



FACULTY OF LAW  
Lund University

Lovisa Damström

**#MeToo, Men's Sexual Violence against  
Women and the Chilling Effect of Defamation  
Lawsuits: A Feminist Critique of the Swedish Criminal  
Justice System**

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Supervisor: Ulrika Andersson

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## **Abstract**

#MeToo became in 2017 a strong and successful movement in Sweden where women exercised their freedom of expression to question structural injustice and men's sexual violence against women. The movement broke the silence and stigma about being victim of men's sexual violence and helped fight impunity. However, some of the #MeToo women in Sweden who told their stories also pointed out their perpetrators. Consequently, five of those women were met with a chilling and silencing legal consequence: defamation lawsuits.

When examining the interrelation between freedom of expression, men's sexual violence against women, and defamation under Swedish law, it was found that to disseminate information about being victim of sexual violence and name your perpetrator, constituted the crime of defamation. Moreover, defamation constitutes a lawful restriction on freedom of expression under IHRL. It is meant to protect the reputation of an individual and is applied objectively and equally for all. However, because of deeply rooted discriminatory practices in the Swedish society, such restriction can impose a disproportionate interference with freedom of expression under Articles 19 and 26 in conjunction with Articles 2 and 3 of the ICCPR and Article 5 of the CEDAW.

One of the most extreme expressions of such discriminatory practice is men's sexual violence against women, which restrict women's freedom of expression because of stigma, fear, and impunity. It is also caused by the inability of the Swedish criminal justice system to handle men's sexual violence against women, and often women are reproduced in court in as untrustworthy, sexualized subjects that do not fit into the realm of the autonomous legal subject. Serious defamation cases often involve sexual violence, and they affect men and women differently. Women are often victims of being posed in sexualized context, while men are often accused of being sex criminals. The #MeToo defamation cases involve the latter, where the women who claimed they had been victims of sexual violence and had achieved no justice became the perpetrators of a defamation crime.

The result of my research shows that the #MeToo cases constitutes a societal, structural, and legal complexity between freedom of expression, men's sexual violence against women, and defamation. In the Swedish criminal justice system, because of its objective assessment, such complexity not only position women victims of sexual violence as criminals who have overstepped the boundaries of Swedish defamation law. Women are once again reproduced as a sexualized and untrustworthy subjects, whose freedom of expression is limited. As a result, it causes a discriminatory interference with Articles 19 and 26 in conjunction with 2 and 3 of the ICCPR and Article 5 of the CEDAW.

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## **Abbreviations**

Brottsförebyggande Rådet/Swedish National Council for Crime Prevention	<b>BRÅ</b>
Brottsbalken/The Swedish Penal Code	<b>BrB</b>
Committee on the Elimination of Discrimination against Women	<b>CEDAW</b>
European Convention om Human Right	<b>ECHR</b>
European Court of Human Rights	<b>ECtHR</b>
Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression	<b>SRFoE</b>
Swedish Prosecution Authority	<b>SPA</b>
Special Rapporteur on Violence against Women	<b>SRVaW</b>
The International Convention on the Elimination of all Forms of Discrimination against Women	<b>CEDAW</b>
The International Covenant on Civil and Political Rights	<b>ICCPR</b>
The Swedish Constitution/Regeringsformen	<b>RF</b>

# 1. Introduction

## 1.2 Background

In 2017 the #MeToo movement sparked great attention to sexual violence against women in Sweden. The movement raised awareness, reduced stigmatization, and empowered women to exercise their freedom of expression to speak out about their experiences of being victims of men's sexual violence.<sup>1</sup> Nevertheless, in the years following #MeToo, women in Sweden encountered a silencing legal backlash and consequence for speaking out: defamation lawsuits.<sup>2</sup>

'All humans are born free and equal in dignity and rights' echoes as the foundation for international human rights law (IHRL). However, not all human beings are treated equally because of who they are, where they were born, or what sex they have.<sup>3</sup> The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (SRFoE) has found that structural inequalities limits the right to freedom of expression for women and is based on deeply entrenched traditional, historical, and cultural factors.<sup>4</sup> Such factor have historically restricted freedom of expression of women whom are met with 'stereotypes, harassment and violence', and can affect de facto equality<sup>5</sup> for women.<sup>6</sup> Structural discrimination against women is prevalent all over the world, including Sweden. Sweden is reputed<sup>7</sup> as a gender-equal country with well-developed gender politics<sup>8</sup>. Nevertheless, in Sweden, women are still structurally unequal, which affect their everyday lives and their enjoyment of human rights.<sup>9</sup> This includes women's possibility to exercise freedom of

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<sup>1</sup> Ro'ee Levy and Martin Mattsson, 'The Effects of Social Movements: Evidence from #MeToo' (December 2, 2019) 4-5; Ulrika Andersson et al, *Rape Narratives in Motion* (Springer International Publishing 2019) 2, 4.

<sup>2</sup> Deboarh Tuerkheimer, 'Beyond #MeToo' (2019) 94 NYU L Rev 1146 1149.

<sup>3</sup> Universal Declaration of Human Rights 1948 Article 1 & 2.

<sup>4</sup> Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Frank La Rue' (A/HRC/14/23, 20 April 2010) para 43.

<sup>5</sup> De facto gender equality is this thesis means substantive equality. Through a transformative approach, we can strive to achieve the equal treatment of women and men, the outcome of gender equality (Marsha Freeman, Christine Chinkin & Beate Rudolf (eds), *The UN Convention on the Elimination of All forms of Discrimination Against Women: A Commentary* (OUP, 2012) 4.

<sup>6</sup> OHCHR, 'Commitments for Women's Rights: Time to Turn Empty Promises Into Concrete Change for Women' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13097&LangID=E>> (Accessed 2020-03-03)

<sup>7</sup> This can be discussed as a problematic rhetoric. The Swedish government and population often argue that Sweden is gender equal, and therefore, there is nothing to change or challenge. The factual reality is that a lot of women in Sweden face sexual violence, domestically, at work, and by strangers. Most cases go unreported, and of those who report, most cases are dismissed due to lack of evidence. (Lena Martinsson, Gabriele Griffin & Katarina Giritili Nygren, *Challenging the Myth of Gender Equality in Sweden* (Policy Press 2016) 3).

<sup>8</sup> Betänkande av Jämställdhetsutredningen (2015), *Mål och Myndighet: En Effektiv Styrning av Jämställdhetspolitiken* (SOU 2015:86).

<sup>9</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No 35 on Gender-based Violence against Women, Updating General Recommendation No 19' (CEDAW/C/GC/35, 26 July 2017) paras 1, 19, 30(b); Åsa Gunnarsson (et al), *Genusrättsvetenskap* (2<sup>nd</sup> edn, Studentlitteratur 2018) 45; CEDAW

expression protected under the International Covenant on Civil and Political Rights (ICCPR) Article 19. Freedom of expression under Article 19, being foundational for democracy<sup>10</sup>, must be exercised on an equal basis and without discrimination.<sup>11</sup>

The effects of inequality between men and women has moreover resulted in a lack of protection against sexual violence against women. Sweden has a strong legal protection against the crime (international<sup>12</sup>, regional<sup>13</sup>, and national<sup>14</sup>), but the crime is persistent and unresolved in practice. It is one of the most prominent forms of gender-based discrimination and violence in the country that disproportionately affects women.<sup>15</sup> Worldwide, more than one third of women have experienced sexual violence. In Sweden during 2017, 35.8% of women compared to 4.7% of men between the ages 20-24 had been victims of sexual violence, proving women to be particularly at risk of the crime.<sup>16</sup> Sweden has faced international critique for its lack of efficient strategies to combat sexual violence against women, such as the low rates of reporting and prosecution of the crime and the high level of impunity<sup>17</sup> and that norms of victim blaming are still prevalent.<sup>18</sup> Because of this very lack of reporting, The Swedish Equality Ombudsman (DO) it is difficult to assess de facto equality as there lacks statistics.<sup>19</sup> Violence against women is therefore because of underreporting, stigma, and mistrust, a highly unresolved problem that disproportionately targets women.<sup>20</sup> Such discrimination is based upon power hierarchies between men and women. Such hierarchies affect how women and men are perceived because

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Article 5; United Nations, 'Transforming our world: the 2030 Agenda for sustainable development' (A/RES/70/1, 2015) (2030 Agenda) Goal 5.

<sup>10</sup> Human Rights Committee, 'General Comment No 34: Article 19: Freedoms of Opinion and Expression' (CCPR/C/GC/34, 12 September 2011) para 2.

<sup>11</sup> ICCPR article 3 equal rights of men and women, art 4(1) restriction not solely based on discrimination on the basis of sex, art 26 equality before the law.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979; Declaration on the Elimination of Violence Against Women 1993; The International Covenant on Civil and Political Rights of 1966.

<sup>13</sup> Council of Europe on Preventing and Combating Violence Against Women and Domestic Violence 2011 (Istanbul Convention) Articles 36, 40; The European Convention on Human Rights 1949.

<sup>14</sup> The Swedish Criminal Code Chapter 6, Swedish Discrimination Act of 2008 (§1:4)

<sup>15</sup> United Nations Development Programme, 'Beyond Income, Beyond Averages, Beyond Today: Inequalities in Human Development in the 21<sup>st</sup> Century (Human Development Report 2019 148; Declaration on the Elimination of Violence against Women (DEVaW) article 1.

<sup>16</sup> Brottsförebyggande Rådet, 'Crime and Statistics: Rape and Sexual Offences' <<https://www.bra.se/bra-in-english/home/crime-and-statistics/rape-and-sex-offences.html>> (Accessed 2020-03-02).

<sup>17</sup> CEDAW, 'List of Issues and Questions Prior to the Submission of the Tenth Periodic Report of Sweden' (CEDAW/C/SWE/QPR/10, 20 March 2019) 3.

<sup>18</sup> Amnesty International, 'Time for Change: Justice for Rape Survivors in the Nordic Countries' (2019)79-83.

<sup>19</sup> Diskrimineringsombudsmannen, 'Kön som Diskrimineringsgrund' <<https://www.do.se/om-diskriminering/skyddade-diskrimineringsgrunder/kon-som-diskrimineringsgrund/>> (2020-03-04).

<sup>20</sup> United Nations Development Programme, 'Beyond Income, Beyond Averages, Beyond Today: Inequalities in Human Development in the 21<sup>st</sup> Century (Human Development Report 2019 148; Declaration on the Elimination of Violence against Women (DEVaW) UNPD (n 15) 166.



of what roles they, arguably, have in society<sup>21</sup>. This unequal distribution of power between the genders result in a restriction of personal freedoms for women and their full and equal participation in society.<sup>22</sup> As such, for women to exercise their right to freedom of expression to tell their stories and speak out about sexual violence is still faced by stigma and traditional gender norms. Therefore, women and men do not have an equal access to exercise their right to freedom of expression.

As already mentioned, in 2017 women of the world made a powerful and game-changing effort to combat sexual violence against women: the #MeToo movement. #MeToo gave women a platform to exercise their freedom of expression and break the silence surrounding sexual violence, raised awareness, and challenged those very gender norms and structures that disproportionately affects women.<sup>23</sup> In Sweden, the #MeToo movement created uproars in different work sectors, and amendments in politics and law was made to adhere to the strife to end sexual violence against women. In 2018, Sweden took steps to adhere to international human rights standards.<sup>24</sup> It, for example, adopted a new consent law focusing on non-voluntariness and introduced ‘negligent rape’<sup>25</sup>.<sup>26</sup> During #MeToo, talking out about sexual abuse and naming perpetrators became part of the success of the movement, and helped women in Sweden to seek out and achieve justice.<sup>27</sup> Nevertheless, some of the women who spoke out about their experiences faced a legal backlash: defamation lawsuits and sentences. To publicly accuse another person of being a criminal, despite the information disseminated being true, creates a risk of being sentenced for defamation.<sup>28</sup> Thus, as a consequence of speaking out on social media, women in Sweden, and globally, have also been reported and sentenced for defamation against their alleged perpetrators, turning the tables around from the women being the victims, to the men.<sup>29</sup>

On the one hand, the international community and Swedish courts have argued that disseminating information about who has committed a sex crime infringes upon the private life

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<sup>21</sup> Marsha Freeman, Christine Chinkin & Beate Rudolf (eds), *The UN Convention on the Elimination of All forms of Discrimination Against Women: A Commentary* (OUP, 2012) Freeman, Chinkin & Rudolf (n 5) 127.

<sup>22</sup> CEDAW GR 35 (n 9) paras 2, 6-7.

<sup>23</sup> UNPD (n 15) 167.

<sup>24</sup> Time for Change (n 18) 77-8.

<sup>25</sup> A prerequisite to the crime of rape where the crime lacks the *intent* of rape, but the actions taken are still of punishable nature. This entails that if a person was knowingly negligent, such as suspecting their sex partner was not consenting, and still followed through the sex act (Mikaela Bexar, ‘Brottsbalken: Karnov Lagkommentarer’ 272).

<sup>26</sup> Andersson (n 1) 2, 4.

<sup>27</sup> Maria Ridderstedt, ‘MeToo – Ett År Senare: Rättsfallen Efter MeToo – Så Gick Det’ <<https://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=7063515>> (Accessed 2020-03-30).

<sup>28</sup> Brottsbalk 1962:700 5 Kap.

<sup>29</sup> Tuerkheimer (n 2) 1149.

and personal integrity of the ‘#MeToo men’.<sup>30</sup> On the other hand, such way of using defamation has by the Special Rapporteur on Violence against Women (SRVaW) been found to be exercised as a legal threat against women who speak out about their experiences online, which ultimately restricts women’s possibility to exercise freedom of expression to report crimes and speak out.<sup>31</sup> Thus, despite the success stories of #MeToo, women in Sweden have faced defamation lawsuits as a legal backlash restricting their freedom of expression, and consequently, their ability to speak out about who committed a sex crime.<sup>32</sup>

Men’s sexual violence against women, freedom of expression, and defamation are individually well-researched topic (but under development). However, with the three combined, the #MeToo defamation cases however constitutes an uncharted and legally complex topic in need of exploration.

### **1.3 Purpose and Research Question**

This thesis examines the complexity between gender inequality, women victims of sexual violence, freedom of expression, and defamation. From a gender-critical perspective, the thesis will contextualize the ICCPR Article 19 (freedom of expression) and Article 26 (equality before the law) in conjunction with Articles 2 (non-discrimination) and 3 (equality between men and women) as well as CEDAW Article 5 (abolishment of structural injustice) in relation to Swedish criminal law and how the Swedish criminal justice system applies such law in the #MeToo defamation cases.

#MeToo was used, as found above, a means to exercise freedom of expression and critique the prevalence of men’s sexual violence against women, an act based on the discriminatory structures reiterating the roles of women and men. To seek justice, many women named their perpetrators and got sued and sentenced for defamation.

Therefore, as the thesis regards freedom of expression in the context of the inferiority or superiority of the sexes as well as stereotypes of the anticipated roles for women and men, it is relevant to examine if the Swedish criminal justice system harbors such discriminatory practices in the #MeToo defamation cases. This is important considering the involvement of women victims of men’s sexual violence and its possible restrictions of freedom of expression.

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<sup>30</sup> HRC GC 34 (n 10) para 21; Stockholms Tingsrätt, Dom 2019-12-09, Mål Nr B1755-18; Solna Tingsrätt, Dom 2020-03-24, Mål Nr B2985-19; Södertörns Tingsrätt, Dom 2019-12-02, Mål Nr B3405-18; Nacka Tingsrätt, Dom 2019-07-03, Mål Nr B7995-18; Södertörns Tingsrätt, Dom 2018-02-20, Mål Nr B17160-17.

<sup>31</sup> Human Rights Council, ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on Online Violence against Women and Girls from a Human Rights Perspective’ (A/HRC/38/47, 18 June 2018) para 31.

<sup>32</sup> Tuerkheimer (n 2) 1189.

The purpose is therefore to examine how the Swedish criminal justice system applies the law when a defamation case involves women victims of men's sexual violence. And furthermore, if such application of the law can constitute a discriminatory pattern contrary to Article 5 of the CEDAW. And finally, if such discriminatory patterns constitute an unlawful interference with the right to freedom of expression under Article 19 seen in the light of Article 26 in conjunction with Articles 2 and 3 of the ICCPR.

*Therefore, the legal question is:*

Whether the Swedish criminal justice system's balancing of rights in the #MeToo defamation cases can constitute an unlawful interference with freedom of expression under Article 19 and 26 in conjunction with Articles 2 and 3 of the ICCPR and Article 5 CEDAW?

To answer the questions, the thesis will examine following sub-questions:

- 1) When is it justified to exercise freedom of expression and disseminate information about who committed a sex crime?
  - a) Does the structural subordination of women in Swedish criminal justice system hinder women's possibility to exercise freedom of expression with regards to men's sexual violence against women?
  - b) What are the general rules of defamation under the Swedish Penal Code Chapter 5, and how do they affect women victims of sexual violence?
  - c) Is the Swedish criminal justice system able to adhere to the structural subordination of women with regards to men's sexual violence against women in the #MeToo defamation cases?
    - i) How do the courts balance the clash of rights: protection of reputation v speaking out about sexual violence (freedom of expression)?
    - ii) Does the Swedish criminal justice system reproduce gender and sexuality with respect to the roles of women and men?
- 2) How could IHRL (ICCPR, CEDAW) provide protection for women who have spoken out and are now facing defamation lawsuits?

## 1.4 Delimitation and Definitions

### 1.4.1 Delimitations

The thesis and its outcome build on case law after 2017, and therefore the judgements of the analyzed cases are after that year and few in quantity. This automatically delimits the thesis to the five Swedish cases put in relation to IHRL.

With respect to the privacy, many cases within Swedish criminal law are very sensitive in content and with respect to privacy and private life, these cases are not open and accessible to the public. This delimits the analysis to exclude certain case law from before 2017, particularly those regarding men who have been publicly accused of a sex crime on social media, which is a more common defamation crime against men in Sweden.<sup>33</sup>

There are many issues regarding women's freedom of expression and sexual violence that is on today's agenda that can be related to defamation. Online gender-based violence is for example getting more and more common.<sup>34</sup> Although it is a current and pressing issue, it will not as such be examined in this thesis for the sake of the scope. However, it will be mentioned as part of a general culture of sexual violence against women.

When it comes to sexual violence and the #MeToo movement, it is important to note that power structures and structural inequalities are not only applicable between men and women, but there may be other prerequisites that makes a woman (or a man) more vulnerable. So called intersectional discrimination.<sup>35</sup> With regards to *who is the victim* and *whose stories are heard*, the thesis acknowledge that more vulnerable women are often facing even more so an unwillingness to investigate and to provide access to justice, and the possibility to have their stories heard or to even have the possibility to use freedom of expression online, is severely restricted. Sweden has for example had a strong movement for equal civil rights for all, but often vulnerable groups such as Roma people, mentally disabled, and LGBT people has however historically been left out.<sup>36</sup> Thus, feminist do not only relate to those in a privileged position. It seems that women who do write about who committed a sex crime, and who is better able to report sex crimes are women in a more privileged position.<sup>37</sup> Sexual violence is however stigmatized everywhere, and any woman is at risk of falling victim of sexual violence. This

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<sup>33</sup> Brottsförebyggande Rådet, 'Polisanmälda Hot och Kränkningar Mot Enskilda Personer Via Internet' (2015) 66-67.

<sup>34</sup> A/HRC/38/47 (n 31) 12.

<sup>35</sup> Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] 1989 University of Chicago Legal Form 139.

<sup>36</sup> Martinsson, Griffin & Nygren (n 7) 26.

<sup>37</sup> *ibid* 25.

paper is thus aware of the issue, but will not for the scope of this thesis, distinguish between women, so long as this is not relevant in the context of any of the cases examined.

Moreover, Sweden is party to the European Convention of Human Rights (ECHR), and the European Court of Human Rights have substantial precedence on freedom of expression, defamation, and discrimination. However, it will not be part of the analysis of this thesis. The thesis will provide a global perspective on the protection of IHRL in the context of the #MeToo defamation cases in relation to Swedish law. To only use the ECHR would limit that approach, and to also analyze the ECHR would make the scope too broad. However, although it is not the main analytical source, as the ECHR is part of Swedish law the thesis will occasionally substantiate IHRL with ECtHR standards to point to a certain common human rights standard.

#### *1.4.2 Definitions*

##### *Gender*

This thesis uses gender when discussing discrimination between men and women. Gender in this thesis is explained as a social construction of the biologically determined ‘sexes’. Gender is in this thesis used to describe the relationship between women and men in social and legal settings. Because our society is built upon power structures and hierarchies, they also exist between the genders, and because of outdated structures and stereotypes, women are disadvantaged. Thus, how social perceptions of the law are constructed and reproduced in law is an important theme and includes discussions of power structures.<sup>38</sup> It affects how women and men are protected not only by law, but also in practice, and the asymmetry of power between women and men affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life.<sup>39</sup>

##### *Gender equality/inequality*

Gender equality is defined as the equality between women and men and builds upon the social construction of ‘gender’. Gender inequality, often described as the prohibition of discrimination on the basis of sex, affects women disproportionately and is based upon the asymmetric power structures between men and women. Gender as a social construction is however non-static and

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<sup>38</sup> Gunnarsson (n 9) 37-38.

<sup>39</sup> Committee on the Elimination of Discrimination against Women, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW/C/GC/28, 16 December 2010) 2.

changes as society develops, and by questioning gender inequalities, these structures can change.<sup>40</sup>

### *Substantive equality*

(1) to ensure full equality of women before the law, and protection against discrimination in the public and the private spheres; (2) to improve the de facto position of women; and (3) to address gender-based stereotypes that uphold unequal gender relations.<sup>41</sup>

## **1.5 Methodology and Materials**

To examine and answer the research questions this thesis will explore the right to freedom of expression of women victims of sexual violence in relation to gender equality and the #MeToo defamation judgments in Sweden from a critical feminist perspective with an IHRL-approach.

