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The Role of the Judiciary and the Rule of Law

Judicial un-involvement in the wake of the Me Too-Movement

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SUMMARY

Publishing rape allegations on social media whilst not involving the administration of justice became a significant phenomenon in the wake of the Me Too-Movement. Exemplified through two prime examples, the judicial un-involvement, arguably a questioning of the assumption that the law is the powerholder in the state, will be claimed to have been a departure from the concept of the Rule of Law.

The Rule of Law, emphasized as crucial in democratic societies and further worthy of protection of defense, transformed states from states of unpredictability and instability to states where people no longer had to obey the unrestrained wills of the men in power. Presenting concepts characterized by the absence of the Rule of Law, the latter will be deemed the single concept justified to govern a democratic society.

The actions carried out in the wake of the Me Too-Movement will further be discussed in the context of being characterized as significantly unwanted and severe in effect, argued to threaten not only the abovementioned core assumption of the concept of the Rule of Law, but the main protector of it. The argued, worrying trend of judicial un-involvement might, in the long term, have adverse consequences for the Rule of Law.

Arguing the actions to be legally unjustifiable, although not denying the legislative imperfections connected to sexual criminality, the protection and defense of the Rule of Law must be emphasized. In the fine balance between the Rule of Law on the one hand, and freedom to voice dissent on the other, it is important to find solutions to legislative imperfections within the Rule of Law, or we risk damaging the system we are seeking to improve. The engagement of the people must continue to avoid creating mere spectators in the sport of democracy.

SAMMANFATTNING

Publicerade våldtäktsanklagelser på sociala medier och ett icke-involverat rättsväsende blev karaktäriserande fenomen för Me Too-Rörelsen. Exemplifierat genom två huvudexempel hävdas avsaknaden av judiciell inblandning innebära ett ifrågasättande av antagandet att lagen styr staten, vilket i förlängningen argumenteras utgöra avsteg från Rättsstatsprincipen.

Rättsstatsprincipen framhålls som grundläggande och nödvändig i demokratiska samhällen och vidare värdig skydd och försvar. Principen förändrade stater från stater präglade av oförutsebarhet och instabilitet till stater där människor inte längre behövde underordna sig makthavarnas ohämmade viljor. Genom att belysa koncept definierade utifrån avsaknaden av Rättsstatsprincipen hävdas det sistnämnda konceptet utgöra det enda legitima alternativet i ett demokratiskt samhälle.

De bevittnade händelserna under Me Too-Rörelsen diskuteras vidare i förhållande till definitionen av att vara avsevärt oönskade, innebärandes allvarliga konsekvenser, vilka i förlängningen inte bara hotar kärnan i Rättsstatsprincipen utan även principens största beskyddare. Den hävdade, bekymmersamma trenden avseende ett icke-involverat rättsväsende kan på lång sikt ha avsevärt negativa konsekvenser för Rättsstaten.

Diskussionen kring huruvida händelserna företagna under Me Too-Rörelsen kan anses juridisk oberättigade föranleder att vikten av Rättsstatsprincipen betonas och därigenom också behovet av att skydda och försvara densamma. I diskussionen är det dock av stor betydelse att bristerna i lagstiftningen gällande sexualbrott inte under några omständigheter förnekas eller förbises. Balansen mellan Rättsstatsprincipen och rätten att kritisera makthavarna är svår, att hitta lösningar på bristerna i lagstiftningen inom Rättsstatsprincipen blir därför av avgörande betydelse där vi annars riskerar vi att skada det system vi söker förbättra. Folkets engagemang och deltagande måste fortsätta för att undvika att skapa blotta observatörer i sporten vi kallar demokrati.

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1 INTRODUCTION

1.1 The Departure from the Rule of Law in the Wake of the Me Too-Movement

Using social media for publicly accusing alleged wrongdoers to be guilty of sexually related crimes became a significant phenomenon in the wake of the Me Too-Movement.¹ In a number of cases, rape allegations were posted on social media such as Instagram,² whilst not involving the judiciary.³ Illuminated through two prime examples, these actions will be characterized as departures from the Rule of Law due to the element of not involving the system of justice. The legislative imperfections addressed through the allegations cannot be denied, but must be addressed within the Rule of Law, the backbone of modern democracies.⁴

This non-involvement risks deteriorating the respect for established legal institutions, such as the courts, arguably the main protectors of the Rule of Law, which in the long term might be argued to have adverse consequences for the Rule of Law. The protection created through the constitutions is simply a text on a piece of paper which could be replaced,⁵ and the non-involvement of the judiciary could be seen as the first act in the chain of events leading up to such a declined protection. Thus, a discussion regarding the actions carried out in the wake of the Me Too-Movement is of crucial importance.

This thesis does not by any means intend to criticize the purposes of the Me Too-Movement. However, fighting important battles, addressing

¹ See Supplement A and B.

² Instagram is an online picture-sharing application.

³ See Supplement B and *Egill Einarsson v Iceland* App no 24703/15, (ECtHR, 7 February 2018).

⁴ Committee on Legal Affairs and Human Rights, *New threats to the Rule of Law in Council of Europe Member States: Selected Examples* AS/Jur (2017) 27.

⁵ Per Ahlin, *Juridik och Politik: En Introduktion* (Jure Förlag AB 2018) 18.

legislative imperfections, must be done smartly without challenging the backbone of modern democracies, acting within the Rule of Law.

1.2 Purpose

This thesis serves the purpose of emphasizing the significance of the Rule of Law.

The discussion concerning the departures from the Rule of Law witnessed in the wake of the Me Too-movement is not to be mistaken for a condemnation of the movement. Ending sexual violence and supporting victims of such crimes are important and urgent matters. The discussion aims strictly at the formal and procedural aspects of achieving change, which under no circumstances can be mistaken for a contribution to the substantive debate.

This thesis does not intend to discourage public engagement in democracy. On the contrary, democracy is not a spectator sport, it is a phenomenon one not only can but should participate in.

1.3 Research Questions and Definitions

The purpose of this thesis will be achieved through attempts to answer the research questions found below. These questions are followed by a list of definitions of the core terms used in this thesis.

- Were actions carried out in the wake of the Me Too-Movement a departure from the concept of the Rule of Law?
- Were actions carried out in the wake of the Me Too-Movement particularly serious threats to the Rule of Law?
- Can departing from the Rule of Law be justified?

List of Definitions

Departure from the Rule of Law – A deviation from the prescribed course of action based on its manifested principles.⁶

Due Process – The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, i.e. the right to a fair trial. The definition is based on Article 6 of the European Convention on Human Rights. (ECHR, further referred to as the Convention) The principle of due process will be returned to for further justification in Chapter 4.

Legislative Imperfections – Referring to perceived flaws derived to the judiciary, i.e. imperfections with the legal system, the law and the execution of the same.

‘Me Too – Movement’ – A movement founded in 2006 to support and help survivors of, and end, sexual violence. The hashtag #Metoo went viral during the fall of 2017 and reached worldwide.⁷

Rule of Law – A concept of principles claiming the people and the government alike to obey and be ruled by the law, presupposed that the rules are clear, prospective, promulgated, stable, possible to comply with and not retroactive.⁸ The definition is based on a combination of the definitions set out by the legal philosophers Finnis, Fuller and Raz.⁹ The concept of the Rule of Law will be returned to for further justification in Chapter 2.

⁶ Oxford Living Dictionaries, ‘Departure’ (OUP, 2018)
<<https://en.oxforddictionaries.com/definition/departure>>.

⁷ Me Too Movement, ‘History & Vision’ (Me Too., 2018)
<<https://metoomvmt.org/about/>>.

⁸ See Chapter 3 for justification.

⁹ Lon Fuller, *The Morality of Law*, (2nd edn, Yale University Press 1969) 39, John Finnis, *Natural Law and Natural Rights* (HLA Hart ed, 2nd edn, Clarendon Press 1982) 270–274, Joseph Raz, *The Authority of Law* (2nd edn, OUP 2002) 210–211.

Rule of Persons – The exercise of personal, rather than legal, rule and to set one’s desires above the legitimate interest of others, as opposed to and in contrast with the Rule of Law.¹⁰ The term will be returned to for justification in Chapter 2.3.

1.4 Delimitations

This thesis will neither in depth cover the concept of law nor provide an exhaustive account on the different approaches to the concept of law. Natural Law and Legal Positivism will only be mentioned in passing providing a background for the development of the Rule of Law. Likewise, the issue of legislating morals will not be covered in depth.

