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Lay judges and the Swedish rule of law: A qualitative analysis of mixed panels' argument construction in criminal court cases

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Abstract

The purpose of the contemporary lay judge system is to represent society in court and provide insight as well as influence over the nation's legal process, while still adhering to the legal guidelines of professional judges. However, against the backdrop of globalization of societies and the resulting political polarization, the question is whether the current lay judge system provides an adequate reflection of society within the legal system. The problems raised in this study thus concern cases where lay judges overrule the professional judge when reaching a verdict in Swedish district courts, as well as what reasonings are provided by the dissenting parties. The research questions concern 1) how the lay judge system relates to the rule of law within the Swedish court system, and 2) how lay judges can be compared to their professional counterparts in their argument construction and reasonings. In a thematic analysis of criminal court case documents (N=56) where lay judges overruled the professional judge when reaching a verdict, explicit and implicit reasons for the dissenting opinions between lay judges and professionals are explored. The results include three identified themes regarding the arguments used in assessments of criminal cases for lay and professional judges alike: 1) references to legal sources, 2) Highlighting social norms and values, and 3) Utilizing personal opinions based on subjective perceptions of the details of the case. The results indicate no clear boundary between the roles of lay and professional judges, as the analysis shows no significant differences in their argument construction.

Keywords: Lay judges, Rule of law, Legal pluralism, Public sentiments on justice, Argument construction.

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1. Introduction

Lay judges (*nämndemän*) have always been a part of the administration of justice in Sweden in one form or another, long before the introduction of the concepts of jurisprudence and judicial procedure (Diesen, 1996; Modéer, 2010). The fundamental structure of the current system can be traced back 800 years, when legal procedures became centralized into different courts and the concept of being "judged by your peers" was introduced (Diesen, 1996). This prompted the formation of a committee (*nämnd*) which was to partake in trials and help determine guilt and decide punishment, which is a system that has endured until modern times. However, recurring critique regarding the legitimacy of this system has been a part of discourse since the procedural law reforms in 1971. This system is meant to provide insight and influence *by* society over the legal system, yet arguments against the lay judge function are continuously provided by journalists and legal professionals alike.

News articles report extreme judgments that in some cases even went against applicable law (Priem, 2017; Holm, 2018; Shoultz, 2021). Accusations of inappropriate statements or actions by lay judges which speak to their unsuitability have also emerged, which include inattentiveness, evident bias, and even gross misconduct resulting in termination (Jönsson, 2019; Österman, 2021). There is also evidence of recurring instances where individual lay judges continuously and consciously go against the professional judge's assessments (Cantwell, 2022).

Critiques from legal professionals focus mainly on both the legitimacy of lay judges and the efficacy of the lay judge system. Law researchers and legal practitioners argue that lay judges do not live up to their democratic function as they continuously break with the law and legal proceedings in their rulings despite the guidance from professional judges (Sandgren, 2014; Knutsson & Andersson, 2015). Even though these instances are few, it still affects the public's trust in the legal system and the rule of law (Sandgren, 2014). Criticism is also directed at political spheres

unwilling to include non-political lay judges (Knutson & Andersson, 2015). Even The Swedish Bar Association condemns current flaws in the lay judge system and argues for decreased authority for lay judges (Sveriges Advokatsamfund, 2018).

The critiques against the lay judge system call into question a fundamental feature of societal order and the national legal system, namely the Swedish rule of law. The rule of law is a central concept in western ideas of ideal governance, often associated with terms like justice, democracy, liberty, human rights, security, and stability (Call, 2007; Krygier, 2014; Waldron, 2020). From a juridical perspective, rule of law refers to the "virtues *internal* to the state's legal apparatus and ways of doing things" (Krygier, 2019, p. 747). In other words, rule of law is measured by the authority, efficacy, and precision of the legal order within state institutions, processes, and norms. This is the conceptualization generally adapted by national legal systems, including Swedish institutions and legal professionals.

The Swedish Prosecution Authority (Åklagarmyndigheten, n.d.) loosely defines rule of law (or *"Rättssäkerhet"* in Swedish) as "meaning that a nation has a legislation and a system in general that ensures that the individual citizen has protection against capricious intervention from society itself". In contrast to this juridical definition, the socio-legal approach to the rule of law is multifaceted. In addition to the positivistic conceptualizations presented above, the rule of law should also be considered as a measure of law's "conformity to the superior moral norms and principles" (Přibáň, 2020, p. 114). While the many discussions on the rule of law would require their very own study, its essential meaning for this thesis is that the rule of law has both a legal and a social value and act as a measure of the level of conflation between law and society.

Through the globalization and digitalization that defines modern societies, the relationship between law and society has become increasingly intricate and multifarious. Political polarization, fearmongering, and increasing numbers of extremist groups are extensively researched with regard to these modern developments. The lay judge role is an ideal example of the complex questions that

emerge when the ceaseless variables of the social world are introduced into a system best known for its rigid inflexibility. The implementation of lay judges in court trials is an effort to consolidate the gap between law in books and societal values through the use of democratically elected representatives. With the ambition to address the critiques against lay judges against the backdrop of the Swedish rule of law, this thesis explores the realities of lay judges' effect on law in practice within the context of contemporary Swedish society.

1.1. Aims and research questions

This study will consist of analyses of criminal court cases where lay judges go against the professional judge to change the outcome of court rulings. The specific focus will be on district courts (*Tingsrätter*), where lay judges have the most influence and where they possess the ability to overrule the professional judge. This thesis aims to analyse the arguments and underlying reasonings relating to lay judges' rulings in Swedish district courts. Another aim is to explore the ways and extent to which legal pluralism can manifest within the Swedish legal system, as well as to critically assess the ways this issue affects rule of law. Lastly, the ambition of this thesis is also to contribute with new insights into the socio-legal field concerning lay judges and legal systems in practice. The research questions for this thesis are:

1. What similarities and differences can be found between lay and professional judges in their argument construction?

2. How does the lay judge system relate to the rule of law within Swedish district courts?

1.2. Background: Politically appointed lay judges for a democratic rule of law

The following introductory section covers an overview of the role and purpose of the lay judge in the Swedish legal system. This overview includes relevant legislation concerning lay judges, their function, and the appointment process for

lay judges. It also includes the policies and practices that have formed as a result of existing laws. Finally, critical arguments against the current system will be presented, as well as the investigations, revisions, and reforms that have been attempted by the state.