This thesis uses a legal dogmatic method to determine the law relation to the #MeToo defamation cases. It will therefore analyze generally accepted sources of law, such as treaties and general principles of law as well as subsidiary sources, such as judicial decisions, preparatory works and judicial writings.<sup>42</sup> First, freedom of expression is entitled to persons under the Swedish jurisdiction under RF 2:1<sup>43</sup>, as well as the ICCPR Article 19(2) to enable an IHRL approach. The thesis will therefore examine the rules of freedom of expression from a IHRL perspective in relation to women's movements, sexual violence, and disseminating information about who committed a sex crime in Sweden. Moreover, as the #MeToo defamation cases regards a restriction of freedom of expression, RF 2:23 on limitations of freedom of expression (protection of reputation) as well as the Swedish Penal Code Chapter 5, criminalizing defamation, will be applied. This will be examined in relation to the lawful limitations of freedom of expression under Article 19(3) of the ICCPR.

As the #MeToo defamation cases regards women exercising freedom of expression to talk out about being victims of sexual violence, Chapter 6 of the Penal Code will be examined where relevant. Furthermore, the #MeToo defamation cases will also be examined with respect to the prohibition of discrimination on the basis of sex under RF 1:2. This will be related to how the Swedish criminal justice system treats women victims of sexual violence. Both the ICCPR and the CEDAW prohibits discrimination on the basis of sex, including sexual violence against

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<sup>40</sup> Gunnarsson (n 9) 100.

<sup>41</sup> Freeman, Chinkin & Rudolf (n 5) 4.

<sup>42</sup> Statute of the International Court of Justice Article 38(1).

<sup>43</sup> The thesis will not examine the Swedish constitutional laws on freedom of expression and freedom of press as they regard posts made by media channels.

women. Under the ICCPR, there are three Articles that are relevant. Article 2 on the prohibition of discrimination on the basis of sex, Article 3 on the equality between men and women, and article 26 on the equality before the law. Thus, Article 19 and the assessment on the limitations of freedom of expression is seen in the light of Articles 2 and 3. Article 26 can provide an additional layer of examining the women are equal men before the law. The ICCPR is however a gender-neutral convention<sup>44</sup> and it therefore lack a contextualized understanding of gender-equality in the application of law in Sweden.<sup>45</sup> Therefore, this thesis will examine the legal issue from the perspective of Article 5 of the CEDAW. The CEDAW as a women's rights convention and Article 5 can substantiate discriminatory structures and the general subordination of women on the Swedish society. This includes the roles of women and men, attitudes towards women victims of sexual violence and justice, and victimization when analyzing the judicial decisions of the #MeToo defamation cases.<sup>46</sup> To assess such structures is a way to strive towards substantive equality of women.<sup>47</sup> As such, the Swedish #MeToo defamation cases can be assessed from a critical feminist perspective with an IHRL-approach.

Judicial decisions are under IHRL a subsidiary means for determining the rules of international law<sup>48</sup> and are important for the development of IHRL.<sup>49</sup> Therefore, the courts' reasonings and outcomes of the #MeToo defamation cases are of utmost importance for examining the legal issue. As societal values are constantly changing, it is by analyzing the #MeToo judicial decisions possible to assess Sweden's current societal and legal stance on the issue with respect to IHRL.<sup>50</sup> It is particularly important as it enables the thesis to examine patterns and competing interests from a gender-perspective. For example, to analyze case law from the district courts can help make visible if and how much the perception of gender, and the relation between the genders, have in the decision making of the courts.<sup>51</sup> Thus, to examine the #MeToo defamation cases it is possible to interlink the Swedish criminal justice system stance on the relationship between freedom of expression, defamation, and gender equality. The courts' reasonings will contribute to an understanding of the prevalence of discriminatory structures towards women victims of sexual violence and their possibility to exercise freedom

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<sup>44</sup> Freeman, Chinkin & Rudolf (n 5) 5.

<sup>45</sup> See sub-chapter on critical feminist theory.

<sup>46</sup> Freeman, Chinkin & Rudolf (n 5) 3-4.

<sup>47</sup> *ibid* 4.

<sup>48</sup> ICJ Statute Article 38(1)(d) (n 42).

<sup>49</sup> Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, *International Human Rights Law* (3<sup>rd</sup> edn, OUP 2018) 75.

<sup>50</sup> SOU 2016:7, 'Integritet och Straffskydd: Betänkande av Utredningen om ett Modernt och Starkt Straffrättsligt Skydd för den Personliga Integriteten' (SOU 2016) 435.

<sup>51</sup> Gunnarsson (n 9) 100.

of expression to talk about it, and it it's made relevant. To assist in interpreting the meaning of the law, the analysis will be substantiated by Swedish preparatory works, propositions and the government official investigations (SOU) on the right to freedom of expression in relation to the right to privacy and defamation, sexual violence against women, and non-discrimination. This includes SOU 2016:7 on Integrity and criminal protection, Proposition 2016/17:222 on criminal law protection against defamation, and SOU 2015:86 on the Swedish policy on gender equality. These are used as means to interpret the ordinary meaning of the law.<sup>52</sup>

To deepen the analysis, the thesis will be complemented with subsidiary sources and other sources, such as writings of jurists, soft law instruments, empirical data, newspaper articles and websites. General comments or recommendations, working papers and reports of commissions specialized on human rights and women's rights will be examined. It will provide statistics as well as the present-day conditions of gender inequality and freedom of expression, defamation, and sexual violence against women. Although they are not legally binding, they provide a good understanding of the relevance of the principles under IHRL.<sup>53</sup> This also includes writings of jurists which is a subsidiary source<sup>54</sup> and which is highly valued to interpret the law, such as writings of Special Rapporteurs and NGOs.<sup>55</sup> Soft law instruments will also be examined to provide further analytical substance as they act as, e.g., guidelines for IHRL.<sup>56</sup> Article 19, an International human rights organization working for freedom of expression, has provided guidance such as the 'Principles of Freedom of Expression and Protection of Reputation' (Defamation Principles) and 'The Camden Principles' on freedom of expression and equality. Moreover, the thesis use General Recommendations and reports on international standards and Sweden from the Committee on the Elimination of Discrimination against Women (CEDAW Committee), The Special Rapporteur on Violence against Women (SRVW), The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (SRFoE), General Comments of the Human Rights Council (as they examine issues under the ICCPR), the United Nations Development Program (UNDP), and Brottsförebyggande Rådet (Swedish National Council for Crime Prevention, BRÅ). Reports from NGOs such as the Amnesty Report 'Time for Change' on rape in the Nordic countries, and documents issued by Sveriges Kvinnolobby (Swedish Women's Rights Lobby) and Kvinna till Kvinna will be

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<sup>52</sup> Vienna Convention on the Law of Treaties, 1969, Article 31.

<sup>53</sup> Moeckli, Shah & Sivakumaran (n 49) 69.

<sup>54</sup> ICJ Statute (n 42) Art 38(d).

<sup>55</sup> Moeckli, Shah & Sivakumaran (n 49) 78.

<sup>56</sup> *ibid* 82.



addressed. Finally, materials from the Swedish local anti-discrimination organizations such as 'Agera Utan att Diskriminera' (act without discrimination) will be applied.

### 1.5.1 Critical Feminist Legal Theory

I will use a feminist critical discourse to make visible and critique how gender as a social construction generates inequalities between men and women due to power structures, which are often made invisible in neutral law and application of criminal law. To critique this invisibility is vital since science, law, politics, and social reality is not genderless.<sup>57</sup> I will through applying the theory provide a critical context to the findings of *lex lata* in order to discuss if women and men have an equal possibility to exercise freedom of expression with regards to the #MeToo defamation cases.

First of all, this thesis uses a critical feminist perspective to limit the scope of the thesis. This limits the scope to examine how the #MeToo defamation cases affects freedom of expression for women victims of men's sexual violence. Without a gender perspective, it would also deviate from the purpose and risk a neutral assessment that simplifies reality structural inequalities<sup>58</sup>. It could risk discarding the complex tension between freedom of expression, defamation, gender inequality, and sexual violence. Particularly as defamation law is applied in an objective manner towards its subjects. Therefore, a critical feminist theory is in this thesis used as an analytical and interpretative tool.<sup>59</sup>

Secondly, the criminal law legal dogmatic method put up hinders to how the courts deal with men's violence against women.<sup>60</sup> A feminist perspective on law and the application of law goes outside that limitation and examines how legal structures can limit the de facto possibilities to gender equality.<sup>61</sup> This includes the application of IHRL in the national setting, and if it can provide a contextual analysis of gender inequality and of the structural subordination of women in Sweden. Furthermore, it can assist in analyzing how neutral application of law can reinforce male superiority and female subordination.<sup>62</sup> As such, it can also examine how the Swedish courts and IHRL deal with stigma connected to sexual violence and freedom of expression for women, and how such analysis can be relevant in the #MeToo defamation cases.<sup>63</sup> This is

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<sup>57</sup> Eva-Maria Svensson, *Genus och Rätt: En Problemativering av Föreställningen om Rätten* (Iustus Förlag, 1997) 96.

<sup>58</sup> *ibid* 125.

<sup>59</sup> Lee McConnell and Rhona Smith (eds) *Research Methods in Human Rights* (Routledge 2018) 59.

<sup>60</sup> Gunnarsson (n 9) 156.

<sup>61</sup> *ibid* 31.

<sup>62</sup> *ibid* 27.

<sup>63</sup> Svenska Röda Korset och Agera, 'Agera utan att Diskriminera: En Handbok för Arbete mot Diskriminering' (2010) 90.

particularly important as Sweden is a self-proclaimed feminist government with a clear gender equality policy with goals to create opportunities for all citizens regardless of sex. Thus, for women and men to have the same power and possibility to affect their own lives.<sup>64</sup>

In the 1990s, feminist politics became a trend in Sweden. Sweden then recognized that gender inequality is a result of an asymmetry in power between the sexes: the male perspective as the norm and female as an exception to the norm. It therefore started to see the need to change such structures. This led to that amendments were made in the Swedish criminal justice system to try to adhere to the specific needs of women. It also meant that the material aspect of the principle of gender equality was enhanced in law.<sup>65</sup> However, inequalities prevail. To achieve gender equality, women must first be equal before the law and there must exist protection against discrimination in all spheres. Secondly, de facto equality must be achieved, and to do so, third, structures that uphold gender-based stereotypes must be addressed.<sup>66</sup>

A feminist critical theory harbors a general scientific and broad jurisprudence but involves multiples sciences to examine and reach one goal: the path to gender equality. It regards a general adherence in law and application of law to the equal value of all humans.<sup>67</sup> This thesis therefore contextualizes the core of a critical feminist theory: questioning structures of power of the genders and how it effects women's human rights. Simplifying Judith Butlers 'Gender Trouble', the thesis examines how gender and sexuality is produced in the Swedish criminal justice system.<sup>68</sup> Ulrika Andersson has found that by looking at structural inequalities, it is also possible to make general conclusions on how inequality affects men and women. It is therefore also important to look at the discursive subject, namely, 'a subject that is formed and produced in different discourses, such as the criminal justice discourses on sexual abuse'. Such analysis can consequently extract how a discourse can be used as a means of performing power.<sup>69</sup> Therefore, the thesis extends beyond merely examining how power hierarchies affect the roles of and relation between women and men. It is also relevant to examine the criminal justice system as an agent exercising power. Such theory assists in examining normative and structural inequalities that women face related to exercising freedom of expression and talking about being a victim of sexual violence, to report crimes, and to access justice in relation to the #MeToo women and their stories. It can therefore also contribute to analyzing how Swedish

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<sup>64</sup> ibid 100.

<sup>65</sup> Gunnarsson (n 9) 30.

<sup>66</sup> Freeman, Chinkin & Rudolf (n 5) 4.

<sup>67</sup> Gunnarsson (n 9) 39.

<sup>68</sup> Judith Butler, *Gender Trouble: Tenth Anniversary Edition* (Routledge 1999) 4-5

<sup>69</sup> Ulrika Andersson, *Hans (Ord) eller Hennes?: En Könsteoretisk Analys av Straffrättsligt Skydd mot Sexuella Övergrepp* (Bokbox, 2004) 35-37.

courts reason and contextualize the issues in the #MeToo defamation cases. This includes power structures and portrayal of women and men, who is the victim and of what crime, and who is the 'reliable subject'.<sup>70</sup>

Furthermore, power structures also exist within IHRL itself. Feminists have questioned if 'international formulations of rights are useful for women' as the neutral application of human rights oversimplifies the struggles of women, as it is based on structural inequalities of power. A typical example is, as will also be examined in the #MeToo defamation cases, that when balancing 'competing' rights by decision-making bodies' courts often 'reduces women's power' as a natural consequence to neutral application of law.<sup>71</sup> Such application of law - including the mainstream human rights system which is based on individualism and is 'promoted by traditional understandings of human rights' - has an ability to limit the human rights protection for all human beings, and it instead risks protecting the already privileged groups, such as men.<sup>72</sup> Such traditional understanding of IHRL applies in the national context too as Sweden is party to the ICCPR, the main instrument for this thesis.<sup>73</sup> Therefore, to enhance a feminist and critical perspective, the thesis will apply certain standards of the CEDAW that covers structural injustice. When using the ICCPR, the CEDAW is necessary to add as it provides more developed critical and interpretative tools to examine discriminatory structures in the Swedish criminal justice system.<sup>74</sup>

Freedom of expression is a fundamental human right that is considered objective, neutral, and fair for all. It moreover has an important value for the advancement of women's rights and gender equality as it enables women to challenge and critique gender structures.<sup>75</sup> However, belonging to a vulnerable group in Sweden, law and human rights do not apply in an equal manner for women and men. The law as applied today, applies best to those privileged persons that fit into the normative, and therefore superior, legal subject.<sup>76</sup> Such structures and unequal distribution of power must be possible for women to critique, particularly if it regards them.<sup>77</sup>

A critical feminist perspective can consequently work as a tool to dwell deeper into the complexity between freedom of expression, men's sexual violence against women in relation

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<sup>70</sup> Margaret A McLaren, *Women's Activism, Feminism, and Social Justice* (OUP 2019) 9.

<sup>71</sup> Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (MUP 2000) 201-202, 208.

<sup>72</sup> Charlesworth & Chinkin 2000 209.

<sup>73</sup> Svensson (n 57) 117.

<sup>74</sup> ICCPR GC 28 para 5. CEDAW art 5.

<sup>75</sup> Svensson (n 57) 46.

<sup>76</sup> *ibid* 47-49.

<sup>77</sup> *ibid* 88.

to #MeToo, and defamation.<sup>78</sup> Such critique is a necessity combat injustice as our existence is ‘complex, contradictory, and unpredictable’. Critique can thusly provide an alternative understanding to what is the law, how and why it is legitimate, and to whom it constitutes a legal and ‘righteous’ reality.<sup>79</sup> Such analysis could provide an understanding to normative restrictions applied by the Swedish criminal justice system.<sup>80</sup> It is therefore also of importance to examine what is made legally relevant - *or irrelevant*.<sup>81</sup> This can be done by contextualizing a crime in relation to sex and gender and power and sexuality, and to question the autonomous application of law to the ‘autonomous subject’; is each individual really ‘free, rational, and delimited from different contexts’?<sup>82</sup>

Finally, an ‘autonomous subject’ is an individual who is free to make their own decisions and to have full control over their own life without undermining others.<sup>83</sup> Such individual has historically been (white) men, being considered free and public persons, driven by reason. Women on the other hand have been portrayed in the private sphere, as caregivers and dependent on men.<sup>84</sup> Socially and legally speaking, because of such inherited history and gender roles, women are considered unreliable subjects that have to be controlled (e.g. the history of ‘witches’).<sup>85</sup> The autonomous subject therefore also often *benefits* from an objective and neutral application of law, while neutrality may be insensitive to the vulnerability of women and therefore often causes women to suffer from discrimination and deprivation of their human rights.<sup>86</sup> It also means that how courts depict the parties to a criminal trial will be affected by how it applies and interprets the law, which in defamation cases is in an objective manner.<sup>87</sup> When courts apply this norm of neutrality, they risk reiterating and consolidating outdated gender norms and make invisible rather than changing structures of inequality.<sup>88</sup> Therefore, ‘who gets to tell their story, and how, is a question of power’.<sup>89</sup> Power structures and superiority/inferiority between women and men controls women’s physical and psychological

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<sup>78</sup> *ibid* 86.

<sup>79</sup> *ibid* 79, 81, 83.

<sup>80</sup> *ibid* 71-72, 75.

<sup>81</sup> *ibid* 100-101.

<sup>82</sup> Ulrika Holgersson & Helena Tolvhed (red), *Plats för Makt: En Vänbok till Monika Edgren* (Makadam, 2018) 210.

<sup>83</sup> Gunnarsson (n 9) 63.

<sup>84</sup> Svensson (n 57) 107.

<sup>85</sup> *ibid* 145, 164.

<sup>86</sup> Gunnarsson (n 9) 64.

<sup>87</sup> Holgersson & Tolvhed (n 82) 211.

<sup>88</sup> Svensson (n 57) 104.

<sup>89</sup> Holgersson & Tolvhed (n 82) 9, 13.

freedom. ‘Power’ is not something that is in itself ‘bad’, however, seen in relation to gender structures it can constitute discrimination against women.<sup>90</sup>

Critiquing law and judicial practice and analyzing gender-relations will contextualize law and make visible the symbolic and concrete power dynamics between women and men that are restricting the human rights of women.<sup>91</sup> Therefore, when examining the #MeToo defamation cases the thesis will examine how the judiciary applies the law, how it ‘produces’ women, and whether it can account for the particular vulnerability of women victims of men’s sexual violence.

## 1.6 Outline

*Chapter 2* regards the right to freedom of expression of women victims of sexual violence in relation to gender equality. This chapter examines the relation between gender equality and freedom of expression, how men’s sexual violence against women as a form of discrimination can have a silencing effect and restrict women’s possibility to exercise freedom of expression, and how the #MeToo movement became a path to break such silence.

*Chapter 3* defines defamation under IHRL and examines how it is regulated under Swedish law and in relation to freedom of expression, and if Sweden live up to such standards. Such findings are moreover put in the context of gender equality and the principle of non-discrimination. Therefore, this chapter also analyzes how gender equality, freedom of expression, and defamation are interconnected.

*Chapter 4* – the ‘Case Analysis’- is the final chapter and it is designated to the examination of how the Swedish first instance district courts deal with the five #MeToo defamation cases. *First*, the chapter provides a compressed background to the cases and their outcomes. *Second*, it is examined why the #MeToo women decided to exercise freedom of expression to commit the crime of defamation. *Third*, the position and victim status of the complainant and the defendants is assessed to examine how the courts portray the #MeToo women and men in relation to the roles of men and women in society. This is put into the context of exercising freedom of expression and speaking out about sexual violence and disseminate information about who committed such crime. *Fourth*, the final part examines the value of ‘truth’ to determine if a statement is defamatory in the Swedish courts and their assessments with respect to the stigma that hinders women victims of sexual violence from accessing justice.

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<sup>90</sup> Svensson (n 57) 109-111, 113.

<sup>91</sup> *ibid* 120-121, 130.

## **2. Freedom of Expression, Men’s Sexual Violence against Women and Women’s Movements**

‘Freedom of expression and equality are foundational rights and their realization is essential for the enjoyment and protection of all human rights’. Freedom of expression is considered foundational to a democratic society and therefore the enjoyment of human rights.<sup>92</sup> Furthermore, the international community has found that without women’s participation in society, full democracy and sustainability cannot be achieved or upheld. As freedom of expression and the participation of women is fundamental for democracy, for women to be able to exercise freedom of expression and therefore fully and equally participate in society, on an equal level as men, is vital. Nevertheless, gender equality is in most parts of the world neither upheld nor a practical reality, and it hinders women from freely enjoying and exercising freedom of expression.<sup>93</sup> Thus, To restrict women’s freedom of expression is undermining ‘rather than promoting equality’ and it hinders the achievement of democracy and sustainability.<sup>94</sup>

In Sweden, women have historically been restricted de jure and de facto from fully and equally being able to exercise freedom of expression. To this day, despite the obligation to protect against gender-based discrimination under the ICCPR and the CEDAW and under the Swedish Constitution (among other instruments), inequality still restricts the possibility to fully exercise the right. Such inequality that harbors historical and traditional patterns of women’s subordination, which generates gender-based hate, violence, and sexual violence towards women in all spheres of life. Including women who exercise freedom of expression.<sup>95</sup> As a result, gender-based discrimination restricts women’s possibility to talk about being victims of sexual violence, to report perpetrators, and to access justice. Therefore, to exercise freedom of expression through critiquing the current criminal justice system, to participate in women’s movements, to challenge systematic gender inequality, and to break the silence of men’s violence against women is vital for women to achieve change and break such gender

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<sup>92</sup> HRC GC 34 (n 10) para 2.

<sup>93</sup> Agenda 2030 (n 9) Preamble para 20, Goal 5.

<sup>94</sup> Article 19, ‘Camden Principles on Freedom of Expression and Equality’

<<https://www.article19.org/resources/camden-principles-freedom-expression-equality/>> (Accessed 2020-03-20).