The closely interlinked concepts of democracy and human rights will not be discussed in any greater detail. The same is valid for collective actions such as protests and riots which will only be mentioned briefly to provide a historical context.

Concerning the concept of the Rule of Law, this thesis does not cover all aspects but focuses on the principles deemed relevant in the light of the research questions. Each and every principle of the Rule of Law stipulates for a thesis of its own, leaving no room to fully encompass an exhaustive and comprehensive list of them all. The threats to the Rule of Law will be discussed within the frame of the principles that are mentioned, leaving a large part of the comprehensive material outside the scope of this thesis. Finally, the measurements of the Rule of Law will not be covered.

1.5 Method

This thesis is based on the single argument that the specific actions carried out in the wake of the Me Too-Movement were a departure from the Rule of Law and are to be seen as particularly serious threats to the Rule of Law. This argument will be analyzed through the method of ‘analytical

¹⁰ Paul Gowder, ‘Resisting the Rule of Men’ (2018) 62 Saint Louis University Law Journal 333.

jurisprudence’. The argument is based on the conception that there is not necessarily a connection between law and morality.

The specific methods of analyzing used in this thesis, both falling under the general method of ‘analytical jurisprudence’, are ‘decompositional analysis’ and ‘metaphysical analysis’. The complex legal concept in the argument will be analyzed through a ‘decompositional analysis’ for the purpose of breaking down the concept to parts, understanding the underlying elements of the Rule of Law.¹¹ Through the ‘metaphysical analysis’ the truth of the argument will be assumed to be dependent upon facts about the world which it represents, a truth which would not be possible to understand merely through the meanings of the stipulated principles. The meaning of the concept varies depending on the system in which it functions and would in itself not lead to any further conclusions.¹²

This thesis does not intend to engage in the debate regarding the concept of ‘analytical jurisprudence’.¹³

1.6 Material

A range of material have been used for the purpose of attempting to in nuance discuss and answer the research questions set out in this thesis. The material used will be presented chapter for chapter, chronologically.

In the second chapter, which concerns the legal and political concept of the Rule of Law, legal doctrine by legal philosophers and thinkers have been used as material treating the definition of the Rule of Law. Encyclopedias and online dictionaries have further been used to deepen the understanding of the concept and to clarify the concept in accordance with

¹¹ Michael Beaney, ‘Analysis’, *The Stanford Encyclopedia of Philosophy* (Summer edn, 2018) Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2018/entries/analysis/>>.

¹² Georges Rey, "The Analytic/Synthetic Distinction", *The Stanford Encyclopedia of Philosophy* (Fall edn, 2018), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/fall2018/entries/analytic-synthetic/>>.

¹³ cf John Finnis, *Natural Law and Natural Rights* (HLA Hart ed, 2nd edn, Clarendon Press 1982) 9–18, Brian Bix, ‘John Austin’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/spr2018/entries/austin-john/>>.

the chosen method. The chapter ends with a review of the opposing concepts of the Rule of Persons and the Rule of the Majority, a review in which scientific articles were resorted to.

The third chapter, regarding addressing legislative imperfections, begins with an account of the specific examples of the actions carried out in the wake of the Me Too-Movement. The material is based on the case of *Egill Einarsson v Iceland*¹⁴ and the Instagram post published by a Swedish media profile involving an accusation of rape.¹⁵ The website belonging to the Swedish Press Council has been used to provide further information on the widespread media reporting that derived from this Instagram post. Chapter three finishes with a historical review of how legislative imperfections historically have been addressed, using material such as historical articles and encyclopedias.

The fourth chapter, in which addressing legislative imperfections within the Rule of Law is discussed, is based on Articles 6, 8 and 10 of the Convention regulating the right to a fair trial, the right to respect of reputation and freedom of expression. Rulings from the ECtHR and guides and handbooks from the ECHR have been used as material. Articles by legal scholars have been used to enhance and nuance the understanding of the underlying values stipulating the rights and freedoms of the relevant articles of the Convention.

In the fifth chapter, the actions carried out in the wake of the Me Too-Movement are discussed in relation to the Articles of the Convention, naturally using the Convention as the material for the chapter.

The sixth chapter, concerning the characterization of the discussed departures from the Rule of Law as particularly serious threats to the concept, is based on legal doctrine and rulings from the ECtHR and the Convention.

¹⁴ *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 February 2018).

¹⁵ See Supplement B.

1.7 Research Status

The specific legal consequences of the actions taking place during the fall of 2017 and in the wake of the Me Too-Movement, as discussed in this thesis, have yet to be subject for doctrinal commentary by legal scholars. The published material which have discussed the concerned actions in regard of the Rule of Law consist of debate articles, mostly written by journalists and opinion-formers, but also by a few legal practitioners.¹⁶

The Rule of Law has been subjected to research for centuries. Legal scholarship and research exist in abundance. Noticeably, there seems not to exist an exhaustive account of the threats to the Rule of Law, but solely extensive material on the threats separately.¹⁷ In regard to justifying a departure from the Rule of Law there are research both within the field of legal and moral philosophy, but the latter is not subject for discussion for the purpose of this thesis.

1.8 Structure

Inspiration for the structure of this thesis was found in the structure of the rulings by the ECtHR structuring their judgements with the issue, the facts, the relevant law, the application of the law, followed by a discussion and a conclusion.

The present chapter, introducing the issue of not involving the judiciary whilst publishing the rape allegation in the wake of the Me Too-Movement, most essentially presents the purpose and research questions of this thesis. The purpose is, as previously stated, to emphasize the significance of protecting and defending the Rule of Law and of acting within it.

¹⁶ Moa Berglöf, 'Folkdomstolar på Facebook hotar rättsstaten' (2016) Norran, Anne Ramberg, 'Ett medialt haveri' (Anne Rambergs blogg, 30 May 2018) <<https://annerambergs.wordpress.com/2018/05/30/ett-medialt-haveri/>>, Lilian Sjölund, 'Dömd av folkdomstolen' (2018) Helahälsingland.

¹⁷ See Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018), Committee on Legal Affairs and Human Rights, 'New threats to the rule of law in Council of Europe member States: selected examples' AS/Jur (2017) 27, Brian Tamanaha, *Law as Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006).

Following the introduction, the highlighted importance of the protection and defense of the concept of the Rule of Law will be justified through a historical review providing an account of how the concept transformed the state from a state of unpredictability to a state where people could plan their lives with certainty and stability under the law. The term the Rule of Law will be defined and argued to be a purely formal and procedural political and legal ideal, separated from substantive dimensions. The concept will further be discussed in relation to its opposites, the Rule of Persons and the Rule of the Majority.

Having enhanced an understanding for the Rule of Law, addressing legislative imperfections as witnessed in the wake of the Me Too-Movement will be discussed in the third chapter. The specific actions carried out in the wake of the movement will be identified through two prime examples, which will be referred to throughout this thesis. The chapter ends with an account of the historical importance of the peoples' resisting and reacting and the historical addressing of legislative imperfections through protests and riots.

The fourth chapter concerns the possibilities and restrictions of addressing legislative imperfections within the Rule of Law, providing an account of articles 6, 8 and 10 of the Convention. The right to a fair trial, the right to protection of reputation and freedom of speech will be discussed along with the underlying values and elements of these rights and freedoms.

Reaching the point where both the actions carried out in the wake of the Me Too-Movement and the applicable law have been accounted for, the actions will be discussed as potential, and further argued, departures from the Rule of Law.

The final chapter of the descriptive part of this thesis concerns the departure from the Rule of Law carried out in the wake of the Me Too-Movement as a particularly serious threat to the concept of the Rule of Law. It will be argued that the departures witnessed in the wake of the Me Too-Movement threatens the assumption that the law is the powerholder in the state, hence should be considered particularly serious threats to the Rule of Law.

The last chapter of this thesis consist of a discussion about the material which have been used. The research questions set out in the beginning of this thesis will be discussed and answered, providing an account for the anticipated questions raised in the process of constructing this thesis.

2 JUSTIFYING THE PROTECTION AND DEFENSE OF THE RULE OF LAW

The significance of the Rule of Law, broadly understood as claiming the law to be the powerholder of the state, will be emphasized through its historical impact. The concept transformed the state from a state of unpredictability to a state of security and stability through law, which meant that people were no longer forced to obey the unrestrained wills of the men in power. As the main argument of this thesis claims the departures from the Rule of Law witnessed in the wake of the Me Too-Movement to have been particularly serious threats to the Rule of Law, the present chapter will seek to justify the definition of the concept. Characterized as a purely formal and procedural legal and political ideal, the highly debated additional dimension of substantive elements will be discussed and further rejected. The claimed separation between the Rule of Law and the Rule of the Good Law enables a discussion of the legality of the actions carried out in the wake of the Me Too-Movement, irrespective of their moral character. Discussing the opposites of the concept, the Rule of Law, despite its imperfections, will be argued to be crucial to defend and protect.