1.2.1. Lay judges in the contemporary Swedish legal system

The Code of Judicial Procedure (Rättegångsbalk [RB], 1942:740) chapter 1 section 3b states that criminal trials in the district courts require a panel of one professional judge and three lay judges to preside over each case[1]. The number of professional and lay judges can be changed to some extent if required, but the number of professional judges may never exceed that of lay judges (RB 1942:740, chapter 1 section 8). Each presiding judge, lay or professional, has equal authority in all rulings related to - and including - the final verdict of each case. If there exist dissenting opinions concerning the verdict there will be a vote, where the panel members cast their votes and explain their reasoning (RB 1942:740, chapter 29 section 1). The final verdict is decided by the majority vote. If there is no majority, the least disruptive and more favourable option with regard to the defendant will be the final verdict. Only when no option can be considered more favourable than the other can the professional judge decide the final verdict (RB 1942:740, chapter 29 section 3). The panel members who do not agree with the final verdict are required to present their reasons for the disagreement as a part of the consequent court case document as a 'dissenting opinion' (*skiljaktig mening*) (RB 1942:740, chapter 6 section 2 part 2).

Lay judges are required to be an adult Swedish citizen who is registered within the municipality that belongs to the district court they participate in. They must be of good judgment, independent, law-abiding, and otherwise suitable for their position

[1] There are two exceptions to this rule. A criminal case does not require lay judges if the crime in question has a prescribed disciplinary sanction of no more than six months imprisonment and does not necessitate a sanction beyond a monetary fine. Lay judges are also not required if the crime in question does not prescribe more than two years imprisonment, and the circumstances allows for the final verdict to be decided at the same time as the detention hearing (*Häktningsförhandlingen*).

(RB 1942:740, chapter 4 section 5). The Courts of Sweden (*Sveriges Domstolar*) hav a responsibility to control the suitability of the appointed lay judges. They are also obligated to dismiss any lay judge who does not fulfil the requirements or becomes unsuitable for service during their term, for example by committing a crime (RB 1942:740, chapter 4 section 8).

A lay judge appointment lasts four years (RB 1942:740, chapter 4 section 8). The appointment process of lay judges can be divided into three elements: a nomination process, an election process, and a control process. RB (1942:740) chapter 4 section 7 states that the overall process should *strive* to make the lay judge pool representative of the public in terms of age, gender, ethnic background, and profession. There are however no actual legal requirements for diversity in the lay judge pool.

The Code of Judicial Procedure does not establish which organizations are in charge of the nomination process. In practice, however, the only organizations allowed to nominate people for lay judge positions are the political parties that have a seat on the local municipal council (Sveriges Domstolar, 2021a; Nämndemannautredningen, 2013). Moreover, the nomination process is conducted at the discretion of the local political parties in each municipality, who offer little official insight into how they produce lay judge nominees. There exists no law requiring lay judges to be a member of a political party. However, the political parties responsible for nominations have the right to demand membership of their nominees (Svenska Domstolar, 2021b). Sweden's largest political parties, the Social Democrats (S, Socialdemokraterna, n.d.) and the Moderate party (M, Moderaterna, n.d.) require membership to be nominated by their party. The Environment Party (MP) mentions that they want non-party members to apply for lay judge positions in their lay judge recruitment announcements (Miljöpartiet de gröna, 2019; 2020). The remaining major parties in Sweden offer no information relating to their requirements or their nomination process.

The election process for district courts is conducted by the local Municipal council (*Kommunfullmäktige,* RB 1942:740, chapter 4 section 7), which is composed of the same locally elected political parties in charge of the nomination process. The municipal councils are responsible for ensuring that the nominees are suitable for the lay judge position and fulfil the requirements established by the Courts of Sweden. The municipal council rarely opposes the nominations provided by the political parties (Nämndemannautredningen, 2013). According to the latest official investigation into this process (Nämndemannautredningen, 2013), there is no regulated routine established on the national or municipal level regarding the suitability assessments; it is instead conducted differently depending on each party and each municipal council.

The control process is conducted by the Courts of Sweden (Sveriges Domstolar, 2021a). Before lay judges can serve, the courts control whether they fulfil the legal requirements for service. The suitability of lay judges is decided based on a template produced by the Courts of Sweden, which is based on their operationalization of relevant legislation. The qualifications regarding age, citizenship, and residency are controlled as required by law. They also ensure the absence of a criminal record (Sveriges Domstolar, 2021a). The Courts of Sweden also reserve the right to reject an appointed lay judge if their profession provides them with a connection with the legal system in a manner that the Courts of Sweden deem inappropriate and incompatible with lay judge duties. Examples of these professions include law enforcement, legal professionals, and civil servants employed by regulating government bodies. If the appointed lay judges get approved for service, they undergo an obligatory introduction course before they can actively participate in trials (Svenska Domstolar, 2021a).

Lay judges are neither required nor expected to possess any legal education or experience. Their purpose is to provide the trial with the “common sense” of the “average person” (Sveriges Domstolar, 2021a). They are however obligated to follow the law when assessing and ruling in court cases (Sveriges Domstolar,

2021b). The purpose and mission of the lay judge are interpreted by the Courts of Sweden as follows:

> The mission as a lay judge is closely related to what happens in our society and its development. People, their situation and problems are the core of the operation lay judges come into contact with. [...] The courts are a fundamental pillar in our democracy and the lay judge system will contribute to the trust in the courts. Lay judges are representatives of Sweden's population and their purpose is to provide the general public with insight into the courts' operation. They contribute common sense and experience from different fields.
>
> (Sveriges Domstolar, 2021a)

Another vital aspect of lay judge service is their impartiality; lay judges are not permitted to act in accordance with their party affiliation or otherwise allow personal circumstances and values to influence their service in court. Even though lay judges are appointed by political parties, the position itself is to be considered non-political (Sveriges Domstolar, 2021a).

The explanation so far has only considered the structure of the district courts. However, the Swedish legal system naturally has additional appellate courts (*Hovrätter*) and the Supreme court (*Högsta domstolen*) that can be appealed to if there is any reason to doubt the fairness or validity of the district courts' verdicts (RB 1942:740, chapter 49 section 1, 14). Lay judges' influence over trials decreases in every instance. In appellate courts, the professionals have a majority with three presiding professional judges and two lay judges (RB 1942:740, chapter 2 section 4 part 2). There are no lay judges assigned to the Supreme Court. It can thus be argued that while the lay judges contribute with a democratic function in the district and appellate courts, due process or validity of verdicts can be questioned through appeal. In cases of appeal, professional influence is systematically increased to safeguard against subjective lay judges and any potential harm to the rule of law. However, the verdicts of district courts are binding until the verdict of the appellate court is given, which means that even in extreme cases where lay judges break the law, the resulting verdict is binding until the moment it is overturned. While there

exist no statistics outlining how long an appeal process takes, it could realistically take several months for unprioritized cases in more populated areas.