<sup>95</sup> A/HRC/38/47 (n 31) para 13; CEDAW GR 35 (n 9) para 15.

structures.<sup>96</sup> When women speak out, collectively, it gives them voice and visibility to express their struggles. Without it, impunity prevails.<sup>97</sup>

Impunity in crimes of sexual violence prevails in the Swedish criminal justice system. It has been widely critiqued by feminist scholars for its inability to handle men's violence against women. Consequently, the legal gap between law and equality politics that the Swedish feminist government work for, has been made visible. Women's autonomy and protection against violence has in Swedish criminal justice traditionally not been a priority. Despite de jure equality protecting women against sex crimes, the courts still often focus on stereotypical matters such as the role or behavior of the women in relation to the sex crime. Perceptions of what is 'male' and 'female' behavior also often affect the courts reasonings.<sup>98</sup> It also means that women's voices and stories in court have been restricted, and so their possibility to exercise freedom of expression. The HRC has for example found 'silence is also a form of impunity, and one way of breaking it is to ensure women's freedom of expression'. Thusly, the possibility to report violence against women 'has a direct effect on the fight against impunity'.<sup>99</sup> In Sweden, women's rights movements such as #Prataomdet, #Fatta, #Tafsainte, and recently, #MeToo have helped challenge and change attitudes<sup>100</sup> towards sexual violence against women. It has been found to be an efficient force to strengthen women, increase knowledge and decrease stigma attached to the crime, and, even though in small scale and a slow pace, increased the reporting of sex crimes.<sup>101</sup>

This chapter will explore the interconnectedness between freedom of expression, gender equality and men's sexual violence against women. It will build up an understanding to the structural issue of men's sexual violence against women in Sweden and the Swedish criminal justice system, how it affects women's freedom of expression, and how it, further examined in chapter 3 and 4, may be reflected in the #MeToo defamation cases.

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<sup>96</sup> Human Rights Council, 'Accelerating Efforts to Eliminate Violence against Women and Girls: Preventing and Responding to Violence against Women and Girls in the Digital Context' (A/HRC/38/L.6, 2 July 2018) para 10(g).

<sup>97</sup> Camden Principles Web (n 94).

<sup>98</sup> Gunnarsson (n 9) 154.

<sup>99</sup> A/HRC/14/23 (n 4) para 49.

<sup>100</sup> Svensson (n 57) 86.

<sup>101</sup> Brottsförebyggande Rådet, 'Indikationer på Sexualbrottsutvecklingen 2005-2017' (Rapport 2019:5, Maj 2019) 106-107.

## 2.1 Freedom of Expression, Gender Equality and Men's Sexual Violence against Women

### 2.1.1 Freedom of Expression and Gender Equality - the ICCPR and the CEDAW

'Power can mean different things – power to choose, to decide, to be, and to speak'. Access to human rights is based on the power that gender norms enables men. Therefore, the way we are treated and treat one another is based on what behavior is tolerated and by whom. And, it affects who is rewarded or punished for their behavior.<sup>102</sup>

Freedom of expression under Article 19(2) is one of the most protected human rights freedoms, considered to have universal nature.<sup>103</sup> As it is fundamental to democracy<sup>104</sup>, it forms an integral part of the full enjoyment of human rights, and cannot be derogated from even in times of emergency. Its protection extends to oblige both state actors and private individuals.<sup>105</sup> This includes the negative obligation to respect the right and refrain from interfering, and the positive obligation to prevent, punish, and investigate.<sup>106</sup> Moreover, as women's participation is interlinked with the achievement of democracy, it is also one of the most important principles interlinked with women's human rights, particularly freedom of expression.<sup>107</sup> Therefore, the right to freedom of expression for women is also protected from unlawful interference on the basis of discrimination.<sup>108</sup>

As freedom of expression includes the right to seek, receive, and impart information and ideas 'of all kinds regardless of frontiers'.<sup>109</sup> Individuals therefore have: (a) the right to hold opinions without interference; (b) the right to seek and receive information and the right of access to information; and (c) the right to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice.<sup>110</sup> It includes any type of expression and in any form including expression on the internet.<sup>111</sup> It can regard political expression, one's own and public affairs, canvassing,

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<sup>102</sup> Agera utan att Diskriminera (n 63) 82-83.

<sup>103</sup> Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OSAIL, 2013) paras 1.01-1.02.

<sup>104</sup> HRC GC 34 (n 10) paras 2-3, 7.

<sup>105</sup> *ibid* paras 3-5, 7.

<sup>106</sup> A/HRC/14/23 (n 4) para 25.

<sup>107</sup> *ibid* para 42.

<sup>108</sup> Joseph & Castan (n 103) 9.

<sup>109</sup> HRC GC 34 (n 10) para 12.

<sup>110</sup> A/HRC/14/23 (n 4) para 24.

<sup>111</sup> HRC GC 34 para 15.



discussing human rights, journalism, cultural and artistic expression and can be offensive and critical in nature. It can be expressed in different forms, such as written or spoken, on paper or electronically.<sup>112</sup> To be able to exercise freedom of expression has therefore been found vital for marginalized groups, as discrimination restricts the enjoyment of human rights. To be able to exercise freedom of expression is therefore vital because ‘Pluralism and diversity are hallmarks of freedom of expression’ and it ‘enables vibrant, multi-faceted public interest debate giving voice to different perspectives and viewpoints’. Article 19 (org) has found that when certain groups are denied a voice, it makes them more vulnerable to marginalization and discrimination.<sup>113</sup>

Gender equality is also fundamental to democracy and the realization of a sustainable future (Agenda 2030 goal 5). Equality is valued so highly that the international community have discussions if the principle of non-discrimination on the basis of sex should have customary and *jus cogens* status.<sup>114</sup> The ICCPR prohibits discrimination on the basis of sex under Article 2 (non-discrimination), Article 3 (equality between women and men) and Article 26 (equality before the law). The realization of these articles has been found vital for the enjoyment of all human rights without discrimination.<sup>115</sup> And like freedom of expression, this applies to all branches of the government: executive, judicial, and legislative.<sup>116</sup> The HRC has found discrimination to mean ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’. Thus, it includes discrimination against women, and it recognizes the existence of both direct and indirect discrimination.<sup>117</sup> Direct discrimination is found to be law or policies that expressly restricts women’s rights. Indirect discrimination is an effect of e.g. a law that is neutral and applied neutrally, but disproportionately affects women.<sup>118</sup>

Article 26 of the ICCPR is, as Article 19, an autonomous right<sup>119</sup> and it ensures equality before the law and equal protection of the law without discrimination both directly and indirectly. It

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<sup>112</sup> Joseph & Castan (n 103) para 18.08.

<sup>113</sup> Article 19, ‘The Camden Principles on Freedom of Expression and Equality’ (2009) 1.

<sup>114</sup> Freeman, Chinkin & Rudolf (n 5) 28.

<sup>115</sup> Human Rights Committee, ‘CCPR General Comment No 18: Non-discrimination’ (Thirty-seventh Session of the Human Rights Committee, 10 November 1989) paras 1-2.

<sup>116</sup> Human Rights Committee, ‘General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (CCPR/C/21/Rev.1/Add. 13, 26 May 2004) paras 4, 6, 8.

<sup>117</sup> HRC GC 18 (n 115) para 7; Freeman, Chinkin & Rudolf (n 5) 4.

<sup>118</sup> Joseph & Castan (n 103) para 23.39.

<sup>119</sup> Moeckli, Shah & Sivakumaran (n 49) 153, 155.

applies in relation to the covenant rights as well as national law outside of the convention scope.<sup>120</sup> The HRC e.g. found that it was contrary to Article 26 to not allow for continued employment benefits of married women, without the same requirements for men, as it directly discriminated women.<sup>121</sup> It could also include that ‘prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value.’<sup>122</sup> Moreover, the effects of a decision or application of law can also constitute discrimination indirectly contrary to Article 26, and is a common result when law is applied in a neutral manner.<sup>123</sup> Articles 2 and 3 are subordinate<sup>124</sup> rights but which are foundational to all other articles of the covenant, such as freedom of expression and equality before the law.<sup>125</sup> It means that when interfering or regulating the right to freedom of expression, non-discrimination on the basis of sex must be ensured.<sup>126</sup> Under Article 2, States must act with good faith to ensure that there is no unlawful discrimination on the basis of sex.<sup>127</sup> Such obligation applies both to the state and private actors.<sup>128</sup> Article 3 ensures the equal enjoyment of rights between women and men, including freedom of expression.<sup>129</sup> The article includes working against patterns of the role of women and men in society, including discrimination caused by deeply rooted traditions and cultures.<sup>130</sup>

The HRC has found that such traditions, culture, and history that entrenches systematic discrimination against women ‘influences the enjoyment and respect for all the rights enshrined in the covenant’.<sup>131</sup> Thus, including the freedom to express oneself. The SRFoE has noted that ‘freedom of expression gains added value when it is used to protect groups... in need of particular attention, such as women...’.<sup>132</sup> Moreover, it has found that there ‘exist an undeniable link between freedom of expression and women’s human rights, which include the right to express their opinions...’.<sup>133</sup> Thusly, discrimination hinders women’s right to seek, receive and

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<sup>120</sup> HRC GC 18 (n 115) paras 7, 9, 10, 12.

<sup>121</sup> *S.W.M Broeks v The Netherlands* Communication No 172/1984 (CCPR/C/OP/2 at 196, 1990).

<sup>122</sup> Human Rights Committee, ‘CCPR General Comment No 28: Article 3 (The Equality of Rights between Men and Women)’ (Sixty-eight Session of the Human Rights Committee, 29 March 2000) para 31.

<sup>123</sup> *Rupert Althammer v Australia* Communication No 988/2001 (CCPR/C/78/D/998/2001, 8 August 2003) para 10.2.

<sup>124</sup> Moeckli, Shah & Sivakumaran (n 49) 152-153.

<sup>125</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR), ‘Civil and Political Rights: The Human Rights Committee Fact Sheet No 15 (Rev 1)’ (2005) 5, 7; Joseph & Castan (n 103) para 23.17.

<sup>126</sup> *ibid* 15, 4.

<sup>127</sup> HRC GC 31 (n 116) para 3.

<sup>128</sup> *ibid* paras 4, 6, 8.

<sup>129</sup> HRC GC 28 (n 122) para 2.

<sup>130</sup> *ibid* paras 3-5, 22.

<sup>131</sup> *ibid* para 5.

<sup>132</sup> A/HRC/14/23 (n 4) para 41.

<sup>133</sup> *ibid* para 42.

impart information and ultimately restricts women's participation in society. Whilst the HRC and the SRFoE has recognized such structures, it does not provide a substantial analysis to systematic discrimination and power structures that restrict women's freedom of expression.<sup>134</sup>

The CEDAW obliges states to respect, protect and fulfill the human rights of women.<sup>135</sup> As one of its most important pillars, article 5 of the CEDAW therefore obliges states to abolish historical and traditional patterns of discrimination against women. It is vital for the advancement of women's rights as it addresses transformative justice,<sup>136</sup> and gives expression to that human rights are not static.<sup>137</sup> Therefore, the CEDAW provides a substantial addition both to the broad rights under the ICCPR as well as national law.<sup>138</sup> The CEDAW depicts 'gender' and also discrimination against women as something socially constructed. That it imposes 'identities, attributes and roles for women and men' which results in 'hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women'.<sup>139</sup> Such structures 'not only deny women the right to be treated respectfully as an equal and dignified human being; they also deny women the *autonomy to live their lives according to their own choices and convictions* about their personal and unique contribution to sustaining and developing humanity.'. Such argumentation contributes to furthering the recognition of women as autonomous individuals, outside of their assigned gender roles.<sup>140</sup> The CEDAW has moreover recognized that the general subordination of women cause indirect discrimination 'as neutral laws or policies may fail to take into account women's life experiences which may differ from those of men'.<sup>141</sup>

Women's autonomy is however often neglected. Although the CEDAW has found that freedom of expression is essential for women's rights,<sup>142</sup> it has also found that violence against women as a gender-based crime hinders gender equality. Violence against women forms part of an extreme and clear expression of structural and gender-based discrimination.<sup>143</sup> Such form of discrimination restricts women's freedom of expression, particularly in certain spaces such

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<sup>134</sup> Joseph & Castan (n 103) paras 23.104-23.105, 23.108.

<sup>135</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25: Article 4 Paragraph 1, of the Convention (Temporary Special Measures)' (Thirtieth Session, 2004) para 4.

<sup>136</sup> Freeman, Chinkin & Rudolf (n 5) 143-145.

<sup>137</sup> Svensson (n 57) 86.

<sup>138</sup> Freeman, Chinkin & Rudolf (n 5) 17.

<sup>139</sup> CEDAW GR 28 (n 39) para 5.

<sup>140</sup> Freeman, Chinkin & Rudolf (n 5) 144-145, 150.

<sup>141</sup> (CEDAW GR 25 (n 135) footnote 1.

<sup>142</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No 23: Political and Public Life' (Sixteenth Session, 1997) para 6.

<sup>143</sup> Freeman, Chinkin & Rudolf (n 5) 153.

as the public sphere.<sup>144</sup> It has thusly also recognized that gender-based violence against women is indivisible from and interdependent with freedom of expression.<sup>145</sup> This has also been recognized by the SRFoE, finding that violence against women constitutes a gender-based crime and prevents for women from freely exercising freedom of expression, as it causes an ‘atmosphere of fear’.<sup>146</sup>

### *2.1.2 Freedom of Expression and Gender Equality in Sweden*

In Sweden, freedom of expression is constitutionally regulated in RF 2:1. In accordance with IHRL, freedom of expression is also part of Sweden’s prerequisites for a democratic society and any restriction of the right shall be applied narrowly. The right includes any type of expression, including speech, writing, or in picture, or by other means made to disseminate information.<sup>147</sup> Gender equality has also been found to constitute a basis for an equal and democratic society.<sup>148</sup> Belonging to a historically disadvantaged group, women, thus including women in Sweden, do not have equal access to freedom of expression. This include the struggle to have their voices heard.<sup>149</sup> However, as a party to the ICCPR, Sweden have both a negative<sup>150</sup> obligation not to interference with Article 19, and a positive<sup>151</sup> obligation to take preventive measures to fully realize Article 19. Moreover, in accordance with Articles 2, 3, and 26 of the ICCPR, freedom of expression must apply equally for women and men and without discrimination. Such discrimination applies to all state institutions: executive, legislative, and judiciary.<sup>152</sup>

The Swedish government is one of the first, self-proclaimed, feminist governments in the world, as the fight to achieve gender equality a priority.<sup>153</sup> Following, it has taken measures to ensure equality between men and women, achieving a gender equal labor market, and

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<sup>144</sup> CEDAW GR 28 (n 39) para 6.

<sup>145</sup> CEDAW GR 35 (n 9) para 15.

<sup>146</sup> Commission on Human Rights, ‘Promotion and Protection of the Right to Freedom of Opinion and Expression: Report of the Special Rapporteur, Mr Abid Hussain, Submitted Pursuant to Commission on Human Rights Resolution 1997/26’ (E/CN.4/1998/40, 28 January 1998) paras 49-51.

<sup>147</sup> Regeringsformen (1974:152) 1 kap. 2 § (Lexino, 2020-01-01).

<sup>148</sup> Regeringen, ‘Makt, Mål och Myndighet – Feministisk Politik för en Jämställd Framtid’ (Skr 2016/17:10) 71.

<sup>149</sup> Human Rights Council, ‘Report of the Special Rapporteur on the Promotion and Protection of the Rights of Freedom of Opinion and Expression: Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade’ (A/HRC/14/23/Add.2, 25 March 2010) 5.

<sup>150</sup> HRC GC 31 (n 116) para 6.

<sup>151</sup> *ibid.*

<sup>152</sup> *Ibid* para 4.

<sup>153</sup> Regeringen, ‘Feministisk Regering’ <<https://www.regeringen.se/regeringens-politik/feministisk-regering/>> (Accessed 2020-04-01).

prioritizing to combat gender-based violence.<sup>154</sup> Since the 1970's Sweden has actively promoted gender equality de jure with a goal to make law gender neutral since it previously had excluded women.<sup>155</sup> In 1976, a protection against discrimination was established in the constitution: RF 1:2. Gender equality was also later established as an individual right under RF 2:13. Although neutral in its wording, it gave attention to that men and women are in fact not treated equally. Additionally, positive measures were enforced, indicating a strife towards recognizing de facto equality.<sup>156</sup> Furthermore, similarly to the CEDAW, Sweden recognizes that 'sex' and 'gender' has been developed to become a social phenomenon. Thus, the Swedish Government has moved from seeing it as an individual issue to a structural one.<sup>157</sup> Thus, RF ensures the full and equal participation of all human beings, and to combat discrimination on the basis of sex. Including practices that affects women's freedom of expression.<sup>158</sup> This includes that courts state agencies must ensure equality before the law.<sup>159</sup> Moreover, the Swedish Discrimination Act prohibits discrimination on the basis of sex.<sup>160</sup> It prohibits discrimination in the public sector as well as the social service, schools, and employers. This includes the work to actively prevent and investigate discrimination.<sup>161</sup> It does however not include discriminatory practices in the judiciary.<sup>162</sup> This sector is however protected under RF 1:2 and 2:13 and under Article 26 of the ICCPR on equality before the law.

Nevertheless, although Sweden has recognized the need to work to achieve de facto (substantive) equality, the law simply refers to gender equality de jure: equality before the law. In accordance with the obligation under ICCPR and CEDAW, Sweden have to work to 'ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all covenant rights'.<sup>163</sup> Therefore, even though the 'overall objective of gender equality in Sweden is to ensure that women and men have the same power to shape society and their own lives'<sup>164</sup>, gender inequality

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<sup>154</sup> Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (E/C.12/SWE/6, 16 March 2016) paras 91-92, 95, 99, 105.

<sup>155</sup> Gunnarsson (n 9) 13.

<sup>156</sup> *ibid* 14.

<sup>157</sup> Susanne Fransson & Eberhard Stüber, *Diskrimineringslagen: En Kommentar* (2a upplagan, Norstedts Juridik, senast uppdaterad 2017-01-01).

<sup>158</sup> RF 2:1.

<sup>159</sup> Gunnarsson (n 9) 13.

<sup>160</sup> Diskrimineringslag artikel 1.

<sup>161</sup> Diskrimineringslag 2 kap 7§, 3 kap.

<sup>162</sup> Diskrimineringslag 2 kap.

<sup>163</sup> HRC GC 28 (n 122) para 5

<sup>164</sup> Makt, Mål och Myndighet (n 148) 70.

persists. Consequently, restrictions on basic human rights such as freedom of expression may be imposed on indirect and discriminatory such grounds.<sup>165</sup>

### *2.1.3 Freedom of Expression and Men's Sexual Violence against Women under the ICCPR and the CEDAW*

Men's sexual violence is part of the discriminatory structures that hinders women's possibility to exercise freedom of expression. More than one third of women worldwide has become victims of men's sexual violence, which puts women particularly at risk.<sup>166</sup> The discriminatory act is therefore considered a social issue that is systematically targets women.<sup>167</sup> The CEDAW has recognized this as it defines gender based violence as 'violence which is directed against a woman because she is a woman or that affects women disproportionately' and is contrary to IHRL.<sup>168</sup> UN Women defines sexual violence as 'a human rights violation of gender-based discrimination, regardless of sex, in a context of unequal power relations such as workplace and/or gender hierarchy'.<sup>169</sup> This unequal power 'gives authority and credibility' to men, which means that sexual abuse is often disregarded, and so is the experience of the victim.<sup>170</sup> Michael Foucault explains that men and women are part of a social hierarchy based on power where men use sex to express this hierarchy as a form of social oppression. A 'social phenomenon', 'sexualized by culture'.<sup>171</sup> This unequal distribution of power of the social creation of 'the genders', that inevitably results in gender-based violence, is built upon traditional, cultural and social structures and hierarchies that puts women particularly at risk.<sup>172</sup> Stereotypes regarding the roles of women continue to prevail with the continuation of acts and impunity of men's sexual violence against women.<sup>173</sup> Thusly, there exist social, psychological and legal consequences for a woman victim of sexual violence.<sup>174</sup> Consequently, women victims of sexual violence have very little to no access to justice.<sup>175</sup>

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<sup>165</sup> Gunnarsson (n 9) 15.

<sup>166</sup> UNPD (n 15) 166.

<sup>167</sup> CEDAW GR 35 (n 9) para 9.

<sup>168</sup> *ibid* para 1.

<sup>169</sup> UN Women, 'Towards an End to Sexual Harassment: the Urgency and Nature of Change in the Era of #MeToo' (2018) 6.

<sup>170</sup> *ibid* 10.

<sup>171</sup> Ulrika Andersson et al, *Våldtäkt i Sverige 1990-2013: Ett Historiskt och Intersektionellt Perspektiv på Berättelser om Våldtäkt Inom Olika Genrer* (GränslösNr 6 2016) 88, 90.

<sup>172</sup> CEDAW GR 35 (n 9) para 9-10.

<sup>173</sup> UNPD (n 15) 152, 155-156, 166.

<sup>174</sup> Levy & Mattsson (n 1) 6.

<sup>175</sup> HRC GC 18 (n 115) para 18.

It means that there are both legal and social factors that impede women from exercising the rights protected under Article 19 on an equal basis.<sup>176</sup> Socially, men are in general expected to take more space, particularly in public life, such as politics, lawmaking, education (except gender studies), and media.<sup>177</sup> Thus, when women take up public space and exercise their freedom of expression under Article 19, they often encounter ‘stereotypes, harassment and violence’, restricting women’s freedom of expression on a discriminatory basis. Such restriction if not recognized, could constitute an act contrary to article 5 of the CEDAW.<sup>178</sup> The SRFoE has stressed the importance to position freedom of expression and women’s rights in relation to gender-structures that imposes inequality between women and men, including sexual violence against women.<sup>179</sup> This is important since freedom of expression can e.g. enable women to access information about access to justice or health and anti-violence programmes as a victim of a sex crime. This is however something that is often lacking for women victims of sexual violence.<sup>180</sup> SRFoE has also expressed concern that fear and shame of being a victim of sexual violence have a negative impact on women’s ability to freely exercise freedom of expression. Such stigma and discrimination can be caused directly by legislation. However, it is often part of attitudes in practice that reflects ‘cultural history and social norms’.<sup>181</sup> Such social norms can restrict freedom of expression in the sense that when women do speak out about sexual violence, they are met with stereotypical attitudes. Women are often considered ‘aggressive’, ‘irrational’, or ‘too much’ and stigma can lead to abuse or mistrust as a consequence for speaking out.<sup>182</sup> Consequently, women can experience indirect discrimination restricting freedom of expression contrary to Articles 19 and 26 taken with Articles 2 and 3 of the ICCPR and CEDAW Article 5.