2.1 The Historical Importance of the Rule of Law

To justify the protection and defense of the Rule of Law a historical excursus is of value. Demonstrated through Aristotle, John Locke and Montesquieu, the Rule of Law transformed the state by leaving a state of unpredictability to enter a state where security and stability through law were required.

The Rule of Law understood in a broad sense, simply claiming the law to be the powerholder in the state demanding its subjects to organize their

lives accordingly, dates back to classical Athens.¹⁸ Aristotle claimed the law to be the powerholder of the state,¹⁹ if properly constructed, by scaling the supremely virtuous individuals, the experts, the great mass and the law against each other.²⁰ Moving from a state of nature to a state of positive law in the Early Modern period,²¹ John Locke feared a state where the subjects had to obey laws based on sudden thoughts and unrestrained wills.²² During the French Enlightenment period, Montesquieu stressed the importance of court decisions to become preserved and learned by the people in respect of peoples' strive for a certain and fixed life, and of their dignity.²³

The Rule of Law has been of crucial historical importance. The debate concerning its definition is derived from ascribing the concept with elements of different characterizations.

2.2 Separating the Rule of Law from the Rule of the Good Law

The Rule of Law can be described as a term of art, so complex that it seems incapable of a universal, comprehensive definition.²⁴ Taking a stand in whether or not to protect and defend the concept requires a definition and understanding of the same. The Rule of Law will be argued to be a concept defined as a purely formal and procedural ideal, not necessarily connected to neither the good nor the morally unacceptable. Substantive justice will be argued to be an independent ideal separated from the Rule of Law. Identifying such a separation is of importance to answer the question if the actions carried

¹⁸ Jeremy Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2016)

<<https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>>.

¹⁹ Aristotle, *Politics* (Harris Rackham (tr) Loeb Classical Library, Harvard University Press 1932) 231.

²⁰ *ibid* 221.

²¹ Jeremy Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2016)

<<https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>>.

²² John Locke, *Two Treatises of Government* (2nd edn, Dent 1947) 137.

²³ Montesquieu, Charles De Secondat, *Spirit of Laws* (G. Bell and Sons 1914) 81 (book 6 ch 1).

²⁴ David Beatty, *The Ultimate Rule of Law* (OUP 2004) pt preface.

out in the wake of the Me Too-Movement should be considered as departures from the Rule of Law.

The Rule of Law can be argued to hold three categories of principles the characters of which are formal, procedural and substantive, respectively. The formal principles characterize the form of the norms that govern a society, i.e. the prospectivity, stability, promulgation, generality, among others, of the norms. The procedural principles concern the process by which the norms are administered, and the administration of the institutions which involves, among other things, the independence of the judiciary. The third element of the Rule of Law has caused controversy by adding substantive ideals such as human rights, democracy and liberty to the concept.²⁵

As previously mentioned in passing, the Rule of Law is defined as a set of principles claiming the people and the government alike to obey and be ruled by the law, if the rules are clear, prospective, promulgated, stable, possible to comply with and not retroactive.²⁶ The obligation to obey can be regarded as both a legal and a moral obligation,²⁷ the latter falling outside the scope of this thesis, which is solely focusing on the legal obligation and the legal justification of departing from the Rule of Law.

The rejection of an additional substantive dimension of the Rule of Law is to a large extent based on a combination of the definitions made by the legal philosophers Finnis, Fuller and Raz. Rejecting a substantive dimension is not to be seen as equal to the opinion that content does not matter, solely that substantive justice is an independent ideal separated from the Rule of Law.²⁸

The controversy caused by the additional substantive element to the Rule of Law arise from the divergence of opinion between legal philosophers and thinkers on the question of if law should be thought of as intertwined

²⁵ Jeremy Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2016)

<<https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>>.

²⁶ see Chapter 1.3.

²⁷ Joseph Raz, *The Authority of Law* (2nd edn, OUP 2002) 262.

²⁸ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11.

with, or sharply disconnected from, morality.²⁹ Rawls considered the Rule of Law to contain elements of natural justice and therefore did not regard Tyranny as a legal system, since he believed there to be no legitimate expectations of how to organize one's actions and behavior.³⁰ Dworkin argued both democracy and the Rule of law to be derived from the same fundamental ideal and that people must be treated as equals if governments were to be accepted.³¹

Finnis claimed that all aspects of the common good could not be guaranteed by the Rule of Law.³² Its function was instead to systematically restrict the government's freedom of maneuver.³³ Raz saw the concept as designed to minimize harm to freedom and dignity, not to be the protector of the same, which would have been to mistake the Rule of Law for the Rule of the Good Law.³⁴ Attaching substantive elements would require that the ideal's nature was based upon a complete social philosophy.³⁵ Seen as a purely formal and procedural concept, Raz argued that non-democratic legal systems could conform to the Rule of Law to a greater extent than legal systems in democratic societies, despite the former's denial of human rights, religious freedom and sexual equality.³⁶

Understanding the Rule of Law, the backbone of modern democracies and the set of principles which transferred the state from a state of unpredictability to a state of stability through law, is crucial to further consider the severity of threatening the concept to its core. The Rule of Law

²⁹ cf John Finnis, *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) ch 'Legal Liberalism' or *Liber et Legalis?*, Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 152, Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1995) 210.

³⁰ John Rawls, *A Theory of Justice* (Clarendon Press 1972) 236–239.

³¹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 32.

³² John Finnis, *Natural Law and Natural Rights* (HLA Hart ed, 2nd edn, Clarendon Press 1982) 274.

³³ *ibid* 270.

³⁴ Joseph Raz, *The Authority of Law* (2nd edn, OUP 2002) 210.

³⁵ *ibid* 211.

³⁶ *ibid*.

may be considered imperfect, nevertheless argued to be the only option which could govern a democratic society.

2.3 The Rule of Persons and its Tension with the Rule of Law

The Rule of Law may conflict with the wills of persons as well as with the will of the majority and such conflicts will cause a tension in society as both the persons and the majority may desire to act in disregard and in violation of the Rule of Law.

The Rule of Persons, for the purpose of this thesis understood as the exercise of personal, rather than legal, rule and to set one's desires above the legitimate interest of others, juxtapositions the Rule of Law.³⁷ It may be argued that the Rule of Persons is characterized by the absence of the Rule of Law since the latter requires the government and the people alike to obey the law, independent of presented, personal wills. The Rule of Persons is not to be mistaken for the Rule of the Majority, which shares the mentioned characterization and to which a tension in relation to the Rule of Law could be identified.³⁸

The Rule of the Majority, not to be confused with the 'people' who rule in the form of government structured in democracies,³⁹ is to be understood as the will of the most numerous or most active part of the people. This group may potentially have the desire to oppress people who are not part of their majority group. Hence, the majority rule could under such circumstances be argued to be understood as "the tyranny of the majority", and an evil against the society.⁴⁰ The majority may decide to deny the

³⁷ Paul Gowder, 'Resisting the Rule of Men' (2018) 62 Saint Louis University Law Journal 333.

³⁸ Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave Macmillan 2014) 24.

³⁹ Parchen Markell, 'The Rule of the People: Arendt, Archê, and Democracy' (2006) 100 American Political Science Association 1.

⁴⁰ John Stuart Mill, *On Liberty* (The Walter Scott Publishing Co., Ltd 1859) ch 1 introductory.

principles of democracy and establish a new form of government such as turning from a democracy to establishing a dictatorship.⁴¹

The Rule of Persons holds no requirement of having to be established on the will of the majority in a society, the number of people of which the desires derive from is not of interest as opposed to the Rule of the Majority. The line between the both concepts, absenting the Rule of Law, is for the purpose of this thesis drawn at the head count of people who imposes to exercise personal, rather than legal, rule.

Both the options absenting the Rule of Law carries the risk of not guaranteeing the stability, protection or security ensured by the Rule of Law, elements which arguably preserves human dignity. Despite the imperfections which may be ascribed to the Rule of Law, the lost guarantees mentioned above through its opposites cannot be said to stipulate from an option in a democratic society.