1.2.2. Critique and attempts at reform

As early as the preparatory investigation leading up to the 1983 government bill regarding the composition of the courts (Prop. 1982/83:126) expressed concerns regarding the lack of diversity in the lay judge pool since it "was not as versatile in its composition as desired" (Prop. 2005/06:180, p. 16). As a result of an official investigation by the state (*Sveriges Offentliga Utredningar, SOU*) in 2002, a government bill was proposed (Prop. 2005/06:180) which would direct political parties to broaden their recruitment to increase diversity in terms of age, gender, profession, and ethnicity. It was also proposed that the positions should circulate to a greater extent so that new people were continually introduced. Finally, the bill suggested that there should be controls implemented that could guarantee that the appointed lay judges were appropriate for the position and that the Courts of Sweden would have the right to remove lay judges from service if they did not meet the requirements. This proposition did not pass parliament.

Similar arguments were raised in the next state investigation regarding lay judges in 2013 (Nämndemannautredningen, 2013). The resulting bill (Prop. 2013/14:169) included suggestions to establish requirements and controls to ensure the suitability of lay judges, the right to reject or remove unsuitable lay judges, a stated assurance that lay judges were not political, and the implementation of an obligatory introduction course. This bill was passed in 2014 and is the latest addition to the legislation relating to lay judges.

In both 2002 and 2013, it was suggested to include a so-called "free quota", which would guarantee the inclusion of eligible candidates who would be allowed to apply for a nomination regardless of their political involvement. It was also suggested to implement requirements for diversity and representativeness in the lay judge pool. The 2013 investigation included additional arguments for removing lay judges from appellate courts. It was also suggested that individuals and organizations other than

political parties would be allowed to nominate candidates (Nämndemannautredningen, 2013). Even though both investigations argue that political parties should not be excluded from the nomination process, these suggestions all had the purpose to make lay judges more representative and less political. These suggestions were not included in any government bill.

Despite the attempted and actual reform, the lay judge system has not escaped continued criticism. Members' bills to parliament have stated continuous dissatisfaction with the result of the attempted reforms (Motion 2011/12:Ju312; Motion 2012/13:Ju317; Motion 2017/18:1756; Motion 2020/21:632). They also indicate mistrust not only in the efficacy of the lay judge appointment process but also in the legitimacy of the fundamental concept of lay judges.

In a report by the Swedish National Courts Administration (*Domstolsverket*) mapping the efforts to increase diversity and procedural knowledge in the lay judge pool following the 2014 reforms, the results indicated no notable impact or improvements to the process (Ridal Ceder, 2020). The results showed that "merely 5 per cent of lay judges were appointed without belonging to a political party" (Ridal Ceder, 2020, p. 4). Additionally, the diversity of lay judges remained unchanged, the average age increased, and the essential knowledge of the law and legal procedure was not considered to have improved. The report argued that to effectively improve the representativeness and efficacy of lay judges, political parties need to remove the requirement of party membership in their nomination processes. This requirement prevents many who would otherwise be interested in a lay judge position from applying (Ridal Ceder, 2020).

Less than 5 per cent of the Swedish population is affiliated with any political party (Samuelsson, 2018). Despite the symbolic statements promising non-political lay judges, there are no legally grounded structures preventing a continued politicization of the lay judge pool. The decision to exclude civil servants from specific government bodies because of an assumed bias deriving from their professional background, while still arguing for the unlikeliness of bias from

individuals with a political background, is also curious. The arguments for political involvement in the lay judge system should be considered fundamentally flawed when all other professions even remotely connected to the legal system are assumed to possess an inevitable bias.

The Courts of Sweden affirm the importance of impartiality and objectivity from professional and lay judges alike since everyone has the right to a fair trial. Therefore, "lay judges cannot pursue political opinions in court and cannot let themselves be affected by personal values" (Sveriges Domstolar, 2021a). However, the many attempts to reform the process and role of lay judges, along with the continuous critique directed at the current system, indicate a need to assess and explore how their influence manifests in practice.

2. Literature review

In order to situate this thesis against the backdrop of previous research within the field, a literature review was conducted to adequately frame the prevailing relevance of the research questions. The review includes literature on lay judges and their role in legal systems, not only in Sweden but also in an international context. These include the representativeness of lay judges, the efficacy of the lay judge function compared to professional judges, the specific context of lay judges in Swedish courts, and discussions on lay judges' relation to democracy against the backdrop of the rule of law.

2.1. A societal sense of justice?

The main purpose of the lay judge is to strengthen the legal system by increasing concurrence between law and society. But before declaring lay judges as unequivocal democratic representatives of the people's sense of justice in court, there must be a discussion on whether or not a societal sense of justice is generalizable. There is also the question of whether any generalizations ever provide results that are representative of a majority of the national population.

Balvig et al's (2015) research on public sentiments on justice concludes that while the Scandinavian public's uninformed sense of justice generally advocates for more punitive sanctions in their courts, they also tend to argue for lower sentences than professional judges when asked to assess actual vignette cases. The study finds support for the base idea outlining the concept of public sentiments on justice, which is that "The propensities towards punitiveness seem to diminish with more information and increasing proximity to the parties involved" (Balvig et al, 2015, p. 342). Olaussen (2014) presents similar results in his study assessing the Norwegian public's penal attitudes. Both studies show that people's sense of justice is more in line with current legislation than public discourse would suggest. In other words, people generally perceive the legal system as less punitive than desired as a result of misconceptions relating to how the legal system works in practice.

The public's misconception of law and the legal system is in no way a new phenomenon, nor limited to Scandinavian countries (Thomson & Ragona, 1987; Roberts & Stalans, 2000; Dowler, 2003; Levenson et al, 2007; Pickett et al, 2015). The main culprit is here identified as mass media, in which fearmongering and hyperbole are causing "people's underestimation of the actual level of punishment" (Olaussen, 2014, p.79). Graeme Newman's (2008) findings further suggest that in liberal, highly economically developed countries which tend to have more lenient laws and less punitive sanctions, the public generally favours more severe punishments for deviance than the law provides.

Concerning the question of whether the lay judge system fulfils the role of democratic influence, the above research would suggest a dissonance between the practical workings of the legal system and how it is perceived by the public. It also suggests difficulties with democratic representation in court, as the population possesses vastly differing ideas and sentiments concerning justice. What is not discussed here, however, is what implications these issues have on law in practice, and by extension the rule of law. To adequately assess the efficacy of the lay judge system, its practical application in court must be further investigated.

