andersson (2004) stresses regarding women's bodies as open and available together with Connell (1996) who illuminates masculine desires.

### **6.3.10. Age**

The age of the defendant is not discussed as much within the analysed verdicts except for two of the guilty verdicts. In these two verdicts, the district court refers to the age difference between the injured party and the defendant. In both of these cases is the defendant much older than the injured party. I argue, the age difference could be interpreted by the district court as abnormal. Especially in the light of the district court stresses the fact that the injured party has rejected the defendant before, based on the age difference, in one of the cases, and that the injured party had reason to feel secure in his company, in the other. I argue, this could be related to the findings of Lindgren and Lundström's (2010, p. 322 & 315) study, which showed that media characterised the defendant's with deviant behaviour in the cases were he initially was seen as "normal". At the same time, media presented the injured party as the ideal victim. By contrast, in one of the exculpatory verdicts, I argue, the defendant is most likely much older than the injured party. Thus, I have to stress the fact, this is nothing, the district court highlights or discuss within the verdict. However, the birth date of the defendant can be read in the verdict. The personal information of the injured party is covered by confidentiality yet, I argue, it is well founded to assume that the injured party is much younger than the defendant. I argue, in this case, in the light of the injured party has an on going drug abuse, she have dismissed herself to be regarded as the "ideal victim". One can only speculate if the age of the defendant had been more present in the argumentation of the district court, if the injured party lived up to the stereotype of the ideal victim.

### **6.4. Third dimension – social practice**

There is no clear line between the discursive practice and social practise within Fairclough's three-dimensional model (Winther Jørgensen & Phillips 2000, p. 93). Therefore, parts of the discussion in this dimension are to some extent repetitive. However, I aim to cast some light on the societal effects in broader terms of the discourses presented under the previous heading.

The district court's mirrors societal beliefs and at the same time it influence norms within society. The judiciary of the district court make their decisions from their individual perspective, i.e. their habitus, the fundamental framework of the decisions is of course the law, however, laws has to be interpreted by the judiciary. The analysis of the rape verdicts within this study show, if the defendant have an aggressive and violent background, mental illness or abuse the outcome of the verdict is more likely to find the defendant guilty. Through our habitus we decide what we interpret as good or bad behaviour (Bourdieu 1995, p. 19). A defendant with these characteristics has a great social distance in relation to the judiciary of the district courts. Further, the district court reproduce what is considered a legitimated and normative behaviour through their decision-making, since the characteristics have to be considered as valuable (ibid., p. 97 and 103-104).

The lack of understanding of other groups could be part of the explanation of these findings, but I think the most important fact is that our interpretation of other groups often implicates negative attributes. The symbolic capital of the group of defendant's with these characteristics is, I argue, low since their symbolic capital is not legitimate according to the district court (Bourdieu 1989, p. 17). The symbolic capital of the injured party seems to be in line with what I found regarding the defendant. If she has a low symbolic capital the defendant is more likely to be found not guilty. The district court exercise power through discourses and, symbolic violence produce class inequalities (Carrabine et. al. 2009, p. 124). The decision-making of the district court shows, individuals with less symbolic capital are more likely to be perceived as less trustworthy.

I argue, this illuminates the district courts lack of objectivity. As I mentioned in the previous chapter, the district court's does not discuss the defendant's characteristics as much as they do about the injured party and her eventual mental illness. However, the judiciary's attitude towards mental illness regarding the injured party shows their incapability to understand its complexity. The social

space the district courts indicate by the discussion of mental illness is a foundation stone of the construction of social class (Bourdieu 1987, p. 5). Further, I argue, this reflects and also produce whom the “real rapist” and the “real victim” are. Societal expectations of typical male and female behaviour are also affected by these discourses as it reflects what is accepted or not. The differences between men and women are socially constructed, which is based on masculine domination (Bourdieu 1999, p. 37 and 19ff).

