How we talk about rape matters
- *the construction of rape in the Swedish legal system*

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Abstract

On the first of July 2018, the Swedish sexual crime act on rape was changed. One of the purposes with the new legislative amendment was to demonstrate that the boundary goes to whether participation in the sexual act has been voluntary or not (Prop 2017/18: 177), for a conviction. Pressure from feminist movements and allies has pushed different states to reform their laws to prevent and punish violence against women. Additionally, the notion of consent and participate voluntarily has been one of the highly debated topics in Sweden after the #MeToo movement in 2017. This study aims to examine the possibility of legislation to change dominant legal discourses and understandings of rape. Further, the aim is to explore how courts handle rape discursively, how the law impacts the legal discourse, and how that discourse might impact and be impacted by the general understanding of rape. The investigation was carried out by collecting 36 rape convictions from Swedish district courts, using three periods (2010, 2017, 2019). By using Fairclough's three-dimension model for critical discourse analysis, patterns within each year, and between the years where shown. By examining the discourses, I wish to give insight into how the dominant discourse in court construct rape and consent. The study concludes that certain discourses within the legal discourse have changed, but the dominant discourse of how rape is constructed has not changed due to the change in the legal framework.

Keywords: Rape, Fairclough, Consent, Rape myths

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1. Introduction and research questions

In the Swedish penal code, the paragraph concerning rape has, in modern times, been amended five times; 1984, 1998, 2005, 2013, and 2018. No crime category has undergone such significant changes during the years as sex crimes (Leijonhufvud et al. 2017). These changes have further demonstrated the different ways in which the law has been used as a tool in order to bring justice to the victims of rape and create a new notion of rape. While Nordic countries enjoy the highest levels of gender equality according to the Global Gender Gap Index (World Economic Forum 2019), sexual violence remains as a form of gender inequality (Antonsdottir 2020: 15).

The current study seeks to deepen the understanding of the law itself, making explicit the discursive reasoning behind the deployment of the law in its different incarnations throughout time. I will examine how courts handle rape discursively, how the law impacts the legal discourse, and how that discourse might impact and be impacted by the general understanding of rape (and other present discourses). Already in 2008, a report concerning the legal framework (Leijonhufvud 2008) proclaimed that rape should be amended and based on whether participation in sexual activity is voluntary or not. This means that it would no longer be a necessary prerequisite for rape that there has been violence or threat of some form of exploitation. Instead, the boundary should be drawn at whether participation in the sexual act has been voluntary or not (Leijonhufvud 2008). The critic against the legal framework at the time (Prop. 2004/05:45), was against the stereotypical expectations against rape victims to behave a certain way, and that it reproduced stereotypes concerning female sexuality and rape myths. Fraser (2015) stresses that the patriarchal structure present in our society compels women to be silent and act passively in the context of rape. Additionally, it is a possibility that these norms affect women to resist unwanted sex verbally, rather than physically, or not act at all. The premise of this thesis is that sexual violence is rooted in unequal power relations. As a gender-based crime, men and boys are disproportionately committed against women and girls, while men and boys are also affected based on their gender (Antonsdottir 2020: 16).

On the first of July 2018, the Swedish sexual crime act on rape was changed. The purpose of the change in the law was to clarify that participation in sexual activity should be given if it is voluntary. The amendment also aims to express that it should no longer be required that the perpetrator has used force or threat, or exploited the victim's particularly vulnerable situation, to be able to be convicted of rape (Prop 2017/18: 177). Additionally, the new law was suggested to place the blame more clearly on the perpetrator (Prop 2017/18: 177). However, in the preparatory work

for the legislative amendment or in the legislative text in the legal change in 2018, had no requirement for the voluntary to be manifested in any particular way. Pressure from feminist movements and allies has pushed different states to reform their laws to prevent and punish violence against women. Furthermore, with the #MeToo movement in 2017, the public spotlight was intensified on sexual assaults and the legislation regarding sexual offenses. Noteworthy, with the latest change in the law, the focus was more intensified on the concepts of consent and participating voluntarily. However, consent is a broad concept without a clear definition on an international or national level (Amnesty International 2018; Prop 2017/18: 177). As a result, interpreting and implementing the new law is up to the court, which means that much of the new understanding of rape and consent is placed in the courtroom. Globally, criminal justice remains the dominant justice paradigm in cases of sexual violence (Antonsdottir 2020: 17). The implementation of laws has an impact on society, and at the same time, laws must adapt to comply with current societal norms. The social practice enables the texts produced by the court to become part of reproducing social practice (Nafstad 2019: 854), which affects society. This becomes particularly interesting when it comes to sexual offenses, with the discrepancy between the societal norms and the law.

According to Fairclough (1995), the law represents a form of negotiated text, the outcome of a process of negotiation about which voices should be included in the text, and in what relation. The discourse order is a system of communicative events; it does not only reproduce the order of discourse but also changes them through creative language use. This can be applied to how verdicts are written in courts. With language use, we create representations and contribute to constructing reality (Winther- Jögensen & Phillips 2002: 9). More explicitly, the law represents a calcification of a particular discourse which after its translation into law. Through an examination of the law, further illumination of any particular trends in consideration of valid grounds for consent remained constant, changed, or appeared over time. It can be argued that the law and its implementation, which is not discursively neutral, are mainly responsible for the material conditions which contribute to the social understandings. Furthermore, the law is used to justify or challenge further development of the discourses already in play (Garner 2019). The latest change in the law has been described as a paradigm shift regarding sexual assault and rape. Therefore, it is of interest to examine the ideological consequences, and this study has its foundation from a critical standpoint.

1.1 Delimitations

This study will only be analyzing the legal framework concerning rape in 2010, 2017, and 2019. In order to follow the legal discourse over time, a timeframe had to been chosen, and some limitations were made. Furthermore, this choice leaves out previous legal changes and analysis of previous dominant discourses. This would help reveal why certain discourses are dominant over others but are beyond the scope of this study.

1.2 Aim and relevance

The current study aims to examine the possibility of legislation to change dominant legal discourses and understandings of rape. Furthermore, the specific focus is if the 2018 legal amendments on sexual offenses have impacted/not impacted dominant legal discourse. Based on this, two research questions will lead this study:

- Do the legal amendment from 2018 on sexual offenses affect the legal discourses regarding rape and consent, and if so, how, why, and in which ways?
- What are the potential socio-legal implications of these discourses from a critical feminist legal perspective?

1.3 Outline

A brief note on the structure. This study will start with a background chapter, introducing the concept of rape and the legal framework. Further, the literature review follows, where earlier literature will be presented, and my study will be placed in the literature in the field. The following chapter presents the theoretical framework that will be applied in this current study, starting with Fairclough's critical discourse analysis, followed by the Feminist legal theory. The analysis will be carried out in a critical discourse analysis fashion, following Fairclough's critical discourse analysis. The analysis will, therefore, be divided into three sections (textual, discursive, and social practice). The textual analysis will be shorter than the two other parts, to give room for the findings and discussions found in the analysis. Furthermore, the Feminist legal theory will be applied to the result of the analysis in order to examine the effects of the discourses in the broader context. Finally, a conclusion will summarize the study in order to answer the aim and the research questions, and the possible impact and connections to previous literature, theory, and method. What are the potential socio-legal implications of these discourses from a critical feminist legal perspective?

2. Background

2.1 Definition of rape

The English word for rape comes from the Latin root "rapere," which means robbery (Sanyal 2019). The terms “rape,” “sexual assault,” “sexual abuse,” and “sexual violence” are generally considered to be synonymous and are often used interchangeably (WHO 2003). Amnesty (2018) defines “sexual violence” (including rape) as a broad term used in international law to describe unwanted or non-consensual sexual activity. More significantly, legal definitions of specific types of sexual violence may differ from the medical and social definitions and can vary between countries and even within countries (WHO 2003). According to the United Nation’s relatively narrow definition, rape is described as “the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part or object” (WHO 2016). Rape is a global problem that occurs in all countries, religions, and social classes. Hence, the topic has been studied in a range of different fields and with different approaches.

2.2 International reports

Sexual violence has a clear link to men's violence against women, power structures, dominance, and sexuality (Jarl & Stolt 2010; Htun & Jensenius 2020; MacKinnon 2017; WHO 2003). There is significant underreporting of sexual violence (Adolfsson 2018), which creates difficulties when attempting to compare studies in this field (Christianson 2015; Jozkowski, Manning & Hunt 2018; WHO 2003). In 2006, The United Nations published a report estimating that every third woman on earth is subjected to violence at some time during her lifetime and that every fifth woman at some time in her life has been subjected to rape or attempted rape (The United Nations 2006). For decades, women's organizations and networks have worked to increase the efforts of both states and the international community to address men's violence against women and girls. Several measures have been made internationally over the past 10 to 20 years to break the silence of men’s violence against women (Johnsson-Latham 2010; MacKinnon 2016). According to Wendt (2010:132), rape can be understood as a severe problem from both an individual and a social perspective. Furthermore, “rape can be understood as an act of power, where the perpetrator's sexual acts become an expression of dominance, and the victim is used and subordinated” (Wendt 2010:132). Johnsson-Latham (2010) stresses that the occurrence of sexual, physical, and psychological violence is one of the biggest gender equality problems in the world and something that helps to

maintain gender equality. Moreover, gender theorists have emphasized that the very existence of violence leads to a restriction of women's freedom of action while men as a group gain power over women - although many men never rape themselves (Jarl & Stolt 2010). Already in 2003, the European Court of Human Rights stressed:

> "Member States' positive obligations under Articles 3 and 8 of the [European] Convention [on Human Rights] must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."

(European Court of Human Rights Annual Report 2003:54).

2.3 International legislation

According to international human rights law, all sexual violence (including rape), should be defined by the lack of consent to sexual activity (Amnesty International 2018). All legislation should include a combination of gender-neutral and gender-specific provisions to reflect the specific experiences and needs of women and girl survivors of violence. Besides, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) calls for the legal definition of crimes of rape to be based on lack of consent rather than on the use of force or threats by the perpetrator or the victim's resistance (Amnesty International 2018: 15). Laws based on consent regulation already exists in several countries, such as the United Kingdom of Great Britain, Ireland, Canada, Australia, New Zealand, India, and in some US states. For example, the British Consent Act was introduced as early as 1976 and contains several policies concerning what evidence may be presented during rape trials (Sexual Offences Amendment Act 1976). Section 2 of the Sexual Offenses (Amendments) Act 1976 regulates, for example, which questions may be asked to the plaintiffs. The purpose of the English legislation was to prevent the victim from being cross-examined about her sexual past during the trial (Sexual Offences Amendment Act 1976). No questions of this type were allowed to be asked without the judge's approval, and questions were not related to sexual experiences that the victim had with anyone other than the accused. However, the law faced some criticism and was said not to fulfill its protection purpose, since the judges almost always considered that questions about the plaintiff's sexual habits and sexual history were relevant (Leijonhufvud 2008). When the implementation of new legislation regarding sexual assault was discussed in Sweden, there was a shift in the debate from focusing on the victim to the perpetrator. With the new legal changes, the focal point is put on

the accused, and he or she believed that the sexual act was wanted by the opposing party (Prop 2017/18: 177).

2.4 Swedish legislation

The new legislation in 2018 (SFS 2018:618) faced critiques from several actors. Some questioned the concept of whether the individual's consent should be the basis on which the legislation is built. The problem is not that the law is based on the idea of self-determination, but that criminal law primarily focuses on violence and threats (Asp 2010). In 2008, Amnesty International did a survey concerning attitudes towards rape, including 2,600 people from different parts of Sweden. The result indicated that around one out of four in the study thought that women were considered responsible for rape, especially if they were dressed seductively, flirting, or under the influence of alcohol or other drugs, or do not physically resist or scream (Christianson 2015). In recent years, Sweden has been criticized by the UN Special Rapporteur on violence against women and by the UN Committee for the Elimination of Discrimination against Women, for the high levels of men's violence against women, the lack of protections for victims and the low proportion of crimes reported (Wendt 2010: 132). This study will focus on the years 2010, 2017, and 2019. In 2010, the paragraph on rape had the following wording, based on the law from 2005:

> “Anyone who, through violence or unlawful threats, compels a person to have sexual intercourse or to commit or endure another sexual act if the act concerning the nature of the offense and the circumstances are otherwise comparable to forced intercourse, is convicted of rape to prison, at least two and not more than six years. Violence equals putting someone in impotence or other such condition.
>
> The same applies to a person who commits with a person such a sexual act as referred to in the first subparagraph by unduly exploiting that the person due to unconsciousness, high intoxication, fear, or other similar condition or disability, cannot peace or control his or her behavior. If a crime referred to in the first or second paragraph is less severe, is sentenced to imprisonment for a maximum of four years.
>
> If the crime is serious, convicted of serious rape to prison, a minimum of four and a maximum of ten years. When assessing whether the crime is severe and special consideration should be given to whether the violence or threat was particularly severe or if

more than one perpetrator was involved in the crime, or whether the perpetrator concerning the procedure or otherwise, showed special recklessness or cruelty.”

(Prop. 2004/05:45)[1]

In 2013, the legal framework was changed, and the terminology replaced the term ”sexual relation” with the broader term ”sexual act” (SFS 2013:365). Additionally, the term "helpless state” was considered too narrow and not covering all of the acts that deserve to be penalized where the perpetrator has exploited the situation in which the victim finds herself (SFS 2013:365). The intention with the legal changes was to create an opportunity to convict a perpetrator when the victim encounters the abuse with total passivity. In 2017, based on the law regulations in 2013, the law had the following wording:

“The same applies to those who carry out sexual intercourse or a sexual act with a person, which according to the first subparagraph is comparable to sexual intercourse by improperly exploiting the person because of unconsciousness, sleep, severe fear, intoxication or another drug, illness, bodily injury or mental disorder or otherwise, given the circumstances, they are in a particularly vulnerable situation.”