Another problem that occurs when discussing public sentiments on justice is the use of aggregated measurements of what constitutes public sentiments themselves. Although aggregated results may indicate current national punitive attitudes, the actual data shows "considerable disagreements among respondents about which punishment they would inflict on the perpetrator" (Olaussen 2014, p. 84). In other words, the different extremes regarding penal attitudes are so far apart that most people fall outside the scope of any generalized conceptions of the norm. Exacerbated by mass and social media, recent political discourse polarizes the opposing progressive and conservative groups to drift further from the political middle (Spohr, 2017; McCoy, Rahman, & Somer, 2018), which in turn is reflected in perceptions and opinions regarding crime policy, assessment of guilt, and punishments. In this way, it becomes difficult to speak of 'the public' as a coherent

societal force since no statement regarding a societal sense of justice will fully reflect the majority of the national population.

2.2. Comparing lay judges and professional judges in an international setting

The lay judge system as a part of civil legal structures is not uncommon, and can be found in European countries such as Germany (Casper & Zeisel, 1975; Machura, 2001), Finland (Klami & Hämäläinen, 1992), Denmark (Anderson, 1990; Ivkovic, 2015), Poland (Pomorski, 1975; Gajda-Roszczynialska & Markiewicz, 2020), and Croatia (Ivkovic, 2009), as well as in Japan (Johnson, 2020; Hirayama, 2012; Corey & Hans, 2010; Watson, 2016), South Africa (Ivcovic, 2015) and China (Yue, 2001; Pißler, 2020). The field wherein lay judges are studied and compared to their professional counterparts has been extensively explored both within countries and in comparative studies (Provine, 1986; Burges, Corby, & Latreille, 2014; Ivkovic, 2007; 2015).

Cross-country comparative analyses of lay judge systems are a fairly problematic endeavour considering how lay judges are defined differently in each country. Their practical responsibilities as well as their symbolic role within each legal system also differ. Their authority thus differs in each country depending on factors such as the number of lay judges included in a case, how they are expected to participate, and what authority they possess compared to the professional judge(s). One example is how lay judges in countries such as Germany and Croatia are required to possess specialized skills in relevant fields other than the legal (Machura, 2001; Ivkovic, 2007; 2015), while countries like Denmark, South Africa, Poland, and China have no such requirements (Ivkovic, 2015; Pomorski, 1975; Yue, 2001). Nevertheless, some key features outline the fundamental concept of the lay judge as presented in the research, in which the base fundamentals coincide well with the Swedish understanding of the lay judges' role and purpose. The main aspect of lay judges is thus that they are not meant to involve themselves in the technicalities of the legal system as opposed to legal professionals. They are instead expected to provide

insight both *for* the public into the system, as well as *by* the public onto law in practice.

Findings regarding lay judges' attitudes in comparison with their professional counterparts conclude that while lay judges can be comparatively lenient or punitive depending on their respective country, dissent between professional and lay judges is a rare occurrence in most countries (Yue, 2001; Ivkovic, 2009; Olaussen, 2014; Johnson, 2020). Except for Poland (Pomorski, 1975), lay judges tend to fall in line with the professional judges' assessments. The explanations regarding low dissent rates tend to vary. In some cases, this is considered proof of the competence and accuracy of appointed lay judges and that there are no real differences in terms of attitude or behaviour compared to professional judges (Provine, 1986; Klami & Hämäläinen, 1992).

Other research would instead explain the high unanimity as a result of a perceived difference in legitimacy and authority by the involved parties themselves. In most lay judge systems, legal education and experience will have an inherent value and will consequently provide an elevated status in the context of the court. Professional judges can therefore influence lay judges' opinions since they are perceived to have a higher status and a tendency to be more accurate, even though professionals and lay judges possess the same level of individual authority in theory (Machura, 2001; Yue 2001; Ivkovic, 2007). Additionally, as Machura (2001) argues is the case for the German system, "proportion between professional and lay judges is important. When laypersons are in a minority, their influence diminishes" (p. 465). Another alternate explanation is how, as in the cases of China (Yue, 2001), Germany (Machura, 2001), and Norway (Ivkovic, 2007), lay judges can be nominated and appointed based on criteria that conform to general attitudes presented by professional judges. In support of the two latter explanations of low dissent rates, studies on the recent inclusion of lay judges in the Japanese legal system do not indicate any significant changes in sentencing patterns despite an expected increase in leniency (Johnson, 2020; Watson 2016).

The overall accuracy and competence of lay judges can be considered a matter of perspective as well. There is a general agreement in research that lay judges fulfil a democratic function wherein the public - at least symbolically - gains access to the court process. In a study of the newly implemented Japanese system, Corey and Hans (2010) argued that "the mere presence of lay judges on panels may serve as something of a deterrent to professional judges if they are inclined to be arbitrary, hasty, corrupt, or biased" (p. 87). The lay judge can here be considered a barrier against corruption and discrimination as well as an advocate for democracy and societal values. However, research highlighting the lack of dissent and the professionals' potential influence on lay participants may affect the credibility of this perspective. Watson (2016) argues in his analysis of the Japanese system that the impression of lay judges as democratic representatives may be flawed. Instead, it allows conscripted citizens to become complicit in the faults of the existing system; instead of contributing with increasingly just verdicts they simply shield professional judges from criticism. Furthermore, there is also no evidence disproving the possibility of lay participants themselves could partake in corrupt practices.

According to the literature, the general perception of lay judges is that they are less experienced, more emotional, and fairly biased in their assessments, especially if they lack additional education or professional background other than the juridical. As an example, Pißler, (2020) argued that the 2018 reform of the lay judge system in China indicates that "people's assessors are (in many cases, probably rightfully) not trusted to judge legal questions" (p. 256). This perception is especially prevalent among legal professionals (Pomorski, 1975, Ivkovic, 2007). Studies such as Johnsson's (2020) analysis of Japanese courts and Klami and Hämäläinen's (1992) comparative research on Finnish and Swedish courts would instead argue that there is no measurable difference between professional and lay judges in terms of accuracy, emotion, or bias. While other lay participants may require additional legal information, lay judges accumulate moderate experience because of repeat performances and longer mandate periods (Ivkovic, 2007; Malsch, 2009) This may

help lay judges in terms of competence, although "their experience is gathered ad hoc and only sporadically, lacking systematic training" (Ivkovic, 2007, p. 437).

The research on the efficacy of lay judges can be summarized as inconclusive. Context, method, and research field of each study seem to affect the results and arguments of the researchers. Most research is also conducted based solely on the 'objective' effectiveness of the lay judge, separated from their role as a democratic function. Lay judges function as representatives of the people and can thus be considered to be included *because* of their subjective, situated, and uneducated perspective. In this sense, studies focusing on how "right" a lay judge can be compared to the professional fully ignore the fundamentally different functions these two roles fulfil within the context of the legal system.