The real rapist is violent and aggressive, the real victim have visible injuries. In the light of the complexity of rape crimes, I argue, it could be hard for a women to qualify as the real victim, and easier for men to disqualify as the real rapist, this is in line with previous research. Feminist legal theories claim that law take a phallogocentric perspective in their decision-making and thereby reproduce masculine domination (Smart 1989). In line with this, Bourdieu argue, symbolic violence, often exercised by institutions, reproduce masculine domination. It requires much more to be regarded as a real rapist than to be perceived as the real victim. With this in mind, the district courts do reproduce discourses of masculine domination. Following Foucault’s notion of discourses, these inequalities are reflected in society. To be regarded as the real rapist it also requires, more or less, pure lies. This reflects that lies are not valuable and legitimate behaviour, which is important in regards of the defendant’s symbolic capital (Bourdieu 1989, p. 17).

The more it is obvious that the defendant lies or fabricates the more likely it is for him to be found guilty. The fact that pure lies affect the trustworthiness of the defendant is not very spectacular. On the other hand, I argue, most lies are not as easy to see through. It is also very interesting that the district courts argumentation of similar events or behaviour is considered to be a disadvantage of the defendant in the convictions, simultaneously; it is interpreted by the court as an advantage of the defendant in the verdicts of acquittal. I argue, this is a result of the district court’s interpretation of the symbolic capital and social class of the defendant. In the case where the court already has found the defendant innocent,

they find alternative explanations of behaviour they consider disturbing in the convictions. This is a form of symbolic violence, exercised by including- and excluding mechanisms, which I argue, is a result of how we perceive others in respect of their symbolic capital and habitus.

Discourses produced and reproduced by the district court sets itself above other discourses (Smart 1989, p. 9 and; Foucault 1993, p. 13). Discourses decide who has the authority to speak (Foucault 1993, p. 7). The comparison of the convictions and verdicts of acquittal show, it is of importance who articulates the reasons of the injured party to put false accusations against the defendant. First, I found it very crucial to stress that the stereotype of women as a liar with a desire of revenge is a part of the patriarchy. When the district court opens up for this to be a meaningful discussion they reproduce the stereotype of women but also masculine domination within society. Second, in the verdicts of acquittal the district court highlights reasons for the injured party to give false accusations against the defendant. By contrast, in the guilty verdicts, the district court does not find these types of reasons. Instead the defendant claims several reasons for the injured party to falsely accuse him of rape. As I mentioned in the previous chapter of discursive practise, the important difference is whether it is the district court or the defendant who pronounce the possibility that the injured party's lies. This indicates the district court's exercise of symbolic violence and how the legal system determines who has the authority to talk, and the importance of the spoken word. Further, the district courts maintain its position in society.

Similar to Pettersson's (2006b) result of her research, this study has not found any significant argumentation of the defendant's cultural, ethnical or religious background. Discourses set the framework of how we interpret the world and symbolic capital explains the content of the discourse. The reproduction of "the other" comprises the interpretation of the symbolic capital and social class of the other, which generates the positioning of the group or individual in the social room. The district court's argumentation of the defendant's attitude towards

women is almost absent, thus, non-verbal discourses does also exercise power (Hunt & Wickham 1994, p. 8). When the district courts ignore the defendant's attitude towards women, which reflects patriarchy, regardless of the outcome of the rape verdict, it also reproduce masculine domination. I argue, it is of most importance that the district courts mark their distance from these types of attitudes. In only one case, the district court made a comment on the defendant's attitude towards women, which where defined as "partially cultural". Firstly, by this comment the district court repudiate the severity of the attitude. Secondly, the district court ascribe "the other" to have an attitude towards women. This means that the district court not only reproduce patriarchal attitudes and thereby inequalities between men and women. This comment also reproduce the identity and behaviour of "the cultural others".