(SFS 2013:365)[2]

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[1] My own translation. The law in its original language:
Den som genom våld eller olaga hot tvingar en person till samlag eller till att företa eller tåla annan sexuell handling, om gärningen med hän- syn till kränkningens art och omständigheterna i övrigt är jämförlig med påtvingat samlag, döms för våldtäkt till fängelse, lägst två och högst sex år. Med våld jämställs att försätta någon i vanmakt eller annat sådant tillstånd. Detsamma gäller den som med en person genomför en sådan sexuell handling som avses i första stycket genom att otillbörligt utnyttja att per- sonen på grund av medvetslöshet, höggradig berusning, rädsla eller an- nat liknande tillstånd eller funktionshinder inte kan freda sig eller kontrollera sitt handlande. Är ett brott som avses i första eller andra stycket mindre allvarligt, döms till fängelse i högst fyra år. Är brottet grovt, döms för grov våldtäkt till fängelse, lägst fyra och högst tio år. Vid bedömande av om brottet är grovt skall särskilt beaktas, om våldet eller hotet varit av särskilt allvarlig art eller om fler än en gärningsman medverkat i brottet, eller om gärningsmannen med hänsyn till tillvägagångssättet eller annars, visat särskild hänsynslöshet eller råhet. (Prop. 2004/05:45)

[2] My own translation. The law in its original language:
Den som genom misshandel eller annars med våld eller genom hot om brottslig gärning tvingar en person till samlag eller till att företa eller tåla en annan sexuell handling som med hänsyn till kränkningens allvar är jämförlig med samlag, döms för våldtäkt till fängelse i lägst två och högst sex år. Detsamma gäller den som med en person genomför ett samlag eller en sexuell handling som enligt första stycket är jämförlig med samlag genom att otillbörligt utnyttja att personen på grund av medvetslöshet, sömn, allvarlig rädsla, berusning eller annan drogpåverkan, sjukdom, kroppsskada eller psykisk störning eller annars med hänsyn till omständigheterna befinner sig i en särskilt utsatt situation.
Är ett brott som avses i första eller andra stycket med hänsyn till omständigheterna vid brottet att anse som mindre grovt, döms för våldtäkt till fängelse i högst fyra år. Är brott som avses i första eller andra stycket att anse som grovt, döms för grov våldtäkt till fängelse i lägst fyra och högst tio år. Vid bedömande av om brottet är grovt ska det särskilt beaktas, om våldet eller hotet varit av särskilt allvarlig art eller om fler än en förgripit sig på offret eller på annat sätt deltagit i övergreppet eller om gärningsmannen med hänsyn till tillvägagångssättet eller annars visat särskild hänsynslöshet eller råhet. Law (2013:365).

In 2014, the Swedish government assigned a Sexual Offences Committee the authority to examine the current construction of the crime rape (Dir. 2014:123). The committee's focus was primarily on the obligation of violence, threat, and improper use of the victim's helpless condition and the possibility to replace the law with a consent model. The committee argued that the current legislation should be replaced by a provision that makes it a criminal offense to carry out a sexual act against or effect a sexual act by someone who does not voluntarily participate in the act (SOU 2016).

In 2016, the Committee presented the report "A Stronger Protection for Sexual Integrity" (SOU 2016), which lead to the latest changes in the legal framework of sexual assault (SFS 2018:618). The substantial change presented in the report was that rape should be amended and based on whether participation in sexual activity is voluntary or not (SOU 2016). This means that it is no longer a prerequisite for rape that there has been violence or threat of some form of exploitation. Instead, the boundary goes to whether participation in the sexual act has been voluntary or not (SOU 2016). However, similarly to the international legal framework, neither does Sweden have a clear definition of consent (Prop 2017/18).

Htun and Jensenius (2020) stress that in the 2000s, pressure from feminist movements and allies has succeeded in pushing different states to reform their laws to prevent and punish violence against women. Additionally, the notion of consent and participate voluntarily has been one of the highly debated topics in Sweden after the #MeToo movement in 2017. However, in the preparatory work for the legislative amendment or the legislative text is no requirement for the voluntary to be manifested in any particular way. Therefore, the term voluntary and the role of consent is essential when handling rape cases in court. The latest change in the law aims to determine whether the limit for criminal offenses should be drawn on whether the participation in sexual activity is voluntary. It should no longer be required that the perpetrator has used force or threat, or exploited the victim's particularly vulnerable situation, to be able to be convicted of rape (Prop 2017/18: 177). In 2019, the section on rape had the following wording, based on the law regulations in 2018:

> "A person who performs sexual intercourse or some other sexual act that given the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least two and at most six years. When assessing whether participation is voluntary or not, particular

consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if:

1. their participation is a result of the assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offense or a threat to give detrimental information about another person;

2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise given the circumstances; or

3. the perpetrator induces the person to participate by severely abusing the person's position of dependence on the perpetrator."

(SFS 2018:618)[3]

[3] My own translation. The law in its original language:
Den som, med en person som inte deltar frivilligt, genomför ett samlag eller en annan sexuell handling som med hänsyn till kränkningens allvar är jämförlig med samlag, döms för våldtäkt till fängelse i lägst två år och högst sex år. Vid bedömningen av om ett deltagande är frivilligt eller inte ska det särskilt beaktas om frivillighet har kommit till uttryck genom ord eller handling eller på annat sätt. En person kan aldrig anses delta frivilligt om deltagandet är en följd av misshandel, annat våld eller hot om brottslig gärning, hot om att åtala eller ange någon annan för brott eller hot om att lämna ett menligt meddelande om någon annan, gärningsmannen otillbörligt utnyttjar att personen på grund av medvetslöshet, sömn, allvarlig rädsla, berusning eller annan drogpåverkan, sjukdom, kroppsskada, psykisk störning eller annars med hänsyn till omständigheterna befinner sig i en särskilt utsatt situation, eller gärningsmannen förmår personen att delta genom att allvarligt missbruka att personen står i beroendeställning till gärningsmannen. (Lag 2018:618).

3. Literature review

3.1 Strategy for literature review

In order to conduct my literature review, I followed the steps by Cooper and Hedges (1993 in Hart 2018: 109-110). I started with developing a strategy with a search vocabulary for locating potentially relevant material - including explicit criteria for the inclusion and exclusion of studies. I have chosen to include both Swedish and English search-terms in the literature review search: "Rape, "Consent," AND "Court." I also included categorizations, studies of rape in court, and studies of rape and legal professions. I limited by search, from the 2000s to today's date, due to the comprehensive material. I have chosen to apply a scholastic (traditional) literature review, which aims to understand the different contributions that have been made to a problem and make interpretations about what each one means (Hart 2018). For the initial stage of the literature review, Lund University library and Oslo University library were used to find material. Furthermore, a table was outlined to organize the material (Hart 2018). My purpose with the literature review was to gain more knowledge and search for how rape has been studied, analyzed, and to identify a research gap. Additionally, the review is creating a foundation for my coding material and for analyzing societal practices as part of the discourse analysis.

I discovered that rape had been handled in a variety of disciplines. However, there is a clear line between the researchers who have investigated convicted sex offenders, those who investigate the link between sexuality and masculinity on a more structural and socio-cultural level, and a third approach focusing on the victims and the victims' experiences of rape. While some investigate the violence itself, others focus on the public's attitudes to sexuality, consent, and rape. This literature review will be divided into six sub-themes because these were the most discussed in the field and relates to my study: (1) The link between sexuality and masculinity; (2) Feminist discourse; (3) The role of the victim; (4) Victim blaming; (5) Offenders of sexual assault; and (6) Consent.

3.2 The link between sexuality and masculinity

Cowan (2016:116) stresses that recent changes in laws regarding sex tell us something about the gap between law and "the social" but also about the power of law. According to some scholars, rape is primarily about the exercise of power, not sexuality. It is not only an act of power against an

individual woman but also against women as a group (Bergenheim 2010). However, Bourke (2007 in Sanyal 2018:10) gives a different point of view:

> "Rape is a kind of social spectacle. It is very ritualized. It varies between different countries; it changes over time. Rape is by no means timeless or random ... on the contrary, rape and sexual violence have deep roots in a specific political, economic and cultural environment".

Social spectacle or not, one fact that cannot be ignored is that a majority of all violence in the world is perpetrated by men (Nilsson 2009). According to some scholars (Andersson 2004; Christianson 2015), a gender perspective is essential when analyzing crimes of sexual character. I agree with this point of view and have chosen to apply a feminist legal theory in this current study in the analysis of the social context. The feminist legal approach tries to show how laws are gender-neutral on the surface but impact men and women differently (Scheppele 1994: 392). Andersson (2004) takes this debate into the legal sphere, and stress that sexual offenses are subordinated gender. She gives an example that rape offenses had explicit references to gender in the legislative text up to 1984. Although this is not the case of the current legal text regarding rape, she stresses that gender still has a central role to play. I would argue that the clear-cut line with men as subjects and women as an object can be a problematic starting point for my type of research. I am more in favor of Butler's (1999) point of view that men's violence against women is shaped in a context where gender and gender differences are understood in a certain way - a gender order that legitimizes and defends individual acts. Society could be said to have a heterogeneous two-gender model structure, which affects how individuals see sex and how society, organizations, groups, and relationships are structured and organized.

According to Sanyal (2019), our society sees women as violence subjects and men as a subject of violence; with the underlying understanding that men (subject) harm women (object). However, most sexual, violent crime news articles focus mainly on the female victim - her actions, herself, what she had done earlier in her life, and so on (Jarlo 2019). As a consequence, issues concerning body and sexuality are raised when discussing women's sexual integrity. Concepts of gender, body, and sexuality can, therefore, be seen as integrated. According to Brooks and Thompson (2019), when sexual offenses come to trial, little of the actual sex is discussed, the law is resistant to talking explicitly about bodies.

3.3 Feminist discourse

During my literature review, I found several studies using feminist theory as a theoretical framework. Feminist theories begin with the assumption that gender is primarily socially created and produced, not innately determined and immutable (Renzetti 2013: 7). Gender may be defined as the socially construed expectations or norm prescribed female and male attributes and behavior that are usually organized dichotomously as femininity and masculinity (Renzetti 2013: 7). Many feminists have been critical of how language is constructed and argued that language is not neutral; instead, it is 'man-made' in the sense that men have been able to dominate knowledge production (Letherby 2003: 30, 32; Sanyal 2018). Therefore, the understanding of "normal" sex is divided into the heterosexual boxes of masculine (active domination) and feminine (passive subordination) (Wendt 2010). Hence, if female sexual activity is not accepted as normal, women's opportunities to access adequate legal protection and sexual self-determination are made more difficult (Wendt 2010). Men's violence is frequently manifested through sexual coercion or rape and is a fundamental part of the construction of masculinity (Christianson 2015; MacKinnon 2016). Andersson (2004) expresses in her dissertation that women's bodies are constructed as sexually "open", accessible, and passive. Besides, Naffine (1997 in Andersson 2004: 27) stresses that "the starting point of the penal system is a male autonomous and a physically delimited subject, which can be understood as the female sex" (with a heterosexual norm). This understanding of bodies can be very problematic, especially in the case of sexual assault and rape. Thus, how femininity and masculinity are culturally produced is linked to the heterosexual matrix (Butler 1999).

Furthermore, Bergenheim (2005: 410), describe rape trials ”as a kind of public pornographic exposure of the woman and her sexuality, with the assessment of the victim's protective value and the examination of the woman's body”. The term "judicial rape" is sometimes applied to trials that tend to be pornographic and compel women to reveal their innermost feelings and their body, while the man's sexual experiences and habits are not subject to the same review (Bergenheim 2005). The feminist approach does not deny that there are physical gender differences but claims that these are designated and shaped by discursive practices, which means that discourses determine what is seen as gender.

In the legal discourse, as well as in all social interactions and processes of everyday life according to the feminist perspective, gender is embedded (Sutorius 2014). Legal technologies and texts create discourses and subjectivities that result in a specific understanding of flexibility. Sutorius (2014) argues that the problem with the traditional view of the law is that it is supposedly objective and does not include a power perspective. Similarly, Bergenheim (2005) stresses that there is a double standard where men and women are subject to different sexual morality rules, which legitimize male violence in the name of objectivity. However, if the law reflects societal conditions and priorities in society in general, where patriarchal structures are fundamental, it also means that the legal framework should express this relationship (Sutorius 2014).

3.4 The role of the victim

This study aims to explore the possibility of legislation to change dominant legal discourses and understandings of rape. Therefore, it is relevant to include the victim's role to get a greater understanding of the specific crime this study aims to investigate. Scholars argue that criminal law internationally focuses on the defendant's actions and whether the victim properly took the required steps to avoid unwanted sex. Hence it fails to account for the many victims who freeze from fear or anxiety rather than fight back against an attacker (Davidson 2018; Kaplan 2017). Because of these flaws, the law introduced in 2018, have attempted to shift the focus from force to consent, with the intension to give better protection to the victim (SOU 2016).

Scholars argue that the discourses surrounding rape crime are changeable over time, but in recent decades the problem of rape has been brought up on the media and the political agenda. However, it is usually framed as spectacular, attention-grabbing cases, focusing on the individual level instead of the global problem (Bergenheim 2010; Wendt 2010). Accordingly, Arnberg, Lasker, and Sundevall (2015) conducted a study of the Swedish history of sexuality between the years 1608-2010. One interesting discovering showed that during the 1600 and early 1700s, the focus in rape cases was the men's violence rather than women's morals. Historically rape was seen as a crime of property directed against the woman's husband or family (Asp 2010). However, in the mid-1700s, the view of rape changed. Women's actions at the time of the rape and their life, in general, were examined and interpreted against the background of deep suspicion of all female sexuality (Arnberg et al., 2015). Similarly, Bergenheim (2005) stresses that when the demand for violence decreases, the resistance of the woman becomes instead decisive, and she has to prove to

the court that she did not give her consent. At the center is the woman's body, how it is interpreted and read becomes increasingly subtle and less visible.

3.5 Victim blaming and rape myths

Scholars stress that a fundamental suspicion remains of women who assert charges of rape. Media coverage of sexual abuse tends to reproduce a narrow understanding of what constitutes a "real" rape, of who can be a rapist, and what a "real" rape victim looks like. Thus, perceptions are maintained that the rapes that most people encounter as not really "real" rapes (Minow 2016; Wendt 2010). One fundament in this field is Wennstam's book published in 2002, ”The girl and the blame”. By using a qualitative approach, she focuses on the victim's role and experiences of rape. Similarly, Andersson (2004) conducted a gender-theoretical analysis of criminal protection against sexual abuse using court cases. Her study aimed to investigate the victim's role in the legal process and how the victim always seems to be the focus of the judicial review. Bergenheim (2010:17) on the other hand, made a more controversial announcement stressing that ”In fact, all men are possible sexual offenders and all women possible victims”, describing a reality where there is an established notion where men's sexuality is uncontrollable - and at the same time, the responsibility for controlling male sexuality is placed on the woman. The woman has to make it clear that she does not want to have sex, and if she does not say anything, she is expected to be available (Bergenheim 2010:17). Hence the focus is on the victim and the victim's behavior and not the perpetrator.

However, a specific form of passivity on the part of the victim is a so-called freezing reaction or "frozen fright". It can be defined as that the person who is exposed to a traumatic situation entirely or partially loses the ability to move or emit sound (Brå 2019a; Minow 2016:194). In Myhrman's (2017) dissertation, it is argued that the design and application of current rape regulations pose problems, especially in assessments concerning the credibility of the victim, how the offense is classified, and the assessment of severe fears and particularly vulnerable situations. Something that emerges is the underlying problem that the legislator and the enforcer have preconceptions about how an ideal rape victim should be, react, and act. While some courts acknowledge that a victim can have a" frozen fright" reaction, others require some kind of physically resisted from the woman. In those situations, verbal resistance ”crying, begging, screaming, or simply saying "no" is not seen as enough to show non-consent (Minow 2016:194).