2.3. The Swedish context

Though not explicitly, lay judges serve a political function to some extent in every country. In addition to countries that choose lay judges based on their concordance with judge-like characteristics (Yue, 2001; Machura, 2001; Ivkovic, 2007) elected officials are in charge of the Polish appointment process, making it effectively political (Gajda-Roszczynialska & Markiewicz, 2020). Even in countries like France and Germany where "lay judges are very concerned to assert their independence from their organizational roots and act as judges, not representatives" (Burges et al., 2014, p. 204), it can be argued that the process itself is a political construct formed to serve a *symbolic* function, namely democratic representation. The symbolic function of lay judges is thus political in the sense that it is meant to increase public faith and trust in the legal system as a primary goal. The perception of justice through democratic insight can increase perceived legitimacy in the legal system even when the actual accuracy of verdicts remains unchanged.

The political involvement in the appointment of lay judges in the Swedish legal system presents a potential controversy. Considering that the main role of lay judges is as a representative of the people and as a dynamic and adaptable input to the rigid and binary nature of our legal system, relying on political party nominations to

appoint lay judge positions may prove counterproductive. In further exploration of the political influence on (and of) lay judges, Sweden stands out as one of few countries which almost exclusively appoint politically affiliated lay judges.

The two most recent official investigations authorized by the state (Justitiedepartementet, 2002, Nämdemannautredningen, 2013) both argued that the position of a lay judge should reflect the average population with regard to gender, age, and background. Both investigations also found that lay judges did not reflect the national population; the mean age was well above average, and ethnic minorities were underrepresented. The investigations suggest a correlation between this discrepancy and the prerequisite of political engagement in the appointment of lay judges.

Despite the outlined issues with political involvement in the process, both investigations remain supportive of the current system. Regardless of the established issues, the 2013 investigation concludes that "The locally elected assemblies are distinctly democratically embedded [...] Citizens and other permanent residents have influence over the election assemblies' composition and it can therefore be ensured that the lay judges are the public's representatives in the courts" (Nämdemannautredningen, 2013, p 21).

It was concluded in both investigations that lay judges should not be appointed based on political involvement, not because it interferes with rule of law nor the legal system's independent status but mainly because it negatively affects diversity among lay judges. The argument itself presents a curious paradox; for an expressly unpolitical position in the legal system, the state continuously argues that the process for nominating candidates should be unconditionally decided by the political parties. The stated issues with the current system as a result of political involvement should present adequate grounds for a more critical view of the current appointment process. Furthermore, while the state's official investigations conclude that there is nothing wrong with the political nature of the appointment procedure, they do not directly investigate the efficacy of lay judges to any great extent.

Scientific research on lay judges within the Swedish context is not as prevalent as might be expected considering the numerous critical accounts that have been published in newspapers and non-academic journals originating from both within and outside of the legal system. Many within the Swedish juridical field tend to publish their work in established juridical journals such as *Svensk Juristtidning* and *Advokaten*, which cannot be classified as scientific as their material is not necessarily peer-reviewed (Svensk Juristtidning, 2018; Advokaten, n.d.).

Nevertheless, the majority of existing research seems to dispute the Swedish state's official investigations to some extent. In line with some international research on the representative character of lay judges, they are not only much older (Ridal Ceder, 2020) but also "richer and more well educated than the average Swede" (Diesen, 2001a, p. 314). According to John Bell (2004), age discrepancy can be explained in part as a natural consequence of the remaining population having work commitments, but most deviating characteristics may stem from the requirement of political affiliation. The appointment process could therefore benefit from greater inclusion of social diversity, and perhaps also from specialist knowledge other than the juridical (Diesen, 1996, Bell, 2004).

There is also the issue of the discrepancy between the representativeness of the entire lay judge pool, and actual representation in each case, as argued by Anwar, Bayer, & Hjalmarsson (2018, p. 868):

> Sweden uses proportionate political representation as an alternative approach to selecting jurors representative of the local population's political ideologies. One may then ask why such "biases" are a concern? Is this not exactly what the system was designed to achieve? Unfortunately, we would argue that it is not. Although the pool of available namndemän may represent a cross-section of societal opinion, a defendant's case is not decided by the entire pool—just three namndemän randomly chosen from the pool. In a seated jury of three individuals and a society with nine political parties that are oftentimes far apart on the political spectrum, small sample problems imply that defendants are unlikely to face a triplet that is in and of itself representative of society.

The assessments of competence of lay judges in Swedish courts consist of a variety of dissenting conclusions. In terms of competence and accuracy in evidence assessments, Portnoy et al (2020) found no difference between Swedish lay judges and other lay participants in courts of other countries. Klami and Hämäläinen (1992) argue that lay judges do not display bias to any greater extent than professional judges on average. They further argue that the fundamental purpose of lay judges is their lack of a professional legal background, which incidentally also is the cause of their perceived bias.

In contrast, Anwar, Bayer, & Hjalmarsson's study (2018, p. 838) found "substantial systematic biases with respect to political affiliation" in lay judges who are affiliated with the far-right and far-left political parties in Sweden. Diesen's (1995; 2001a) widely cited findings also suggest that while there is no clear connection between lay judges' demographics (such as sex, age, occupation, or political opinion) and final verdicts, they generally have more subjective and emotional attitudes than professional judges. Lay judges also tend to perceive a case as a conflict between the accused and the victim to a greater extent, and usually let the result and severity of a crime affect their assessments of guilt. Additionally, his findings indicate that 30 per cent of lay judges "look upon their participation in court as a political function" (Diesen, 2001a, p. 315).

In another study, Diesen (2015) again compared professional and lay judges, this time along with police officers and complete novices with no legal experience, in their ability to assess the legitimacy of the evidence. In the survey, "the professional judges answered most questions correctly (at the level 97-100%) while lay judges and police officers were at approximately the same lower level (50-93%) and novices significantly lower in most respects" (Diesen, 2015, p. 27). Lay judges as a group are noticeably inconsistent in this study, which further suggests there are no safeguards against potential incompetence even when many lay judges are capable.