As a consequence, many women feel guilt, are too afraid to report, or do not realize they have been victims of a sex crime. Some women feel that there is more at stake to report than not. The SRFoE has found that women keep silent about being victims of sexual violence for reasons ‘including fear of reprisal, shame, the belief that they are somehow responsible for the violence, the knowledge that they will not be believed, and, in some cases, suppression of the memory of violence because it is too painful to recall’.<sup>183</sup> This means that women are often forced into

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<sup>176</sup> Joseph & Castan (n 103) para 22.

<sup>177</sup> Sarah Macheria, ‘Who Makes the News? Global Media Monitoring Project 2015’ (2015) 98

<sup>178</sup> OHCHR Commitments for Women’s Rights (n 6).

<sup>179</sup> A/HRC/14/23 (n 4) para 42, 43.

<sup>180</sup> *ibid* para 44.

<sup>181</sup> E/CN.4/1998/40 (n 146) para 54.

<sup>182</sup> Deutsche Gesellschaft für die Vereinten Nationen e.V, ‘Taking Online Gender-Based Violence Seriously’ <<https://dgvn.de/meldung/taking-online-gender-based-violence-seriously/>> (Accessed 2020-03-03).

<sup>183</sup> E/CN.4/1998/40 (n 146) para 53.

silence. Therefore, being able to exercise and access freedom of expression as a woman also means being able to use your voice to, among other things, access protection and healthcare, to report crimes of sexual violence, publicly discuss matters of injustice, and to fight impunity.<sup>184</sup> Thusly, it is found that violence against women hinders women's access to substantive equality and therefore equal access to their human rights and as such, freedom of expression.<sup>185</sup>

#### *2.1.4 Sexual Violence and Freedom of Expression in Sweden*

In Sweden it is recognized that sexual violence against women contributes to maintaining the power-hierarchies between men and women, where women are subordinate men.<sup>186</sup> However, it is not too long ago that such thinking did not apply. Sexual violence against women is today criminalized under Chapter 6 of the Swedish Penal Code, but not until 1964, rape became prohibited within marriage. And in the 1970's, the principle of equal treatment was enforced in the Swedish legal system.<sup>187</sup> Not until the 1980s, sexual violence against women started to become a societal matter and women's rights movements and organizations exercised their freedom of expression to demand change.<sup>188</sup> The government took notice, and 1990's, 'sexuality' as a tool for power was highlighted as a central question to gender equality. In 1991, men's violence against women was defined as a matter of gender equality, and 1994 it was recognized that men's violence against women is connected to power-hierarchies between the genders. In 1999, purchasing sexual favors (rape) was criminalized.<sup>189</sup> Before 2018, rape laws in Sweden put excessive burden on the victim to prove both that she had been forced to a sexual act, but also that she had expressed non-voluntariness by words or actions.<sup>190</sup> As feminist scholars and women's movements fought for change, finally in 2018, a consent-focused law against rape was established, and the prerequisites of force and violence were abolished.<sup>191</sup> However, despite development to protect against sexual violence against women and an increase of women reporting sexual violence in Sweden, it is still highly prevalent, particularly

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<sup>184</sup> A/HRC/14/23 (n 4) para 49.

<sup>185</sup> CEDAW GR 35 (n 9) para 10.

<sup>186</sup> SOU 2015:86 (n 8) 236.

<sup>187</sup> Gunnarsson (n 9) 13.

<sup>188</sup> SOU 2015:86 (n 8) 237.

<sup>189</sup> Gunnarsson (n 9) 149-151, 155-156.

<sup>190</sup> Ulrika Andersson, *Det Vardagligas Fråvaro: En Analys av Rättsliga Narrativ i Två Samtida Våldtäktsfall* Holgersson & Tolvhed (n 82) 213-214.

<sup>191</sup> Justitiekommitténs Betänkande, 'En Ny Sexualbrottslagstiftning Byggt på Frivillighet' (2017/18:JuU29) 8.



domestically, or in the form of sexual harassment at work<sup>192</sup>. And still, most sex crimes are not reported.<sup>193</sup>

Statistics in Sweden show that women are disproportionately affected by sexual violence. In 2017, the Swedish police received 5,236 reports of rape involving persons aged 15 or over. In 95% (and preliminary statistics of 2018, 96%) of such reports, the victims were women or girls. Of those already few that do report sex crimes, fewer will have their case heard in court, whilst most cases get dismissed, often due to lack of evidence. 96% of the reported sex crimes are dismissed by police or prosecutor, where 44% of the crimes are difficult to investigate or prove.<sup>194</sup> In 2017, prosecutions were initiated in only 6% of cases involving adults.<sup>195</sup> Moreover, as internet developed, online harassment and violence against women is also not uncommon and disproportionately affects women (up to 42% of women and only 13% of men have been victims of private pictures of them being e.g. disseminated to others online).<sup>196</sup> Contrary to Articles 2, 3, and 26 of the ICCPR and the standards of the CEDAW, when it regards sex crimes against women, substantive equality (de facto) is clearly not achieved.<sup>197</sup>

*'All stories have its time and place but also its non-time, time where stories about sexuality and sexual violence is missing an audience, and turns silent'.*<sup>198</sup>

Gendered power structures with respect to sexual violence against women is still prevalent in Sweden.<sup>199</sup> Men's violence against women is rooted in the ideology of men's entitlement and privilege over women, male control over power, and enforced gender roles, contrary to CEDAW Article 5. Such ideology punishes women for acting outside that of the roles of women (the private and domestic caregiver).<sup>200</sup> Consequently, despite Sweden being a progressive country with regards to gender equality, and that gender-based violence is recognized and prohibited under international and national law, men's sexual violence is highly prominent.<sup>201</sup> Men's sexual violence is part of a power structure where women are targeted for being women. It is prevalent in all parts of the Swedish society: at home, at work or school, or online, at clubs,

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<sup>192</sup> E/C.12/SWE/6 (n 154) para 216.

<sup>193</sup> SOU 2015:86 (n 8) 241, 247, 250, 256-257.

<sup>194</sup> *ibid* 272.

<sup>195</sup> Time for Change (n 18) 77.

<sup>196</sup> SOU 2015:86 (n 8) 272.

<sup>197</sup> McLaren (n 70) 11.

<sup>198</sup> Andersson 2016 (n 171) 82, 83.

<sup>199</sup> McConnell & Smith (n 59) 59.

<sup>200</sup> CEDAW GR 35 (n 9) para 19.

<sup>201</sup> UNPD (n 15) 148; DEVaW (n 15) Article 1.

in the park<sup>202</sup>, and as found above, most crimes do not get reported.<sup>203</sup> Close relations to their perpetrator can be a hinder since reporting the crime committed by someone close could have great consequences of the woman's social life. Many women also refrain from reporting since investigations requires women to relive the sex crime in detail and that they are exposed to the possibility of being questioned.<sup>204</sup> Thusly, women in Sweden are particularly vulnerable, and the lack of adequate protection indicates that Swedish criminal justice system do not adhere to such vulnerability, and de facto inequality prevails. Such practice creates a mistrust in authority.<sup>205</sup> Consequently, the standpoint of the rape culture is that of being silent and moving on, instead of reporting such a crime, and women cannot access justice.<sup>206</sup>

The Swedish criminal justice system has been critiqued for being unable to handle men's violence against women, and thus lacking adherence to the particular needs and vulnerability of women. Perceptions about the roles of women and men therefore also affects the criminal justice system both in relation to gender equality de jure and de facto. As a consequence, women are silenced.<sup>207</sup> In criminal justice, only applying criminal law may exclude social and psychological factors.<sup>208</sup> For example, Chapter 6 of the Penal Code regulating sex crimes is gender neutral and focus on the 'interest to protect the autonomy of the individual'. This is problematic as women in Sweden are, because of systematic discrimination, not entitled the same autonomy as men.<sup>209</sup> As Ulrika Andersson has stated, it indicates an inability of both the judiciary and legislative of analyzing power and sexuality and an unwillingness to discuss the root causes to gender and sexuality in such crimes.<sup>210</sup> Moreover, the criminal justice mainly applies preparatory works to interpret and make conclusions about the law and its application in a specific case. By doing so, it is very restrictive towards going outside the scope of interpretation. This may lead to a negligence towards other relevant sources that may be important to the advancement of women's rights, contrary to Article 26 of the ICCPR and the prohibition of indirect discrimination. When courts only interpret the law by its ordinary meaning, it may consequently exclude expressions of societal changes.<sup>211</sup> Consequently, this has resulted in that women who talk about their experiences of being victims of men's sexual

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<sup>202</sup> A/HRC/38/L.6 (n 96) para 10(i).

<sup>203</sup> Human Rights Committee, 'Concluding Observations on the Seventh Periodic Review on Sweden' (CCPR/C/SWE/CO/7, 28 April 2016) para 20.

<sup>204</sup> BRÅ 2019:5 (n 101) 106.

<sup>205</sup> UNPD (n 15) 166.

<sup>206</sup> Holgersson & Tolvhed (n 82) 268-269.

<sup>207</sup> Gunnarsson (n 9) 154.

<sup>208</sup> *ibid* 157.

<sup>209</sup> *ibid* 154.

<sup>210</sup> Andersson 2004 (n 69) 272-273.

<sup>211</sup> Ulrika Andersson Holgersson & Tolvhed (n 82) 218-219.

violence, are not believed, as their experiences are often disregarded in the context of the ‘objective’ reality. And, matters that women bring before courts in a legal proceeding are not seen as relevant for the legal reasoning and assessment. Women and their experiences are silenced and their freedom to express them is hindered by systematic discrimination contrary to Article 19 in conjunction with Articles 2 and 3 of the ICCPR.<sup>212</sup>

In order to ensure that women can talk about such matters, Sweden must actively work with its gender politics and policies to abolish such stereotypes and traditions that reinforces sexual violence against women.<sup>213</sup> Thus, it is clear that even in states such as Sweden, where gender-mainstreaming in law, policies, and programmes are existent, and where women’s specific needs are taken into account, particularly that of the criminal justice system, the protection against sexual violence is still not enough and de facto inequality persists.<sup>214</sup>

## **2.2 Freedom of Expression and Men’s Sexual Violence against Women in the Context of #MeToo**

‘Silence is also a form of impunity, and one way of breaking it is to ensure women’s freedom of expression’.<sup>215</sup>

The #MeToo movement originated when Tarana Burke who in 2006 used the hashtag ‘MeToo’ to raise awareness of sexual abuse against, mainly African American, women. In 2017, after the New York Times revealed the sexual assaults committed by Harvey Weinstein, the #MeToo became a widespread global social movement. It was Alyssa Milano whom encouraged women to start using #MeToo as a way to raise awareness of sexual violence against women.<sup>216</sup> Suddenly, women took space and place, and social media became a platform to talk about men’s sexual violence against women. The same year, the women of the #MeToo movement became the ‘*person of the year*’ for breaking the silence surrounding sexual violence.<sup>217</sup>

The attention the ‘zero tolerance’ of sex crimes gained during the #MeToo movement made women victims of sexual violence collectively reflect upon and discuss the issue.<sup>218</sup> To be able

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<sup>212</sup> Gunnarsson (n 9) 155.

<sup>213</sup> UN Women (n 169) 10.

<sup>214</sup> A/HRC/38/L.6 (n 96) para 10(i).

<sup>215</sup> A/HRC/14/23 (n 4) para 49.

<sup>216</sup> Sanjana Pegu, ‘MeToo in India: Building Revolutions from Solidarities’ (Indian Institute of Management Calcutta, Springer 2019) 151-168, 152.

<sup>217</sup> UNPD (n 15) 147.

<sup>218</sup> BRÅ 2019:5 (n 101) 108.

to exercise freedom of expression, women could critique and question men's violence against women. Such expression is as found above protected under Article 19(2) of the ICCPR,<sup>219</sup> as it enables women to discuss and critique human rights issues on all levels, including men's violence against women.<sup>220</sup> Movements such as #MeToo are essential for individual and social development, dignity, and fulfilment of all persons and rights.<sup>221</sup> Such expression enables women to critique power hierarchies and structural inequality and strife towards a more democratic society. As found above, it therefore is vital for the advancement of women's rights, democracy, and sustainability.<sup>222</sup> It is a means to achieve social justice. Justice which is a necessity when law or the application of law is not just or equal.<sup>223</sup> Freedom of expression also enables women's rights movements to challenge not only external structures (law, politics, and society) but also internal psychological barriers, where women can get a platform and take up space to demand change. Social movements as a form of expression have for women been a way to step out of such sexualized oppression, and to critique social, historical, and otherwise structural inequalities collectively. This as an attempt and pressure to step out of de jure equality, and into de facto, substantive, equality.<sup>224</sup>

Women's rights movements empowers women to talk about their stories, to understand that they may have been victims of a sex crime, and be encouraged and able to report crimes.<sup>225</sup> For example, in India after the Nirbhaya-case in 2012, the incident sparked great attention not only in India, but worldwide, as people demanded a stop to men's sexual violence against women.<sup>226</sup> This has been a powerful tool for women's rights movements both offline and online to challenge normative perceptions of sexual violence against women. As women have gained knowledge about their rights and stigma is reduced, they also feel empowered to report crimes. Thus, such movements can help shift in norms and behaviors.<sup>227</sup> These are stories that are told by women first-hand, but collectively.<sup>228</sup> Thus, by exercising their freedom of expression, women of the #MeToo movement challenged structural inequalities between men and women.

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<sup>219</sup> HRC GC 34 (n 10) para 11.

<sup>220</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edn NP Engel, 2005) 483.

<sup>221</sup> Article 19, 'Defining Defamation: Principles on Freedom of Expression and Protection of Reputation' (Article 19 2017) 2-3.

<sup>222</sup> Nicola Wenzel, 'Opinion and Expression, Freedom of, International Protection (MPEPIL, 2013) para 3

<sup>223</sup> McLaren (n 70) 2.

<sup>224</sup> *Ibid* 5, 7, 9-12.

<sup>225</sup> Levy & Mattsson (n 1) 22-23.

<sup>226</sup> Pegu (216) 151-168, 153.

<sup>227</sup> Levy & Mattsson (n 1) 4-5, 22-23.

<sup>228</sup> Andersson (n 1) 223-224.

They put pressure to end violence against women, created solidarity between women victims of sexual violence, and increased the reporting<sup>229</sup> of crimes of sexual violence.<sup>230</sup>

### *2.2.1 #MeToo and Freedom of Expression in Sweden*

With the rise of internet and social media as a means of communication, it has become a large platform for exchanging ideas and opinions.<sup>231</sup> Electronic communication has become a way to enable women to ‘organize, mobilize and inform themselves more effectively’. Online expression grew into a large platform to organize for women’s rights.<sup>232</sup> In Sweden, online social women’s rights movements such as #Prataomdet (Talk about it), #Fatta (Get it), #Tafsainte (Do not touch), #MakeEqual, #HeForShe, #VågaAnmäl (dare to report), and #Mörkertalet (undocumented) among others have had a great impact on the women’s rights in relation to sex crimes.<sup>233</sup> In each one of the movements the message was ‘zero tolerance’ for men’s sexual violence against women. It included that blame should be on the perpetrator and not the victim, and to break the silence and increase reporting of sex crimes. During 2017, #MeToo became one of the biggest women’s rights movements in Swedish history.<sup>234</sup> Women in Sweden found a way break away from the ‘individual’ woman victim and were able to use a collective voice to take space, talk more openly about sexual violence, and to support one another.<sup>235</sup> The movement gave Swedish women time and space to address the gaps that, as found above, exist in law and in practice on the protection against men’s sexual violence against women.<sup>236</sup>

With #MeToo, it also became relevant to question the inability of the criminal justice system to deal with men’s violence against women. Whose story is being validated and how? ‘Who can tell a story and where? On what grounds and with what legitimacy?’<sup>237</sup> Women’s possibility to exercise freedom of expression is therefore also reliant upon the roles of men and women: what subject is most believable. As found above, this is a common issue in rape cases; in a society where men’s voices and societal stance is the norm, in the Swedish criminal justice

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<sup>229</sup> In a study of #MeToo and the effect of social movements, it was shown that after one month there was a 10% increase of reporting of crimes of sexual abuse, and after more than one month there was an increase of 18%. This shows indicators to that it has a persistent effect increasing over time (Levy & Mattsson (n 1) 17.)

<sup>230</sup> UN Women (n 169) 5.

<sup>231</sup> HRC GC 34 (n 10) para 15.

<sup>232</sup> *ibid* para 48.

<sup>233</sup> Holgersson & Tolvhed (n 82) 261.

<sup>234</sup> BRÅ 2019:5 (n 101) 105-106.

<sup>235</sup> Andersson 2016 (n 171) 82-84.

<sup>236</sup> Catherine A MacKinnon, ‘#MeToo Has Done What the Law Could Not’

<<https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>> (Accessed 2020-02-03).

<sup>237</sup> Holgersson & Tolvhed (n 82) 262.

system, women have the weaker voice. Such norms often cause ‘reversed victimology’ meaning that women become the unreliable subjects, and the alleged perpetrator becomes the trustworthy victim.<sup>238</sup>

Finally, because of injustice and the strife for solidarity among women, and a hope to access justice, some women in Sweden decided to name their perpetrators and therefore faced defamation lawsuits. #MeToo has worked as a tool on the path to overcome inequality de jure and de facto. On the other hand, defamation lawsuits have been argued to possibly pose a trumping, legal, hinder to this development.<sup>239</sup> As will be examined in the following chapter, defamation is a complex way of restricting women’s freedom of expression as it is justified under IHRL and Swedish law. However, it is on the contrary left to examine if the gender hierarchies and structure of inequality found in crimes of men’s sexual violence against women may affect the discussion of women’s possibility to exercise freedom of expression

### **2.3 Conclusion**

Under both IHRL and Swedish law freedom of expression and gender equality are fundamental rights for democracy, and therefore also vital for women’s enjoyment of their human rights. One of the biggest threats to gender equality is men’s sexual violence against women. It is based on deeply rooted structures of the roles of men and women, and effectively hinder women from exercising freedom of expression, contrary to Article 19(2) of the ICCPR and Articles 2, 3, and 26 of the ICCPR as well as Article 5 of the CEDAW. Moreover, men’s sexual violence against women is a persistent issue in the Swedish society. It is part of the power structures where men use sexual violence to express their power as a form of social and sexualized oppression. Such oppression hinders women from exercising their freedom of expression in different ways. For example, women who step out of their assigned gender roles, who take up space and who are not afraid to talk about issues such as men’s sexual violence are often themselves met with hatred and violence. It is also common that because of feelings of shame and guilt, many women do not often realize that they have been victims of a sex crime and do not report. And, because of stigma and fear, women often cannot or do not report. Finally, and most importantly, such structures also prevail in the Swedish criminal justice system, and it has been critiqued for its inability to deal with men’s sexual violence against women. Therefore, such cultures indirectly discriminates against women and hinder women from exercising freedom of expression under

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<sup>238</sup> Andersson (n 1) 224-226.

<sup>239</sup> McLaren (n 70) 9.

Article 19 taken with Articles 2 and 3. Women of the #MeToo movement however collectively exercised their freedom of expression to challenge those structures, to find support, and to seek justice. They exercise freedom of expression to question whose story is validated and how, who can tell a story and where. However, because of the prevailing injustice and impunity of cases regarding men's sexual violence against women, some women in Sweden decided to name their perpetrators and were sued and sentenced for defamation.

### 3. Defamation as a Lawful Limitation to Freedom of Expression

What #MeToo women had in common was fighting the injustice for crimes of sexual abuse and to openly talk about it.<sup>240</sup> The #MeToo movement, along with other movements, were successful since women could exercise their freedom of expression to break the silence that stigma have encapsulated when it comes to sex crimes. With the movement, there are indicators to that the reporting sex crimes increased<sup>241</sup> and that more sentences against men who had committed acts of sexual violence were issued.<sup>242</sup> Therefore, as the movement challenged the ‘mythical success story’ of gender equality in Sweden, the defamation lawsuits against the #MeToo women came for many as a shocking and silencing legal consequence for speaking out against injustice.<sup>243</sup> Consequently, to ‘unofficially report’ someone by disseminating information that they have committed a sex crime may face legal consequences.<sup>244</sup>

Defamation lawsuits against women who speak out about men’s sexual violence has been expressed to be a legal tactic to ‘silence’ women, both in the past and as a consequence of #MeToo. In India for example, the #MeToo movement spread through social media, and sexual harassers were named and listed.<sup>245</sup> However, Indian women were met with criminal defamation lawsuits. And, it has been argued that ‘a criminal defamation charge is a clear attempt to bully, intimidate and silence those who are bringing to light systemic abuse of women by men in powerful positions’.<sup>246</sup> In India, a female journalist accused the minister of state for external affairs (and former journalist) for sexually harassing her and other women. His response was a criminal defamation lawsuit that in India entails imprisonment up to two years.<sup>247</sup> In Malaysia a woman was subjected to a criminal defamation lawsuit for speaking out about being sexually harassed by her physician.<sup>248</sup> In China, there has been many cases of women speaking out against sexual violence and harassment that got was sentenced for the

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<sup>240</sup> Catherine A MacKinnon and Durba Mitra, ‘Ask a Feminist: Sexual Harassment in the Age of #MeToo’ [2019] 44 [3] (Journal of Women in Culture & Society) 1027, 1030-33.

<sup>241</sup> After one month there was a 10% increase, and after more than one month, a 18% increase showing indicators to a more persistent effect where reports increases over time (Levy & Mattsson (n 1) 4-5).

<sup>242</sup> Levy & Mattsson (n 1) 4-5.

<sup>243</sup> Martinsson, Griffin & Nygren (n 7) 1; UNPD (n 15) 147.

<sup>244</sup> Tuerkheimer (n 2) 1189.

<sup>245</sup> Levy & Mattsson (n 1) 4-5.