The relationship between gendered power relations and rape; and how the dominant "common sense" understanding of rape plays out within the legal system, often in the form of rape myths (Weisberg 1996). Some of these myths excuse rape, others minimize its seriousness or deny that the woman suffered harm or question whether a rape even occurred at all (Minow 2016: 196; Davies 2013). These rape myths are familiar to us all, ”women mean "yes" when they say "no"; women are "asking for it" when they wear provocative clothes, only virgins can be raped; if a woman says "yes" once, there is no reason to believe her "no" the next time; women who "tease" men deserve to be raped; a woman who goes to the home of a man on the first date implies she is willing to have sex (Jozkowski et al., 2018; Minow 2016: 196; Wendt 2010). Rape myths are beliefs about rape that serve to deny, downplay, or justify sexually aggressive behavior that men commit against women. They can reflect how people believe instances of sexual assault typically unfold or reflect beliefs about how a sexual assault victim should react (Fields 2017; Zydervelt et al., 2016). They can also be used to distance the case from the "real rape" stereotype, to discredit the complainant, and to emphasize the aspects of the case that were consistent with rape myths (Temkin, Gray & Barrett 2016).

3.6 Offenders of sexual assault

This study aims to investigate legal discourse regarding rape. Therefore, it is relevant to include the offender's role; hence, how the offender is discursively constructed might impact how consent and rape are understood and constructed. The power of rape is not merely a function of the biological difference. Instead, the fact that the social script succeeds in soliciting its target participation helps to" create the rapist's power" (Marcus 1992 in Davies 2013: 60). These beliefs not only disempower women but fuel the rapists' perceptions of himself as powerful as well. In her dissertation, Wennstam (2004) investigates the man behind the crime of rape. She awake questions like" Is a girl entitled to change her mind about sex- if so at the last second? Alternatively, does a guy have the right to sex in certain situations?”

Most people think of rape as a crime that is committed by an evil stranger. However, both international and national reports have shown that victims of rape or sexual assault stress that the perpetrator was a friend, acquaintance, or relative (Brå 2020; Minow 2016:199). Underlying the reluctance to prosecute acquaintance rape cases and the difficulties because of social norms, beliefs, and attitudes that foster a presumption of consent (Minow 2016:199). Jarlbro (2019) discusses how

violence against women is presented in media, historically, and in the present. She stresses that perpetrator is described as an "ordinary man" but also a monster. Research has consistently shown that multiple schemas influence jurors in alleged sexual assaults, including offense stereotypes and victim stereotypes (Jarlbro 2019; Jarl & Stolt 2010; Wendt 2010). However, according to Stuart, McKimmie, and Masser (2019), stereotypically, presentations of perpetrators in the media do not influence the perception, for example, judges and the police. I would argue in favor of those who stress that stereotypes influence people's pre-knowledge and perception. Judges are part of the social context and hence not immune to these kinds of stereotypes.

3.7 Consent

The notion that there might be a "truth" of sex, as Foucault terms it, is produced precisely through the regulatory practices that generate coherent identities through the matrix of coherent gender norms (Butler 1999). The heterosexualization of desire requires and institutes the production of discrete and asymmetrical oppositions between "feminine" and "masculine," where these are understood as descriptive attributes of "male" and "female" (Butler 1999: 23). Scholars argue that the issues surrounding consent, and that" mistaken sex" have generated much debate between criminal law scholars, but that the peer-reviewed literature lacks consistency in defining sexual consent (Simpson 2016; Wills, Blunt-Vinti and Jozkowski 2019).

Over the past four decades, feminist scholars have gendered discourses surrounding ”normal sex”, "real rape” and consent (Henry & Powell 2014). However, until this day, no international or regional human rights instrument defines consent (Amnesty International 2018; Prop 2017/18). Jozkowski et al. (2018) and Liberto (2017) define sexual consent as voluntary, "freely given verbal or nonverbal communication of feelings of willingness to engage in sexual activity." While other scholars stress that sexual consent is the definite ascertainment of willingness to engage in a sexual interaction, based on autonomy (Brooks & Thompson 2019; Shumlich & Fisher 2019). Levand and Zapien (2019) argue that consent is an essential construct in sexual discourse. However, when consent is applied and interpreted in legal discourse, it is often not without problems, lack of clarity, and significant consequence (Levand & Zapien 2019). Finding the answer to whether consent is present within a sexual encounter has become increasingly difficult for the courts due to the focus on gender binaries, a conservative sexual ethic, and clear offender/victim roles (Alexander and De Luca 2019; Brooks & Thompson 2019; Stuart et al. 2019). With the #MeToo movement in 2017, the

public spotlight was even more intensified on sexual assaults and the legislation regarding sexual offenses. Scholars have argued that #MeToo was a direct response to the states failed to impose appropriate consequences on those who commit sexual harassment and sexual assault and that this grassroots work has been undertaken for decades thanks to reciprocal gender relations (McKinney 2019; Murray 2019; Tippett 2018). It has been emphasized that in the aftermath of the #MeToo era, there will be an increased number of sexual harassment claims, based on the highlighted knowledge the diverging ways that sexual harassment is perceived, mainly along gender lines (New York Times 2020). The notion of consent and voluntary intercourse has been a debated topic in Sweden after the #MeToo movement in 2017.

3.8 Summary

This literature review aimed to examine how rape has been studied and to identify a research gap. Some scholars argue that rape is primarily about the exercise of power, not sexuality (Bergenheim 2010). The feminist discourse approach develops this idea further and stresses that because of the way language is constructed, men have been able to dominate knowledge production (Butler 1999: 10). No social life is an exception to this, which means that also the legal system and courts handling cases of sexual assault are affected by these structures. As a consequence, some scholars argue that criminal law internationally focuses on the defendant's actions and whether the victim properly took the required steps to avoid unwanted sex (Davidson 2018; Kaplan 2017). As a result, the notion of victim-blaming has been a fundamental suspicion against women who assert charges of rape. Thus, perceptions are maintained that the rapes that most people come across as not really "real" rapes (Minow 2016; Wendt 2010). A common theme of rape trials between two adults is the issue of consent (Stone 2013), and with today's legal framework, judges commonly rely on standard charges. Studies made in the Swedish context have focused on the necessary condition of the consent with the new law (Danielsen 2019; Kjerstensson 2019), evidence problems in rape cases versus a potential consent settlement (Båtelson 2014; Nyström 2018; Ravelli 2016), the legal changes regarding Rape (Andersson 2013; Kringstad 2019), sexual self-determination has been limited by the new sexual crime legislation (Saarloos 2019) and the role of consent in cases of BDSM (Wegerstad 2012). The term consent is a broad concept (Amnesty International 2018), and interpreting and implementing the new law introduced in 2018 is up to the court, which means that much of the new understanding of rape and consent is placed in the courtroom. There is much research conducted on how to understand consent in different contexts. However, there is a research

gap regarding how Swedish courts have operated to create a notion of consent, and how they create discourses concerning rape, since the legal change. This study contributes to improving the knowledge in the field and addresses a topic of current interest, for which more consciousness and debate is needed.

4. Methodology

This qualitative study will have its foundation in a constructionism approach. Since this study aims to explore the possibility of legislation to change dominant legal discourses and understandings of rape, this framework will be beneficial. The constructionism approach asserts that social actors are continually accomplishing social phenomena and their meanings. Social phenomena are produced through social interaction, and how we understand and (re)created them are based on social interaction (Bryman 2016; Della Porta & Keating 2008; Jackson 2011). Additionally, an inductive approach will be used. This approach follows the structure that theory is the outcome of the research, which involves drawing a generalizable inference of observations (Bryman 2016).

4.1 Data collection

This study aims to explore the possibility of legislation to change dominant legal discourses and understandings of rape. I want to examine the change in the legal discourse and, therefore, use verdicts as my material. In order to follow the discourse over time, a timeframe with the following years has been chosen; 2010, 2017, and 2019. The legal framework for sexual offenses has changed continuously. Since the beginning of the 2000s, the law has been changed three times (2005, 2013 and 2018). Firstly, I have chosen 2010 as the first period, hence it enables a time frame of 10 years, from 2010 to 2019. Furthermore, this period was before the #Metoo debates, and a different societal climate was present in society. Secondly, the year 2017 has been chosen because it is the year before the latest change in the legal framework. This is also the year #MeToo movement was under considerable debate in Sweden and a lot of the public discussion where the focus on sexual assault and abuse, female sexuality, and the legal framework for a sexual offense. This debate did not just concern the legal discourses, but the society in general in the dominant discourses included in our everyday life. It is therefore interesting to include 2017, to investigate if the discourse had already changed due to #Metoo and the consent debate. Thirdly, the year 2019 was chosen because it is one year after the latest change in the legal framework and the latest material I can get access to. This timeframe opens a possibility to examine the possibility of legislation to change dominant legal discourses and understandings of rape and consent.

In order to collect my material, multi-stage cluster sampling was used. This sampling method is applicable when the sample is drawn from a widely dispersed population, such as the national or large regions (Bryman 2016). The material is based on rape verdicts from district courts in four

bigger cities: Umeå, Malmö, Stockholm, and Gothenburg. I have chosen these cities to achieve a wide variety in my sample, and include courts from north, south, east, and west. The strength of this method is that it enables comparison between different courts and minimizes a local bias. The material has been collected via a website called Jpinfonet, which holds a searchable archive of Swedish court cases. I used the term ”våldtäkt 6 kap. 1§ BrB” to find verdicts concerning rape.

When a year was chosen, I picked every third verdict from each of the four cities. I used this method for all the chosen years until I had 12 verdicts from every year. This sampling resulted in a sample of totally 36 verdicts. The material includes both rape cases with a convicted offender and cases which did not lead to a conviction. The amount of convicted and not- convicted are approximately the same for each of the selected years (see appendix 1).

The exclusion criteria that will be used is that only rape cases between adults, a male offender, and a female victim, will be included. Of the reported rapes against adults (18 years or older) in 2019, 92 percent were crimes against a woman and 8 percent against a man (Brå 2020). Additionally, the legislation and the judiciary's work on rape against adults and rape against children differ a great deal, making it difficult to study them in a context.

4.2 Method of analysis

I aim to explore the possibility of legislation to change dominant legal discourses and understandings of rape; therefore, qualitative data will be suitable. An essential part of the reflections undertaken by the qualitative researcher will be the attempt to identify ”patterns and processes, commonalities and differences” (Denscombe 2003: 272). Qualitative data will not produce general laws or universal truths, but a rather contextual and in-depth understanding of a particular phenomenon (Della Porta & Keating 2008: 26-27).

4.3 Court documents

The sample size depends on the number of factors connected with the research and the researcher’s decisions. However, the sample size in small-scale research should be between 30 and 250 cases (Bryman 2016: 21). This study consists of 36 chosen verdicts, and every verdict is approximately 20 pages long. Denscombe (2003: 216) stresses that government publications tend to have credibility. Furthermore, it is often assumed to be objective data since officials have produced the material and might be regarded as impartial. Bryman (2016: 560) stresses that legal documents can

tell us something about what goes on in a specific organization and help us to uncover its culture, and be seen as windows into social and organizational realities.

4.4 Discourse analysis

This will be a brief introduction to the discourse analysis that will be applied in this study. I will come back to the theoretical aspects of critical discourse analysis in a theoretical framework chapter. In discourse analysis, theory and method are intertwined, and researchers must accept the underlying philosophical premises to use discourse analysis as their method of empirical study (Winther- Jörgensen & Phillips 2002: 4). The core of discourse analysis is that language can be applied to a variety of forms of communication other than talk. In the present study, the analysis will be conducted using Fairclough's critical discourse analysis. To conduct a critical discourse analysis, coding, and categorizing of the data has to be made in order to break the data down into units for analysis (Denscombe 2003: 217). This method will be beneficial when examining discourses in the verdicts to illuminate patterns and possible changes between the selected years.

4.5 Ethical considerations

Ethical issues cannot be ignored, as they relate directly to the integrity of a piece of research and the disciplines involved in protecting the participants (Denscombe 2003:134). Diener and Crandall (1978 in Bryman 2016: 125) have four ethical principles that have to be taken into consideration when doing research: (1) whether there is harm to participants; (2) whether there is a lack of informed consent; (3) whether there is an invasion of privacy; (4) whether deception is involved. According to the principle of publicity, the public is allowed to gain insight into the activities of the state and county councils. If a document is stored at an authority, such as a court, the material is open for the public (Sveriges domstolar 2019). The material in this study is verdicts, and my focus is on the actions of the courts, not the private or personal information about the plaintiff or accused. No names or information that can be connected to the people in the verdicts will be included. The object I will examine is a governing organization in society and not the role of acts of the plaintiff or the perpetrator. I will only include short texts from the material to visualize discourses.

Furthermore, I will code all the verdicts with numbers to make them anonymous. I will refer to which year the verdict is from, not which city. I want to emphasize that the persons in the verdicts are not participants, as the individuals are insignificant to the study. In the collection and use of data, it is essential to be conscious of the legislation relating to ”personal data” and follow data

protection principles. The principles are that the collection and process of data are fairly and lawfully (Denscombe 2003:141). I relate to these principles by access the material via JPinfonet and only choose the verdicts that will be included in the study. The material will be held on my personal computer, for my use only. After the study is finished, the verdicts will be deleted from the computer.

4.6 Validity, reliability and reflexivity

This section concerns my bias as a researcher and my influence on the material. As in all qualitative research, the researcher must make individual decisions and limitations. For example, my decision to only include female victims and male offenders and only focus on adults. Furthermore, due to the time frame and resources, only material from four courts where chosen. This can, of course, affect the character of my material. Reliability is whether the research instruments are neutral in their effect and would measure the same result when used on other occasions. In qualitative research, it turns into a question, ”if someone else did the same study, would it be the same result?” (Denscombe 2003: 273). I would argue that in my study, this goes hand in hand with the question of generalizability. I strive to be as transparent as possible while conducting my material and sampling to make it replicable. Some stress the disadvantages of conducting a qualitative study, arguing, for example, that the data may be less representative, that the interpretations are bound up with the view of the researcher, and the possibility to decontextualized the meaning of a text (Denscombe 2003: 281). I would argue that qualitative research has advantages: the data and the analysis are grounded and have a richness and detail (Denscombe 2003: 280)

Reflexivity is about my position as a researcher in this study, which is especially important when conducting a qualitative study (Denscombe 2003: 274). While doing this kind of research, there is a risk of bias or possible influence when conducting material or while analyzing the material. My approach in this research project is based on a constructionism approach. This view asserts that social phenomena and their meanings are continually being accomplished by social actors (Bryman 2016; Della Porta & Keating 2008). Because analysis is often part of the culture under study, they share many of the taken-for-granted common-sense understandings expressed in the material. The difficulty is that it is precisely the common-sense understandings that are to be investigated: analysis focuses on how some statements are accepted as true or ”naturalized,” and others are not (Winther- Jörgensen & Phillips 2002: 21). The challenge with having this approach is that if we accept that ”reality” is socially created, that ”truth” is discursively produced effects and that

subjects are decentred, what do we do about the ”truth” that we as researcher-subjects produce? (Denscombe 2003: 300).