A similar discussion occurs in analyses of Swedish lay judges' legitimacy. Most studies argue that lay judges are perceived as political, less efficient, and less accurate, especially by their professional counterparts. The main value lay judges are perceived to contribute is through their democratic function, which in turn strengthens the legitimacy of the legal system in the eyes of the public (Diesen, 1995, 2001b; Klami & Hämäläinen, 1992; Ivkovic, 2007; 2015). However, discussions on the actual legitimacy of lay judge rulings yield more dissent among researchers. As established, lay judges do not typically go against the professional judge in court rulings, and the research on Swedish lay and professional judges reflect the international inconclusive discussion on the issue of lay judges' legitimacy. Critical perspectives emphasize either how passive and impressionable lay judges are in practice, or how their rulings often are products of emotion and bias. This can further be considered a result of the social hierarchy between lay judges and professionals, where lay judges perceive the professional judge to have more authority and legitimacy because of their professional status and are thus easily influenced by the professional (Bell, 2004). In the cases lay judges do present a dissenting opinion, it can be explained as a result of their bias or lacking understanding of the law (Diesen, 1996; Anwar, Bayer, & Hjalmarsson, 2018).

The discussions surrounding the efficacy and legitimacy of Swedish lay judges thus seem to focus on their political function or affiliation. More favourably inclined research would instead argue that low dissent rates prove that lay judge assessments are no more erroneous or biased than those of professional judges (Klami & Hämäläinen, 1992). The perception of lay judges as unprofessional, emotional, political, and biased can here be explained by the narrative constructed by legal professionals (Johannesson, 2018). Legal professionals, because of their own presumptions caused by their background, interpret dissenting opinions by lay judges as "unfortunate departures from the legal norm" (Johannesson, 2018, p. 1172) and never as a result of their own bias or prejudice.

2.4. Democracy versus technocracy: Lay judges and the rule of law

In conclusion, certain main points outline the overall literature on lay judges and their function. First, declaring lay judges as democratic representatives of the publics' sentiments on justice and societal values can prove more complicated than Swedish policy may suggest. Generalizations of public perception have proven that not only are there prevalent misconceptions of what the legal system does and how it works. There are also few - if any - conclusions on public sentiments that adequately represent the majority. Second, while there exists a good amount of international and transnational research on lay judges, nation-specific roles and conceptual meanings of the lay judge vastly differ depending on the context in a manner that makes comparative transnational analyses challenging. Third, *published* research on the Swedish lay judge system is surprisingly lacking. Lastly, research on lay judges and lay judge systems can be described as inconclusive. It is rather a discussion of differing opinions with regard to necessity, legitimacy, and effects. This is both a result of differing legal and national contexts and a difference in opinion regarding the value of the lay judge role.

Considering the presented arguments for and against lay judges and their arguably political role in Swedish courts, what can be said about their actual influence on verdicts? There are no clear answers regarding the rate of dissenting opinions between lay judges and their professional counterparts. Some researchers state that dissent occurs in no more than three per cent of court cases (Ivkovic, 2015; Johannesson, 2018), while Anwar, Bayer, and Hjalmarsson (2018, p. 848) found that "Eight per cent of observations have at least one dissenting opinion with respect to the verdict for at least one charge or the sentence". Diesen (2015) states that the rate of dissent increased from three to six per cent between 1994 and 2010. Nevertheless, the rates of dissent are generally low, and one dissenting opinion does not equate to any changes in the final verdict. Regardless of whether this rarity can be explained by the influence of their professional judge, their own competence, or a combination of both, the fact remains that lay judges' actual influence on final verdicts remains fairly low.

Diesen (2001b) argues that "the space for manoeuvre of the lay judges today is limited by the standards of the law: it is only when the law does not give the answer that lay judging can have a real impact on the verdict" (p. 357). Even if lay judges may have the theoretical power to influence and change law in practice, they are supposedly held hostage by the professional judge's knowledge of legislation and due process. Conversely, Diesen (1996) also argues that in instances where lay judges do have a dissenting opinion, there is no safeguard against changing the outcome of the verdict if arguments against this opinion have no basis in law or precedent; there simply needs to be a majority among the panel. Casper and Zeisel (1972) also argue that "even if [lay judges] do not often prevail, the cumulative impact of their voice may not be negligible" (p. 191). Anwar, Bayer, and Hjalmarsson (2018) further connect the significant political bias found in their study to actual instances where lay judges have directly decided the verdict despite a dissenting opinion by the attending professional judge. Considering it is illegal for lay judges to let their political background influence their verdicts, it seems Diesen's argument may fall short in practice.

Considering the discussion on political bias among Swedish lay judges, what does this mean for lay judges' democratic function and the consequent effects on the rule of law? Diesen (2001b) argues that there is no conclusive research nor any other evidence that establishes a "right" way to rule. Additionally, "systematic biases are prevalent in criminal justice systems around the world" regardless of what legal system is utilized in the search for justice (Anwar, Bayer, & Hjalmarsson, 2018, p.868; see also Portnoy et al, 2020). Therefore, "as long as judging cannot be performed in a completely scientific way there is room for lay judges in court" (Diesen, 2001b, p.362). The lay judge possesses an established symbolic function which makes the legal system more legitimate in the eyes of the public. There is therefore no real support for the argument that the accuracy of verdicts or the rule of law would improve by removing the lay judge system - it might even cause the legal system to lose its tradition-bound authority. Conversely, there is no conclusive proof that lay judges directly improve rule of law either.

In Gajda-Roszczynialska and Markiewicz‘s (2020) study on the political influence over Polish courts, they argue that direct political involvement in the legal system corrodes the rule of law and “ensure[s] that judges were subservient to the political will of the authorities” (p. 451). There is also the issue that while lay judges in theory are bound by legal constraints in their influence on verdicts, some research suggests that political bias can directly influence verdicts. Additionally, Anwar, Bayer, and Hjalmarsson, (2018) argue that this influence occurs in line with extreme parties’ political platforms in a manner that does not represent the majority nor establishes a strong, democratic rule of law.

The question of how lay judges affect rule of law is essentially a discussion on what should be considered more valuable: public representation, or methodology and expertise? In other words, it becomes a conflict between politics and science, between *democracy* and *technocracy* (Diesen, 2001b). While lay judges supposedly represent the public in a manner that anchors law to societal values and keeps the legal process from becoming too complicated for the general public, they also consequently constrain the methodological development and the use of modern techniques (Diesen, 2001b; Malsch, 2007). There are however some problems with this approach to the Swedish lay judge system. Since the research does not conclusively prove the representative character of lay judges, the arguments for their democratic function risk becoming void, or at least adjusted to be viewed as a solely political function. The technocratic argument also falls short of considering the human factor; the removal of lay judges would not necessarily make courts less political, as there is no scientific basis for the claim that professional judges do not risk political bias simply because of their academic background.

Herein also lies an identifiable gap in the current research; in the discussion of the democratic function versus the comparable competence of lay judges, there is not much research contemplating the paradox of creating a representative pool in a modern, globalized society. In discussions of whether lay judges effectively fulfil their role, there are few contemplations regarding the fact that societies are becoming increasingly influenced by moral authorities other than domestic laws

and national norms. In light of the globalization of norms and values concerning justice, the ambition of this thesis is to address the paradox of enduring definitions of rule of law and legal systems as national, hierarchical structures.