⁴¹ Nathan Rotenstreich, 'Rule by Majority or By Principles' (1954) 21 Social Research 411.

3 ADDRESSING LEGISLATIVE IMPERFECTIONS

The actions carried out in the wake of the Me Too-Movement i.e. using social media for accusing alleged wrongdoers to be responsible of sexually related crimes, will be argued to be considered as addressing legislative imperfections. Voicing such opinions could be done both in compliance with, and in violation of, the Rule of Law, a discussion which will be returned to further on in this thesis.

Addressing such imperfections must be considered as a natural part of any democracy and can therefore not be criticized in principle. To emphasize the importance of the acceptance from the authorities regarding the resisting and reacting of the people, a brief historical account will be provided on how the people played a crucial role in shaping the Early Modern European State. The present chapter, i.e. Chapter 3, serves the purpose of underlining what specific parts of the actions carried out in the wake of the Me Too-Movement that further will be claimed to be departures from the Rule of Law.

3.1 Addressing Legislative Imperfections in the Wake of the Me Too-Movement

The actions carried out in the wake of the Me Too-Movement will be illuminated through two prime examples in which public accusations of rape were made against people who were known to the public in their respective countries. The two cases represent and shed light on the set of events which can be regarded as general for the multiple actions carried out in the wake of the Me Too-Movement, i.e. publishing rape allegations, carried out without the involvement of the judiciary. The two cases will be referred to throughout the present and the following chapters of this thesis.

On October 16, 2017 a well-known Swedish columnist, media-profile and actress posted an Instagram picture depicting herself with the caption that

she had been drugged and raped in 2006. The alleged wrongdoer was a journalist known to the wide public, working for one of Sweden's leading newspapers. The Instagram post contained the name of the alleged wrongdoer. The post received 39.399 likes.⁴² A police report was filed in 2011, but the investigation was discontinued in October 2012 due to lack of evidence.⁴³ The published Instagram post containing the allegation triggered several leading newspapers in Sweden to write articles on the accusations, several of which later were criticized for breaching the press ethical rules by the Swedish Press Council.⁴⁴ In 2017, the alleged wrongdoer's name was the third most googled name in Sweden.⁴⁵ The alleged wrongdoer has now pressed defamation charges against the woman whom accused him of having drugged and raped her, the case has not yet gone to trial.⁴⁶

In the case of *Egill Einarsson v. Iceland*, a well-known person on Iceland publishing articles and blogs and appearing on television and other media, was accused of having raped and committed other sexual offenses against two women at two separate occasions in 2011 and 2012. Both criminal proceedings were dismissed in mid- and late 2012, respectively, due

⁴² See Supplement B.

⁴³ SVT Nyheter, 'Wallin och Virtanen – detta här hänt' (SVT, 2018) <<https://www.svt.se/nyheter/inrikes/wallin-vs-virtanen-detta-har-hant>>.

⁴⁴ See PO-PON, 'Expressen klandras för kärleksförklaring' (Allmänhetens Pressombudsman Pressens Opinionsnämnd) <<https://po.se/fallningar/expressen-klandras-for-karleksforklaring/>>, PO-PON, 'Expressen fälld i Pressens Opinionsnämnd för påståenden om Fredrik Virtanen' (Allmänhetens Pressombudsman Pressens Opinionsnämnd) <<https://po.se/fallningar/expressen-falld-i-prensens-opinionsnamnd-for-pastaenden-om-fredrik-virtanen/>>, 'PO-PON, Svenska Dagbladet klandras för publicering om NN [namn angivet]' (Allmänhetens Pressombudsman Pressens Opinionsnämnd) <<https://po.se/fallningar/svenska-dagbladet-klandras-for-publicering-om-nn-namn-angivet/>>.

⁴⁵ Google Trends, 'See what was trending in 2017 - Sweden' (Google Trends, 2017) <<https://trends.google.com/trends/yis/2017/SE/>>.

⁴⁶ SVT Nyheter, 'Åklagaren: Åtal för grovt förtal mot Cissi Wallin kommer sannolikt nästa vecka' (SVT, 2018) <<https://www.svt.se/nyheter/inrikes/aklagaren-atal-for-grovt-fortal-mot-cissi-wallin-att-vanta>>.

to lack of evidence.⁴⁷ After the discontinuance of the criminal proceedings, an Icelandic magazine accompanying a leading newspaper published an interview with Egill, portraying his picture and a text where he claimed the accusations to have been false.⁴⁸ On the same day as the article was published, an Icelandic citizen published the picture used in the article with the caption “Fuck you rapist bastard” on his Instagram account. The person who published the Instagram post had altered the picture by drawing an upside down cross on Egill’s forehead and writing “loser” across his face.⁴⁹ Triggered by this Instagram post, another newspaper published an article containing the altered picture published on Instagram along with an interview with the Egill.⁵⁰ In December of 2012, Egill filed defamation charges against the individual publishing the Instagram post.⁵¹ The case came before the ECtHR which gave its final decision in February 2018.

The Court considered the statement “Fuck you rapist bastard” to have been a factual statement due to the nature of the term “rapist”, directly referring to a person who has committed the act of rape. The Court found Article 8 of the Convention to have been violated as the person who published the Instagram post was not considered to have sufficient support by facts for the factual and defamatory statement made.

The two prime examples described may be interpreted as expressions of anger and discontent with the law. Further, the allegations of rape can arguably be said to have concerned the experienced faults of the judiciary to find both the alleged wrongdoers legally innocent, and can therefore be interpreted as aimed at legislative imperfections. Disagreeing with the judiciary and resisting and reacting against the authorities is not necessarily negative, on the contrary. This will be emphasized through a historical review of the important role of people criticizing the authorities.

⁴⁷ *Egill Einarsson v Iceland* App no 24703/15, (ECtHR, 7 February 2018) para 6.

⁴⁸ *ibid* para 7.

⁴⁹ *ibid* para 8.

⁵⁰ *ibid* para 10.

⁵¹ *ibid* para 12.

3.2 The Historical Importance of Reacting and Resisting Against the Authorities

The acceptance of the people's right to disagree with the authorities and with the manifestations of the Rule of Law must be considered as premises of any democracy. Historically, the reacting and resisting of the people shaped the Early Modern European State. Addressing legislative imperfections, i.e. mere criticism of the authorities, cannot, in democratic societies, be criticized in principle.

Ordinary people played a crucial role in shaping the Early Modern European state, which occurred over a period from the fifteenth to the eighteenth centuries,⁵² through criticism, resistance and reaction upon the world around them.⁵³ States were built and developed from the bottom-up⁵⁴ through the power struggle as well as the interaction between the authorities and its subjects.⁵⁵ E.P Thompson coined the concept of moral economy as a broader and more appropriate term than riot.⁵⁶ The concept sought to explain how moral outrage and measurable ideals motivated the crowd to protest. It was not a revengeful mob set out to overthrow the thrown. Instead, the crowd consisted of rational, moral people motivated by either moral outrage, measurable ideals or actual deprivation. This led them to express their discontent with the political decisions which they had no official input in.⁵⁷ The vast majority of the Europeans were left outside the political system,⁵⁸

⁵² Linda Charnes, Dennis Kennedy, *The Oxford Companion to Theatre and Performance* (OUP 2010) ch, Early Modern Period in Europe.

⁵³ Harald Gustafsson, *Makt och Människor: Europeisk statsbildning från medeltiden till franska revolutionen* (2nd ed, Makadam 2018) 178.

⁵⁴ *ibid* 147.

⁵⁵ *ibid* 182.

⁵⁶ E.P Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 *Past & Present* 76.

⁵⁷ William Beik, 'Popular Protest and Rebellions', *Europe, 1450 to 1789: Encyclopedia of the Early Modern World* (2004), Lars Edgren, 'Livsmedelprotesterna i Malmö 1799', (2014) 149–150 *Arbetshistoria* 8, <<http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/popular-protest-and-rebellions>>, E.P Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 *Past & Present* 76.

⁵⁸ William Beik, 'Popular Protest and Rebellions', *Europe, 1450 to 1789: Encyclopedia of the Early Modern World* (2004),

since only around one in five adult men were politically represented in the Agrarian society during the nineteenth century.⁵⁹ The lack of formal channels for complaint and political misrepresentation paved way for new protests and riots,⁶⁰ which became a significant phenomenon and an established alternative to participation in the politics during the Early Modern period in Europe.⁶¹

Irrespective of anticipated claims of the ‘positive outcomes’ of protests and riots, actions carried out in violation of the Rule of Law cannot be legally justified. Actions characterized as within the Rule of Law varies from both time period and country. The applicable laws in regard to the actions carried out in the wake of the Me Too-Movement will therefore be reviewed.