My decision to use critical discourse analysis comes with some challenges. The relationship between me as a researcher, the discourse, and ‘reality’ become more intentionally motivated. As a researcher, I need to realize that my research activities say something about me and how this will affect my work and avoid subjectivity (Letherby 2003:8). My position is that I am young, white, female, and a student. The potential effect of this is that I, as a female, have presumptions and experiences of this topic from a female perspective. This can impact my interpretations of the material and feel more related to the feminine than masculine ”roles” in the material. Furthermore, I study sociology of law, a small social science topic, and have my background in criminology. This means I already have some pre-knowledge in the field being studied, which might impact my choice of material, which quotes I think stands out from the material and how I conduct my analysis. Furthermore, the concepts that will be applied, will be a result of me as a researcher, by entering a dialogue with objects, creates concepts that respond to the changing tensions in the material.

4.7 Methodological limitations

The research design has some methodological limitations worth taking into consideration. Firstly, there are limitations in using CDA as a tool for analysis. While it is flexible, it is also vulnerable to influence by the researcher's beliefs and values, as qualitative research is generally. Sampling material from JPinfonet may result in a biased sample, as the verdicts not necessarily reflect the broader research population. The lack of differentiation within the selected years could potentially result from a homogeneous composition of the verdicts selected. Besides, the findings only relate to the context in which the data was gathered, and cannot be directly generalized beyond those settings (Riger and Sigurvinsdottir 2016). In order to minimize bias, a random selection of verdicts was applied, and after that, the verdicts where examined. Secondly, another methodological limitation that may have impacted the validity of my conclusions is that using a randomized sampling might affect my ability to reach a variety among the verdicts. For example, there might be differences in the discourses found from the beginning of 2019 compared to those in the verdicts from the end of 2019. The latest legal amendment was issued in the summer of 2018; hence the legal discourse might gradually transform during the year.

5. Theoretical framework

I will start this chapter with a brief introduction to the theoretical framework and why I found it suitable for this study. I will start by introducing critical discourse analysis and Fairclough's three-dimension model for critical discourse analysis. After that, I will move on to the Feminist legal theory and clarify how it will be connected to this study. The decision to use Fairclough's CDA and feminist legal theory as a theoretical framework in this study is beneficial since both have a critical standpoint, do not see discourses as neutral, and emphasizes the role of the relationship between discourse and social life. Therefore I would argue that these two theories are compatible and complement one another in this thesis. With my critical standpoint, these theories helped me as an author to analyze the empirical material, and draw conclusions from the results.

Critical discourse analysis (later referred to as CDA) has its roots in Foucault's ideas about the exercise of power through the construction practices, individual subjectivity, and the operation of rules and procedures (Winther- Jörgensen & Phillips 2002: 12). This approach emphasizes the role of language as a power resource related to ideology and socio-cultural change (Bryman 2016). Language is constructed in discourses, and discourses maintained and changed in discourse practices (Winther-Jörgensen & Phillips: 2002: 12). Discourse refers to a particular way of talking about and understanding the world (or an aspect of the world), and the meaning we attach to words is not inherent in them but a result of social conventions (Winther- Jörgensen & Phillips 2002: 1). Consequently, how we understand the worlds are historically and culturally specific and contingent. I have chosen this theoretical framework because critical discourse has a social constructivist starting point (Winther- Jörgensen & Phillips 2002: 3). While Foucauldian discourse analysis is widely for the study of the usage of languages in texts and its contextual meaning, Fairclough's CDA would be more suitable for this current study because the aim is to study the social perpetuation of dominance, power abuse by text and talk in a socio-political context.

The discourse order is a system of communicative events; it reproduces the order of discourse and changes them through creative language use. This can be applied to how verdicts are written in courts. With language use, we create representations and contribute to constructing reality (Winther-Jörgensen & Phillips 2002: 9). This can be connected to how the juridical field and legal professions shape the law, with several sources besides the law itself. Additionally, based on power struggles

between the discourses within the juridical field (Bourdieu 1999), I would argue that this framework would be suitable for this kind of research.

Furthermore, the law is a source of production of discourses and plays a dominant role in shaping consciousness and behavior. Some feminists consider the law to be a gendering practice, which constitutes male and female subject positions and contributes to identity formation (Fudge in Davies & Munro 2013: 333). The theoretical questions which characterize feminist legal theory are the nature of the contemporary gender, power relations, and the role of law in their creation and reproduction (Davies & Munro 2013:3). Hence, this theoretical framework would be suitable for this study, aiming to explore the possibility of legislation to change dominant legal discourses and understandings of rape.

5.1 Fairclough's Critical discourse analysis

CDA engages with the relationship between discourse and social life. Firstly, the purpose of CDA is to analyze and reveal how a particular discourse either maintains, hides, or changes unequal power relations. Secondly, it aims to contribute to change towards an equal society (Chouliaraki & Fairclough & 1999: 9). Furthermore, in CDA, there is a co-constitutive relationship between discourse and social life, as discourse structures the social life and is itself structured by social life (Chouliaraki & Fairclough & 1999). CDA provides the ability to study the relation between discourse and social development in different social domains. Discursive practices tend to create and reproduce unequal power relations between social groups. The aim of the critical discourse analysis is, therefore, useful to underline them to contribute to social change (Chouliaraki & Fairclough & 1999). CDA is intended to generate critical social research, which contributes to the rectification of injustice and inequality in society (Chouliaraki & Fairclough & 1999). In this kind of research, the first exercise is not to sort out which of the world's statements in the research material are right and which are wrong. On the contrary, it is an exercise in exploring patterns in and across the statements and identifying the social consequences of different discursive representations of reality (Chouliaraki & Fairclough & 1999).

Central to Fairclough's approach is that discourse is a necessary form of social practice both reproduces and changes knowledge and, at the same time, also shaped by other social practices and structures (Chouliaraki & Fairclough & 1999). Fairclough's reasoning is in line with a

poststructuralist position, claiming that discourse practice reproduces an already existing discursive structure and challenges the structure by using words to denote what may lie outside the structure (Chouliaraki & Fairclough & 1999). Our ways of understanding the world are created and maintained by social processes. Knowledge is created through social interaction in which we construct universal truths and what is true and false (Chouliaraki & Fairclough & 1999). This can be connected to the new law introduced in 2018, which aimed to change the understanding and definition of rape and consent. However, it is up to the court to execute this based on the knowledge created through social interaction in which we construct universal truths and what is true and false.

5.1.1 Power

CDA is critical in the sense that it aims to reveal the role of discursive practice in the maintenance of the social world, including those relations that involve unequal relations of power. It aims to contribute to social change along the lines of more equal power relations in communication processes and society in general (Chouliaraki & Fairclough & 1999). This involves asking questions like who uses language, how, why, and when. Additionally, the understanding of discourse as both constitutive and constituted, and the notion of power is central to the theory (Bryman 2016: 540). Ideologies are explained as constructions of meaning that contribute to the production, reproduction, and transformations of domination (Fairclough 1995). Hence, ideologies are created in societies in which relations of domination are based on social structures such as class and gender (Fairclough 1995). This can be connected to how the juridical field and legal professions are shaping law, based on power struggles within the juridical field (Bourdieu 1999).

5.1.2 Hegemony

Hegemony is not only dominance but also a process of negotiation out of which emerges as consensus concerning meaning. As a result, hegemony is never stable but changing and incomplete (Fairclough 1995). According to Fairclough, the concept of hegemony gives us how to analyze how discourse is part of a more considerable social practice involving power relations. Discursive practice can be seen as an aspect of a hegemonic struggle that contributes to the reproduction and transformation of the order of discourse of which it is part. This is a relevant aspect of the feminist legal theory that will be applied in the analysis of the material. Furthermore, discursive change takes place when discursive elements are articulated in new ways (Fairclough 1995). This is relevant, hence this study aims to compare the legal discourse before and after the legal changes.

5.1.3 Intertextuality and interdiscursivity

According to Fairclough, language use always draws on earlier discursive structures, as language users build on already established meanings, elements, and discourses of other texts. In his theory, this is the concept of intertextuality. Furthermore, it is by combining elements from different discourses that concrete language use can change the individual discourse and thereby the social world (through reproduction or discursive change) (Winther- Jörgensen & Phillips 2002: 7). Another critical element in Fairclough's theory is interdiscursivity, which occurs when different discourses and genres are articulated in a communicative event (Fairclough 1995). Interdiscursivity is a form of intertextuality, but intertextuality refers to the conditions whereby all communicative events draw on earlier events (Fairclough 1995). Change is created by drawing in existing discourses in new ways, but the possibilities for change are limited by power relations which, determine the access of different actors to different discourses (Fairclough 1995).

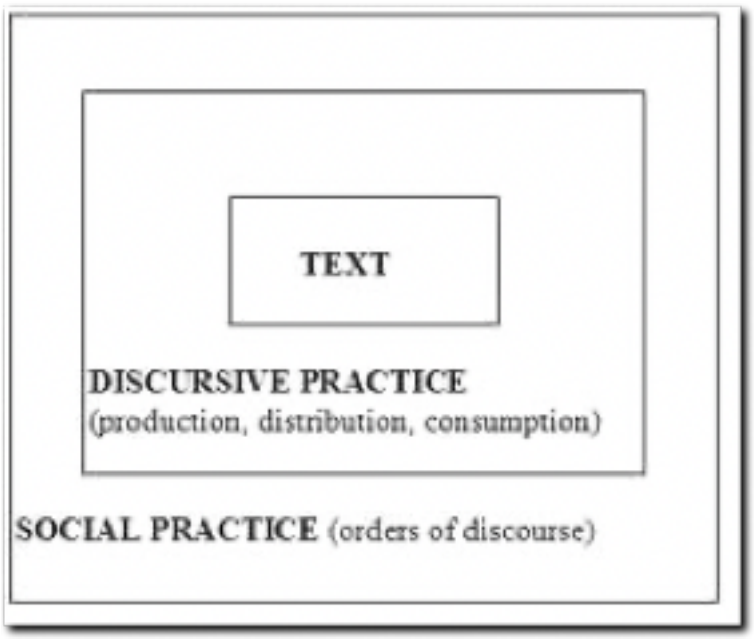
5.2 Fairclough's three dimension model

Fairclough's framework contains a range of different concepts that are interconnected in a three - dimensional model (Fairclough 1992b). Fairclough applies the concept of discourse in three different ways. In the most abstract sense, discourse refers to language use as a social practice; discourse is both constitutive and constituted. Secondly, discourse is understood as the kind of language used within a specific field, such a political discourse. Thirdly, discourse is used as a count noun (a discourse, the discourse); it refers to a way of speaking, which gives meaning to experiences from a particular perspective (Fairclough 1992b). Every instance of language use is a communicative event consisting of three dimensions:

(1) Examine the actual content, structure, and meaning of the text under scrutiny (the text dimension)

(2) Examination of the form of discursive interaction used to communicate meaning and beliefs (the discursive practice dimension) and

(3) Consideration of the social context in which the discursive event is taking place (the social practice dimension) (Fairclough 1992b).



Fairclough's three-dimension model for critical discourse analysis (Fairclough 1992b).

Fairclough's three-dimensional model is an analytical framework based on the principle that text can never be understood or analyzed in isolation - they can only be understood to a web or other texts concerning the social context (Fairclough 1992b). All three dimensions should be covered in a specific discourse analysis of a communicative event, and analytically separated (Fairclough 1992b). Investigation proceeds by analyzing specific instances of language use, Fairclough terminology, and the communicative event's order with the order of discourse. This means that communicate events shape and are shaped by the more comprehensive social practice through their relationship to the order of the discourse (Fairclough 1992b). Therefore, my analysis will be divided into these three different levels.

5.2.1 Text dimension

The analysis of a communicative event thus includes the analysis of the linguistic structure. The text analysis focuses on the formal features, for example, the vocabulary and grammar, and from which discourses and genres are realized linguistically (Fairclough 1992b). By detailed analysis of the linguistic character of a text using particular tools, it is possible to see how discourses are activated textually and arrive at particular interpretations. Fairclough proposes several tools for text analysis; interactional control (the relationship between speakers, including who sets the conversational agenda); ethos (how identities are constructed through language and aspects of the body); and metaphors; wording and grammar (Fairclough 1992b). All these give insight into how texts treat

events and social relations and thereby construct particular versions of reality, social identities, and social relations (Fairclough 1992b).

Interactional control is relevant for the analysis of verdicts because it shows which voices are heard, the words chosen are showing an attitude, the approach to the object (Fairclough 1992b). In this study, the texts are written and produced by an authority that holds a particular position in society. Furthermore, it is possible to examine if there is an active/passive voice which shows in the subject positions and areas of action. The examination of the transitivity of the texts illustrated how one group in the descriptions assume the role of passive recipients, while the other is portrayed as the responsible agents (Fairclough 1992b). This is important for how the discourses are shaped and how consensus is constructed. Secondly, I will use the concept ethos to investigate how identities are constructed through language, for example, women and men, plaintiffs, and perpetrators. All these elements are essential for the construction of the texts.

5.2.2 Discursive practice

The analysis of a communicative event includes the analysis of the discourses and genres which are articulated in the production and consumption of the text (Fairclough 1992b). Additionally, the relation between text and social practice is mediated by discursive practice. Analysis of discursive practice focus on how the author of a text draw on already existing discourses and genres to create text, and on how receivers of texts also apply available discourses and genres in the consumption and interpretation of the text (Fairclough 1992b).

When analyzing an intertextual chain, one can see how structure and content are transformed and formulate a hypothesis about the kinds of production conditions to which the different versions are subject (Fairclough 1992b). An example of how this will be included in the analysis is to investigate if other discourses appear in the material, and if so, in which ways and how they are described. This will be relevant for the analysis to see if the legal discourse draws on already existing discourses. In the discursive practice, it can, therefore, be discourses, but also discursive orders (sub discourses within a broad discourse).