3. Theoretical framework

In the essence of critical theory, this thesis strives to question existing legal structures as a social phenomenon in order to identify the results of underlying, flawed presumptions of an existing objective ideal. The theoretical framework is grounded in socio-legal, critical discussions on the law as a moral authority, as well as the actual and perceived legitimacy of law. In light of the gap in research concerning the globalization of norms and values regarding justice, the theoretical framework is chosen to reflect this critical approach to understanding the Swedish legal system.

In order to consolidate the contradictory purposes of the lay judge system against the backdrop of the ambiguity of rule of law, one must first understand the possibilities and limits of how law and justice can be conceptualized. This thesis will therefore frame the analysis of the Swedish rule of law within socio-legal understandings of how law and society are conflated in practice. To understand the role of lay judges as representatives of an entire national population and to account for how this can be realized in practice, theorizations regarding public sentiment on justice are discussed. However, the main aspect of the theoretical framework includes approaches to understanding the conflation of law and society in court based on different conceptualizations of legal pluralism.

3.1. Public sentiments on justice

‘Public sentiments on justice’ as a concept outlines the relationship between the public’s knowledge, perception, and involvement with regard to the law. Rule of law and the legitimacy of the legal system is dependent on public opinion to amass and retain authority over society. Public sentiments on justice serve as a direct or indirect influence on political penal discourse and can be utilized to justify needlessly harsh or even discriminatory policies (Rydberg & Roberts, 2014). It is also a phenomenon that cannot be disregarded when implementing criminal policies without inviting questions regarding democratic legitimacy (Green, 2006).

Public sentiments on justice are a concept mainly used in discussions on crime control and penal policy. Nevertheless, it can provide particular insight into the lay judge system in their democratic role as representatives of said public. There is significant value in adhering to public sentiments when conducting law in practice. There is an established correlation between a legal system's concurrence with societal morality and values and its credibility and influence (Tyler, 2003; Robinson, 2014). Naturally, if law instead drifts away from moral values and public sentiment, people's respect and deference toward the legal system decreases. It is thus in the interest of the legal system itself to internalize public sentiments on justice.

Green (2006) defines the difference between "shallow, unconsidered public *opinion*, and reflective, informed public *judgment*" (p.130). The condition distinguishing 'judgment' from 'opinion' is the levels of knowledge or involvement that exist once the public has properly engaged with the subject in question. Similarly, Balvig et al's (2015) research on public sentiments on justice concludes that while the public's uninformed sense of justice generally advocates for more punitive sanctions in their courts, there is a misconception among the public regarding the actual punitiveness of the legal system. As previously mentioned, much research has been conducted outlining and explaining the discrepancy between law in practice and public understanding of the legal system. This is explained as a result of both lacking internalized knowledge of the legal system among the public, as well as proliferated misinformation and exacerbation provided by the media.

When the public possesses a general misconception of how the law works in practice, any lay people involved in the legal system risk operating on such assumptions to consciously affect individual cases. For a lay judge to act as a representative of the people, when neither they nor the people they represent have an accurate grasp of what occurs within the field, may prove counterproductive.

Consequently, fully surrendering penal policy to public opinion "could lead to conspicuously unacceptable results" (Rydberg & Roberts, 2014). Criminal law is especially subject to strong emotions, which do not naturally result in objective opinions or reasonable sentiments (Bagaric, 2014). In this way, the lay judge system should be a satisfactory solution to incorporate public values without inviting unreasonable subjectivity. The lay judges supposedly act as representatives while being guided by the professional judge, so no verdicts actively break with the written law.

It can also be argued that it is the sole purpose of the lay judge to operate on subjective assumptions *because* of their role as representatives of the public, in order to consolidate the gap between law in practice and societal sentiments. This fundamental idea regarding lay judges can also be observed in the government's own explanations and discussions regarding the lay judge system. When observing the laws, regulations, and investigations of the lay judge system, the main concern is generally the representativeness of the lay judge pool in terms of demographics and political ideology. The lay judge system is in this way meant to strengthen the rule of law by introducing insight and influence by the people through this representation. The issue with this conflation of demographics, ideology, and morality is that it assumes that differing sentiments on justice within a society can be neatly divided in accordance with different social groups, which is not necessarily the case.

3.2. Legal pluralism

The fundamental idea of legal pluralism is the notion that law is derived from no single source. Law is instead the product of a multitude of social forces which affect both how law is constructed and how it may be applied in practice. For its theoretical relevance, this thesis explores the differentiation between *weak* and *strong* legal pluralism, both in terms of how legal pluralism can be *understood* from a theoretical standpoint as well as how it can be applied to the context of the Swedish lay judge system.

The intricacies of legal pluralism and how it may be applied to the lay judge system will be introduced by John Griffiths' (1986) differentiation between *weak* and *strong* approaches to legal pluralism. The weak approach refers to a conceptualization of legal pluralism in purely juridical terms. The plurality then becomes restricted to the state legal order and refers only to the different governing bodies *within* a nationalized legal system. An example is the many forms of courts within a system and their order of authority. The weak approach, also called the "juristic" or "classic" approach (A. Griffiths, 2002), considers the relationship between different governing bodies as hierarchical, reliant on the notion of an existing ideal or gold standard of governance (J. Griffiths, 1986). This is also the reason John Griffiths dubs it a "weak" approach to understanding law, as it understands the law and legal institutions as the only source for regulatory authority and national solidarity.

Another flaw in this approach is its definition of the relationship between law and state, as explained by Anne Griffiths (2002, p. 292):

> [Weak legal pluralism] is too statist in its conception of law, which has consequences for the ways in which we perceive law. Under this model, authority became centralised in the form of the state, represented through government, the most visible manifestation of which is the legislature. [...] In this way law became established as a self--validating system, a system whose validity, authority, and legitimacy rely no longer on any external source such as morality or religion, but rather on internal sources which are self-referential for its regulation and perpetuation.

By conflating law and state, the "weak" approach becomes blind to alternative sources for morality and values, even though the law itself originates from the very same alternative sources. It thus cannot conceive of additional sources of regulatory power as equal, nor their consequent effect on law and the perception of existing law. The problem with this state-bound, institution-based conceptualization of law is its reliance on a nationally cohesive perception of morality and justice.