<<http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/popular-protest-and-rebellions>>, Mats Adolfsson, *Bondeuppror och Gatustrider: 1719–1932* (Natur och Kultur 2007) 19.

⁵⁹ Magnus Olofsson, ‘Upploppskulturer: Stockholm och landsort i svenska 1800-talsupplopp’ (2014) 149–150 *Arbetshistoria* 13.

⁶⁰ Mats Adolfsson, *Bondeuppror och Gatustrider: 1719–1932* (Natur och Kultur 2007) 19.

⁶¹ William Beik, ‘Popular Protest and Rebellions’, *Europe, 1450 to 1789: Encyclopedia of the Early Modern World* (2004)

<<http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/popular-protest-and-rebellions>>.

4 THE ART OF ADDRESSING LEGISLATIVE IMPERFECTIONS WITHOUT DEPARTING FROM THE RULE OF LAW

Addressing legislative imperfections could be carried out both in compliance with, and in violation of the Rule of Law. The fine balancing of freedom of expression on the one side, and fundamental rights such as the protection of reputation and the right to a fair trial on the other side, will thus be considered.

4.1 The European Convention on Human Rights

The legal authority used is the European Convention on Human Rights. The Convention aims at securing the universal rights declared in the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948.⁶²

4.2 Balancing Freedom of Expression and The Right to Protection of Reputation

People's right to address imperfections, to disagree with the judiciary and to be of the opinion that someone might be a rapist can, depending on the situation, be guaranteed by freedom of expression. Arguably, posting allegations of rape on social media, as have been discussed in relation to the prime examples referred to throughout this thesis, can be seen as expressions of anger and discontent. However, these actions must be carried out in respect of the right to protection of reputation under Article 8 of the Convention.

The right to protection of reputation is part of the right to respect for private life. This right is invoked as an individual's reputation is attacked,

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) preamble.

attaining a certain level of seriousness,⁶³ causing prejudice to the personal enjoyment of the rights safeguarded by the article.⁶⁴ There must be a sufficient link between the alleged attack on reputation and the claimant.⁶⁵ The threshold test of the level of seriousness is of importance in cases taking place on the Internet due to the millions of posted offensive or defamatory comments online every day. In the case of *Payam Tamiz v. the United Kingdom*, the Court stated that a majority of the comments posted online are likely to be too trivial in character, and the extent of their publication, too limited. The Court considered that, despite being undoubtedly offensive, comments could be tolerable considering the context in which they were written in.⁶⁶ In the case of *Egill Einarsson v Iceland* the Court stated that public people who provoked a heated debate should not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts.⁶⁷ Statements could further be considered either value judgements or factual statements, which both can be considered lawful presupposed that the statements are supported by relevant and sufficient facts.⁶⁸

In regard to the specific act of claiming someone to be a rapist, the Court has stated that the objective and factual nature of the term ‘rapist’ requires the statement to be supported by relevant and sufficient facts, irrespective of being considered a value judgement or a factual statement.⁶⁹

⁶³ *Axel Springer AG v. Germany* App no 39954/08 (ECtHR, 7 February 2012). *Bédat v. Switzerland* App no 56925/08 (ECtHR, 29 March 2016). *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* App no 17224/11 (ECtHR, 27 June 2017).

⁶⁴ Guide (2018) Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence European Court on Human Rights, para 130.

⁶⁵ *Putistin v. Ukraine* App no 16882/03 (ECtHR, 21 February 2014).

⁶⁶ *Payam Tamiz v. the United Kingdom*, App no 3877/14 (ECtHR 19 September 2017).

⁶⁷ *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 February 2018) para 52.

⁶⁸ Guide (2018) Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence European Court on Human Rights, para 131.

⁶⁹ *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 February 2018).

4.3 The Fundamental Principle of Due Process

It lies within the nature of the fundamental principle of due process that it could only be departed from by the administration of justice. Nevertheless, a departure from the principle may be called into question as rape allegations are published whilst not involving the judiciary, potentially undermining the safeguarding of the rights of Article 6 of the Convention.

Due process can in general terms be described as a legal doctrine concerning procedural fairness relating to fair treatment of persons and the procedures that follows from fair treatment. The doctrine also refers to certain values that justify the legal rules of procedures, values which vary depending on the legal system.⁷⁰ The principle is foundational to the justice in the world⁷¹ and is based on universal values of human dignity, freedom, equality and solidarity as part of the fundamental rights of the European Union.⁷²

Within the jurisdiction of the Convention, the fundamental principle of due process is found in Article 6, entitling everyone to a “fair and public hearing within reasonable time by an independent and impartial tribunal established by law”.⁷³ The right is based on the principle of avoiding arbitrary power.⁷⁴ A fair trial includes the right to be heard, the guarantee from outside or inside pressure or influence⁷⁵ and the absence of biases or prejudice.⁷⁶ It further requires the court or tribunal to be established by law, and guarantees equality before the law.

The right to be presumed innocent, a fundamental aspect of the right to a fair trial, could be argued to protect citizens from the state exceeding its

⁷⁰ Dennis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (OUP 2012) ch Procedural Fairness.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) preamble.

⁷² Charter of Fundamental Rights of the European Union, 2012/C 326/02 preamble, art 47–48.

⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art 6.

⁷⁴ *Zubac v. Croatia* App no 40160/12 (ECtHR, 5 April 2018).

⁷⁵ Guide (2018) Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb) European Court on Human Rights, para 200.

⁷⁶ *ibid* para 203.

normal rights of legal punishment as basic moral rights such as liberty and privacy are not supposed to be reduced easily. If the state were to be allowed to curtail the rights of the citizens and not give a clear and public account of the state exceeding its normal right, the rights would not be worth much.⁷⁷

⁷⁷ Richard Lippke, *Taming the Presumption of Innocence* (OUP 2016) ch Justifying the Proof Structure of Criminal Trials.

5 THE ACTIONS CARRIED OUT IN THE WAKE OF THE ME TOO-MOVEMENT WERE DEPARTURES FROM THE RULE OF LAW

The actions carried out in the wake of the Me Too-Movement, illuminated through the prime examples, will be compared to the relevant articles as identified in Chapter 4. Posting rape allegations whilst not involving the judiciary must be considered as a departure the Rule of Law.

Recalling the definition of the term ‘departure from the Rule of Law’ set out in the introductory chapter of this thesis, the term is to be understood as a deviation from the prescribed course of action. Considering the concept of the Rule of Law, mere violations of the law must therefore be regarded as departures from the concept.

5.1 Publishing Rape Allegations on Social Media in the Wake of the Me Too-Movement

Recalling the case of *Egill Einarsson v. Iceland* as described in Chapter 3, the Court considered the statement “Fuck you rapist bastard” to have been a factual statement due to the nature of the term “rapist”, which directly refers to a person who has committed the act of rape. Furthermore, the Court found Article 8 of the Convention to have been violated as the person who published the Instagram post was not considered to have sufficient support by facts for his factual and defamatory statement. The Court did not go further into details of what may be considered as sufficient evidence but solely referred to the discontinuance of the legal proceedings.⁷⁸

Thus, rape allegations cannot be claimed to violate Article 8 of the Convention on all occasions, but must be judged by the court from case to case. To the extent that the actions carried out in the wake of the Me Too-

⁷⁸ *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 February 2018).

Movement are found to be defamatory by the court, a departure from the Rule of Law can be identified.

5.2 The Judicial Un-Involvement in the Wake of the Me Too-Movement

Even though the fundamental principle of due process can only be departed from by the administration of justice, the actions carried out by individuals in the wake of the Me Too-Movement cannot be said to exclude such a violation, as the invoked right cannot be ensured without the involvement of the judiciary. However, concrete violations of Article 6 of the Convention cannot be identified, a departure from due process and in extension the Rule of Law can therefore not be further considered in regard to the right to a fair trial.

Apart from the articles of the Convention that have been discussed, the deviation from the concept of the Rule of Law itself is of crucial importance to bring into question. The Rule of Law presupposes the courts to govern and protect the concept from being departed from, and cannot function without access to the courts.⁷⁹ The monopoly on violence ascribed to the state, the state being the only legitimate actor in regard to legal punishment,⁸⁰ must further be considered as rape allegations concerning the potentiality of legal punishment are published without the involvement of the judiciary. Not involving the judiciary in affairs which legally require its involvement must therefore be deemed as a departure from the Rule of Law.