5.2.3 Social practice

Discursive practices are in a dialectical relationship with other social practices, and discourse is always socially embedded (Fairclough 1992b). The analysis of a communicative event thus includes considerations about whether the discursive practice reproduces or restructures the existing order of discourse and what consequences it has for the broader social practice (Fairclough 1992b). There are two aspects to look closer to. The first is the relationship between discursive practice and its order of discourse. Secondly, the aim is to map the partly non-discursive, social, and cultural relations and structures that constitute the broader context of the discursive practice. For Fairclough, text analysis alone is not sufficient for discourse analysis, as it does not light on the links between text and societal and cultural processes and structures (Fairclough 1992b). I have chosen to apply feminist legal theory in order to examine the effects on the broader context.

5.3 Feminist Legal Theory

What is feminism? The simplified answer is that it is the idea that women and men should have equal political, economic, and social rights (Levit & Verchick 2016). Feminist legal theory has its foundation in social construction (Hirschmann 2013: 55), and in the social construction, the idea of discourse is vital, and via discourses, it is possible to understand how the world view of individual batterers converge with the sexist attitudes. The feminist legal theory is beneficial for this study because it strives to identify concrete problems and proposed legal reforms, gender, and gender conceptions (Davies & Munro 2013:1; Minow 2016:2; Scheppele 1994: 391; Spade 2015). Furthermore, feminist legal scholars do not see the law as a neutral instrument, they see the law as embodying a male bias, and that gender is embedded in all social interactions and processes of everyday life (Renzetti 2013: 7). As a result, the role of gender is particularly crucial in law since law regulates all other institutions in society (Minow 2016:9; Scheppele 1994: 392).

The development of feminism as a theoretical framework is typically discussed in terms of waves. The first wave of feminism was in the period 1830 - 1920 and focused on women's legal rights. The second wave in the 1960s pinpointed gender inequality as rooted in both intimate relationships between men and women and in institutional arrangements. The third wave, in the present time, highlights the focus on problematizing the concept of gender and non-white feminism (Renzetti 2013: 2). Most feminists share the view that our society is patriarchal- organized and dominated by men. Patriarchy is a gender structure which means men dominate women, and what is considered masculine is more highly valued than what is considered feminine (Hirschmann 2013: 57; Renzetti

2013: 8; Scheppele 1994: 392). At its roots, feminism is about equal rights and the recognition that gender is an essential organization of social life and social structure (Minow 2016:2; Renzetti 2013: 6). Therefore, feminist legal theory strive to identify concrete problems and proposed legal reforms, gender, and gender conceptions (Davies & Munro 2013:1; Minow 2016: 2; Scheppele 1994: 391). What makes a theory “feminist” is that it identifies a focus on women, gender relations, power, and inequality (Minow 2016:9; Scheppele 1994: 392). The strength of feminist legal thought is the dynamic combination of stability and change, as well as in the diversity of perspectives and methodologies, and the extensive range of subject matters (Davies & Munro 2013:1).

One of the starting points for the feminist legal approach was discovering hidden male biases behind supposedly neutral laws. This technique, called unmasking, helped identify the gender-based consequences that law creates (Davies 2013: 67; Minow 2016:41). MacKinnon (1989 in Scheppele 1994: 393), stressed: "one could attack the means through which men's domination is achieved: control over sex." The theoretical questions which characterize feminist legal theory are the nature of the contemporary gender "power relations and the role of law in their creation and reproduction" (Davies & Munro 2013:3). Law is for the production of discourses and plays a dominant role in shaping consciousness and behavior. Some feminists consider the law to be a gendering practice, which constitutes male and female subject positions and contributes to identity formation (Fudge in Davies & Munro 2013: 333).

5.3.1 Postmodern feminism

The specific perspective within the feminist legal theory I intended to use in the analysis is postmodern feminism. Feminists influenced by postmodernism stress that language does not merely reflect but actively construct reality. There is no objective truth; everything is a social construction (Renzetti 2013: 60). Furthermore, there is not only one truth but many truths, none of which is privileged, and these different truths exist within different discourses (Letherby 2003: 52; Minow 2016). Every text has a discourse that has a historical and social context and material conditions under which it is produced (Renzetti 2013: 62.). As a consequence, gender is shaped by social structures and dominating discourses. As a result, language constructs what it means to be a man or woman.

Postmodern feminism reveals that language, knowledge, and power are connected in ways that transmit cultural norms of gender (Minow 2016:37). One important aspect is to focus on is

oppression and to investigate hierarchies that are created and passed on in the culture. A central task for postmodern feminists is to deconstruct texts to expose its covert message, for example, taken-for-granted assumptions and truth claims (Minow 2016; Renzetti 2013: 62). Truth is what the discourse allows to be true, and knowledge is constructed through discourse (Letherby 2003:52). Postmodern feminist legal theory attempt to move beyond the categories of sameness and difference. These strategies are intended to reveal the non-obvious ways that power works in relationships (Minow 2016). Judith Butlers gives an example of the ways language constructs gender identities with a postmodern point of view. Butler's theory is based on the understanding that language creates reality and that women and men are no biological categories. Sex is socially constructed; the illusion of sexuality is preserved by an organized gender discursive compulsory framework (heterosexual matrix) (Butler 1999). Hence, when labeling a man or woman, we perform according to the heterosexual matrix, which is necessary for gender construction (Butler 1999). Fraser (2015) stresses that the patriarchal structure present in our society compels women to be silent and act passively in the context of rape. It is a possibility that these norms affect women to resist unwanted sex verbally, rather than physically, or not act at all.

5.3.2 The role of the discourse

Our understanding of femininity is embedded in culture and affect how men and women think of themselves and how they learn their gender. In an attempt to prevent the victim of sexual from showing bruises to demonstrate non-consent, it has been necessary for feminist legal scholars to undermine critical aspects of the "rape script" (Davies 2013: 60). Changing discourse is a vital entry point for changing the social construction of rape, and thereby of women as victims and men as predators. These scripts and discourses come to constitute women's identities and the choices that they make (Conaghan 2019: 363; Davies 2013: 60). The new law in 2018 aims to change understanding and definitions of rape, but it is up to the court to execute this, the discourse in court thus becomes very relevant. The interactive dynamic of how women's identities as choosing subjects are constituted to make the choices that patriarchy needs them to make (Davies 2013: 60). Feminist legal theory analyze the gendering effects and symbolism of law and been especially successful at challenging the substantive truths of law (Davies 2013: 79).

6. Analysis

6.1 Textual analysis

The analysis starts with the examination of the actual content, structure, and meaning of the texts. The second part of the analysis is the discursive interaction used to communicate meaning and beliefs. The third part of the analysis considers the social context in which the discursive event is taking place. In the text analysis part, the focus is on the grammar of the text, the structure of the sentences, the presentations of the event, and how the victim and perpetrator are presented. The words that are chosen indicates an attitude, and the approach to the object described.

Furthermore, I will analyze how the texts construct the subject and object. The texts are written and produced by an authority, a court, which holds a particular position in society. The texts are government publications and can, therefore, be described as authoritative and have credibility. The texts give an impression of being objective and impartial, since the data have been produced by officials (Denscombe 2003: 216). Furthermore, the voice comes from an authority or expert knowledge, and the text is written in a formal, non-political manner. Therefore, the text can indicate to construct the identity of the voice as confident and trustable. The authoritative voice is used as ”the voice of truth,” which introduces the reader to the texts. The texts start with a small summary of the current case, and after that, the statements are included. The genre that is used is both a witness account and storytelling. Even if statements from the accused, plaintiff, and witnesses are included, they are cut down and in the text described that ”only the essential parts are included.” So, the material is processed through the legal framework before included in the verdict. Therefore the grammar, vocabulary, and words are adapted to the legal wording.

6.1.1 Vocabulary

The texts are written in a legal context, therefore, a legal vocabulary is used and words that may be ”normal” is not frequently used outside the field. The word use is written in such a way that some prior knowledge within the legal field is necessary to fully understand the text. However, the texts are repeatedly using sentence coherence, that refers to the reader's local and global understanding of the written and spoken language, concluding binding parts of text that help guide them through understanding the author's intentions. Transition words and phrases like "why," "as a result," and ”because”. An example of this is when a verdict refers to a case by the hight supreme court in order to give support for their opinion or judgement.

”As the Supreme Court has found, it is reasonable for the plaintiff's story to be verified to the extent possible”[4]

(Case 4 / 2010)

”As the Supreme Court stated in the NJÅ 2009 case, p. 447 and subsequent rulings, it is not enough that the plaintiff's story is more credible than the accused”[5]

(Case 5/2017)

”The Supreme Court further stated that in rape cases, the evidence, in addition to the parties stories, is not often based on the fact that the prosecutor after the incident told it about other persons heard as witnesses”[6]

(Case 1/2019)

I would argue that in the verdicts from 2010, there is an active/passive voice which shows the subject positions and areas of action. For example, if the text express that ”X was forced to”, this can be used as a linguistic tool used to tone down an individual's or group's actions or guilt. The perpetrator of the action becomes invisible and the focus is then put on the other, in this case the victim. In the material from 2010, several texts described both the victim and perpetrator as having an active role.

”X steered Y toward the mattress and pushed Y down on it”[7]

(case 2/2010)

The examination of the transitivity of the text illustrate how the victim (woman) in the descriptions assume the role of passive recipients, while men are portrayed as the responsible agents. This has consequences for the construction of women's subject positions. Furthermore, the material from 2010 had texts describing constructed as passive sentences without objects or subjects. In the

[4] Såsom Högsta domstolen har konstaterat är det rimligt att målsägandens berättelse kontrolleras i den mån det är möjligt.

[5] Som Högsta domstolen uttalat i rättsfallet NJÅ 2009 s. 447 och senare avgöranden är det inte tillräckligt att målsägandens berättelse är mer trovärdig än den tilltalades.

[6] Högsta domstolen uttalade vidare att i våldtäktsmål bygger bevisningen, utöver parternas berättelser, inte sällan på att målsäganden efter händelsen berättat om den för andra personer som hörs som vittnen.

[7] X styrde Y mot madrassen och knuffade ned Y på den.

following quote, rape is described as ”the incident (that) occurred”, and not where the perpetrator did something to the victim. One quote from the material illustrate this:

> ”She went to X residence where she met him. In connection with her visit to X, the prosecuted incident occurred”[8]

(case 2/2010)

When language is framed in this way, the descriptions contain responsibility-relieving tendencies. Passivation is actualized by focusing entirely in the descriptions from the responsible actors, so that instead the focus is on the recipients of the event, the victim (woman). As a consequence, the responsible actor is rendered invisible by placing all the focus in the description on the recipient. This kind of attitude towards the victim can reflect some kind of blame on the victim for the occurred ”incident” or it is framed in a way that picture the incident as inevitable - she went to the house, and it just happened. I would argue that this form language construction indicate that there is a ”right” or ”wrong” behavior from the victim. Furthermore, this might point out the way society attributes responsibility on the victim while the perpetrator of the action becomes invisible. This can indicate a consensus around how rape occurs is constructed, and how each party should or is expected to act in certain situations. In the material from 2017 and 2019, it was much less indications with an active subject in the first part of the sentence, and no active subject in the second part of the sentence. This language use can indicate that the rape is not portrayed as something that ”just happens”, without a responsible actor. This can be understood as that the discourse have shed more light on the perpetrator and the actions in the sentence. In the material from 2017 and 2019, where both the victim and perpetrators are described as active:

> ”At some point, she managed to get out into the corridor, but he came after, grabbed her leg and pushed and dragged her in again”[9]

(case 3/ 2017)

[8] X begav sig till Y bostad där X träffade Y. I samband med X besök hos Y inträffade den åtalade händelsen.

[9] Vid något tillfälle lyckades hon ta sig ut i korridoren, men han kom efter, tog tag i hennes ben samt knuffade och släpade in henne igen.

”She tried to get away from him, but he prevented her from getting there by holding her body against hers so she couldn't get away”[10]

(case 3/ 2019)

Therefore, it seems like the transitivity of the text illustrates how the victim (woman) in the descriptions assume the role of passive recipients, while preferably men are portrayed as the responsible agents, are much less in the material from 2017 and 2019, compared to 2010. This is important for how the discourses are shaped and how consensus is constructed (Fairclough 1992b). According to Fairclough's CDA, this can indicate how rape is constructed linguistically, and a consensus is created. Secondly, the texts' ethos illustrates how the identities of men and women, perpetrators, and plaintiffs are constructed through language. Feminist legal theory investigates how hierarchies and taken-for-granted assumptions and truth claims are created and passed on in the culture (Minow 2016; Renzetti 2013: 62). This can be applied to how the ethos in the texts that illustrates how the identities categories men and women are created. Fraser (2015) stresses that the patriarchal structure present in our society compels women to be silent and act passively in the context of rape. It is a possibility that these norms affect women to resist unwanted sex verbally, rather than physically, or not act at all. These patterns are distinguishable when critically examine the legal discourses using CDA.

6.2 Discursive practices

This part of the analysis aims to shed light on the consequences in terms of how rape and consent are understood and discursively produces. Intertextuality refers to the condition whereby all forthcoming events draw on earlier events. A pronounced form of intertextuality is manifest intertextuality, whereby texts explicitly draw on other texts, for instance, by citing them (Fairclough 1992b: 117). Both juridical voices represent the intertextuality in the text, but also a medical voice and law enforcement voice. This gives the texts an impression of authority and expert knowledge. The discursive consequences due to expert knowledge are that these texts are given more discursive power. In the texts, I found that some of the verdicts used manifest intertextuality by referring to other court cases, police reports, or medical reports. This is an example of how the authors of the

[10] Hon försökte komma bort från honom, men han hindrade henne från att komma därifrån genom att hålla sin kropp mot hennes så att hon inte kunde komma loss.

text draw on the existing discourses and genres and how receivers apply available discourses and genres for their understanding and interpretation of the text. Two examples of manifest intertextuality when the court refers to police hearings, respectively, a medical journal:

> ”Furthermore, in connection with the same hearing as written evidence, the defense has relied on what she stated at the police hearings xx xx-xx-xx.”[11]

(case 9/ 2010)

> ”According to the investigation, she had 2.64 per thousand ethanol in the urine and the alcohol content was falling at the time of the test.”[12]

(Case 2 / 2019)

The produced texts have a clear purpose, to either convict or free a suspected perpetrator. The texts are produced by an authority, which means that the texts produced go under the Public Access to Information and Secrecy Act (Regeringskansliet 2015), giving public provisions to access public documents. Therefore, the texts are consumed, not only of those involved in the juridical case, but also actors outside of the courtroom. So even if the text’s primary purpose is to deliver a verdict, it also has an impact on the social and how this type of crime is seen upon. Furthermore, verdicts are written with other legal professionals in mind, to show the correctness and professionalism of the one who is writing the verdict and in case of appeal. Discursive change takes place when discursive elements are articulated in new ways (Fairclough 1995). This is relevant, hence this study aims to compare the legal discourse before and after the legal changes.