<sup>246</sup> Alasdair Pal and Aditya Kalra, ‘Defamation Suits Aimed at India’s #MeToo Complainants Call Stall Movement’ <https://www.reuters.com/article/us-india-harassment-lawsuits-analysis/defamation-suits-aimed-at-indias-metoo-complainants-could-stall-movement-idUSKCN1MROZT> (accessed 2020-02-17)

<sup>247</sup> Aruna Kashyap ‘When #MeToo Meets the Architecture of Intimidation’ <<https://fpif.org/when-metoo-meets-the-architecture-of-intimidation/>> (Accessed 2020-02-10).

<sup>248</sup> Article 19, ‘Malaysia: Article 19 Welcomes Withdraw of Criminal Defamation Charges against Journalist’ <<https://www.article19.org/resources/malaysia-article-19-welcomes-withdraw-of-criminal-defamation-charges-against-journalist/>> (Accessed 2020-03-20).



having committed the crime of defamation. When one of the women was asked why she named her perpetrator, she said: ‘I am just angry...I have no ability to take him to court’.<sup>249</sup> It has moreover been found that women in China have to ‘think twice about going public in a highly patriarchal society that often shames them for speaking out’.<sup>250</sup> In the United States of America, a woman was accused for defamation after her and several other women had accused an author of a teenage drama, who had ‘spent his entire career standing up for victims’, for sexually abusing them. He claimed that he had ‘spent his entire career standing up for victims’, and therefore the allegations had been ‘devastating’ to his career. Moreover, he argued that he had experienced the ‘sexual relationship’ with the women as consensual.<sup>251</sup> Famous US singer Kesha has for years struggled with a legal twist against her producer and song writer after she in 2013 accused him of sexually harassing her during ten years of her career. He responded with a defamation lawsuit, and has won the pre-trials.<sup>252</sup> In France, a woman got ‘counterattacked’ with a defamation lawsuit after accusing a media consultant to have sexually harassed her. After admitting to the allegations but not characterizing them as sexual harassment and blaming the incident on him being drunk, he filed a defamation suit where the woman was found guilty of defamation.<sup>253</sup> In 2011, a woman in Libya got imprisoned and sued for defamation by the soldiers that assaulted her after telling reporters about being gang-raped and abused.<sup>254</sup> In the Swedish Court of Appeal, a man was found guilty of a sex crime after using defamation as a threat to force a woman to commit sexual acts.<sup>255</sup> Thusly, these types of defamation lawsuits are directed towards women who speak out about sexual violence, and therefore it is also exercised as a demonstration of (male) power. This has been confirmed by the SRVaW who found that threats of and legal proceedings for defamation against women who speak out online about their experience of sexual abuse or violence can have a chilling effect on women and hinder them from accessing justice.<sup>256</sup>

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<sup>249</sup> Sui-Lee Wee & Lee Yuan, ‘They Said #MeToo. Now They are Being Sued’ <<https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html>> (Accessed 2020-02-17).

<sup>250</sup> *ibid.*

<sup>251</sup> Alexandra Alter, ‘Jay Asher, Author of ‘Thirteen Reasons Why’, Files Defamation Lawsuit’ <<https://www.nytimes.com/2019/01/25/books/jay-asher-lawsuit-thirteen-reasons-why.html>> (Accessed 2020-02-17).

<sup>252</sup> Mark Savage, ‘Kesha Suffers Setback in Dr Luke Defamation Trial’ <<https://www.bbc.com/news/entertainment-arts-51412420>> (Accessed 2020-02-18).

<sup>253</sup> Aurelien Breeden, ‘French #MeToo Movement’s Founder Loses Defamation Case’ <<https://www.nytimes.com/2019/09/25/world/europe/france-sandra-muller-verdict.html>> (Accessed 2020-02-17).

<sup>254</sup> European Parliament, ‘Information and Notices’ [55] (Official Journal of the European Union 2012, C 229 E) 128

<sup>255</sup> Svea Hovrätt Mål Nr 6098-10 (Dom 2019-01-09) 6.

<sup>256</sup> A/HRC/38/47 (n 31) para 31.

### **3.1 Defamation under Article 19(3) of the ICCPR**

Being one of the most fundamental principles in a democratic society, Article 19(3) still allows for restrictions on the right to freedom of expression. Freedom of expression may be restricted on the basis of a) the ‘respect of the rights or reputations of others’ and b) ‘for the protection of national security or of public order, or of public health or morals’, as long as they can be justified.<sup>257</sup> Under Article 19(3), defamation falls under the respect of the rights or reputation of others. It constitutes a legal tension between the right to freedom of expression and the right to private life (protected under Article 17 ICCPR). Naturally, for a restriction to be legitimate under IHRL, it must be provided for by law, be necessary, and proportionate.<sup>258</sup> This is particularly important as restricting freedom of expression risks ‘silencing those exercising the right to freedom of expression’, particularly restrictions based on discriminatory structures.<sup>259</sup>

#### *3.1.1 Article 19(3) – Restricting Freedom of Expression to Protect Reputation*

As found in Chapter 2, under Article 19(2) a person is allowed to make statements in any form, and it can be shocking, provoking, and critical. However, depending on the content of the expression, to whom it was directed, and the means and circulation of the dissemination of the statement, an expression can constitute the crime of defamation, which is a reputational crime.<sup>260</sup>

The right to reputation, regulated under Article 17 of the ICCPR, obliges states to protect against any unlawful interference, by natural or legal persons, by attacks on honor and reputation of an individual. It means that states are obliged to provide adequate legislation protecting Article 17, as well as for individuals to be able to protect themselves from such attacks, and that effective remedies are available against those responsible.<sup>261</sup> Under Article 19(3), reputation means ‘esteem in which a physical person or a legal entity is generally held within a particular community’.<sup>262</sup> Thus, reputation relates to the ‘dignity, emotional or psychological integrity, and the inviolability of the person, and privacy and private life more

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<sup>257</sup> HRC GC 34 (n 10) para 21.

<sup>258</sup> *ibid* para 22.

<sup>259</sup> *ibid* paras 23, 26.

<sup>260</sup> Human Rights Council, ‘Implementation of General Assembly Resolution 60/251 of March 2006 Entitled “Human Rights Council: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, Ambeyi Ligabo’ (A/HRC/4/27, 2 January 2007) para 47.

<sup>261</sup> Human Rights Committee, ‘CCPR General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation’ (8 April 1988) paras 1, 11.

<sup>262</sup> Defining Defamation (n 221) 2.

broadly'.<sup>263</sup> To use reputation as a legitimate restriction to freedom of expression has however not been given a specific margin of appreciation, but restrictions have to be made with caution and cannot be general or overly broad.<sup>264</sup> The potential to restrict the right to freedom of expression require three conditions: 1) That it is prescribed by law; 2) Protect a legitimate reputation interest; 3) Be necessary in a democratic society.<sup>265</sup>

It means that first, it must be prescribed by law that is clearly formulated, predictable and accessible for the public and not violate the principle of non-discrimination (contrary to Article 26 of the ICCPR).<sup>266</sup> Such restriction of the right to freedom of expression on the basis of reputation must therefore aim to the 'protection of a legitimate reputation interest'. Such interest should be the protection of 'false statements of fact that cause damage to their reputation', and not to protect 'subjective feelings or interests'.<sup>267</sup> Furthermore, the purpose must be genuine and have a demonstrable effect. Thus, it must be proportionate to the interests protected, and must constitute the least intrusive measure. Therefore, when restricting an expression, states must clearly express 'the precise nature of the threat, and the necessity and proportionality of the specific action taken' and 'establishing a direct and immediate connection between the expression and the threat'.<sup>268</sup> According to the Defamation Principles, for a restriction to be necessary in a democratic society the purpose must also constitute a genuine effort to protect an individual against a reputational injury. This includes e.g. exposure to public ridicule or measures that cause someone to be 'shunned or avoided'.<sup>269</sup> Such harm to a person's reputation must moreover reach a certain threshold of 'serious harm' before a restriction can be considered proportionate.<sup>270</sup> Thus, it must have imposed an injury to the defamed.<sup>271</sup> To determine if the measure was proportionate, it is possible to look at the form of the expression, as well as the way it was disseminated. For example, on what platform it was disseminated, and in what way. It is also relevance to examine if it was exercised in public or political debates, and if it was directed towards a public person (politician, head of state) or a private individual. To critique or disseminate information in a political debate or about a public person may require a more

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<sup>263</sup> *ibid* 8.

<sup>264</sup> HRC GC 34 (n 10) para 34, 36.

<sup>265</sup> A/HRC/4/27 (n 260) para 46.

<sup>266</sup> HRC GC 34 (n 10) paras 25-26 Defining Defamation (n 221) 5.

<sup>267</sup> *ibid* 3, 5.

<sup>268</sup> HRC GC 34 (n 10) paras 34-35, 38.

<sup>269</sup> Defining Defamation (n 221) 6.

<sup>270</sup> *ibid* 9.

<sup>271</sup> A/HRC/4/27 (n 260) para 47.

restrictive possibility to limit to freedom of expression. Critique against a private individual may give states a less restrictive possibility to limit the right in accordance with Article 17.<sup>272</sup>

Moreover, as the purpose of protecting reputation is to protect persons from false statements of fact, the proportionality test should also be of interest to examine if the statement was substantially true. This includes ‘proof of false statements’ and ‘mental culpability’. Thus if the accused was aware of the untruthfulness of statement or if the intent was to cause harm.<sup>273</sup> The HRC has stated that cases regarding defamation crimes, particularly penal defamation laws ‘should include such defences as the defence of truth’, and it should be *proved that a statement is ‘totally untrue’*.<sup>274</sup> The SRFoE reports that the statement must be *completely false* and must have caused an (intentional) injury to the claimant.<sup>275</sup> The ECtHR has argued that ‘A statement ... may be hard-hitting or vituperative but *it will not amount to defamation if it is in fact true*, because a person is only entitled to a reputation that is based on truth’.<sup>276</sup> And, as found above, Article 19 (org) has found that ‘*the only legitimate purpose of defamation laws is to protect people from false statements of fact that cause damage to their reputation.*’<sup>277</sup>

Finally, to examine the proportionately it is also relevant to examine the severity of the harm in relation to the type of legal measure that can be taken towards an individual. When balancing the proportionality and the tension between protection of reputation and freedom of expression, it is relevant to examine the type of regulation it regards and what measures are imposed.<sup>278</sup> Lawsuits are internationally considered a civil claim, but many states still impose criminal remedies to protect reputation. Article 19 (org) has found that ‘All criminal defamation claims should be abolished without delay’.<sup>279</sup> The HRC and the SRFoE has stated that States should avoid excessively punitive measures and penalties, such as criminal sanctions to defamation, and even excessively harsh civil remedies. Moreover, the HRC has urged State parties to consider decriminalization of defamation, and if not, that the application of the criminal law should only be allowed for in the most serious of cases and that imprisonment is never an appropriate penalty.<sup>280</sup> The SRFoE has also found that excessive criminal penalties are imposed to silence the press, and that it may also be imposed to non-journalists, who often suffer distress

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<sup>272</sup> HRC GC 34 (n 10) para 39.

<sup>273</sup> Defining Defamation (n 221) 11.

<sup>274</sup> HRC GC 34 (n 10) para 47.

<sup>275</sup> A/HRC/4/27 (n 260) para 47.

<sup>276</sup> Tarlach McGonagle, ‘Freedom of Expression and Defamation: A Study of the Case Law of the European Court of Human Rights’ (CoEP, 2016) 13.

<sup>277</sup> Defining Defamation (n 221) 8.

<sup>278</sup> *ibid* 10.

<sup>279</sup> *ibid* 10.

<sup>280</sup> HRC GC 34 (n 10) para 47; A/HRC/4/27 (n 260) para 48.

and are obliged to spend ‘remarkable amounts of money’ for legal aid.<sup>281</sup> Article 19 (org) further develops that criminal defamation should not be imposed regardless of ‘how egregious or blatant the defamatory statement’.<sup>282</sup> This is vital to avoid any misuse of defamation laws to, for example, suppress public debates and societal critique.<sup>283</sup> Moreover, according to the guidelines of the Defamation Principles, criminal defamation should never be imposed unless the facts are false and with intent to cause harm.<sup>284</sup> Moreover, criminalization of defamation indicates a clear interest of controlling a particular activity, and it can create a social stigma. The ECtHR has for example found that it has a chilling effect since it imposes a criminal record of the person concerned, and can have social consequences.<sup>285</sup> Just as argued by the SRVaW<sup>286</sup>, harsh sentences to defamation imposes a chilling effect on the right to freedom of expression, particularly if it targets a certain group of vulnerable individuals, such as women.<sup>287</sup> Therefore, in the context of women speaking out about sexual violence, there also exist a risk that criminal proceeding are initiated against the accuser, rather than the accused for ‘powerful individuals to silence their accuser’.<sup>288</sup>

### **3.2 Defamation under Swedish Law: Chapter 5 of the Penal Code**

To disseminate information that someone has committed a sex crime, or the judgement of such crime, can be punishable under Swedish law.<sup>289</sup> Therefore, being one of the most fundamental principles in the Swedish democratic society, freedom of expression can be restricted in accordance with RF 2:23 and the Swedish Penal Code Chapter 5, and in accordance with its obligations under ICCPR Article 19(3). This includes defamatory expression which harms the reputation of others. Thus, when the protection of private life outweighs that of the right to freedom of expression.

This chapter explores how the Swedish criminal justice system handles defamation cases. And, considering its inability to deal with men’s sexual violence against women, its potential impact on women victims of sexual violence and possibility to exercise freedom of expression.

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<sup>281</sup> *ibid* (n 260) para 56.

<sup>282</sup> Defining Defamation (n 221) 10.

<sup>283</sup> *ibid* 3.

<sup>284</sup> *ibid* 10.

<sup>285</sup> McGonagle (n 276) 56.

<sup>286</sup> A/HRC/38/47 (n 31) para 31.

<sup>287</sup> Defining Defamation (n 221) 11.

<sup>288</sup> Article 19 Malaysia (n 248)

<sup>289</sup> SOU 2016:7 (n 50) 220.

### 3.2.1 Defamation

Under Swedish law, defamation can impose a legitimate restriction to freedom of expression if an individual disseminates information about another that harms their reputation. This applies regardless if the information is true, and if it is meant to expose someone to the disrespect of others. The crime of defamation is meant to protect private life (RF 1:2 paragraph 4) of others from the dissemination of an expression that can be harmful to the life of that person. Restriction on freedom of expression (RF 2:20(1)) can be made if it regards the protection of reputation (RF 2:23). Such restriction can only be made if it is provided for by law, if it is accepted in a democratic society, if they are necessary to the aim, and cannot impose a threat to freedom of opinion and democracy (RF 2:21). Restrictions can therefore never exceed what is necessary to the aim and cannot be overly broad so that it threatens the freedom of opinion as it is foundational for democracy.<sup>290</sup> A legitimate restriction could for example be to protect individuals from the risk of social injuries that can come from harming one's reputation. This differs slightly from the IHRL standards, where a statement must also be false, which will be further assessed below. Nevertheless, the purpose of both systems is that such harm can affect a person's social position and personal integrity.<sup>291</sup> Therefore, in order to respect the democratic nature of freedom of expression, balancing between rights must be done in the light of present-day conditions. In Sweden, each case is thusly examined on a case-to-case basis, and the courts have the freedom to interpret the interest of freedom of expression contrary respect for private life in relation to the circumstances of the case.<sup>292</sup>

Depending on the act and its circumstances, defamation can be determined as either defamation or aggravated defamation under Chapter 5:1 and 5:2 of the Swedish Penal Code.<sup>293</sup> In accordance with Article 19(3) of the ICCPR, Chapter 5:1 of the Swedish Penal Code determines that an act is considered defamation if information about a living person (with exception under 5:4) is disseminated.<sup>294</sup> By disseminating such information the person 'points out someone as being a criminal or having a reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others'. This information must be posed as a statement or similar to a fact.<sup>295</sup> If the statement is of such determined nature but is found justified, its truth can be tried.<sup>296</sup> Statements containing more general terms, such as

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<sup>290</sup> Kungliga Majestäts Proposition nr 10 år 1962 s A 3.

<sup>291</sup> SOU 2016:7 (n 50) 401, 403, 439.

<sup>292</sup> *ibid* 449.

<sup>293</sup> Prop. 2016/17:222, 'Ett Starkt Straffrättsligt Skydd för den Personliga Integriteten' (Regeringen 2017) 65.

<sup>294</sup> Brottsbalk (1962:700) 5 kap. 1 § (Lexino, 2019-01-01).

<sup>295</sup> SOU 2016:7 (n 50) 401.

<sup>296</sup> Lexino 5:1 (n 194).

calling someone a ‘gangster’ can amount to defamation, while opinionated values (subjective feelings) can be disregarded.<sup>297</sup> Furthermore, for an act to be defamatory, the statement must have become disseminated to others than the person the information concerns.<sup>298</sup>

Defamatory statements can be justified under certain circumstances, such as that of having an obligation to speak (e.g. making a witness statement or a duty within your line of work). The statement must be done with the precondition that the statement was true or believed to be true, or that there existed any other reasonable ground for it to be justified.<sup>299</sup> The court will seek to examine if the information was disseminated with the intent (done with malice) to injure someone’s reputation. However, contrary to IHRL, if such intent was found and the act was found unjustified, the truth of a statement is not tried.<sup>300</sup> What is instead of relevance is to examine aspects such as the quality of the statement. This includes the severity of the accusations, such as if someone was called a murderer compared to stating that someone was fined a speeding ticket.<sup>301</sup> The circulation of a statement, such as in what form it was circulated, how, and how the statement was posed to others should also be considered. Thus, the statement must also expose someone to the disrespect of others. The dissemination of information must therefore affect the person’s reputation among others. Such crowd could for example be family, friends, or colleagues or in general that the disreputation of a person affects their position and personal value in their social crowd.<sup>302</sup>

Furthermore, although subjective feelings of disreputation cannot amount to defamation, such feelings can however be of interest if the dissemination of information about a person was found defamatory. Such information is used to determine the harm the defamation caused a person, and the court can examine a person’s perceived and subjective suffering.<sup>303</sup> For example, in NJA 1992 s 594 regarding statements of sexual activities, the content of the secret filming of a sexual act was not *per se* considered defamatory. However, the content had been disseminated and circulated a derogatory manner, posing her as reprehensible in her way of living. Therefore, the complainant was exposed to the disrespect of others and the act still amounted to defamation. In NJA 2003 s 567, the Court found a reputational harm can also be determined based on public values. To disseminate information to others containing ‘facts’ that a person

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<sup>297</sup> *ibid.*

<sup>298</sup> 2016/17:222 (n 293) 65

<sup>299</sup> *ibid* 2016/17:222 65; SOU 2016:7 (n 50) 413; Lexino 5:1 2019-01-01.

<sup>300</sup> *ibid* 67.

<sup>301</sup> Lexino 5:1 (n 194).

<sup>302</sup> SOU 2016:7 (n 50) 410-411.

<sup>303</sup> Lexino 5:1 (n 194).

was to participate in a pornographic movie was considered exposing someone to the disrespect of others as it, in the Swedish society, was considered a reprehensible way of living.<sup>304</sup>

A justification can also be considered with regards to the circumstances at the time of the act. This includes the seriousness of the allegations, to whom and in what situation it was disseminated and with what purpose. It is also of relevance to examine who the statement regarded (as found above), and who expressed it. For example, in NJA 1014 s 808 for students to state in their thesis that a person was as a criminal was considered justified for the sake of the possibility to freely express and exchange thoughts in an academic setting. It could for example also be justified to furnish information in a newspaper about a politician participating in a pornographic movie, considering her position, compared to the cases above where it could not be justified. Thusly, a person's position in society is also of interest to the circumstances.<sup>305</sup>

As found above, what matters in Swedish defamation cases is that the disseminated information harmed a person's reputation. Consequently, even true information can be found defamatory put in proportion to the complainants suffering.<sup>306</sup> However, if the expression was found justified or if the person disseminating information had a reasonable ground to express it, the level of truth *can* be, but is often not, examined to determine if a defamation sentence would be proportionate.<sup>307</sup> This distinguishes from the IHRL standards, where the truth seem to have a higher value.<sup>308</sup> In Sweden, the truthful nature of the content has to be proved by the accused. And, the more severe the accusation, the more restrictive burden of proof lays on the accused. Moreover, there has to exist a general interest for it to be defensible.<sup>309</sup> For example, in the case of the thesis writing students mentioned above, the defamatory statement was justified. However, the accusation that a person was a criminal was found not to be true, and the students were eventually found guilty of defamation. The Court found that they should have investigated on a deeper level whether the information actually was true. This was particularly important since they accused a person of being a criminal.<sup>310</sup> Under Chapter 5 of the Penal Code it has however been found that to verify the truth, a defendant could for example refer to a recent judgment. Even if such case had been dismissed in court, it could still be relevant as long as the defamation trial did not entail a new trial of the same case. Moreover, a reasonable ground

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<sup>304</sup> Lexino 5:1 (n 194).

<sup>305</sup> *ibid.*

<sup>306</sup> *ibid.*

<sup>307</sup> SOU 2016:7 (n 50) 404.

<sup>308</sup> HRC GC 34 (n 10) para 47.

<sup>309</sup> Lennart Nilsson & Pär Ullrich, 'Förtal i Sociala Medier – Det här Säger

Lagen' <<https://www.expressen.se/nyheter/fortal-i-sociala-medier-det-har-sager-lagen/>> (Accessed 2020-03-10).

<sup>310</sup> Lexino 5:1 (n 194).



for examining the truth could also be if the information the defendant had disseminated earlier had been expressed e.g. through a witness statement. If so, it could be enough to only refer to such statement.<sup>311</sup> This is important with respect to defamation cases that arose during #MeToo as they often regard statements of acts of sexual violence that were unreported or that such cases were dismissed. As found in Chapter 2, this is a result of stigma and the Swedish criminal justice system's inability to deal with men's sexual violence against women. If and how a Court can examine the truth of such statement and in relation to the #MeToo cases will be further assessed in Chapter 4.