⁷⁹ *Golder v. the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 34.

⁸⁰ Sung Ho Kim, 'Max Weber', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2017)
<<https://plato.stanford.edu/archives/win2017/entries/weber/>>.

6 THE ACTIONS CARRIED OUT IN THE WAKE OF THE ME TOO-MOVEMENT WERE PARTICULARLY SERIOUS THREATS TO THE RULE OF LAW

Shifting focus from the actions carried out in the wake of the Me Too-Movement as a departure from the Rule of Law, the discussion will now consider if the actions could be claimed as particularly serious threats to the Rule of Law. The possible characterization of the abovementioned actions as particularly serious threats was intrigued by a statement claiming the Me Too-Movement to have been the biggest threat to the concept of the Rule of Law.⁸¹ The veracity of the statement cannot be sought to be found within this thesis, as the movement itself falls outside the scope of this thesis. However, the statement could be approached through discussing the actions carried out in the wake of the Me Too-Movement as particularly serious threats to the Rule of Law.

6.1 Threats Against Ideals

The Rule of Law is generally acknowledged as a political and legal ideal.⁸² As an ideal, something representing an abstract and hypothetical goal,⁸³ complete conformity may be seen as both impossible and undesirable. Furthermore, radical and systematical violations of concepts could be

⁸¹ Ingrid Carlqvist, 'Nu räcker det – lägg ner #Metoo!' (2017) Det Fria Sverige <<https://www.detfriasverige.se/nu-racker-det-lagg-ner-metoo/>>.

⁸² Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave Macmillan 2014) 13.

⁸³ Oxford Living Dictionaries, 'Ideal' (OUP, 2018) <<https://en.oxforddictionaries.com/definition/ideal>>.

considered natural functions of ideals.⁸⁴ Irrespective of if the ideal tolerates encroachments to a certain degree or not, potential threats could be identified.

For the purpose of this thesis it will be assumed that if not an ideal could be threatened, its principles could. A threat to a principle which construct an ideal will be regarded as a threat to the ideal itself. The Rule of Law will therefore be assumed to carry the possibility of being threatened.

6.2 Particularly Serious Threats to the Rule of Law

There are numerous threats to the Rule of Law.⁸⁵ To justify the claim that the actions carried out in the wake of the Me Too-Movement were particularly serious threat to the Rule of law several terms must be defined. Taking into account that the Rule of Law could be argued to be an ideal tolerates encroachments to some degree, certain deviations from the ideal must be accepted as a natural function of the ideal. A threat, something which pose a danger or a risk, must therefore be defined as threatening the core of the concept, stipulating the foundation of the various principles which constructs the Rule of Law. At the core of the concept lies the assumption that the law is the powerholder in the state. A particularly serious threat will for the purpose of this thesis be interpreted as something significantly unwanted, and severe in effect, posing a possible danger or risk to the assumption of the law as the powerholder in the state.⁸⁶

⁸⁴ Joseph Raz, *The Authority of Law* (2nd edn, OUP 2002) 223–224.

⁸⁵ See Brian Tamanaha, *Law as Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006), Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018), Committee on Legal Affairs and Human Rights, 'New threats to the rule of law in Council of Europe member States: selected examples' AS/Jur (2017) 27.

⁸⁶ Oxford Living Dictionaries, 'Particularly' (OUP, 2018)

<<https://en.oxforddictionaries.com/definition/particularly>>, Oxford Living Dictionaries, 'Seriously' (OUP 2018)

<<https://en.oxforddictionaries.com/definition/seriously>>.

6.3 The Judicial Un-Involvement in the Wake of the Me Too-Movement were a Particularly Serious Threat to the Rule of Law

The actions carried out in the wake of the Me Too-Movement have been characterized through the un-involvement of the system of justice whilst carrying out actions which legally require such involvement.⁸⁷ It will now be considered if such actions could be characterized as particularly serious threats to the Rule of Law.

Considering the found absence of concrete violations of Article 6 of the Convention, the potentially posed threat to the Rule of Law of not safeguarding such rights, cannot be considered relevant in relation to the actions carried out in the wake of the Me Too-Movement.

The Rule of Law cannot, as previously stated, function without adequate access to the courts.⁸⁸ Thus, not involving the courts could be argued to be understood as questioning the law as the powerholder in the state, as the court executes the law. Departing from the Rule of Law in the sense of not involving the judiciary when publishing the allegations of rape must therefore be considered as threatening to the core of the concept.

The possible departure from the Rule of Law identified in the act of publishing rape allegations, considering the potential unlawfulness of such actions,⁸⁹ cannot be considered as necessarily questioning the law as the powerholder of the state. Unlawful acts are not in themselves threatening to the core assumption of the concept as one may still expect the acts to be condemned by the system of justice through the established legal institutions. Hence, the actions carried out in the wake of the Me Too-Movement cannot be characterized as threats to the Rule of Law solely on the basis of if they were to be found to violate Article 8 of the Convention.

Considering the judicial un-involvement witnessed in the wake of the Me Too-Movement, it could be argued to interfere with the judiciary's role of executing the law and further guaranteeing the law as the powerholder in

⁸⁷ See Chapter 5.2

⁸⁸ *Golder v. the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 34.

⁸⁹ See Chapter 4.2.

the state. The undermining of the protection which citizens hold from the state from being deprived of some of the prerequisites of human agency, such as being curtailed of one's privacy or liberty, is further called into question. Thus, not involving the courts in affairs in which it is legally required must be considered significantly unwanted and severe in effect, as the Rule of Law cannot be neither protected as the powerholder in the state, or executed, without the courts and the respect for the institutions. The specific element of not involving the judiciary whilst posting rape allegations must therefore be characterized as particularly serious threats to the Rule of Law.

7 DISCUSSION

7.1 Were the Actions Carried Out in the Wake of the Me Too-Movement a Departure from the Rule of Law?

In order to attempt to answer the question of whether the actions carried out in the wake of the Me Too-Movement are departures from the Rule of Law, there are several aspects to consider. First of all, the relevant elements of the actions discussed above must be identified, along with the relevant components of the principle of the Rule of Law. The relevant elements will then be discussed in relation to each other, in an attempt to answer the question above.

7.1.1 The Identified Aspects of The Actions Carried Out in the Wake of the Me Too-Movement

Starting with identifying the specific elements of the actions carried out in the wake of the Me Too-Movement, which are of interest for the purpose of discussing the abovementioned question, the two prime examples referred to throughout this thesis will be recalled. Rape allegations were published on social media, after, in both cases, the system of justice had decided to end the previous legal proceedings. Two different aspects should be highlighted; the posting of public allegations on Instagram, which may violate Article 8 of the Convention and secondly, posting these allegations without involving the system of justice in a situation in which it is the role of the system of justice to judge on question of guilt and innocence.

Turning to the relevant set of elements that could be identified within the principle of the Rule of Law, involvement of the judiciary and access to the courts are of crucial importance. The established role of the courts is further of importance as the protector and upholder of the concept of the Rule

of Law which, as repeatedly stated, cannot function without access to the courts.⁹⁰

7.1.2 The Actions Carried Out in the Wake of the Me Too-Movement Were a Departure from the Rule of Law

The first aspect identified, that is, publishing the public allegations which may violate Article 8 of the Convention, concerns the balancing between freedom of expression and the right to protection of reputation. Expressing anger and discontent, disagreeing with the judiciary's conclusions and reacting against the authorities must be considered both natural and fundamental parts of democratic societies. As such, these acts are both legal and should, to an extent, be encouraged.

To the extent that the rape allegations in the wake of the Me Too-Movement are found to violate Article 8 of the Convention, the unlawful act of defamation must be considered a departure from the Rule of Law.

The second identified aspect above, still demands recognition of the alleged committed crimes, if not from the justice system itself, then from other parts of society. Disagreeing with the judiciary's conclusions and reacting to perceived legislative imperfections is, as has been repeatedly stated, lawful and necessary in a democratic society. Such reactions can be carried out without potentially departing from the Rule of Law by acting in compliance with both Article 8 of the Convention and through involving the judiciary in rape allegations. For example, shifting focus from the specific alleged wrongdoer to general claims that the justice system is failing to bring justice to victims of sexual violence would have been in compliance with the right to express anger and discontent, hence not at risk of threatening to undermine the fundamental right of Article 8 of the Convention. Involving the judiciary whilst publishing the rape allegations, irrespectively of if they can be characterized as acts of defamation, would further have impacted the course of this discussion as the specific un-involvement of the judiciary is of crucial importance.