Furthermore, by applying the concept of the hegemony the discursive practices, it is possible to examine how discourse practice is part of a more extensive social practice involving power relations (Fairclough 1995). Discursive practice can be seen as an aspect of a hegemonic struggle that contributes to the reproduction and transformation of the order of discourse of which it is part. This is a relevant aspect of the feminist legal theory that will be applied in the analysis of the material. Additionally, the concept of ideologies is explained as constructions of meaning that contribute to

[11] Försvaret har vidare i samband med samma förhör som skriftlig bevisning åberopat vad hon anfört vid polisförhör xxxx-xx-xx

[12] Enligt utredningen hade hon 2,64 promille etanol i urinen och alkoholhalten var vid provtillfället fallande.

the production, reproduction, and transformations of domination (Fairclough 1995). Hence, ideologies are created in societies where relations of domination are based on social structures such as class and gender (Fairclough 1995).

A brief note on the structure. I will start with the medical discourse order and its role in the material. In the following section, I will present the sexuality discourse order and include a specific discourse I found in the material, namely the female sexuality discourse. Connected to the sexuality discourse is the rape myths discourse, which will be analyzed in relation to gender. Further follows the violence discourse order. At last, the consent discourse will be presented.

6.2.1 Medical discourse order

The second central discourse was about the scientific evidence, a discourse that, in many cases, was also related to the plaintiff's statement. The courts mainly talked about evidence that belonged to technical investigations of various kinds, such as sperm, information from forensic examinations or medical certificates of injury or the like, and testimonial information about the conduct of the target after the incident. In 2010, the court often emphasized the amount of violence the perpetrator practiced, in what way, and if it has provided some physical evidence in the form of bruises, scratch marks, etc. On these occasions, the texts often refer to other discourses, often medical journals or experts in the field, for example, doctors to legitimate their judgment. In some cases, the medical discourse is described as essential for prosecution, even though according to the legal text at the time (Prop. 2004/05: 45), do not demand any specific type of physical violence.

Furthermore, in the legal text, there is no specific amount of violence described. I will come back to this under the headline violence discourse order. An example of how the medical discourse is included in the courts' judgments in some of the verdicts from 2010:

> ”From journal notes from a doctor's visit the plaintiff made, the plaintiff only shows that one could observe swelling and some irritation in the vulva/vagina.”[13]

(case 6 /2010)

In 2010, 7 out of 12 verdicts used manifest intertextuality referring to a medical discourse order in order to describe the victim's behavior or injuries/lack of injuries. It seems like there is some kind of hegemony that at least some kind of violence that leaves marks has to occur during a rape. This

[13] Av journalanteckningen från ett läkarbesök X gjorde framgår endast att man kunnat iaktta en svullnad och viss irritation i vulva/vagina

pattern could indicate a hegemony that more violence where to expect after a rape, and raise a dispute if the event was ”real rape”. I will come back to this under the headline violence discourse order. In 2017, 9 out of 12 verdicts used manifest intertextuality referring to a medical discourse order in order to describe the victim's behavior or injuries/lack of injuries. In 2019, 6 out of 12 verdicts used manifested intertextuality in this manner. These results indicate no significant change in the discourse before the legal change in 2018.

A specific discourse in the medical discourse order was the frozen fright discourse. Frozen fright is a medical condition when a person, who is exposed to a traumatic situation, entirely or partially loses the ability to move or emit sound (Brå 2019a; Minow 2016: 194). In Myhrman’s (2017) dissertation, published before the latest changes in the law in 2018, it is argued that the design and application of current rape regulations pose problems, especially in assessments concerning the credibility of the victim, how the offense is classified, and the assessment of severe fears and particularly vulnerable situations.

The analysis indicated that in 2010 and 2017, the frozen fright discourse was not as established as it was in 2019. In 2010 and 2017, 0 out of 12 verdicts used the term frozen fright to describe the victim's actions. However, the texts are describing a behavior according to the frozen fright discourse. While in 2019, 3 out of 12 verdicts used the term in order to describe the victim's behavior. Examples from 2010, 2017, and 2019 described the plaintiff's behavior to the term in the following manner:

> ”The plaintiff woke up in the morning by the offender who had intercourse with her (...) The plaintiff became petrified and did not make a sound.”[14]
>
> (case 7/ 2010)

> "It may also seem strange at first that X did not cry for help or tried to escape the alleged attack.”[15]
>
> (case 5/ 2017)

[14] X vaknade på morgonen av att Y hade samlag med henne (...) X blev som förstenad och fick inte fram ett ljud.

[15] Det kan också i förstone framstå som egendomligt att X inte ropade på hjälp eller på annat sätt försökte undkomma det påstådda angreppet

> ”It is well known that rape victims can suffer from so-called "frozen fright," i.e., that the victim is paralyzed and unable to resist. Such a reaction can also occur when the victim knows and trusts the perpetrator.”[16]

(case 4/ 2019)

In 2019 the frozen fright discourse became more established, and the term is used to describe situations where the victim does not cry out for help or become petrified and do not move. There are numerous reasons why rape victims might not physically resist their attackers and victims do not necessarily sustain physical injuries from their ordeal (Zydervelt et al., 2016). However, a handful verdict from 2019 described the victim's behavior in the following manner:

> ”Given the nightmare-like events that she described, it seems strange that, even though she was frightened and frozen, she did not try to get away sooner or later after he had fallen asleep.”[17]

(case 8/ 2019)

The analysis indicates that the discourse regarding frozen fright has not changed between 2010 and 2017. In 2019, there is a change in the discourse, and the term frozen fright is present in the discourse. However, there are differences within the material, and while some verdicts from 2019 refer to frozen fright, others do not seem to consider it. To conclude, the analysis indicates a change in the discourse regarding the concept of consent. However, there are differences within the material, and while some verdicts from 2019 refer to the term frozen fright, others do not seem to consider it.

6.2.2 Sexuality discourse order

The analysis indicates that old fashion values regarding sexuality and gender is present in the material. In the verdicts from 2010, a considerable part of the discourse presents an active/passive voice, which shows the subject positions and areas of action. When comparing the years, the active/ passive voice was less present in the material from 2017 and 2019, than in the material from 2010. Furthermore, the text's transitivity illustrated how the victim (woman) in the descriptions assume

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[16] Det är väl känt att våldtäktsoffer kan drabbas av så kallad ”frozen fright”, d.v.s. att offret blir paralyserat och oförmöget att göra motstånd. En sådan reaktion kan även uppstå när offret känner och litar på gärningsmannen.

[17] Med hänsyn till den mardrömslika händelseförlopp som hon beskrivit att hon just hade råkat ut för framstår det också som underligt att hon, även om hon var livrädd och frusen, inte försökte att förr eller senare ta sig därifrån när han väl hade somnat.

the role of passive recipients, while men are preferably portrayed as responsible agents. The text's transitivity can be connected to the concept ethos (Fairclough 1992b), to show how identities are constructed through language, for example, women and men, plaintiffs, and perpetrators. The analysis indicates that old fashion values regarding sexuality and gender. In the verdicts from 2010, a considerable part of the discourse constructs a hegemony with a passive woman and an active man. This indicates that the discourse draws upon earlier discourses and norms within the legal field. For example, in verdicts from 2010, the text use manifest intertextuality referring to a High Supreme Court judgment from 1980. Through a reform in 1984, significant changes were made to Chapter 6, The Criminal Code on changes concerning sexual crimes. The reasons for the law change were, among other things, that earlier moral conceptions of sexual issues characterized the earlier provisions and that the provisions of the regulations were partly based on an outdated view of women and gender (Prop 1983/84: 105). These results indicate that the legal discourse in 2010 drawn upon a 30 years old discourse on rape. Furthermore, this shows how old discourses might affect the present and how old hegemony is still can be present. Examples of these patterns from verdicts in 2010:

> ”To begin with, the assumption that the plaintiff would have had intercourse in a restaurant restroom with a man she had never met before is extremely far-fetched and unlikely.”[18]
>
> (case 11/ 2010)

It seems to be a hegemony concerning what defines a love relationship stressing that sex should only occur in a relationship. Implicitly, it is understood that people that engage in casual sex without defining themselves as a couple do not fit into the framework. Furthermore, there seems to be an assumption that a woman never would meet up with a man she has never meet before to have sex. The quote above expressed female sexuality in terms of ”extremely far-fetched” and ”unlikely” that a woman would engage in such behavior. This discourse indicates that women are expected not to have sex with random men, especially in public places. Furthermore, this indicates an ideology concerning specific expected gender roles in the legal discourse. I will come back to this under the headline of female sexuality discourse.

In the Swedish legal framework, the first law that explicitly prohibited rape in marriage came in 1962. Even though the law came into force in 1965, no one was convicted of domestic marital rape

[18] Till att börja med är antagandet att X skulle ha haft samlag på en restaurangtoalett med en man som hon tidigare aldrig hade träffat ytterst långsökt och osannolik.

until 1984 (Nyström 2009). Marks of previous legal discourses and hegemony could be found in verdicts from all the selected years. Following quotes comes from verdicts were all perpetrators were not convicted for rape:

> ”Because of their previous relationship (...), it may very well be that Y believed he was allowed to do as he did even though she said no (...) Therefore it cannot be questioned to judge Y for rape.”[19]

(case 6/ 2010)

> ”It is clear that they had sex against the will of the plaintiff and that she said no several times, but it is possible that he still thought she wanted to have sex with him since they had previously had sex after she had not first wanted it.”[20]

(case 1/ 2017)

> ”He never, however, received an affirmative answer (from X), but the reason he continued the intercourse was that he had a feeling that X wanted it.”[21]

(case 10/ 2019)

Furthermore, there is a specific discourse regarding female sexuality connected to sexuality discourse order. The female sexuality discourse is more specified on the expectations of a woman's gender role, rape myth, and expectations of how a victim should act. These expectations seem to be especially present if the victim and perpetrator have had sex on any occasion before the rape. Selected quotes from the chosen years visualize the discourse of female sexuality:

> ”The plaintiff is also gay and has no sexual interest in men.”[22]

(case 11/ 2010)

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[19] Mot bakgrund av deras tidigare förhållande (...) och att det mycket väl kan vara så att Y trott att han fick göra som han gjorde trots att hon sade nej (...) Det kan därför inte komma ifråga att döma Y för våldtäkt.

[20] Det är visserligen klarlagt att de hade sex mot Xs vilja och att hon sa nej flera gånger, men det år möjligt att han ändå trodde att hon ville ha sex med honom eftersom de även tidigare haft sex efter att hon först inte velat ha det

[21] Han fick dock aldrig ett jakande svar, men skälet till att han ändå utförde dem var en känsla som han hade att X var med på det. 23 Målsäganden är dessutom homosexuell och har inget sexuellt intresse av män.

[22] Målsäganden är dessutom homosexuell och har inget sexuellt intresse av män.

”The fact that the plaintiff did not tell the police that she had voluntarily had sex with X before the incident on Sunday night constitutes a burden on her in determining the credibility of the information she has now submitted to the court.”[23]

(case 9/ 2017)

”Nor has she hesitated to tell about things that could be to her disadvantage, such as having an orgasm”[24]

(case 1/ 2019)

The quotes above indicate that gender expectations are present in the legal discourse for all the selected years. Furthermore, these gender expectations seem to exist outside of the legal discourse as- well, hence the victims know about these expectations and stereotypical roles. As a result, some are, therefore, afraid and choose not to tell all the information to the officials. Probably based on the knowledge that if they do not behave or act according to the norm of how a victim should behave, they will be faced with skepticism. Tuerkheimer (2012) stresses that jurisprudence is part of constructing female sexuality discourse. The boundaries that circumscribe appropriate sexual conduct have shifted over time, but the courts persist in making normative judgments about women's sexuality. In 2010, 6 out of 12 verdicts specifically discussed female sexuality. In 2017, 3 out of 12 verdicts discussed female sexuality, and in 2019, 2 out of 12 verdicts included female sexuality in the verdicts. This pattern indicates that the discourse has changed due to social context at the time. The general sexuality discourse seems not to have changed during this period 2010-2019. This phenomenon can be due to the rape myth discourse that will be presented in the following section.

[23] Den omständigheten att målsäganden vid polisförhör inte berättat att hon haft sex frivilligt med X före händelsen på söndagsnatten utgör en belastning för henne när det gäller att avgöra trovärdigheten av de uppgifter hon nu lämnat inför rätten.

[24] Inte heller har hon tvekat att berätta om saker som kan vara till hennes nackdel, såsom att hon fick orgasm

6.2.3 Rape myths discourse

Another discourse that frequently occurred in the texts was the rape myths discourse. Rape myths are assumptions that reproduce a narrow understanding of what constitutes a "real" rape, of who can be a rapist, and what a "real" rape victim looks like. Additionally, the focus is exclusively on the victim's clothing, not the perpetrators or the act itself. In the material, these patterns were present in all the selected years:

> ”She was wearing a black denim skirt and a t-shirt. Under her skirt, she was wearing only panties.”[25]
>
> (case 4/ 2010)

> ”He pulled her white panties aside and tried to have sex with her.”[26]
>
> (case 11/ 2017)

> ”She knows that her pantyhose, panties, and skirt were pulled off by her, but she does not know if things have happened before that.”[27]
>
> (case 9/ 2019)

In the discourses from 2010 and 2017, the texts were more precisely descriptive of the victim's clothing; for example," under her skirt, she was wearing only panties" and" her white panties." This kind of information was not relevant in the judgment of the case per se but was still included. In the material from 2019, it was far less of these descriptions of the victim's clothing. Furthermore, when such elements were included in the texts, it was to describe the assault. Included in the rape myth discourse is the victim's behavior, and how a victim should act according to that discourse. In the discourse, it was primarily focusing on the victim's behavior after the rape.

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[25] Hon hade på sig en svart jeanskjol och en t-shirt. Under kjolen hade hon bara trosor

[26] Han drog hennes vita trosor åt sidan och försökte ha sex med henne

[27] Hon vet att hennes strumpbyxor, trosor och kjol rycktes av henne sam tidigt, men hon vet inte om det har hänt saker före det

”Her reactions have appeared emotionally adequate, and her story has been vivid and nuanced and accompanied by gestures and faces.”[28]

(case 4/ 2010)

”She went to the psychiatrist with her parents. She had trouble sleeping, got panic attacks, and cut herself from the bad feeling. Since February 2017, she goes to a psychologist once a week.”[29]

(case 1/ 2017)

”The District Court considers that X has had a reaction after the incident that has been compatible with how a woman can be expected to react after a rape.”[30]

(case 4/ 2019)

To conclude, in 2010, the number of verdicts that described the victim's clothing was 9 out of 12. In 2017, 8 out of 12 verdicts described the victim's clothing. In 2019, 9 out of 12 verdicts described the victim's clothing, and far fewer descriptions of the victim's clothing were used in the material. However, this pattern still indicates that there are no changes in the legal discourse regarding rape myths.