### 3.2.2 Aggravated Defamation and Online Speech

Contrary to the observations and findings of the HRC and the SRFoE that argues for defamation as a civil remedy, Sweden has found that criminalization of defamation falls within its positive obligations to protect the right to private life and personal integrity. And, that it therefore constitutes a legitimate restriction to freedom of expression.<sup>312</sup> Any such restriction must however be seen in the light of the widest possible enjoyment of freedom of expression and information in political, religious, scientific, or cultural expression.<sup>313</sup>

A defamation claim can be raised by a complainant to a prosecutor or raised by a public prosecutor if it is of public interest.<sup>314</sup> Defamation cases, which are generally plaintiff cases, are often not investigated, and it is rare that public prosecutors raise such cases as they must be of public interest. Those cases that do get investigated are those of more serious nature, and often regards defamation that fall under 'aggravated defamation'. It usually regards statements connected to sexuality, racism, or to accuse someone of having committed a serious crime.<sup>315</sup>

Moreover, there exist no consistency in preceding case law on aggravated defamation.<sup>316</sup> Therefore, to determine if a defamation crime is aggravated, the courts examine the content of the information as well as the scale of the dissemination and if otherwise, the purpose was meant to bring serious harm.<sup>317</sup> This is determined after analyzing the overall circumstances of the case and on a case-to-case basis.<sup>318</sup>

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<sup>311</sup> Stefan Johansson et al, 'Brottsbalken' (16th edn, NJ 2020).

<sup>312</sup> 2016/17:222 (n 293) 21.

<sup>313</sup> Magnus Isberg & Marianne Eliasson, *Grundlagarna: Regeringsformen, Successionsordningen, Riksdagsordningen* (NJ, 2012, 3rd edn/JUNO edn 3A, 2019).

<sup>314</sup> 2016/17:222 (n 293) 65.

<sup>315</sup> Åklagarmyndigheten, 'Förtal och Förolämpning' <<https://www.aklagare.se/om-brottsligheten/olika-brottstyper/fortal-och-forolampning/>> (Accessed 2020-03-20).

<sup>316</sup> SOU 2016:7 (n 50) 447.

<sup>317</sup> 2016/17:222 (n 293) 68.

<sup>318</sup> SOU 2016:7 (n 50) 452.

A crime of aggravated defamation usually regards information that has gained a more broad and general dissemination, often occurring online and to a large crowd of people. Moreover, as found above the severity of the accusations is of importance. For example, it can amount to aggravated defamation to accuse someone of being a pedophile or having committed a sex crime. The position of the defamed and the extent of psychological suffering is also examined to determine if the defamatory statement constituted serious harm<sup>319, 320</sup>

As stated above, the scale of the dissemination is also of interest.<sup>321</sup> It can be justified to disseminate information that can amount to aggravated defamation to a closed circle. It is however not justified if the information is disseminated to others outside of such reliable circle.<sup>322</sup> Therefore to amount to aggravated defamation the information it must have been made accessible to many people<sup>323</sup>, or if the dissemination was made in such a way that it was meant to cause attention. For example, defamation online often regards publication or written statements on social media that is accessible for a lot of people.<sup>324</sup> Thus, the courts examine to whom and how many the dissemination of the statement was made accessible to. By doing so it is also possible to determine if it was easy for persons close to the complainant to identify them.<sup>325</sup>

Internet is today such a platform used as an every-day way of communication for many human beings, and it has become a platform for expressing opinions and thoughts. Thusly, it is a big forum for exercising freedom of expression, and to reach more people which is part of our contemporary societal development.<sup>326</sup> As found in Chapter 2, it therefore also includes online social movements, such as #MeToo. Online expression is however often a very fast way to disseminate information and to many people. This can result in great harm to a person's integrity.<sup>327</sup> Thus, to determine if a crime was aggravated it is relevant to examine to how many persons the information was traceable, and in what type of forum it was posted. The dissemination of the information online and on social media is also taken into consideration if the case is of aggravated nature. For example, in NJA 1992 s 594, the dissemination of a filming of sexual intercourse between the defendant (man) and the plaintiff (woman) was considered

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<sup>319</sup> SOU 2016:7 (n 50) 415.

<sup>320</sup> Åklagarmyndigheten, 'Förtal och Förolämpning: Särskilt om Handläggning och Åtalsprövning' (Handbok 2019) 12, 14.

<sup>321</sup> SOU 2016:7 (n 50) 433, 448.

<sup>322</sup> Lexino 5:1 (n 194).

<sup>323</sup> There is no specific number of persons that have to be reached, and it is determined on a case-to-case basis (SOU 2016:7 (n 50) 452).

<sup>324</sup> BRÅ Polisanmäla Hot (n 33) 64.

<sup>325</sup> Brottsbalk (1962:700) 5 Kap 2 (Lexino, 2019-01-01); SOU 2016:7 (n 50) 452, 453.

<sup>326</sup> 2016/17:222 (n 293) 19.

<sup>327</sup> *ibid.*

aggravated defamation since it was disseminated to others. By doing so the accused exposed a person's sexual feelings, and therefore exposed her to the disrespect of others.<sup>328</sup> In NJA 2015 s 86 the accused had posted a video of sexual intercourse on porn sites. First, the content was considered to highly infringe upon the person's dignity. Second, it was disseminated in such a way that it was accessible to many, which caused the complainant severe suffering.<sup>329</sup>

Finally, defamation crimes involving criminal liability has been critiqued for being vague. This can be very problematic as it regards criminalization that restricts freedom of expression. Both under IHRL and under Swedish law it has been found that such vague definition can impede freedom of opinion and constitute unnecessarily harsh censoring.<sup>330</sup>

### **3.3 Gender Equality and Defamation**

It was found that 'Women who speak out about their abuse online are frequently and increasingly threatened with legal proceedings, such as for defamation, which aims to prevent them from reporting their situation.'. This includes the use of defamation lawsuits by powerful individuals to silence their accuser who is in the #MeToo cases vulnerable individuals.<sup>331</sup>

According to the Camden Principles, freedom of expression can and should be restricted on certain grounds, however, such restrictions must be assessed on a case to case basis and take into account patterns of vulnerability.<sup>332</sup> The HRC has found that all laws, also those relating to freedom of expression, or restriction of such law under Article 19(3), must be seen in the light of the principle of non-discrimination.<sup>333</sup> It was found in Chapter 2 that freedom of expression and gender equality are interconnected as they both are needed for democracy, and a necessity for women to exercise their human rights. However, gender unequal practices, particularly men's sexual violence against women, can hinder women from exercising freedom of expression. This was questioned by the #MeToo movement and as a result, women of the #MeToo movement started to name men committing sex crimes to challenge injustice. Consequently, some women committed a severe defamatory crime.<sup>334</sup>

Such defamation crimes were by the Swedish Prosecution Authority found to constitute a public and societal interest as they regarded statements accusing someone of a serious crime. It also found that one of the more common defamation crimes are posts on social media where a

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<sup>328</sup> Lexino 5:2 (n 325); SOU 2016:7 (n 50) 405, 421.

<sup>329</sup> *ibid* Lexino.

<sup>330</sup> SOU 2016:7 (n 50) 443.

<sup>331</sup> A/HRC/38/47 (n 31) para 31; Article 19 Malaysia (n 248).

<sup>332</sup> Camden Principles (n 113) 2.

<sup>333</sup> HRC GC 34 (n 10) para 26.

<sup>334</sup> Martinsson, Griffin & Nygren (n 7) 1.

person disseminates a statement accusing someone of having committed a sex crime. It also found that these 'alternative legal processes' sometimes substitute official police reports of such crime. It also argued that such unofficial means are not legally safe, and with low opportunities for the accused to defend themselves. Such social media posts can also be so harmful that although police reports had been made for the sex crime, the circumstances can still be such that it constitutes a crime of defamation. Therefore, it was considered to be of public interest to prosecute such defamation crimes.<sup>335</sup>

As will be examined in the next chapter, all #MeToo cases regarded women who 'took law into their own hands' and spoke out about who had committed a sex crime against them. This was to highlight impunity and the questionable handling of men's violence against women in Sweden. The crime of defamation and the crime of sexual violence however differs. Harriet Wistrich, director of UK's Centre for Women's Justice, pointed out that there exists a certain injustice when these two crimes are intertwined. She found that: 'the standard of proof in rape or sexual assault cases is high and can be quite difficult to prove. In defamation cases involving allegations of rape or sexual assault, that standard of proof still exists'.<sup>336</sup> Thus, as found in Chapter 2, crimes of sexual violence in Sweden are difficult to prove. And, on the contrary, defamation crimes are often rather easy to prove. This is problematic as the #MeToo defamation cases may be founded on the basis of the extreme high rates of impunity of sexualized crimes that disproportionately affects women in Sweden.<sup>337</sup> Since the #MeToo women, allegedly, belong to such a group that are affected by impunity for crimes of sexual violence, they belong to a particularly vulnerable group in the Swedish society. The #MeToo men on the other hand, do not belong to a vulnerable group, and are victims of a crime as the result of impunity. Thusly, from the very basis of the Swedish society, the #MeToo women are in a general disadvantaged and subordinated position from the #MeToo men, contrary to Article 5 of the CEDAW.

These gender structures have also been found in statistics. According to the BRÅ statistics on exposure of crimes online, out of 100 000 persons interviewed, an equal number of women and men indicated that they perceived that they had been victims of online based reputation crimes. However, when BRÅ examined the reported cases, crimes regarding the right to privacy disproportionately affected women: 80% of women reported the crime compared to 20% of men. It moreover found that women perceived online hate more serious than men, and often

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<sup>335</sup> Åklagarmyndigheten Förtal och Förolämpning (n 320) 33.

<sup>336</sup> <<https://edition.cnn.com/2019/06/05/europe/metoo-defamation-trials-sandra-muller-france-intl/index.html>> (Accessed 2020-03-23).

<sup>337</sup> Time for Change (n 18) 80-81, 92.

reported crimes involving words such as ‘bitch’ or ‘whore’. It found that such statistics indicated that women were more often exposed online posing them in a sexualized manner.<sup>338</sup> Thusly, defamation crimes are clearly connected to the structural perceptions of the roles of women as they are often connected to gender and sexuality.<sup>339</sup> Furthermore, BRÅ found in 2015 that men more often reported crimes of defamation regarding publicly written statements online accusing someone of a serious crime, particularly sex crimes.<sup>340</sup> Therefore, there are strong indicators to that different types of defamation crimes affects women and men differently. Defamation crimes that often affects women are those posing women in a sexualized manner, whilst defamation crimes against men more often involves posing them as perpetrators of a serious sex crime. Thusly, traditional inequalities and structures are prevalent even in defamation crimes, and can constitute discriminatory practices based on the roles of women and men, contrary to Article 5 of the CEDAW. This is, arguably, a reflection of the power relation between men and women, and who is a victim to what. Because of the #MeToo defamation lawsuits, the victim-status is flipped back and forth between the men and women. The women allegedly being victims of a sex crime, and the men victim of defamation for being tried ‘through a court of social media’.<sup>341</sup> Thusly, freedom of expression, men’s sexual violence against women, and defamation are directly connected, and it is a possibility that restricting freedom of expression can be made on a discriminatory basis, contrary to Article 19 and 26 in conjunction with Articles 2 and 3 of the ICCPR.

Finally, the #MeToo defamation cases regards the stories and the perceived and subjective reputation and suffering of the #MeToo men, which is of interest when assessing the #MeToo defamation cases.<sup>342</sup> Having in mind the power hierarchies between women and men, it is important to point out the different roles of the parties to the cases. Ulrika Andersson presented such questions very precisely when she asked: ‘Through what stories are women’s voices heard?’ and ‘How should a story be told for it to be perceived as true?’.<sup>343</sup> And, on the contrary, through what stories are men’s voices heard, and why is he perceived to tell the truth?

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<sup>338</sup> Brottsförebyggande Rådet, ‘Kortanalys 6/2019: Hot och Kränkninar på Nätet: En Jämförande Beskrivning Utifrån Kön och Ålder’ (Kortanalys 6/2019) 9-10.

<sup>339</sup> 2016/17:222 (n 293) 20.

<sup>340</sup> BRÅ Polisanmäla Hot (n 33) 67.

<sup>341</sup> Kara Fox & Antione Crouin (CNN), ‘Men are Suing Women who Accused Them of harassment. Will it Stop Others from Speaking Out?’ <<https://edition.cnn.com/2019/06/05/europe/metoo-defamation-trials-sandra-muller-france-intl/index.html>> (Accessed 2020-03-23).

<sup>342</sup> 2016/17:222 (n 293) 19.

<sup>343</sup> Andersson 2016 (n 171) 84.

The next chapter will explore if and how the courts analyze such questions in a defamation case, and how women are produced in the Swedish criminal justice system when defamation cases involve men's sexual violence against women.

### **3.4 Conclusion**

Although freedom of expression is fundamental, it is still subject to restrictions. Under article 19(3) of the ICCPR, defamation is one of the few reasons for restricting the right to freedom of expression. This as long as it is prescribed by law, pursue a legitimate reputation interest, and is necessary in a democratic society. Under IHRL, a legitimate reputation interest is to protect from false statements of facts that cause damage to their reputation. In Sweden, it is to protect someone from social injuries. This is in the #MeToo defamation cases weighted in relation to the freedom of expression of women victims of sexual violence. What is particularly interesting to the #MeToo cases it that they often involve criminal remedies. In Sweden, criminal remedies are often applied to more severe accusations, such as stating that someone has committed a sex crime. The international community has however found that such remedies are in risk of ending up in excessive penalties, and it induces a certain social stigma. It can therefore have a chilling effect on freedom of expression. This was particularly true if it regarded vulnerable groups, such as women. Therefore, such restrictions do not apply to the principle of non-discrimination, which must be taken into account under articles 2, 3 and 26 of the ICCPR and article 5 of the CEDAW. Therefore, even when applying defamation law, it must be taken into account that certain practices can hinder freedom of expression for women victims of sexual violence. It is particularly important to consider as defamation lawsuits has been brought against women who speak out about structural injustice as a legal tactic to silence women. This has been found in many countries and was particularly exercised against women during #MeToo who disseminated information about being victims of sexual violence and named their perpetrators. Finally, such practice was in Sweden confirmed by statistic stating that defamation crimes that were of serious nature often involved crimes relating to sexual violence. Women were often subjected to defamation by the dissemination of sex-videos. Men were often subjected to accusations of having committed a sex crime. Thus, sexualized gender structures and roles are seen even in defamation cases and are contrary to Article 5 of the CEDAW and can infringe upon Articles 19 and 26 in conjunction with 2 and 3 of the ICCPR.

## 4. Case Analysis

In the following case analysis, I will analyze five different cases (hereinafter cases 1, 2, 3, 4, and 5) that arose after the #MeToo movement in Sweden. They have been chosen as they all involve five Swedish #MeToo women (the defendants) who wrote about their experience of sexual abuse and disseminated information about who had abused them (the complainants), and got sentenced for the crime. Thusly, restricting their freedom of expression. This chapter will examine if the Swedish criminal justice system (first instance district courts) was able to adhere to the general subordination of women, specifically women victims of sexual violence with respect to Article 5 of the CEDAW. Moreover, the chapter can contextualize whether such structures can impede women's possibility to exercise freedom of expression under Article 19 and 26 in conjunction with 2 and 3 of the ICCPR. Therefore, the focus group in this chapter is the #MeToo women and the impact of the judgments on the women's possibility to exercise freedom of expression in the Swedish society.

*First*, there will be provided a compressed background to the cases and their outcomes. *Second*, why a woman would exercise freedom of expression to commit a reputation crime. *Third* the position/victim status of the complainant and the defendants. *Fourth*, the value of 'truth' in the courts' assessments will be examined to provide an analysis of the understanding of the portrayal of women in cases involving sex crimes in defamation trials.

### 4.1 Background

Case 1 is the first, shortest and least detailed among the five cases where a defamation sentence was issued. In 2018, Södertörn District Court found that the right to freedom of expression was legitimately restricted as the defendant has pointed out the complainant as a rapist and disseminated such information online, as it constituted defamation. The defendant had in a Facebook-post during the #MeToo movement written about 'the next worst experience of her life': being raped by the complainant. She had never reported the rape because of shame, and the #MeToo movement had given her space to share her story. She had written about the rape and provided information that could easily identify the complainant. The complainant who himself had been a supporter of the movement, had after seeing the social media post suffered trauma because of the allegations. Therefore, by widely disseminating information posing the complainant as a criminal, she had exposed him to the disrespect of others. Therefore, taken together with that she never filed a police report against the complainant for the rape, the Court

found the defendant guilty of defamation.<sup>344</sup> The Court found that there however existed mitigating circumstances. This included that the defendant had suffered from the realization that she had been raped, and that the #MeToo movement encouraged persons to talk about and name perpetrators of sex crimes. Therefore, she was sentenced to pay 10 000 SEK in damages to the complainant.<sup>345</sup>

Case 2. In summer 2019, Nacka District Court found that it was legitimate to restrict the defendant's right to freedom of expression as she had pointed out the complainant as a rapist and disseminated such information to others, as it constituted aggravated defamation. The defendant had in 2017 during #MeToo made a post in a closed group on Facebook called #MeTooBackstage (women working backstage). She stated that 25 years prior when they had been colleagues, the complainant (now famous director) had slept at the defendant's house when the defendant had woken up being raped by the complainant. Sexual harassment and abuse had at the time been part of a (discriminatory) culture against women within the media-business. As a consequence, she never filed a report, and instead she quit her job. The complainant, on the contrary, claimed that they had consensual sex, and that he never used violence or such disrespectful language that the defendant had claimed.<sup>346</sup> The Court found that through her post, she had intended to point out the complainant as a criminal.<sup>347</sup> Moreover, it found that despite that she had made such posts to give attention to structural inequalities in two different branches, it was not justified to point out someone as a criminal and widely disseminate such information (over 9000 persons including colleagues of the complainant was reached).<sup>348</sup> As the post had contained allegations of serious criminality, that the dissemination was widespread, and that it had caused injury to the complainant's private life, working life and reputation, she was sentenced to aggravated defamation.<sup>349</sup> As the accusations regarded a severe crime (rape and racist incitements) the sentence constituted imprisonment. However, as previously unpunished and unlikely to commit a crime again, the defendant was given a suspended sentence with daily fines and was ordered to pay 60 000 SEK in damages for the suffering of the complainant.<sup>350</sup>

Case 3. In winter 2019, Södertörn District Court found the defendant guilty of aggravated defamation. The defendant had during #MeToo made an Instagram-post calling the complainant

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<sup>344</sup> Södertörns Tingsrätt, Dom 2018-02-20, Mål Nr B 17160-17 3-5.

<sup>345</sup> *ibid* 6.

<sup>346</sup> Nacka Tingsrätt, Dom 2019-07-03, Mål Nr B 7995-18 5-7.

<sup>347</sup> *ibid* 8-10.

<sup>348</sup> *ibid* 11-12.

<sup>349</sup> *ibid* 12.

<sup>350</sup> *ibid* 13-14.



(her colleague) a pedophile and abuser of women and children. She also warned others that he may abuse new women and children. She had therefore pointed him out as a criminal. The defendant claimed the information to be true, and that it could be justified.<sup>351</sup> The defendant's reason to make such post had been connected to #MeToo as she had wanted to tell her story and urge others not to vote for the complainant in an upcoming election. The Court found that she did not provide information about exactly *what* sexual abuse he had exposed her to, and simply pointed him out as a criminal of serious crimes. Moreover, as it found her intent to have been to cause him harm and that it was widely disseminated (200 persons on her account and the possibility of reaching more) the Court found her guilty of aggravated defamation.<sup>352</sup> The Court however found that aggravated defamation is not such a serious crime that it must entail imprisonment. As the defendant was previously unpunished and was not likely to commit such a crime again, there existed mitigating circumstances. The defendant was given a suspended sentence and was ordered to pay fines and damages of 40 000 SEK for the injury to the complainant's reputation.<sup>353</sup>

Case 4. In winter 2019, Stockholm District Court found the defendant guilty of aggravated defamation after she, in several posts during #MeToo, accused the complainant of being a rapist. The complainant is a well-known journalist at one of the biggest newspapers in Sweden, the defendant a freelance journalist. They had met in 2006, and in 2008, the defendant posted on social media that a 'powerful media man' had raped her. In 2011 she filed a report accusing the complainant for the rape, who denied the crime. The case was closed due to lack of evidence. The posts the defendant made during #MeToo became widely disseminated and reported about on TV. Thusly, the defendant had been exposed to the disrespect of others, and the Court could not justify the acts.<sup>354</sup> The Court found that the defendant had made various posts about the complainant pointing him out as a criminal, such as calling him 'a dangerous sex criminal'.<sup>355</sup> The Court found that the defendant had made such post to state that the complainant had used his position to abuse vulnerable women. She had done so in the spirit of the #MeToo movement where name-giving was found to be part of the success of the movement. Her statement was part of breaking the culture of silence and meant to tell the truth of what had happened to her.<sup>356</sup> This was however not found to constitute a valid reason to harm someone's reputation.

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<sup>351</sup> Södertörns Tingsrätt, Dom 2019-12-02, Mål Nr B 3405-18 5.

<sup>352</sup> *ibid* 6-8.

<sup>353</sup> *ibid* 8.

<sup>354</sup> Stockholms Tingsrätt, Dom 2019-12-09, Mål Nr B 1755-18 4-5.

<sup>355</sup> *ibid* 8-9.

<sup>356</sup> *ibid* 10-13.