⁹⁰ *Golder v. the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 34.

The actions carried out in the wake of the Me Too-Movement, referring specifically to the judiciary's non-involvement, must be seen as a departure from the Rule of Law. The elements concerning possible defamatory statements can only be considered as departures if they are found to be actual acts of defamation by a court.

7.1.3 Counter Arguments – Should the Prime Examples Really be Considered Departures from the Rule of Law?

Arguably, allegations of rape can never be publicly published without involving the system of justice, as the administration of justice would naturally become involved, depending on if the accusation are considered defamatory and reach the threshold of the test of the seriousness.⁹¹ The administration of justice did become involved in both the discussed prime examples referred to in this thesis, which both concerned allegations of rape. The Rule of Law and its required involvement of the judiciary can therefore not be considered to have been departed from.

At the point in time where the legislative imperfections were addressed, the judiciary was not involved. The allegations were chosen to be published on Instagram, not involving the judiciary. Thus, the defamatory proceedings are not relevant to the question above, as the departure from the Rule of Law took place before the claims of defamation.

7.1.4 Conclusion

In conclusion, the actions carried out in the wake of the Me Too-Movement, posting rape allegations whilst not involving the judiciary, can be considered as departures from the Rule of Law.

⁹¹ See Chapter 4.2.

7.2 Were the Actions Carried Out in the Wake of the Me Too-Movement Particularly Serious Threats to the Rule of Law?

In this section, I will attempt to answer the first research question, that is; *were the actions carried out in the wake of the Me Too-Movement particularly serious threats to the Rule of Law?* To answer this question, there are several elements to consider and perhaps most importantly, the identified aspects of the relevant actions presented above will be discussed in the context of threats to the Rule of Law.

7.2.1 The Prerequisites of ‘Particularly Serious Threats’ to the Rule of Law

As explained above, a presupposed requirement in order for something to be characterized as a threat to the Rule of Law, this something must pose a danger, or a risk, to the manifestation of the concept.⁹² Since deviations from the ideal of the Rule of Law might be considered natural functions of the concept itself, a threat must pose a danger or risk to the very core of the concept, and not just to the mere manifestations of it. The Rule of Law and its principles are based on the assumption that the law is the powerholder in the state. When, such as outlined above, people use non-legal system venues in an attempt to access justice, what is under attack is the law’s position as powerholder. The characterization of a particularly serious threat will thus depend on if the threat is considered significantly unwanted and severe in its effect.

7.2.2 Publishing Rape Allegations Whilst Not Involving the Judiciary Are Particularly Serious Threats to the Rule of Law

The relevant elements of the actions carried out in the wake of the Me Too-Movement, as considered in Chapter 7.1, were found to be the judicial un-involvement whilst publishing rape allegations.

To threaten the assumption that the law is the powerholder in the state, the institutions that ensure the position and function of the Rule of Law must

⁹² See Chapter 6.2.

be highlighted. It is generally acknowledged that the law cannot in itself uphold its position as the powerholder in a state, but is dependent on institutions to uphold and preserve its power. The courts execute the law, thus ensuring that the law does not lose its position as powerholder. Thus, the Rule of Law cannot function without adequate access to the courts.⁹³ Furthermore, institutions cannot function without the defense or protection of the citizens themselves, that is, the citizens must recognize the law as the legitimate powerholder. If the courts cannot function, and in extension protect the Rule of Law, the law is no longer the powerholder in the state. Without the involvement of the judiciary, the court's role is questioned, which in extension also is to question the law itself. Not involving the system of justice when publishing rape allegations must therefore be considered as threatening to the Rule of Law.

Turning to the characterization of the threats as particularly serious, the threats must as stated be considered significantly unwanted and severe in effect, posing a possible danger or risk to the law is the powerholder in the state.⁹⁴

Not involving the judiciary in rape allegations inhibits the Rule of Law from fully functioning as the administration of justice must be involved in order to execute the law. Considering that the courts are the institution which protects and defends the Rule of Law, their non-involvement means that the Rule of Law has lost its main protector. Furthermore, not involving the judiciary threatens to undermine the safeguarding of the rights in Article 8 of the Convention. The threat of not involving the judiciary in affairs which, legally require its involvement must on the basis of what have been discussed be considered as significantly unwanted and severe in effect. This as judiciary non-involvement threatens not only the respect for the courts, but their ability to uphold and protect the Rule of Law.

⁹³ *Golder v. the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 34.

⁹⁴ See Chapter 6.2.

7.2.3 Counter Arguments – Should the Prime Examples Really be Considered Particularly Serious Threats?

Not involving the judiciary in the allegations must not necessarily be considered as an act of questioning the law as the powerholder in the state, but simply resisting and reacting against the authorities, in an attempt to demand change. Citizens are completely free to criticize the law and its implementation in democratic states, and this must not be mistaken as threatening the Rule of Law. The non-involvement of the judiciary is rather to be seen as a powerful message to policy makers and politicians, who have the power to deal with existing legal imperfections, without departing from the Rule of Law.

It is important to recognize that citizens are free to criticize and react to their surroundings, as these are not only natural reactions, but also fundamental parts of a democratic society. The mere critique of authorities and their conclusions cannot be regarded as departures from the Rule of Law and certainly not threats to the Rule of Law itself.

It must be emphasized that the actions carried out in the wake of the Me Too-Movement, publishing rape allegations, required the involvement of the judiciary. This as the judiciary is obligated to carry out its role as executor of the law. Had the actions not been potentially unlawful due to the possible defamation, they would most likely had been perceived differently. Merely demanding that the system changes through voicing opinions is not unlawful, and hence does not require the involvement of the judiciary. However, as the abovementioned publishing did in fact contain such allegations and were carried out without the involvement of the judiciary, they cannot be considered as critique of legislative imperfection, but rather as questioning law as the powerholder in the state.

Nevertheless, the non-involvement of the judiciary cannot be said to be severe, as the judiciary holds the power of involving itself. Individuals cannot exclude or prevent the administration of justice, but only act in disregard of the law. Not involving the judiciary is not equivalent to inhibiting the functioning of the Rule of Law and should therefore not be considered as a particularly serious threat.

Despite the judiciary's inherent right to engage, the fact that it was initially not involved has potentially severe consequences. This non-involvement risks deteriorating the respect for established legal institutions, such as the courts, which are also one of the main protectors of the Rule of Law. Further, even though the judiciary have an inherent right of engagement, the fact that they were not voluntarily engaged by citizens themselves, is a worrying trend and might, in the long term, have adverse consequences for the Rule of Law. With this in mind, the allegations published in the wake of the Me Too-Movement must be deemed particularly serious threats to the Rule of Law.

7.2.4 Conclusion

Considering what has been outlined above, the publishing of allegations in the wake of the Me Too-Movement whilst not involving the judiciary must be considered a threat to the Rule of Law. This as they questioned not only the courts as institutions, but also as the executors of the law and as protectors of the Rule of Law. Due to the potentially serious weakening of the respect for the Rule of Law, and its main defender, the actions carried out in the wake of the Me Too-Movement must be considered particularly serious threats to the Rule of Law.

7.3 Can departing from the Rule of Law be justified?

In order to attempt to answer the third and final research question of whether departing from the Rule of Law can be justified, there are several aspects to consider.

The discussion concerns the specific departure from the Rule of Law through the non-involvement of the courts, thus not discussing the legal justification of departing from the Rule of Law in general. This non-involvement interferes with the function of the Rule of Law, which is dependent on the courts as one of its upholding institutions. This specific departure will be discussed in relation to the possibility of a legal justification.

The abovementioned discussion considering a potential legal justification is of interest, as it can be argued that the actions in the wake of

the Me Too-Movement were both necessary and unavoidable. Furthermore, these actions arguably raised much-needed awareness of the huge issue of sexual criminality. Finally, the courts are still functioning, despite these actions, and have not through these acts alone deteriorated, which some would perceive as justifying the actions.

7.3.1 Not Involving the System of Justice is Legally Unjustifiable

Departing from the Rule of Law in the specific sense of not involving the system of justice in cases where the courts normally hold a monopoly of executing the law, must be considered as an intolerable deviation from the Rule of Law.