The district courts reproduce masculine domination and male identities through their discussion about the defendant and his bodily strength. Sexual violence against women is a form of symbolic violence that maintains the patriarchy (Bourdieu 1999, p. 48). Further, the victim is prone to double stigmatisation, not only does the district court accept the bodily inequalities between men and women, they also mirrors that men rape women, if they really want to. In this situation women cannot do anything about it, also it reproduce the masculine stereotype of men and their bodily strength and aggression (Connell 2003, p. 46). Additionally, this puts men on a higher position than women. It victimises women and reproduce male identities not only through his bodily strength but also men's sexual desires, a sexual desire women are expected to meet. Since women are expected to fulfil the desires of men it could happen that she sometimes do this against her own will. If she used to do this, the district court argues that the defendant maybe did not intend to rape her. He was only trying to meet his own sexual desire; he is a victim of his needs. The social characteristics of women includes that they are submissive in relation to the dominant male (Bourdieu 1999, p. 43). The discussion above indicates that the district court tries to clear the

defendant's violence against the injured party, which maintain inequalities between men and women (ibid., p. 48).

This is the typical stereotype of men, reproduced by the district court. Even if this is only one case, my material is little in comparison with the number of rape verdicts yearly determined by the district courts across the country. This is deeply problematic, the argumentation disqualifies the defendant as a rapist, and it reflects an attitude towards women in society and objectifies women in regards to men's sexual needs. It reproduces what a real rape is and who the victims are. Further as I mentioned above, it affect societal beliefs, social identities and maintain not only the social space between men and women, but also the distance between men, and among women, since it reproduce stereotypical characteristics of both men and women. The positioning of others in the social room is fundamental regarding the construction of social class. Through the district courts statements about and conceptualization, i.e. the symbolic violence, of the defendant and the injured party, the district court reproduce and construct social class.

## 7. Conclusion

The aim of this study has been to examine the district court's conceptualization of the defendant in rape verdicts. In order to fulfil the aim and answer the research questions of this study, I have used Fairclough's critical discourse analyses. The second dimension (discursive practise) and the third dimension (social practise) elucidates the identified discourses and casts light on how the discourses influence and are influenced by societal beliefs. The results and conclusion of this study is found in the previous chapter (6.4.), therefore I intend to summarise what I have presented in the third dimension in this chapter. In this final conclusion, I aim to answer the two research questions defined in order to fulfil the purpose of this study: *How are discourses produced and reproduced by the Swedish judiciary of the district courts conceptualization of the defendant in rape verdicts? And; are there any differences in the Swedish judiciary of the district courts conceptualization of the defendant in the light of the defendant's background and if the defendant has a vulnerable position in society?*

The lack of argumentation of the defendant's characteristics indicates that the district court reproduce non-verbal discourses. These discourses contained the characteristics, which describe the "real rapist". In about half of the convictions the defendant are characterised as violent, aggressive, addict etc., these characteristics are not considered as normative behaviour and mirrors the defendant's lack of symbolic capital (Bourdieu 1995, p. 97). This, I argue, also influence the defendant's credibility. Groups that do not share the same lifestyle and characteristics have a greater social space (symbolic space) between them (Bourdieu 1989, p. 20). The distance between different groups and the positions in the social room of others, are often influenced by the lack of understanding of the other group (Bourdieu 1987, p 5). The characteristics of the "real rapist" are not considered to be legitimate by the district court. Bourdieu (1987, p. 5) argue, individuals of "other groups" are often treated with arrogance, which reproduce social distances. The district court contributes to produce "socially guaranteed social identities" by the publication of the rape verdicts, and they have the official



power to categorize its citizens, i.e. the real rapist and the real victim. The district courts exercise of power is the legitimate symbolic violence (Bourdieu 1995, p. 103-104).

It is also of importance to highlight the district courts view of the injured party since the discourses reproduced about her also reflects discourses about the defendant. The characteristics of the injured party in the acquittals illuminate her lack of symbolic capital. She is characterised with psychological problems and addictions, i.e. characteristics similar to those of the “real rapist”. Thus it is very important to stress the fact that the district courts discuss the characteristics of the injured party, in contrary to the lack of argumentation about the defendant. By this, the district court not only reproduce stereotypical beliefs of how women shall behave, they also maintain masculine domination. What are considered to be typically male or female behaviour are social constructions (Bourdieu 1999, p. 37). These social constructions are reproduced and maintained by the district court and their conceptualization of the defendant and the injured party. The discourses of the characteristics of the “real rapist” also mirrors legitimate masculine behaviour.