Considering the severity of the accusations and the widespread nature of the dissemination, and the harm to the complainant's private life, she was found guilty of aggravated defamation.<sup>357</sup> Because of the severity of the crime and the psychological suffering of the complainant the Court found that the crime constituted a suspended sentence of imprisonment to pay fines and damages of 90 000 SEK for the injury to the complainants reputation.<sup>358</sup>

Case 5. In spring 2020, Solna District Court found the defendant guilty of aggravated defamation. The defendant had during #MeToo made a post in a closed Facebook stating that she had after talking to her lawyer about her experiences with the complainant (a famous comedian) decided to file a police report against him. She claimed that he had sexually abused her repeatedly during the time of one year. The post was made in a Facebook group created to support persons who had been exposed to sexual abuse by men. Her purpose with the post had been to find support, and to see if others had been abused by the complainant, and if they wanted to report. The defendant claimed that her intention had not been to disseminate the information so widely and that the act was defensible and the information true.<sup>359</sup> The complainant had however claimed that the sexual relation had been consensual ('mutual' and 'friendly'). He also explained that after the post and finding out that the defendant (and two other women) had filed police reports against him for sexual abuse, his mental health had been very bad, his property had been violated, and his career destroyed.<sup>360</sup> The defendant had posed the complainant as a criminal by stating that the complainant had committed sex crimes against her.<sup>361</sup> The Court also found that she had however not provided exact details of what sex crimes she had been exposed to, and merely made a 'clear, straight and unnuanced accusation of [the complainant] as a criminal'.<sup>362</sup> The post was exposed to the 600 members of the closed Facebook group, and disseminated to more persons outside of it. The Court also found that the allegations against the defendant considered highly stigmatized and serious crimes and was by the Court found to have had the intent to cause him harm. The posts and its widespread dissemination had caused the complainant psychological suffering and harm to his private life. She was therefore found guilty of aggravated defamation.<sup>363</sup> Because of the injury to the reputation of the complainant, his deep psychological suffering, the nature of the crime and its duration, the defendant was sentenced to imprisonment. The sentence got suspended as the defendant was young, previously

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<sup>357</sup> *ibid* 14-15.

<sup>358</sup> *ibid* 15-18.

<sup>359</sup> Solna Tingsrätt, Dom 2020-03-24, Mål Nr B 2985-19 3-7.

<sup>360</sup> *ibid* 8.

<sup>361</sup> *ibid* 10-11.

<sup>362</sup> *ibid* 12.

<sup>363</sup> *ibid* 15.

unpunished and was unlikely to commit another crime. She was sentenced to pay 55 200 SEK in fines and damages.<sup>364</sup>

## **4.2 Women Who Break the Law to Seek out Justice**

‘I am just angry...I have no ability to take him to court’<sup>365</sup> were the words that came out of an interview with a Chinese #MeToo defamation defendant. As found in chapter 2 and 3, similar experiences and reasons to hers have been expressed by women worldwide as they have been subjected to defamation lawsuits. As found in Chapter 2, many women in Sweden do not feel that they can access justice as the Swedish criminal justice system is insufficient in handling crimes of men’s sexual violence against women. Instead, these women exercised their freedom of expression to express dissatisfaction with the oppression of men’s sexual violence against women and to seek justice.

In all five cases, the defendants are women that are no previous criminals and are persons unlikely to ever commit any other crime. This chapter therefore aims to examine why the #MeToo women decided to exercise their freedom of expression and disseminate information about the men who had committed a sex crime despite the risk of committing a defamation crime.

### *4.2.1 Case 1*

In Case 1 the Court started with examining the intent of the defendant to make such post. It found that the defendant had made her post during #MeToo as she then fully realized that she had been victim of a sex crime and could get support from friends. First, the defendant argued that she never reported the crime at the time of the assault since she had not understood that she had been a victim of a sex crime. Second, she had not reported the crime earlier since the Swedish consent law was not yet in place.<sup>366</sup> The now existent Swedish consent law focus on consent or the lack thereof, rather than force, which have been found vital for the protection of victims. Particularly with regards to shame and guilt. This is particularly important as victims often are not able to express non-consent.<sup>367</sup> Moreover, as found earlier, to not understand or accept that you have been victim of a sex crime relates to shame and stigma that victims feel, which the defendant had felt herself. The defendant had for example explicitly stated that the

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<sup>364</sup> *ibid* 15-19.

<sup>365</sup> Wee & Yuan (n 249).

<sup>366</sup> E/CN.4/1998/40 (n 146) para 53.

<sup>367</sup> Justitiekottets Betänkande Ny Sexualbrottslagstiftning (n 191) 8; Andersson (n 1) 2, 4.

rape that happened 8 years prior was the next worst experience of her life. She never wanted to have sex, and she had been ashamed of what happened as she did not resist. Because of such stigma, she never reported the crime.<sup>368</sup> This differ significantly to the crime of defamation, which do not induce such stigma. For example, in the present case, the complainant had stated that ‘He immediately reported’ the defamation.<sup>369</sup>

Nevertheless, the above reason for why the defendant did not file a police report could not justify that she had disseminated information that the complainant had committed a sex crime. It found that she was guilty of defamation since the post could be directly linked to the complainant, and it had been made available to many people. It also found that she should have known it would expose the complainant to the disrespect of others. Finally, it found that the lack of a police report was part of the reason why she was found guilty of defamation: ‘[The defendant] never reported [the complainant] to the police for a sex crime and there are no other circumstances that could justify the act...’.<sup>370</sup> By doing so, the Court indicated that a police report could have constituted a reason to justify the case, or that it may have provided a different assessment or outcome. Consequently, it was also unable to adhere to discriminatory structures that makes women unable to exercise freedom of expression and report being victim of a sex crime.

#### 4.2.2 Case 2

In Case 2, the Court started by examining the defendant’s intent. It reiterated that the defendant had pointed out the complainant as a criminal and made such a post in a Facebook group called ‘#MeTooBackstage’ during #MeToo to lift the weight of her shoulders and talk about the sex crime she had endured 25 years prior which she stated she ‘of course did not report’.<sup>371</sup> She also stated that during the time of the rape, sexual harassment was common in the film industry and that men ‘constantly overstepped boundaries’. The Court additionally found that she had wanted to point out the structures of sexual harassment that prevails within the media industry<sup>372</sup>. The incident had given her anxiety, and instead of making a police report she quit her job. The Court did however not assess such structural inequalities. It moved on stating that although the purpose of the Facebook groups had been to point out structural inequalities, it

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<sup>368</sup> B 17160-17 (n 344) 4.

<sup>369</sup> *ibid* 4.

<sup>370</sup> *ibid* 5.

<sup>371</sup> B 7995-18 (n 346) 10.

<sup>372</sup> *ibid* 10.

was not meant to point out certain individuals.<sup>373</sup> Therefore to disseminate such information could not be justified.

It is thusly not clear if or how the Court valued the absence of a police report or if it is a prerequisite for determining if talking about who committed a sex crime was justified.<sup>374</sup> What however is clear is that #MeToo, discussing and disseminating information with a large crowd stereotypes of crimes of sexual violence against women, and naming perpetrators, could not justify her actions

#### 4.2.3 Case 3

In case 3 it is not clear if the defendant had made a police report or not. However, the Court investigated her intent of the defamatory statement and found that the defendant had during #MeToo felt that she had an obligation to make the post to warn others, to hinder persons from voting for the complainant in a party election, and to tell her story of what she had been victim of. The Court reiterated that although it is justified to talk about your experience of sexual violence, it is not always justified to name and point out another person as the perpetrator.<sup>375</sup> Moreover, the Court had also found that the defendant did not provide any information about *what* she and her child had been victims of. Any person reading the post had therefore not on their own been able to make a make a conclusion if the complainant had acted in a wrongful way. That it could not be considered simply ‘sharing’ her story. It therefore also found that she had a malicious intent to harm the complainant.<sup>376</sup> In a normal defamation case, to require such level of details may be legitimate when protecting a person’s reputation. What it however meant in the present case is that a woman allegedly victim of a sex crime should have publicly written out details about what she and her child had endured. On the contrary, in Case 1, 2 and 4 (below), the level of details about the sex crime did not justify the defamation crime. Thusly, assuming that her statement is true<sup>377</sup>, by making such argument, the Court neglected the stigma that surrounds sexual violence in the Swedish society, which could constitute indirect discrimination contrary to Articles 19 and 26 in conjunction with 2 and 3 of the ICCPR and Article 5 of the CEDAW.

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<sup>373</sup> *ibid* 11.

<sup>374</sup> *ibid* 6-7.

<sup>375</sup> Mål Nr B 3405-18 (n 351) 6.

<sup>376</sup> *ibid* 7.

<sup>377</sup> As seen in chapter 4.4, truth if something assumed by the Court when it examines a case.

#### 4.2.4 Case 4

In Case 4 the Court also started by examining the defendant's purpose to disseminate information posing the complainant a sex criminal. It found that it had been her intention to expose that the complainant had used his position and power to abuse young and vulnerable women. She had also done so to break the culture of silence about rape and sexual abuse that she and so many others had been exposed to. And, she disseminated the information to tell the truth of what she had to endure in the past.<sup>378</sup> The Court found that such circumstances should be seen in the light of the #MeToo movement and the effect of name giving perpetrators. It examined the relevance of name-giving and interviewed Gender Specialist Lena Martinsson. Martinsson found that when names had been revealed, the movement 'took off' worldwide. The Court recognized that the question about sexual violence is relevant and of interest of the general public, and that outing the names of perpetrators did contribute to the attention of the movement.<sup>379</sup> Nevertheless, the Court found that she had filed a police report against the complainant five years after the rape, but that the preliminary investigation had been closed due to lack of evidence. The Court did not assess the value of such police report further and could not find the circumstances to justify a defamation crime. As such, it lawfully restricted her freedom of expression.<sup>380</sup> Thusly, the Court examined the value and relevance of the #MeToo movement and why someone would break the law to seek out justice. It found that talking about sexual violence against women and to name perpetrators was of value to the success of the #MeToo movement and for women to find justice. However, despite such acknowledgement, it could not justify disseminating information about who had committed a sex crime.

#### 4.2.5 Case 5

Case 5 differs slightly from the other cases. Firstly, at the time of the post in 2017, the defendant had not yet filed the police report. However, the same day as she made the social media post about the complainant sexually abusing her, she filed a police report against him. It is thusly the only case that contained a very current report. Secondly, the Court stated that objectively, the intent of the accused was not relevant as she had already pointed him out as a criminal. To do so should have been enough to establish a defamation crime.<sup>381</sup> However, as her intent to make the post was addressed by the parties, it continued assess it. It found that during #MeToo she

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<sup>378</sup> B 1755-18 (n 354) 11-12.

<sup>379</sup> *ibid* 13.

<sup>380</sup> *ibid* 5.

<sup>381</sup> B 2985-19 (n 359) 10.

had decided to meet with a lawyer to discuss what the complainant had exposed her to. The lawyer had indicated that her experience with the complainant could constitute sexual assault. She wanted to share this in order to seek support and to give support if others had been abused by the same person. The Court also pointed out that police reports had been made against the complainant by two other women during #MeToo. Each one of the cases had however been closed due to lack of evidence.<sup>382</sup> Mentioning that two other persons had reported the complainant, and that media had become part of disseminating such information about the complainant, the Court recognized that the defendant was not the only person responsible for the reputational injury.<sup>383</sup>

Nevertheless, it noted that she only referred to the statements she made during the preliminary investigations of the dismissed case brought against the complainant for sexual abuse.<sup>384</sup> It found that ‘The information that she posted about [the complainant] does not contain any specific information about what she had been victim of’. To make ‘speculative placement of his name’ could not justify that she had written to seek support and to see if other had been abused by the same person. The Court continued to state that the post contained ‘a clear, straight and unnuanced accusation of [the complainant] as a criminal’. It found that by doing so, others could not form their own opinion to decide if the complainant had committed a crime.<sup>385</sup> The Court therefore required a victim of sexual assault in a defamation case to in detail describe, both in her disseminated social media post and in the present case, the sexual assault. This assessment neglects the silent culture around sexual violence against women, and it neglects the difficulty of a victim of sexual assault to re-live their assault.<sup>386</sup> Instead, it found that her reason and the circumstances<sup>387</sup> could not justify that she disseminated information accusing the complainant of having committed a sex crime against her. Consequently, the objective and neutral nature of the Court’s application of Chapter 5 of the Penal code reiterates the non-autonomy of the woman as a subject as it put disproportionate pressure on the defendant.<sup>388</sup>

Thusly, although not by intention, the defendant had broken the law in her path to seek out justice for a sex crime she had been victim of and to seek and give support from and to others. This was not a legitimate reason to defame another person. Thus, although #MeToo and its consequences were relevant to examine, in the Court’s objective assessment such circumstances

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<sup>382</sup> *ibid* 7-8.

<sup>383</sup> *ibid* 15.

<sup>384</sup> *ibid* 5.

<sup>385</sup> *ibid* 12.

<sup>386</sup> BRÅ 2019:5 (n 101) 106.

<sup>387</sup> The circumstances of the case will be further explored in the chapter below.

<sup>388</sup> B 2985-19 (n 359) 12.

could not justify a severe defamation crime. É contrario, the Court was unable to adhere to circumstances that happened because of the gender-based discrimination and stigma surrounding sexual violence and found that it was legitimate to restrict her freedom of expression.

### **4.3 The Courts' Assessments and the Portrayal of the Parties**

In this chapter it will be examined how the courts depict the complainant and defendant and their societal position and how it could affect the justification of a defamatory statement. And, whether such positions, from a critical perspective, could be based on gendered power structures which may constitute discrimination against women contrary to Article 5 of the CEDAW, and its effect on the possibility to restrict Article 19 of the ICCPR.<sup>389</sup> This is particularly important as existent power hierarchies 'gives authority and credibility' to men. Therefore, the courts' assessments, being objective and therefore gender neutral, may neglect such patterns.<sup>390</sup> In Chapter 2 it was found that freedom of expression of women victims of men's sexual violence is restricted, particularly when seeking justice. In Chapter 3 it was moreover found that gender roles are connected to defamation cases as they often are connected to gender and sexuality.<sup>391</sup>

In the Swedish criminal justice system, men's voices are heard since their higher societal stance is the norm and therefore have full potential to be autonomous before the law. Women are in the Swedish criminal justice system, the weaker voice.<sup>392</sup> As the courts apply the law in an objective manner in accordance with its ordinary meaning, gender-based discrimination is not considered as part of the analysis. Therefore, the impact of the courts' (objective) assessments and application of law on the individuals of each #MeToo defamation case will be examined.

#### *4.3.1 Case 1*

As the cases are defamation cases, the Courts position the #MeToo women not only as persons telling their stories, but also as perpetrators disseminating stories that became accusations which harmed the #MeToo men. In Case 1 the Court did not point out what position the complainant had in relation to the defendant at the time, how they met, and why. It however presented the

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<sup>389</sup> UN Women (n 169) 6.

<sup>390</sup> UN Women (n 169) 10.

<sup>391</sup> CEDAW GR 35 (n 9) paras 2, 6-7; Gunnarsson (n 9) 154; 2016/17:222 (n 293) 20; Levy & Mattsson (n 1) 4-5, 22-23.

<sup>392</sup> Andersson (n 1) 224-226.



defendants statement about the alleged rape as she had described it: as ‘the next worst experience of her life’. On the contrary, it also found that the complainant had stated that ‘being accused of rape was the worst thing he had ever experienced’, that he immediately filed a police report and that he had suffered trauma.<sup>393</sup> However, without further assessing the different sides, the Court found that the defendant had by making such a post, which could be connected to the complainant and was made in such a forum where many could access it, exposed him to the disrespect of others. She was therefore guilty of defamation.<sup>394</sup>

What however is noteworthy is that the Court that the #MeToo movement and her suffering from the realization of being raped constituted mitigating circumstance in deciding her punishment.<sup>395</sup> Thusly, the Court found that #MeToo is part of the particular circumstances of the cases. Such circumstances include that the movement forms part of a societal debate aiming for change. It for example found that when women had made posts about sexual abuse by men during #MeToo, it had encouraged others to do the same. Although such circumstances could not justify a defamatory statement, it did recognize the meaning of making such post and why women decided to break to law and pose someone as the perpetrator of the sex crime they had endured. Thusly, it recognized that women victims of sexual violence are particularly vulnerable and that it men’s sexual violence against women is part of a discriminatory culture. Consequently, it recognized that she was in a vulnerable position.

This was however met with critique such as that it is legally dangerous to argue that only because many persons had written about sexual crimes and named persons on social media, it was legitimate to commit a defamation crime. Nevertheless, the Chairperson of the Court, Britt Björkne, argued that the case differed from that of a blunt accusation only to harm someone as the defendant had told her story (as found in case 3 and 5 above).<sup>396</sup> Eventually, even though #MeToo and her suffering constituted mitigating circumstances, they still did not justify the defamation crime. Instead, the Court simply recognized that #MeToo formed part of an era where many women exercised their freedom of expression to address stigma, silence and structural injustice. By doing so, the Court adhered to the need to exercise freedom of expression to, collectively, combat men’s violence against women gender inequality. Moreover, in accordance with IHRL, it used it as a circumstance find the least restrictive

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<sup>393</sup> B 17160-17 (n 344) 4.

<sup>394</sup> *ibid* 5-6.

<sup>395</sup> *ibid* 6.

<sup>396</sup> Max Sommerstein, ”Kritiken mot Förtalsdomen efter #Metoo: ’Ger en Farlig Signal’

”<<https://www.svt.se/nyheter/inrikes/metoo-var-formildrande-omstandighet-i-fortalsmal>> (Accessed 2020-04-2).

measure<sup>397</sup>. By doing so, it took into consideration the circumstances which under IHRL could be found to disproportionately affect women.

#### 4.3.2 Case 2

In Case 2, expect nothing that the complainant and defendant had been in the same line of work, and despite the complainant being a famous director and film maker in Sweden, the Court did not assess his position in relation to the complainant's. His position only came forward through the statements of the defendant, and it was possible to understand his position as the Court found it possible to relate her post about him to the title of one of the movies he had directed.<sup>398</sup>

The defendant was accused of defamation for having disseminated information where she accused the complainant of having committed a sex crime against her while using racist slurs. According to the defendant the work culture at the time had included a normalization sexual assault and harassment against women.<sup>399</sup> Thusly, a culture that the defendant had been exposed to and the complainant (allegedly) partaken in. It might not be too far-fetched to assume that in such a culture, this behavior was not addressed, and therefore imposed a culture of silence that disproportionately affected the women in the industry (see Case 5 below). Particularly as she never reported the crime since the sexual assault had given her feelings of shame.<sup>400</sup> This was however not the story that the Court decided to depict. In its assessment the suffering and disreputation of the complainant was objectively examined. The Court found that the complainant claimed, contrary to the defendant, that they did have consensual sex and that he never used racist words.<sup>401</sup> The reason for the Court to assess such statement was however not to determine who's story was valid, but rather to assess the injury and suffering it had caused the complainant. It is however not clear if the complainant's perception of the story responded to his suffering. The complainant had not perceived that he had sexually abused the defendant. Thus, to be accused of such thing both affected his reputation and resulted in his felt harm. This on the other hand also means that the defendants claim became invalid, as his perceived story is what the Court focus on since the reputational suffering is usually based on the subjective feeling of holding a certain reputation.<sup>402</sup>

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<sup>397</sup> HRC GC 34 (n 10) para 39.

<sup>398</sup> B 7995-18 (n 346) 6, 9.

<sup>399</sup> *ibid* 5.

<sup>400</sup> *ibid* 6.

<sup>401</sup> *ibid* 7.

<sup>402</sup> Lexino 5:1 (n 194).

Different from Case 1, the Court did not recognize structural patterns critiqued by the #MeToo movement. The Court instead found that she should have known that the post would be able to reveal the identity of the complainant, and that it would cause him harm as around 9000 persons in the groups was reached (thusly not a confidential group) and had by doing so pointed him out as a criminal, and exposed him to the disrespect of others, and harmed his reputation and honor.<sup>403</sup> Ultimately, the complainant's reputation had been injured, and it had negatively affected his life. The Court therefore made clear that the position of the defendant, being victim of a sex crime who tried to seek justice during #MeToo, did not alleviate the suffering of the complainant. Thusly, contrary to Articles 19 and 26 with Articles 2 and 3 of the ICCPR and Article 5 of the CEDAW it didn't consider that there existed circumstances that had put the complainant in a particularly vulnerable position which she had suffered from, which is part of a culture restricting women's freedom of expression.

#### 4.3.3 Case 3

Although it is clear that the defendant and complainant belonged to the same political party and were colleagues, their relationship was not assessed. Unlike Case 2, 4, and 5, the complainant had the social status of a politician. This may be considered to constitute a role that can take more critique than others from private individuals.<sup>404</sup> Nevertheless, as the defendant also was a politician in the same party, it is not likely that such position could give her more freedom to express such statements against him. On the other hand, it was found in Chapter 2 that when talking about the roles of women and men are the public face of politics, and as such their positions in such setting is more powerful than that of a woman's. Including being believed and having their voice heard.<sup>405</sup> This was however not considered by the Court, and the fact that she had claimed to be a victim of sexual abuse and degrading treatment by a colleague could not justify the dissemination of information accusing the complainant of potentially sexually abusing women and children. It found that her blunt accusation had not only disrupted the democratic process, she had also intentionally caused him harm that had made people disrespect him and not vote for him.<sup>406</sup> With the objective application of defamation law, this Court also proved it clear that it does not give room for analyzing or taking into consideration potential power structures, which it was able to do in Case 1.

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<sup>403</sup> B 7995-18 (n 346) 10, 13.

<sup>404</sup> Defining Defamation (n 221) 10.

<sup>405</sup> Macheria (n 177) 98

<sup>406</sup> B 3405-18 (n 351) 6.