The Rule of Law is a formal and procedural ideal, lacking in substantive dimensions. However, the Rule of Law demands compliance, if the obligatory requisites are fulfilled.⁹⁵ It is crucial to distinguish it from the Rule of the Good Law, as the Rule of Law assumes the law to be the powerholder in the state irrespectively of violating substantive rights.⁹⁶

The legislative imperfections concerning sexually related crimes cannot be denied, nor can the inclination to depart from the Rule of Law on the basis of these imperfections. Nevertheless, it is not possible to legally justify the non-involvement of the judiciary in the specific case of posting rape allegations, as such involvement is legally required.

The actions discussed above may be morally justifiable, an aspect which falls outside the scope of this thesis and which will therefore not be discussed. If such a moral justification were to be made, it would however not impact the legal justification as the latter does not take moral aspects into account.

⁹⁵ See Chapter 1.3.

⁹⁶ See Chapter 2.2.

7.3.2 The Risk of Regression from the Rule of Law to the Rule of Persons

The emphasized significance and importance of the Rule of Law, furthermore the purpose of this thesis, may be argued unreasonable in regard to the perceived incapacity of the concept to deliver justice to victims of sexual criminality. The issue at stake is not to find solutions, but to find solutions within in the Rule of Law.

It must be underlined that the judicial un-involvement in wake of the Me Too-Movement cannot be considered as actual attempts of administering the law outside the justice system. Even though such attempts are not identified, the worrying trend identified might, in the long term, have adverse consequences for the Rule of Law.

The historical importance of the Rule of Law, transforming states from states of unpredictability and instability to states where the people no longer were forced to obey the unrestrained wills of the men in power, must not be forgotten in discussions around the perceived flaws of the concept. The Rule of Persons and the Rule of the Majority, equally inclined to set personal desires above the legitimate interest of others and to exercise personal, rather than legal, rule, further allows oppression of other groups which are not in agreement with the personal interests of the majority or the people in power.

Departing from the Rule of Law by not involving the administration of justice whilst publishing rape allegations on social media, cannot be excluded to, in the long term, result in a regression from the Rule of Law to the Rule of Persons.

7.3.3 Conclusion

From the above, it is clear that not involving the system of justice when publishing rape allegations online cannot be legally justified and must therefore constitute a departure from the Rule of Law. Not only is the departure a particularly serious threat to the Rule of Law, but it also poses a risk of seriously weakening the concept itself, and the respect for it. When citizens stop trusting our collective systems of justice, and attempt to find a sense of justice outside of the realm designed to do just that, this may quickly

become a negative spiral. It is thus crucial to defend and protect the Rule of Law, and its governing institutions.

However, while it is important for us, as a collective, to support and uphold the Rule of Law and the system of justice as foundational pillars of our society's structure, it is equally important to remember that reacting to decisions and voicing one's disappointment are essential building blocks of democratic societies. This engagement must continue, to avoid creating mere spectators in the sport of democracy. But, in the fine balance between the Rule of Law on the one hand, and freedom to voice dissent on the other, it is important to find solutions to legislative imperfections within the Rule of Law, or we risk damaging the system we are seeking to improve.

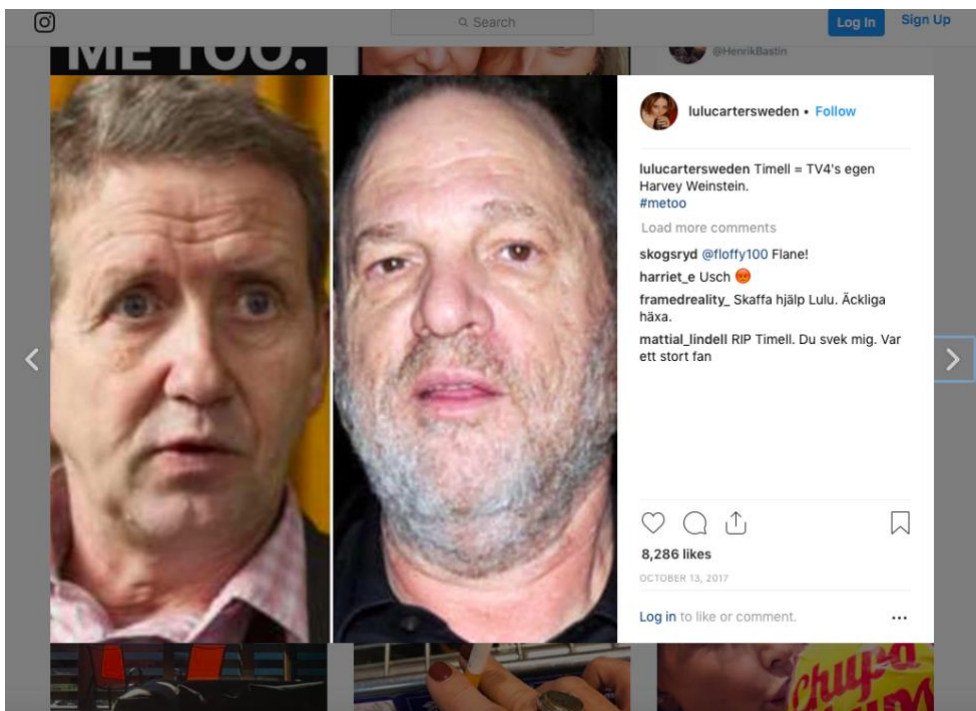
SUPPLEMENT A

A screen shot of the Instagram post published by Lulu Carter.

“@lulucartersweden”.

Posted on October 13th, 2017.

Caption: Timell = Channel 4’s Harvey Weinstein.



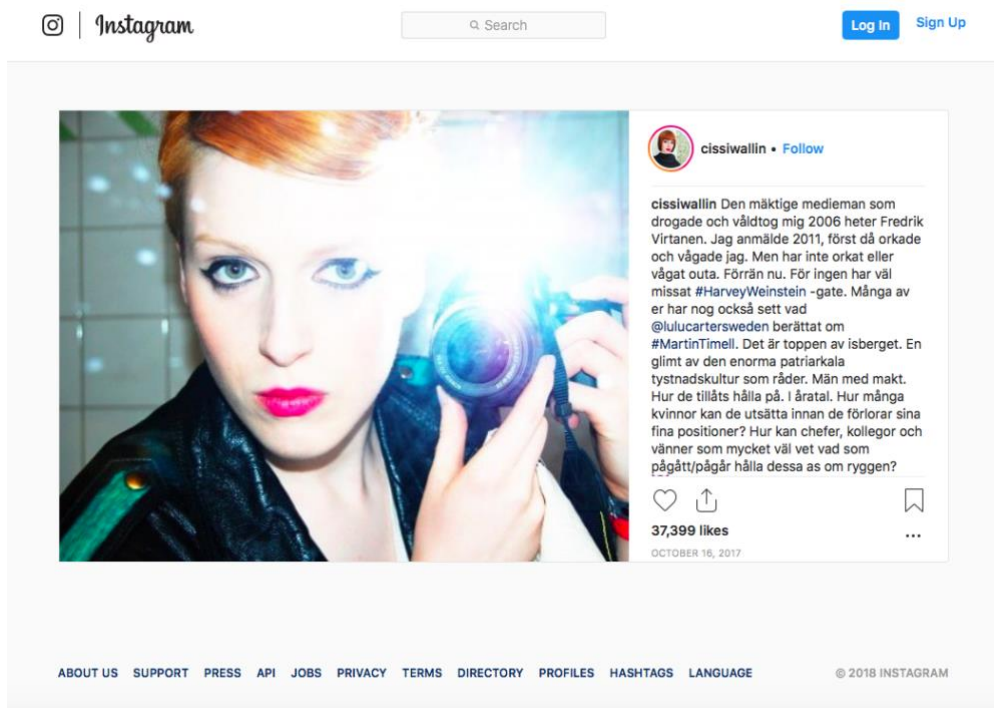
SUPPLEMENT B

A screen shot of the Instagram post published by Cissi Wallin.

“@cissiwallin”.

Posted on October 16th, 2017.

Caption: The powerful media man who drugged and raped me in 2006 is named Fredrik Virtanen. I reported it in 2011, first then I had the strength and courage to. But I haven't found the strength or courage to tell. Until Now. Because surely no one escaped the #HarveyWeinstein-gate. Many of you have probably also seen what @lulucartersweden has told about #MartinTimell. It's the tip of the iceberg. A glimpse of the enormous, patriarchal culture of silence existing. Men with power. How they're allowed to go on. For years and years. How many women may they harass before they lose their fancy positions? How can bosses, colleagues and friends who are well aware of what is going on/has been going on still protect these douchebags?



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