In the light of the lack of statements about the defendant, it is not possible to answer the second research question. However, I argue, the reproduced non-verbal discourses (Hunt & Wickham 1994, p. 8) generates a notion of the Swedish judiciary of the district courts are influenced by their pre-understanding and stereotypical beliefs. The defendant’s background influences the assessment in rape verdicts. With this in mind, the Swedish judiciary of the district courts have difficulties to maintain their claimed objectivity. The analysis of the verdicts showed, the district courts find the same behaviour of the defendant as an advantage in the acquittals, on the other hand, it indicated his blameworthiness in the convictions. This, I argue, indicates the judiciary’s assessment of the defendant, at least partially, is based on their stereotypical beliefs. It could also indicate the district courts lack of understanding or arrogance of “the other”, as I

mentioned above (Bourdieu 1987, p. 5). Thus, I argue, if no one of the parties live up to societal norms it is of more disadvantage regarding the credibility of the injured party as a woman. Aggression and sexual desire are considered typical masculine behaviour (Connell 2003, p. 46). If the injured party fulfil the legitimate stereotype of women, masculine aggression and violence in combination with drugs or alcohol are not accepted. Male identities, stereotypical male characteristics and masculine domination are reproduced by the district courts.

The argumentation about the defendant's greater bodily strength in comparison to the injured party's disability to make resistance doesn't only reproduce men as strong and muscular and their dominated position (Connell 1996, p. 69). It also reflects women as dismissive and victims of masculine sexual behaviour (Bourdieu 1999, p. 19ff). The male body becomes a weapon constantly targeting women. In accordance with Smart (1989, p. 35), I argue, the analysis shows how the district courts maintain inequalities between men and women through a phallogocentric perspective. The district courts also reproduce discourses produced by the defendant, the injured party and witnesses (Pettersson 2006b, p. 177). I argue, statements given about the defendant, not rejected by the district court, or statements repeated by the court, contribute to reproduce discourses. Symbolic capital, social class and thereby social inequalities are maintained by the district court in their argumentation. Additionally, decisions are supported by law and decide what behaviour, of both men and women, are considered legitimate (Foucault 1993, p. 6 & 8 and; Smart 1995, p. 49).

This study has contributed to illuminate the complexity of rape, the rapist and victims. It has cast light on the district courts lack of objectivity; they have difficulties to distance themselves from stereotypical beliefs. This study has examined a small number of rape verdicts; it would be interesting to conduct similar studies on a greater collection of verdicts. Furthermore, research of the courts conceptualization over time would contribute to a deeper understanding of how discourses of rape historically have affected the discourses reproduced today.

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## **Rape verdicts of the district court**

### ***Helsingborg***

B 6765-10  
B 1959-11  
B 1227-12  
B 605-12  
B 3807-13  
B 2636-13  
B 4407-14  
B 2478-14  
B 3306-14  
B 5738-14  
B 5124-14  
B 114-14  
B 799-15  
B 1989-15  
B 6191-15  
B 4381-15  
B 4460-15  
B 6331-16  
B 826-14

### ***Malmö***

B 3980-13  
B 4303-13  
B 10353-13  
B 3565-13  
B 5139-14  
B 5566-14  
B 10528-14  
B 8659-14  
B 2422-14  
B 11749-14  
B 11601-14  
B 7179-14  
B 7387-14  
B 368-14  
B 3524-14  
B 8325-14  
B 5407-15  
B 2399-15  
B 5534-15  
B 4180-15  
B 7629-15  
B 10645-15



B 10192-15  
B 6975-15  
B 3107-16  
B 8740-16  
B 2592-16