6.2.4 Violence discourse order

In this section, I will discuss the discourses regarding the expressions of violence against the victim. Included in the discourse, was to assess whether the resistance was sufficient and if this was not the case, to assess whether there was a reasonable explanation for the lack of resistance. In 2010 the law had the following wording regarding violence: "Anyone who, through violence or unlawful threats (...) Violence equals putting someone in impotence or other such condition." (Prop. 2004/05:45). Therefore, to get someone convicted for rape, it may have been necessary to focus on the violence. However, the law also says "violence equals putting someone in impotence or other such condition" (Prop. 2004/05:45), so it does not explicitly say how violence must have been

[28] Hennes reaktioner har framstått som känslomässigt adekvata och hennes berättelse har varit levande och nyanserad och åtföljts av gester och miner.

[29] (...) uppsökte hon tillsammans med sina föräldrar psykakuten. Hon hade svårt att sova, fick panikångest attacker och skar sig själv till följd av det dåliga mående. Sedan februari 2017 går hon till psykolog en gång i veckan.

[30] Tingsrätten anser att x har haft en reaktion efter händelsen som varit förenlig med hur en kvinna kan förväntas reagera efter en våldtäkt.

practiced, only that violence or threat occurred in some form. Some examples of how violence is described, and which vocabulary is used in the selected years:

> ”The district court found that the injuries were not to be described as completely minor and that they caused the plaintiff's remaining pain and difficulties to sit for about three days after the incident”[31]

(case 1/ 2010)

> ”It is more difficult to imagine that the clothes on the upper body could have been removed without her participation (...) The absence of damage to the clothes should therefore not be attributed to considerable value as a rebuttal”[32]

(case 9/ 2017)

> ”It is thus established that on two occasions, X has partly pressed his penis against the plaintiff vagina and partly penetrated the vagina of the plaintiff with his fingers (...), and the plaintiff did not voluntarily participate.”[33]

(case 12/ 2019)

In 2010, the vocabulary use descriptions such as ”the injuries were not to be described as completely minor”, which gives the impression of an aggressive perpetrator and attacks that leave visible injuries on the victim and her clothes. Even if the plaintiff has shown signs that violence did occur after a medical examination, it is sometimes not seen as enough violence. As mention in the medical discourse, it seems like there is some kind of hegemony that at least some kind of violence that leaves marks has to occur during a rape. Hence, it is seen as natural and general knowledge that rape is a quite violent act. Furthermore, there seems to be a change in the 2017 discourse, where less focus is on the violence, and a more significant understanding of the absence of violence is shown. In the quote from 2017, the wording ”the absence of damage to the clothes should therefore not be attributed to considerable value as a rebuttal” illustrate this attitude.

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[31] På grund av den nämnda utredningen finner tingsrätten vidare visat att skadorna inte varit att beteckna som helt lindriga och att de medfört kvarstående smärta hos X, samt svårigheter för henne att sitta, under en tid av omkring tre dagar efter händelsen

[32] Det är svårare att föreställa sig att även kläderna på överkroppen kunnat tas av utan hennes medverkan (...) Avsaknaden av skador på kläderna bör därför inte tillmätas nämnvärt värde som motbevisning.

[33] Därigenom är det styrkt att X vid två tillfällen dels har tryckt sin penis mot målsägandens kön, dels har penetrerat målsägandens vagina med sina fingrar (...) samt att målsäganden inte deltog frivilligt.

In the discourse of 2019, the vocabulary differs from 2010 and 2017 by not using as describing terms of the plaintiff's injures. The focus in the discourse in 2019 seems to be on the acts itself, and whether the plaintiff did voluntarily participate. Furthermore, comparing the legal discourse before and after the legal change in 2018, several verdicts from 2019 used manifest intertextuality referring to other legal sources in the concluding speech. An example from 2019:

> ”In several legal cases, the high supreme court commented on evidence evaluation in cases of sexual offenses (see NJA 2017 p. 316 but also NJA 2010 p. 671 and NJA 2009 p. 447 I and II). In court cases, it is stated that a credible statement from the plaintiff in association with what has otherwise emerged in the case may be sufficient for a convict.”[34]

(Case 10/ 2019)

Furthermore, it is interesting to examine rape cases without violence or cases that are not seen to include enough violence and how these are described in the discourse. Following quotes from the selected years illustrate the discourse:

> ”The plaintiff's information in itself appears to be more credible than the information provided by X, but there is insufficient supporting evidence for the plaintiff's information for a convict. There is no medical examination or other inquiries about the plaintiff's injuries.”[35]

(Case 12/ 2010)

> ”The district court judges that the plaintiff's story is highly credible. The story is supported by witnesses' information about the plaintiff's condition, reactions, and statements after the incident.”[36]

(case 5/ 2017)

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[34] HD har i flera rättsfall uttalat sig om bevisvärdering i mål om sexualbrott (se NJA 2017 s. 316 men också NJA 2010 s. 671 och NJA 2009 s. 447 I och II). I rättsfallen uttalas att en trovärdig utsaga från målsäganden i förening med vad som i övrigt har framkommit i målet kan vara tillräckligt för en fällande dom.

[35] Målsägandens uppgifter framstår i och för sig som mer trovärdiga än de uppgifter som X har lämnat men det saknas tillräcklig stödbevisning för målsägandens uppgifter för en fällande dom. Någon läkarundersökning eller annan utredning om målsägandens skador finns inte.

[36] Tingsrättens sammanfattande bedömning är att målsägandens berättelse är alltigenom trovärdig. Berättelsen får stöd av vittnenas uppgifter om målsägandens tillstånd, reaktioner och uttalanden efter händelsen.

> ”She has not in any way, whether through words or action or otherwise, shown any signs that she has volunteered. In this situation, it was his duty to make sure that her participation was voluntary. When he did not, he did not have reason to expect that she participated voluntarily.”[37]

(case 4/ 2019)

In 2010, 10 out of 12 verdicts included violence as an essential element in the verdict. As mentioned earlier, this indicates that the discourse in 2010 had a hegemony of which amount of violence that is ”normal” or ”should” be perpetrated in a rape case. In 2017, 4 out of 12 verdicts included violence as an essential element in the verdict. The quote from 2017, illustrate how the discourses have shifted towards the victim’s behavior and actions after the rape. The violence is not mentioned in the judgment and is not requested.

In 2019, 9 out of 12 verdicts included violence in the verdict. This pattern illustrates a shift from a focus on violence in 2010 to a focus on the victim and how she, through words or action, showed any signs that she volunteered in the discourse of 2019. With that said, a majority of the verdicts in the material from 2019 used manifest intertextuality referring to a judgment by the high supreme court stressing that a perpetrator can be convicted for rape based on that the woman behaves compatibly with how a woman can be expected to react after a rape.

6.2.5 Consent

I identified that the terms consent and voluntarily where used equitably to describe the victim’s participation. Following quotes illustrates how the concluding speech were formulated in the discourse at the time:

> ”Through Y's information, the district court finds that through abuse, other violence, and threats of criminal hiding in the way the prosecutor has described forced Y to anal intercourse.”[38]

(case 2 /2010)

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[37] Hon har inte på något sätt, vare sig genom ord eller handling eller på annat sätt, visat några tecken på att hon deltagit frivilligt. Det har i denna situation ålegat honom att förvissa sig om att hennes deltagande varit frivilligt. När han inte gjort det har han inte haft anledning att räkna med att hon deltagit frivilligt.

[38] Genom Xs uppgifter finner tingsrätten utrett att Y genom misshandel, annat våld och hot om brottslig gärningen på sätt åklagaren har beskrivit tvingat X till analt samlag.

”The offense is to be considered rape. Nor has there been any significant violence”[39]

(case 8/ 2017)

”The district court, therefore, finds that X must realize that the plaintiff did not participate voluntarily. It is thus proved that X was guilty of the prosecution.”[40]

(case 3/ 2019)

In 2010, 2 out of 12 verdicts used the term consent, and none expressed that ”X has not participated voluntarily.” This pattern indicates that the victim’s expression of volunteered willingly or not willingly participation was not included in the judgment. In 2017, 8 out of 12 verdicts used the term consent, and two expressed that ”X has not participated voluntarily” in order to express the victim’s participation. This pattern indicates a change in the discourse, which might arise due to the social context. As the quote from 2017 illustrates, the violence focus is still present in the discourse. In 2019, 4 out of 12 verdicts used the term consent, while 11 of 12 verdicts expressed that ”X has not participated voluntarily” in order to express the victim’s participation. This pattern shows a significant difference compared to the previous years. Comparing the discourse of 2017 and 2019 indicates that the discourse focuses less on the violence and more on how the victim expresses that she participated voluntarily. These results might be a response to the #Metoo movement and debates regarding consent and the new legal changes in 2018.

Especially the verdicts from 2017 and 2019, refer to legal texts stressing that a consistently credible statement from the plaintiff may be in conjunction with what has otherwise occurred in the case - eg. Plaintiff's behavior after the event - be sufficient for a convict. Furthermore, when assessing the plaintiff's statement, there is often a reason to emphasize if the story is clear, long, vivid, logical, rich in detail. As a consequence, perhaps more focus has been put on the victim's response, and if it is compatible with a victim of rape should act in order to follow the discourse. When comparing the discourse before and after the legal changes in 2018, some of the verdicts from 2019 used manifest intertextuality referring to witness psychology to explain a victim's response to rape. This development shows that the discourse has included an extern discourse, a psychology discourse, to explain the victim's behavior.

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[39] Förgripelsen är att bedöma som våldtäkt. Det har heller inte förekommit nämnvärt våld.

[40] Tingsrätten därför finner visat att X insåg att målsäganden inte deltog frivilligt. Det är alltså styrkt att X gjort sig skyldig till den åtalade gärningen.

6.3 Social Practice

The two aspects to look closer into concerning social practice are the relationship between discursive practice and its order of discourse and to map the partly non-discursive, social, and cultural relations and structures that constitute the broader context of the discursive practice (Fairclough 1992b). To examine the discursive effects in a broader social context, the postmodern feminist legal theory will be applied to the analysis. This theory analyzes the gendering effects and symbolism of law and been especially successful at challenging the substantive truths of law (Davies 2013: 79). Feminists influenced by postmodernism stress that language does not merely reflect but actively construct reality. A central task for postmodern feminists is to deconstruct texts to expose its covert message, for example, taken-for-granted assumptions and truth claims (Minow 2016; Renzetti 2013: 62). Truth is what the discourse allows to be true, and knowledge is constructed through discourse (Letherby 2003:52). Changing discourse is a vital entry point for changing the social construction of rape, and thereby of women as victims and men as predators. These scripts and discourses come to constitute women's identities and their choices (Conaghan 2019: 363; Davies 2013: 60). The new law in 2018 aims to change understanding and definitions of rape, but it is up to the court to execute this, the discourse in court thus becomes essential. The interactive dynamic of women's identities as choosing subjects constitutes the choices that patriarchy needs them to make (Davies 2013: 60).

The current study aims to examine the possibility of legislation to change dominant legal discourses and understandings of rape. In the material, I found several discourses present in the chosen years (2010, 2017, 2019), the medical discourse, sexuality discourse, rape myths discourse, violence discourse order, consent discourse. In the analysis, I found similarities within the 12 verdicts within each of the selected years, which may indicate patterns of the year's discourse. Furthermore, this chapter will be sorted according to years to get a better overview.

6.3.1 Legal discourse 2010

In 2010, the current law at the time framed rape as "anyone who, through violence or unlawful threats, compels a person to have sexual intercourse (...) or unduly exploiting that the person, due to unconsciousness, high intoxication, fear or other similar condition or disability" (Prop. 2004/05:45). My analysis indicates that the physical element was utterly dominant in the discourse at the time. For instance, physical resistance was expected from the victim, and the responsibility rested on the victim to avoid an assault. An ideology that emerges in these texts is that violence is used to

legitimize that rape has taken place. The vocabulary used to describe the injuries were described as "not completely minor" gives when the impression of an aggressive perpetrator, and attacks that leave visible injuries on the victim and her clothes. The feminist legal theory stresses that myths about sexual assault continue to be produced in media portrayals and courtrooms. As a result, judges continue to refer to the "classic rapist" at trial, and juries continue to expect to see a rape victim in torn clothing running hysterically to the nearest police station or hospital (Fields 2017).

Furthermore, medical journals and statements from doctors to legitimate the judgment were commonly included in legal judgments. In some cases, it was seen as insufficient supporting evidence for the plaintiff's information for a convict, when there were no medical examinations or other inquiries about the plaintiff's injuries. To give an illustration:

> ”The plaintiff's information in itself appears to be more credible than the information provided by X, but there is insufficient supporting evidence for the plaintiff's information for a convict. There is no medical examination or other inquiry about the plaintiff's injuries”
>
> (Case 12/ 2010)

The hegemony seems to express expectations on the victim and how she should act according to the dominant rape discourse constructed in court. As this pattern appears in several verdicts, I interpret that these expectations on the victim are an expression of an ideology. According to this ideology, victims who do not physically resist or act according to the dominant discourse were described as ”strange that the victim did not cry for help” or ”tried to escape the alleged attack”. From a feminist perspective, the patriarchal structure seems to have effects on the legal treatment of women's rape and sexual harassment claims, as women are relegated cognitively, socially, and legally to a role of passive receptivity—forced to prove an absence of consent as men are taught to assume its presence (Fraser 2015). Feminists influenced by postmodernism stress that language does not merely reflect but actively construct reality. I would argue that the social construction of gender via dominant discourses in courts (Letherby 2003: 52; Minow 2016; Renzetti 2013: 60), is an example of this.