#### 4.3.4 Case 4

This is the first case in which the Court explicitly addressed the relation between the complainant and defendant as they had worked in the same sector. The complainant was by the Court described as a public person and journalist that had taken part in civil society and opinion-forming and was therefore positioned to endure more critique. This is vital to recognize as, found in Chapter 2, regards a man in a certain position in the public sector, in this case the media, which is typical seen in the light of gender roles and expectations.<sup>407</sup> The relevance of such position for the Court had however been to examine if such position could legitimize the right to exercise freedom of expression and disseminate information that the complainant had committed a sex crime.<sup>408</sup> The defendant's purpose had on the other hand been to point out structural inequalities between women and men. Particularly, as found in chapter 4.2.4, she had described him as a 'powerful man' that 'had used his position and power to abuse young and vulnerable women'. The defendant explained that she wrote the posts to break the culture of silence regarding sex crimes, and to tell the truth about what she had endured. Thusly, exercising her freedom of expression to describe the culture of men's sexual violence against women.<sup>409</sup> Moreover, the Court found that public debate must be allowed, even statements that critiqued individuals.<sup>410</sup> It also found that the question of sexual violence was 'relevant and of interest for the general public, and outing the names of perpetrators did contribute to the attention of the [#MeToo] movement'.<sup>411</sup> The Court also pointed out that that the defendant had reported but did not find justice through the Swedish criminal justice system due to lack of evidence.<sup>412</sup> Although it is clear that the defendant held a subordinate position to the complainant, the Court's purpose had however not been to assess any type of structural inequality between women and men. The Court eventually found that his position was not such that he could endure such harmful expression. It also found that she had not critiqued his professional capacity and role, but rather him as a private person.<sup>413</sup> Thus, she had pointed him out as a sex criminal and disseminated it widely to thousands of persons instead of a closed circle or the police. Thus, it had not been necessary to single out an individual. Moreover, the crimes she accused him of was of very serious nature and regarded an old crime. Considering

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<sup>407</sup> Macheria (n 177) 98

<sup>408</sup> B 1755-18 (n 354) 11.

<sup>409</sup> *ibid* 4-5.

<sup>410</sup> *ibid* 10.

<sup>411</sup> *ibid* 4, 12-14.

<sup>412</sup> *ibid* 5.

<sup>413</sup> *ibid* 11.

the circumstances, the Court found that she had acted with malicious intent to harm the complainant.<sup>414</sup>

Thus, despite recognizing patterns of structural injustice, the Court could not accept it as a circumstance that could justify her actions. It found that instead of accusing him on social media, she could have talked to family, a therapist or the police.<sup>415</sup> First, such finding disregards her societal position in relation to his. Second, it neglected the fact that she had previously not been able to find justice after reporting him for the crime to the police, and instead presumed she did not seek justice or support. These acts could indirectly discriminate on the basis of sex, and because of such discrimination, hinder her right to freedom of expression under Article 19 and 26 taken with Articles 2 and 3 of the ICCPR.

#### 4.3.5 Case 5

The Court in Case 5 followed the same trend as in the Court in case 4 and pointed out that the complainant was a very famous person and comedian in Sweden, and the defendant a non-public person.<sup>416</sup> The Court stated that freedom of expression gives room for societal debate and critique against public and private individuals.<sup>417</sup> It reiterated that to state that someone had committed a sex crime could be justified if it was in a small reliable circle and regarded a recent judgment. It however found that she should have known that her post would be widely disseminated as the group contained 600 members and reached even more, particularly since he was a famous person. It also found that his public position could was not one that could justify the dissemination of information accusing him of being a sex criminal. On the contrary, it instead found that *because of* his public role, she should have known that the posts would disseminate more widely.<sup>418</sup> Consequently, the Court found his position to constitute part of the defendant's motive. It found that her motive had been meant to cause harm to his career (and consequently psychological well-being) as she had pointed him out for 'very serious and stigmatized crimes' and exposed him to the disrespect of others. She was therefore found guilty of aggravated defamation.<sup>419</sup>

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<sup>414</sup> *ibid* 12-15.

<sup>415</sup> *ibid* 12.

<sup>416</sup> B 2985-19 (n 359) 5.

<sup>417</sup> *ibid* 11.

<sup>418</sup> *ibid* 13.

<sup>419</sup> *ibid* 15.

The Court was consistent in pointing out the complainant's vulnerable position and depicted him as a man victim of many rape allegations. Allegations which he had suffered from.<sup>420</sup> Consequently, the defendant was by the Court depicted as a questionable subject.

It also did not assess the fact that other women had made reports against the complainant, and instead it focused on how such allegations had affected his well-being. Consequently, to disseminate information that the complainant had committed a sex crime, that that the defendant was to report him for it and to seek and offer support for other potential victims, could not be considered as circumstances justifying the act or alleviating her sentence. This differ considerably from Case 1 where, although not justifying such action, the #MeToo movement and calling out structural injustice and therefore naming perpetrators constituted a mitigating circumstance.

#### **4.4 Truth and Reasonable Grounds for Disseminating Harmful Information: an Uncharted and Seldomly Examined Prerequisite for Aggravated Defamation**

As found in Chapter 3, when examining crimes of defamation courts should include the defense of truth. The HRC has found that this applies particularly to laws criminalizing defamation, thus including the Swedish Penal Code Chapter 5.<sup>421</sup> The SRFoE has moreover found that to constitute defamation, not only should a statement be disseminated 'with actual malice', it should also be 'totally untrue'.<sup>422</sup> Even the ECtHR has argued that 'A statement ... may be hard-hitting or vituperative but it will not amount to defamation if it is in fact true, because a person is only entitled to a reputation that is based on truth'.<sup>423</sup> Article 19 (org) has further stated that 'the only legitimate purpose of defamation laws is to protect people from false statements of fact that cause damage to their reputation'.<sup>424</sup> This differ a lot from Swedish law. Swedish defamation law do not exclude the defense of truth. However, the court will not examine truth unless the statement is of such nature that its truth can be tried<sup>425</sup> and that the dissemination of a statement about another person is justified.<sup>426</sup> With respect to the five cases, as found above each case regarded women who either did not report the sex crime they were victims of or reported it and achieved no justice. The reason is found to be stigma, structural

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<sup>420</sup> *ibid* 15.

<sup>421</sup> HRC GC 34 (n 10) para 47; Defining Defamation (n 221) 3.

<sup>422</sup> A/HRC/4/27 (n 260) para 47.

<sup>423</sup> McGonagle (n 276) 13.

<sup>424</sup> Defining Defamation (n 221) 8.

<sup>425</sup> Lexino 5:1 (n 194).

<sup>426</sup> SOU 2016:7 (n 50) 404.

injustice, and the Swedish criminal justice system inability to adhere to the specific vulnerability of women victims of men's sexual violence and its root causes.

If the truth were to be tried, it must be proved by the accused<sup>427</sup>. It is therefore uncertain if any of the #MeToo women could have been able to prove the truth of such statements considering that each case was dismissed or not reported.

How truth would be examined in such cases may be difficult to assess as, with exception to the dissenting opinion of Case 5, none of the cases involved an examination of truth. This sub-chapter will however examine how the courts reason around 'truth' with focus on Case 5.

#### *4.4.1 The Courts' Reasonings in Relation to the Truth*

In Case 1, the Court do not mention nor examine the level of truth. In Case 2 despite recognizing that defamation can indicate that a statement is untrue, the Court found that dissemination of information can amount to defamation despite being true.<sup>428</sup> In Case 3, the Court reiterated that the truth of a statement could be examined if the defamatory statement first was determined justified.<sup>429</sup> In Case 4 the Court stated that there exist no general 'right' to tell the truth.<sup>430</sup> It also found that the Court should in its assessment assume that the statement is true.<sup>431</sup> From the point of view of women victims of men's sexual violence, this type of presumption of truth may at first glance be perceived as controversial: women victims of sexual violence are in the criminal justice system believed. This is however not because of an awareness of their vulnerable position and a general application of such knowledge, but because it examines the actual harmful impact and injury to the complainant of the defamatory statement regardless if it is true or not.

In Case 5, the Court could not find that the case was justified and therefore did not examine the truth. However, a dissenting opinion by Judge Brånin differed with regards to the justification of the case. The judge agreed with the rest of the Court that the defendant was guilty of aggravated defamation, however, on different grounds.

First, Judge Brånin did not agree that the defendant had the intent to disseminate the information so widely. Not could she have known that there existed a real risk of her post being disseminated outside of the Facebook group as it had strict rules of sharing posts outside of the group. Judge Brånin also found that the defendant had shown no malicious intent as she did not

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<sup>427</sup> Nilsson & Ullrich (n 309).

<sup>428</sup> B 7995-18 (n 346) 8.

<sup>429</sup> B 3405-18 (n 351) 5.

<sup>430</sup> B 1755-18 (n 354) 6.

<sup>431</sup> *ibid* 10.

name him in another post that was made public on Twitter. She found that although 600 persons is a large group, this was a group with people of similar experiences and with sympathy among each other. Therefore, she had sought empathy and support from others and also to support others herself.<sup>432</sup> Judge Brånin therefore found that it had been justified for her to make such post claiming the complainant to be a sex criminal.<sup>433</sup> This makes a controversial assessment, recognizing the need for women victims of sexual violence to talk about it, to seek support and express empathy. And consequently, the importance of being able to exercise freedom of expression to disseminate information about who had committed a sex crime, and challenging structural injustice.

Secondly, the Judge proceeded to examine if the statement was true or if she had a reasonable ground for disseminating it. She however found that the truth could not be examined. The reason was that, as the Court had found previously, the defendant had not described what sexual crimes the complainant had exposed her to. She had merely referred to the police report and investigations against the complainant. And what the defendant actually had stated in the hearings had not been made available to the Court.<sup>434</sup> This was questioned by Mårten Schultz, professor in civil law. Shultz argued that in a case like this, the truth of the statement may have an impact. Therefore, Shultz questioned why the ‘accused did not try to explain what had happened’.<sup>435</sup> Brånin and Shultz do however not make clear how such details could have affected the outcome of the case. Nevertheless, as found in Chapter 3, a recent judgment, even a dismissed one, can be relevant to invoke. This includes witness statements, and it should be enough to only to refer to such statement.<sup>436</sup> Despite this, the judge found that the general nature of the disseminated statement could not, even put in relation to her police report and court hearing, be enough to support that she showed reasonable ground for making such a post.<sup>437</sup>

It is not further explained or speculated how such details would be assessed and what impact it would have had for the outcome of the case as it would have been assessed on a case to case basis. The Swedish courts risk by doing so contributing to a negligence towards the stigma around sexual abuse and the difficulty for victims of sexual violence to relive such experiences. Finally, it reiterates and neglects stereotypes that women suffer from with regards to men’s sexual violence, and their ability to speak out about it, and may constitute indirect

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<sup>432</sup> B 2985-19 (n 359) 22.

<sup>433</sup> *ibid* 23.

<sup>434</sup> *ibid* 23.

<sup>435</sup> Mårten Schultz, ‘Märkligt att den Åtalade Inte ens Försökt Förklara’ <<https://www.svd.se/markligt-att-den-atalade-inte-ens-forsokt-forklara>> (Accessed 2020-04-06).

<sup>436</sup> Johansson (311).

<sup>437</sup> B 2985-19 (n 359) 24.



discrimination under Article 5 of the CEDAW and restrict Articles 19 and 26 in conjunction with Articles 2 and 3.<sup>438</sup>

#### 4.5 Conclusion

To balance the right to freedom of expression and the right to privacy, all courts examined the parties arguments and the background to the case, the legal rules to defamation, whether the defendant had disseminated information that could constitute defamation, if the defendant had been obliged to make such statement or if there otherwise could be defensible to disseminate such information, whether it constituted aggravated defamation, and finally what punishment was appropriate. In all cases the courts found that it was not justified to disseminate information about who committed a sex crime, and all cases except Case 1 constituted aggravated defamation. The women had, knowingly or unknowingly, broken the law in order to express their dissatisfaction about the impunity that prevails in the Swedish society when it involves men's sexual violence against women. It was however not something that could be assessed or accounted for in the #MeToo defamation cases. This considering that the structural inequality and issues around men's sexual violence against women cannot be considered a circumstance to justify a defamatory statement. Which in turn is a consequence of how the roles and societal positions of women and men affects the reliability of the legal subjects. In the cases, even though the #MeToo women claimed to be victims of a sex crime, it was the #MeToo men who had suffered from being accused of 'highly stigmatized crimes'. Consequently, his reputational suffering from such statement outweighed her right to exercise freedom of expression and tell her story.

Despite that the courts at times did recognize that such structures and facts existed, and that in Case 1 the Court showed that it *is capable* of accounting for such structures, it was clear that such circumstances did not constitute facts that could justify the dissemination of information that a specific person has committed a sex crime. Moreover, as the Swedish defamation laws allowed for the truth to be excluded, it is also evident that the Swedish Criminal Justice system was in the five cases not able to adhere to the #MeToo women's stories and vulnerability in relation to the #MeToo men. Seen in the light of structural inequality, such vulnerability was not addressed. This caused an indirect discrimination and caused an interference contrary to Articles 19 and 26 in conjunction with 2 and 3 of the ICCPR seen in the light of CEDAW Article 5

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<sup>438</sup> Joseph & Castan (n 103) para 23.39.

## Conclusion

In Sweden women of the #MeToo movement exercised freedom of expression to question and critique the persistent issue of men's sexual violence against women and to call out perpetrators. This broke the stigma and silence around the crime and helped women to access justice when they before had not been able to. It was also a way to express dissatisfaction and demand that Sweden, including its criminal justice system, address such inequalities that are based on the roles of women and men and fight impunity. Some women, who had not been able to access justice named their perpetrators and was met with a chilling legal consequence restricting their freedom of expression: defamation lawsuits.

Freedom of expression under article 19(2) is fundamental both in the international community and in the Swedish society to ensure democracy and the enjoyment of human rights. However, because of systematic discrimination against women, women are hindered from exercising freedom of expression. This constitute a hinder to women accessing human rights since gender equality also is foundational for democracy and sustainability, and is protected in accordance with article 2, 3 and 26 of the ICCPR. Moreover, those very structures that enable such discrimination are prohibited and shall be abolished in accordance with CEDAW Article 5. One of the most extreme expressions of gender-based discrimination is men's sexual violence against women. It is a crime that is highly prevalent and unresolved in the Swedish society, and it disproportionately affects women. It forms part of deeply rooted and sexualized stereotypes of the roles of women and men. It is a violent and discriminatory expression of 'male power', and it also affects how women are reproduced in the criminal justice system. When men's sexual violence against women is contextualized in relation to freedom of expression there exist a clear link that men's sexual violence against women can restrict Article 19. When Article 19 is seen in the light of Articles 2, 3 and 26 of the ICCPR, it is possible to conclude that freedom of expression can be violated when women are hindered from speaking out about being victims, particularly as they are often met with threats and violence, both before, during, and after speaking out. Moreover, because of stigma and shame, many women either do not realize that they have been victims of men's sexual violence, or they choose not to report. Contrary to article 26, most women who chose to report a sex crime do not achieve justice and most cases get dismissed, often due to lack of evidence. As found contrary to Article 5 of the CEDAW, this is an effect of the inability of the Swedish criminal justice system to adhere and handle men's sexual violence against women and is a cause of the deeply rooted discrimination and gender roles that the Swedish society maintains. Consequently, the Swedish criminal justice

system is not adjusted to consider such structures and therefore women's experiences are neglected when the law is applied. Particularly as it in criminal justice is applied objectively and to an assumed autonomous individual, which can also constitute indirect discrimination under Article 26. Such injustice was critiqued by the #MeToo women, but some women however broke the law in order to seek justice and faced defamation lawsuits.

Defamation is a reputational crime that is imposed to protect personal integrity and constitutes both under Article 19(3) of the ICCPR and Swedish law a legitimate reason to restrict freedom of expression. Such restrictions were made to the #MeToo women's freedom of expression as it infringed upon the personal integrity of the #MeToo men. #MeToo as an online movement contained large-scaled political and societal debates to challenge injustice. It was easily disseminated to large crowds of people (thereto its great and positive effect). However, statements where women pointed out men as criminals often regarded allegations of very severe crimes and were directed to private individuals. Therefore, it had a potential to cause great harm to a person's reputation and social stance. To constitute defamation, such statement must in accordance with Article 19 be a false statement of fact that damages a person's reputation. In Sweden, the truth of such statement is however often not examined, unless the case was justified and there existed a general interest to examine the truth. To examine truth may be particularly important as the #MeToo defamation cases involves allegations of serious crimes which often lands in penalties involving criminal remedies which can excessively restrict freedom of expression contrary to Article 19

In Sweden aggravated defamation often involves allegations of very serious crimes, including sex crimes and involve more harsh criminal sanctions. It has however been critiqued for being vague, which can impose a risk of disproportionately restricting freedom of expression. Such disproportionate restriction can be based on discrimination and it has the potential to disregard that women's freedom of expression is restricted when they are victims of men's sexual violence, contrary to articles 2 and 3. Moreover, in Sweden severe defamation crimes often involve sexual violence, and they affect women and men differently. Women are often subjected to defamation crimes posing them in a sexualized manner, while men are often accused on social media for being perpetrators of sex crimes. Therefore, it is evident that structures on the roles of women and men persists even in cases of defamation, and that the #MeToo defamation cases might constitute circumstances contrary to Article 5 of the CEDAW.

In the assessments of the #MeToo defamation cases, the courts balanced the right to freedom of expression with right the right to privacy. This meant that they balanced the right of the #MeToo women to exercise freedom of expression to disseminate information about being

victims of a sex crime and name their perpetrators v the right to reputation of the #MeToo men. When balancing the right, none of the courts found that it was justified to disseminate information about who committed a sex crime. And, all cases except Case 1 constituted aggravated defamation. There were three elements that stood out when assessing the judgments in relation to Articles 19 and 26 in conjunction 2 and 3 of the ICCPR and CEDAW article 5.

*First*, all defendants had felt compelled to break the law and decided to name their perpetrators, the complainants, to seek out justice. This was to break stigma and silence around sexual violence, and to seek justice. Therefore, the women had exercised freedom of expression to disseminated information about who committed a sex crime to point out the structural inequalities that builds way for sexual violence to prevail. Most had also done so to seek support or to support others. Moreover, they were all subjects to the impunity that prevails in the Swedish society, caused by stigma and structural injustice. In Case 1 the defendant had not realized that she had been victim of rape, and therefore did not report. In Case 2, she described that she did not report and quit her job, which indicate feelings such as guilt or shame. In Case 4 and 5 the defendants had filed reports for the sex crime, but their cases got dismissed due to lack of evidence, one of them recent in time and one longer ago. Nevertheless, in the courts' assessments, such circumstances could not constitute a legitimate reason to justify the defamatory statement.

*Second*, in most of the cases, most of the #MeToo men held a typical, public, and superior position to the #MeToo women, such as being politicians, famous movie directors, journalists, and TV-profiles. Particularly important finding as the cases regarded allegations of men's sexual violence against women, and that such crimes restricts the freedom of expression of the women. It differed between the courts whether the societal position of the complainant was relevant to the case. In cases 1-3 the position of the defendant was not examined. What the courts however made relevant in these cases was the different stories of the parties. In Case 1, the rape she had endured was the next worst experience of *her* life, whilst the allegations she made against 'her perpetrator' was one of his worst experiences in *his* life. In Case 2 it came clear that the complainant was a famous movie director who had been part of a work culture allowing for sexual abuse against women, which the Court never assessed. The defendant had moreover *suffered from shame and stigma* and therefore never reported the rape, whilst the complainant argued that he had had consensual sex with her. In Case 3, the complainant and defendant both held positions as politicians, and although this was not assessed, such position would benefit a man. In cases 4-5, the courts did assess their positions, both being two very famous persons in the media industry. In Case 4 the complainant was accused by the defendant

of using his powerful role to abuse women. And, in Case 5 it came clear that the complainant had been accused by other women for similar crimes. However, despite that such structures and facts existed, and although the court in Case 4 recognized that name giving had been part of the success of the #MeToo movement, such circumstances could not constitute facts that could justify their actions. Nor could it find that the men's positions were such that it could justify a defamation crime. The only case that differed significantly was Case 1, where #MeToo and the fact that the defendant had suffered from the realization that she was a victim of a sex crime constituted mitigating circumstances, and she was given a more lenient sentence. Thusly, it indicates that the courts do have the capacity to address and accounting for structural injustice.

*Third*, in the context of the #MeToo defamation cases, to examine the truth could provide a contextual analysis to the intent of making such post, to the particular vulnerability of women victims of sex crimes, and a discussion of injustice. However, since all cases were unjustified, the truth of the statements were never assessed by the courts. The courts established that there existed no general right to tell the truth. Instead, in their objective assessments, the courts referred to 'truth' as something that is already assumed. This did however not mean that the #MeToo women victims of sexual violence were 'believed', as the courts simply examined the impact of the reputational harm, despite it being true or not. Truth has however been expressed as something that is valued in the international community, as defamation is considered to be based on false statements of fact. If truth were to be examined, it could have given the #MeToo women the possibility to prove the statement to be true, and structural injustice could be account for. However, there exist no proof that such examination could justify their acts in the Swedish legal system as their accusations regarded unreported or dismissed cases, difficult to prove. In Case 5, a dissenting opinion found that the act was justified as the defendant had not intended to cause harm as it was disseminated in a group of people with similar experiences (victims of sexual abuse). She also found that she did not intend to disseminate it so widely. The Judge however found that it was not possible to examine truth as she did not provide details about what sexual abuse she had endured, nor given the report from the dismissed case. This despite being possible under defamation law to only refer to a witness statement. In this case, it was therefore not enough to justify her accusations and the harm it had caused the complainant.

Consequently, the Swedish criminal justice system is unable or unwilling to address that when a defamation case involves sexualized crimes and structural injustice, such circumstances could place women in a particularly vulnerable position that restricts freedom of expression on a discriminatory basis. Under IHRL, if a case involves men's sexual violence against women the practice of the Swedish courts, when balancing the right to freedom of expression and the right

to reputation, forms part of a discriminatory structure and silences women contrary to Articles 19 and 26 in conjunction with 2 and 3 of the ICCPR and Article 5 of the CEDAW.

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