Present in the discourse of 2010, is an active/passive voice, which shows the subject positions and areas of action. The transitivity of the text seems to illustrate how the victim (woman) in the descriptions assumes the role of passive recipients, while preferably, men are portrayed as the responsible agents. The ideology of women's role could be interpreted as an expression of the

discourse of gender power. Butlers stress that language constructs gender, and the illusion of sexuality is preserved by an organized gender discursive compulsory framework (heterosexual matrix) (Butler 1999). Fraser (2015) stresses that the patriarchal structure present in our society compels women to be silent and act passively in the context of rape. By using language in this way, sexual hierarchy is produced and reproduced through discourse by the courts and has consequences for the construction of women's subject positions (Davidson 2018; Kaplan 2017). By applying feminist legal theory to these ideologies and discourses, two subject positions about gender emerged; the woman and the man, respectively. The transitivity of the texts and subject positions in the discourse in 2010, reveals old fashioned gender roles which draw upon old sexuality discourses and norms within the legal field. For example, the statement that ”the plaintiff would have had intercourse in a restaurant restroom with a man she had never met before, is extremely far-fetched and unlikely" (case 11/ 2010). Another example is when because of the previous relationship between the victim and accused, the accused" might have believed he was allowed to do as he did even though she said no" (case 6/ 2010), and therefore it cannot be questioned to judge him for rape. Furthermore, the victim's clothing and sexual orientation were described with wording such as" under her skirt, she was wearing only panties" (case 4/ 2010), and ”the plaintiff is also gay and has no sexual interest of men" (case 11/ 2010). According to the feminist legal theory, the law is considered a gendering practice, which constitutes male and female subject positions and contributes to identity formation (Fudge in Davies & Munro 2013: 333). A hegemony regarding female sexuality seems to be present, which may have an impact on the court's expectations on the victim.

Furthermore, these gender expectations exist outside of the legal discourse as well. Hence, the victims know about these expectations and stereotypical roles, and some are, therefore, afraid to tell the officials all the information. This behavior is probably due to the knowledge that if they do not behave or act according to the general norm of how a victim should behave, they will be faced with skepticism. Tuerkheimer (2012) stresses that jurisprudence is part of constructing female sexuality discourse. The boundaries that circumscribe appropriate sexual conduct have shifted over time, but the courts persist in making normative judgments about women's sexuality.

6.3.2 Legal discourse 2017

In the discourse of 2017, violence was still present in the discourse but included less descriptive terms. In both the discourses of 2010 and 2017, the victims' reactions and actions related to the assault were in focus. Even if the frozen fright discourse were not yet established in 2017, the verdicts would describe behaviors according to the discourse. Notably, however, is in the legal discourse of 2017, there is a shift in the discourse where the focus also seems to be more explicitly on the victim's behavior after the rape. According to CDA, discursive change occurs when discursive elements articulate in new ways (Fairclough 1995). Discursive change is a relevant element; hence this study aims to compare the legal discourse before and after the legal changes in 2018. Furthermore, this might indicate a possibility that the social context at the time left some marks in the legal discourse.

The notion of consent and participation voluntarily was a highly debated topic in Sweden after the #MeToo movement in 2017, as well as the new legislative amendments of 2018 for sexual assault. As this study has its foundation in a constructionist approach, ”normal” sexual behavior is seen as a socially constructed reality, continually changing as a result of the social norms and reflecting upon the political and social ideologies of time and place (Jenkins 1998: 4). In the discourse from 2017, with the given social context at the time, the verdicts included intimate details about the victims, not essential for the judgment per se, for example, ”her *white* panties”. The boundaries that circumscribe appropriate sexual conduct have shifted over time, but the courts seem to persist in making normative judgments about women's sexuality. Furthermore, the relationship between the victim and the accused were included when discussing consent. An illustration of this:

> ”It is clear that they had sex *against the will of the plaintiff* and that *she said no several times*, but it is possible that he still thought she wanted to have sex with him since they had previously had sex after she had not first wanted it”
>
> (case 1/ 2017)

Postmodernist feminism view society as patriarchal- organized and dominated by men. Scholars within the legal field argue that a victim's relationship with the defendant or behavior before, during, and after a sexual assault is not informative about the authenticity of an allegation (Zydervelt et al., 2016). To conclude, this indicates that the same ideology constructing gender in 2010 was present in the discourses of 2017.

6.3.3 Legal discourse 2019

In the discourse of 2019, the latest legal amendment on sexual offences was recently implemented (2018). The law aimed to specify that the limit for criminal offenses should be drawn on whether the participation in sexual activity is voluntary or not (Prop 2017/18: 177). Additionally, it should no longer be required that the perpetrator has used force or threat, or exploited the victim's particularly vulnerable situation, to be able to be convicted of rape (Prop 2017/18: 177). Notably, in this current study, the discourse of 2019 was mainly focused on whether the victim appeared emotionally adequate and behaved compatible with how a victim can react after a rape. This discourse indicates an ideology where, even if the law intended to shift the focus from the victim to perpetrator, the discourse seems to fall back to focus on the victim and not the offender in rape cases.

Furthermore, it can be argued that this indicates a disconnection between legal discourse and contemporary society. According to Wennestam (2004: 290), the sex crime laws have developed tremendously in Sweden since the middle of the last century - but at the same time, it appears time and again that the laws are colored by old conceptions of women's and men's sexuality. The construction has consequences for how victims and perpetrators are treated in the legal system. Old stereotypes persist in many aspects, even is the new law aimed to focus more on the perpetrator, the analysis showed that very much focus is still placed on the victim and her reaction to the rape and whether it was adequate for a rape victim. These kinds of hegemonies can be seen as problematic since a victim can react and act very different after a rape (Minow 2016; Fields 2017; Zydervelt et al., 2016). So even if the legal framework has changed due to legal amendments, old ideologies and hegemonies affect the perception of the victim, female sexuality, and consent.

Central to CDA is that discourse is a necessary form of social practice that both reproduce and change knowledge while also shaped by other social practices and structures (Chouliaraki & Fairclough & 1999). Our ways of understanding the world are created and maintained by social processes. Knowledge is created through social interaction in which we construct universal truths and what is true and false (Chouliaraki & Fairclough & 1999). The social practice dimension can be connected to the new law introduced in 2018, which aimed to change the understanding and definition of rape and consent. The lack of clear legal guidelines regarding the concept of consent might lead to a situation by which interpreting and implementing the new law is up to the

courtroom. It becomes problematic when opening up for subjective assessments in court, and then base the produced knowledge through social interaction and shared truths.

Because of the present ideologies concerning rape seems to be present in the legal discourse of 2019, it indicates an underlying problem when the legislator and the enforcer have preconceptions about how an ideal rape victim should be, react, and act. This ideology is evident when some courts acknowledge that it is well known that rape victims can suffer from so-called "frozen fright," while others require some physical resistance from the woman. In those situations, verbal resistance crying, begging, screaming, or simply saying no is not enough to show non-consent (Jozkowski et al., 2018; Minow 2016:194). Fraser (2015) stresses that norms present in our society compel women to be silent and act passivity in the context of rape. It is possible that these norms cause women to resist unwanted sex verbally, rather than physically, or not act at all. Furthermore, when assaulted by an acquaintance, women may be less likely to resist being "less well-prepared psychologically" to do so (Fraser 2015). As mention in the discourses of 2010 and 2017, the relationship between the sexes, both linguistically and content-related, is related to a context for mutual sexual acts and relationships.

A central task for postmodern feminists is to deconstruct texts to expose its covert message, for example, taken-for-granted assumptions and truth claims (Minow 2016; Renzetti 2013: 62). Truth is what the discourse allows to be true, and knowledge is constructed through discourse (Letherby 2003:52). One of the mechanisms that underlie rape culture is benevolent sexism, which refers to characterizing women as ought to be protected and supported. It reverent attitudes towards women as pure and right and violence that can occur when a woman is not behaving accordingly (Fraser 2015). Under the ideology of consent, that is constructed in the legal discourse, the absence of women's agency, constructing beliefs that" she (rape victim) wants it" (Fraser 2015). An example of this could be found in the discourse from 2019:

> ”He never received an affirmative answer (from X), but the reason he continued the intercourse was that he had a feeling that X wanted it”
>
> (case 10/ 2019).

Summarizing, to establish a change in the legal discourse might take a long time. Furthermore, ideologies and discourses concerning how victims should act during or after rape seem to still be highly present in the material. Law plays an influential role in shaping consciousness and behaviors, and changing discourse is a vital entry point for changing the social construction of rape, and thereby of women as victims and men as predators (Conaghan 2019: 363; Davies 2013: 60). When comparing the selected years in the present study, there are still the same number of rapes, no changes in the number of convicted rapists. These patterns indicate that patriarchal structures are still present in society, and social practice does not change in 10 years (2010-2019). Fields (2017) stresses that despite attempts to address the sexual assault epidemic through modification of existing criminal codes and lingering prejudice - rendered traditional legal are useless for sexual assault victims. The findings in this analysis seem to be in line with the feminist legal scholars who stress that law embodies a male bias embedded in binary gendered and heteronormative foundations (Cowan 2016: 116). Consequently, this affects and constructs how rape, consent, and female sexuality are perceived in court.

7. Conclusion

This final chapter summarizes the conclusions drawn from the analysis and answers the central research questions of this study. To fully answer the questions; ”Do the legal amendment from 2018 regarding sexual offenses, affect the legal discourses regarding rape and consent, and if so, how, why and in which ways?” and ”What are the potential socio-legal implications of these discourses from a critical feminist legal perspective?”. We have to consider both under what conditions the legal amendment was implemented and under which conditions consent is justified in the court and or the denial of otherwise valid claims. Further, the patterns in the verdicts allow us to illuminate the legal discourse. Given these considerations, the following subsections will be used; 7.1 Affect on legal discourses; 7.2 Social impacts; 7.3 Potential implications; 7.4 Further research.

7.1 Affect on legal discourses

In this study, three ideologies were apparent; the woman's behavior, the amount of violence, and the expression of consent. By applying feminist legal theory in relation to these ideologies and discourses, two subject positions about gender emerged; the woman and the man, respectively. Women were portrayed as passive victims, while men were actively illustrated. Through this, ideologies and discourses that reproduce the stereotypical and discriminatory structures can work without much resistance. From a constructionism perspective, there is reason to suspect that the ideologies and discourse of the discussion contribute to shaping the "reality" and the "truths" that surround rape as a phenomenon. The findings in this study are in line with previous research that a gender perspective when analyzing crimes of sexual character is essential (Andersson 2004; Christianson 2015; Scheppele 1994), and present when rape cases are prosecuted. Furthermore, the results are in line with the argumentation that society could be said to have a heterogeneous two-gender model structuring, which affects how individuals see sex, but also how society, organizations, groups, and relationships are structured and organized (Butler 1999).

The findings suggest that certain discourses and language use within the legal discourse have changed to some extent after the legal amendment were introduced in 2018. An example of this is how the plaintiff and the rape situation is described, and what is included and not included in the verdicts. One suggestion is that the discourses in the material (medical, sexuality, rape myths, violence, consent) might have been part of changing the language used in the verdicts. This study shows that the concept of consent and the use of intertextuality have affected some discourses, but

not *really* mattered for dominate legal discourse constructing and reproducing the notion of rape in the end.

7.2 Social impact

The ideologies and dominant discourses justify the general conditions under which rape has been handled in court. Over the past four decades, feminist scholars have gendered discourses surrounding ”normal sex”, ”real rape”, and ”consent” (Henry & Powell 2014). However, up until this day, no international (Amnesty International 2018) or national (Prop 2017/18) instrument defines the term consent. Debates concerning sexual assaults and legislation regarding sexual offenses have been focused on both a global and Swedish context. The notion of consent and participation voluntarily was a highly debated topic in Sweden after the #MeToo movement in 2017. This, together with the legal changes in the framework in 2018, might have had an impact on whether the term consent and participate voluntarily have been more implemented in the discourse. However, an explanation as to why the legal discourse might not have changed to a greater extent might be a result of rape myths, the patriarchal structure present in our society, and solid dominant discourses in court. The findings suggest that both the changes in how rape victims are understood and portrayed in court and the inclusion of the term consent could be incorporated to a greater extent. The repeated justifications of legal discourses to modify the court's discourses techniques of reproducing discourses reveals that old ideologies are still present in the legal framework, which is the primary concern of the discourse guiding the development in court.

7.3 Potential implications

Lastly, the findings provide answers to the research question if there are any potential socio-legal implications of these discourses from a critical feminist legal perspective. Above all, previous studies have shown that after significant reforms of policies and laws, rape myths are still common phenomena in court. Moreover, several scholars have argued that criminal justice system reforms will have little impact on courtroom practices until there are changes in societal attitudes towards rape (Zydervelt et al., 2017). According to the feminist legal theory, removing the force element in rape crime is not a sufficient statutory reform if the goal is to conceptualize rape as merely seen without consent or consent as an affirmative standard. The court must be provided something else in its place: statutory guidance on acquaintance rape and the definition of consent (Fraser 2015). Rape myths are assumptions that reproduce a narrow understanding of what constitutes a "real" rape, of who can be a rapist, and what a "real" rape victim looks like. For instance, the ”stranger-in-the-

bushes" mythology does significant harm to sexual assault prevention. It perpetuates confusion about consent by suggesting that anyone who does not physically resist an attack from a stranger somehow "wanted it". Second, it conditions law enforcement, judges, and juries to distrust accusers if allegations are not supported by physical evidence of struggle (Fields 2017). Central to CDA is that discourse is a necessary form of social practice both reproduce and change knowledge and, at the same time, also shaped by other social practices and structures (Chouliaraki & Fairclough & 1999). Fairclough's reasoning is in line with a legal feminism post-constructionism position, claiming that discourse practice not only reproduced an already existing discursive structure but also challenges the structure (Chouliaraki & Fairclough & 1999). There is reason to suspect that the ideologies and discourse of the discussion contribute to shaping the "reality" and the "truths" that surround rape as a phenomenon. I would argue that the current valid grounds regarding consent and rape still seem to be based on previous dominant legal discourses. However, the findings indicate changes in the fundamental grounds and that courts no longer, to the same extend, require the same evidence of physical violence to be present during or as a consequence of rape.

The most immediate implications of the consent discourse being ascendant would be the extending, or permanent addition, of the term after the law was implemented in 2018. Examples of this would be that the term is used in concluding speeches in order to legitimate rapes. The findings show that the exercise of ideologies, widespread hegemony, lack of clear guidance concerning the consent concept, and normalization of certain discourses in court that I have discussed above have resulted in the reproduction of the existing dominant discourses. In the future, and only if the law is successful in its implementation, the legal amendment from 2018 regarding sexual offense could change the legal system's perception of rape.

7.4 Further research

While we have confidently answered the question if the legal amendment from 2018 regarding sexual offenses, affect the legal discourses regarding rape and consent, and if so, how, why and in which ways, and the potential implications of these discourses from a critical feminist legal perspective. The questions of how these changes will be affecting the legal discourses over time are still yet to be answered. The legal amendments came to place in 2018, and the discourse is new, and just recently becoming implemented in the legal framework. Why did this change occur, especially when it did? Or better yet, why are some of the discourse more controlling than others?

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6 kap. 1 § BrB (1962:700)

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Appendix

Appendix 1

The number of convictions and non- convicted each year (2010, 2017, 2019).

	Convicted	Not convicted	Total
2010	6	6	12
2017	7	5	12
2019	8	4	12
Total amount of verdicts	21	15	36