In contrast to the juristic approach to legal pluralism, "strong" legal pluralism considers law "an empirical state of affairs, namely the coexistence within a social

group of legal orders which do not belong to a single 'system"" (J. Griffiths, 1986, p.8). This approach, also termed "deep" or "new" legal pluralism (A. Griffiths, 2002, p. 302), was developed to understand law within the context of the post-colonialist, globalized societies of the modern world (Merry, 1988; Darian-Smith, 2013). This approach understands law and legal norms as derived from - and influenced by - equally recognized regulatory powers (J. Griffiths, 1986). In other words, this approach acknowledges that law and legal institutions produced by the state are only a primary or more dominant source of law when society considers it as such. This is an understanding of law where nationalism and formalized state law are not prioritized, and legal ordering is instead considered to be a result of both internal and external influences of norms and rules (Merry, 1988; Griffith, 2002). While the very real power and authority of state law is a social fact that cannot be reduced to self-validating doctrine (Woodman, 1998), scholars of strong legal pluralism argue that other moral authorities such as religion and ideology can attain equal power and influence over parts, or all, of society.

Discussions on legal pluralism mirror socio-legal discussions on rule of law to some extent (see Přibáň, 2020; Waldron, 2020). Strong legal pluralism is here essentially a critique of the traditional, "weak" legal pluralism, as well as of conceptions of rule of law that is bound within the context of national legal systems. External influence over a national legal system is an integral aspect of any modern society, as "few, if any, areas of law are not - at least potentially - fundamentally impacted by globalization" (Michaels 2013, p. 287). Legal pluralism in turn becomes a natural consequence of globalization. Nevertheless, the legal discourse has remained mainly state-oriented and is generally only researched in a comparative sense (Michaels, 2013). The enduring insistence on ignoring external influence on the law has resulted in impractical attempts to accommodate the economic, social, and political consequences of globalization within domestic legal systems with mainly positivistic understandings of law (Michaels, 2013). Consolidating domestic as well as international pluralistic legal systems requires an understanding of the intricate issues of the many differences regarding norms, cultures, and values (Abbott & Snidal 2000; Trubek, Cotrell, & Nance 2005).

The above discussions on legal pluralism mainly revolve around the globalization of law and legal structures. However, just as globalization has come to affect international relations and transnational law, it has also impacted the domestic application of national law. It is not only legal systems that develop as transnational agreements become increasingly useful and necessary, but societies themselves are becoming globalized and diversified. External influence is therefore not only a top-down influence of international organizations over domestic legal institutions but also a bottom-up influence from within increasingly heterogeneous societies. The bottom-up influence on law is additionally in similar need of consolidation and accommodation within the domestic legal system through a legal pluralistic understanding of the sources of norms and values relating to perceptions of the law.

While this globalized perspective of law is an important point of departure for understanding the scope of legal pluralism, this study specifically explores the possibilities of legal pluralism as manifested within the Swedish legal system and the consequent effect on the rule of law. It is therefore also relevant to include Thomas Mathiesen's (2005) conceptualization of strong and weak legal pluralism, which is more concerned with legal pluralism as manifested within a society.

For Mathiesen, "weak" legal pluralism is also focused on the juridical field itself. However, the focus here is how different actors within a formal legal system understand and utilize law in differing, conflicting ways. Instead of specifically analysing the hierarchal relationships between the different agents, Mathiesen is concerned with how "weak" legal pluralism means a splintered legal culture exists within one legal system. This consequently means that different legal cultures understand law in different ways and thus "The law is not used only in the manner one learns at the juridical faculties, but also in fairly different ways" (Mathiesen, 2005, p. 2015). "Strong" legal pluralism is for Mathiesen (2005) the existence of regulatory systems operating parallel to the law but completely outside the formal legal system. These parallel systems mainly concern the social regulatory structures constructed by and for minority groups within a society. In this way, Mathiesen argues that the notion that law and state are intrinsically connected is incorrect.

Instead, informal norms, rules, and traditions are a natural part of the formal legal system.

John Griffiths' (1986) and Mathiesen's (2005) conceptualizations of weak versus strong legal pluralism do not necessarily exclude each other. They are comparable in the sense that "weak" understandings of law and legal systems ignore the social as an influential factor. Again, this understanding of law only considers the top-down influence of law on society, instead of acknowledging the importance of societal sentiments. This perspective also forgoes the relationships and power balance between different social systems, wherein the legal system is only one of many. The definitions of "strong" legal pluralism are also comparable in the sense that the concept includes highlighting the importance of social forces as a powerful influence on the law. Additionally, modern applications of this concept generally refer to the results of globalization.

However, Mathiesen also argues that parallel regulatory structures are naturally subordinate to the established, conventional legal system. Mathiesen argues that there exists a natural power imbalance between the social and the conventional systems, which is not incorrect in itself. It is however in direct contrast to John Griffiths' (1986) idea of strong legal pluralism. Griffiths' approach does not consider the hierarchy between formal and informal within a society to be relevant, as this comparison would indicate that there exists a preferred, objective standard among the compared systems. Instead, it is the very existence of social influence on both formal law and societal behaviour that is of importance, as well as how this influence affects the construction and application of law in different contexts.

The relevance of discussing different approaches to understanding legal pluralism lies in both the effects *unrecognized* legal pluralism has on the rule of law, as well as the different roles concerning lay and professional judges. Mathiesen's ideas of strong legal pluralism can in a sense exemplify the misconception that legal pluralism means observable, clearly sectioned sets of opinions and sentiments easily categorized in accordance with different social groups. What John Griffiths highlights in his arguments is using an approach to legal pluralism that recognizes

and identifies different sources of rules and values and incorporates them into a more comprehensive understanding of overarching, interconnected regulatory systems in a society.

The understanding of rule of law within the Swedish legal system is that the law maintains the highest authority in the legal process and protects individuals from capricious, subjective influence from an inconsistent society. In this way, the rule of law is considered as the enduring *absence* of additional social influence in the legal system other than that of law itself. However, the Swedish legal system also acknowledges the need for a legal system that adheres to contemporary values, norms, and sentiments on justice. The lay judge system is thus a construct designed to invite legal pluralism into the legal system to conflate law and societal values, with the assumption that the law may still hold the utmost authority. This understanding of law ignores the reality that a person does not naturally hold written law as an internalized standard for their behaviour and opinions. Instead, they adhere to more local norms and values. This remains the case for most people who are not a part of the legal system, which includes lay judges. Furthermore, this understanding of law as an objective standard also ignores the discrepancies and inconsistencies in contemporary written law.

Lay judges are thus put in a fairly contradictory role. On one hand, their main purpose in court is to influence law in practice so it adheres to societal values as much as possible. On the other hand, when the law clearly breaks with what they perceive to be societal values they are still expected to vote in accordance with the professional judge. To make this system even more confusing, there are no clear boundaries outlining when the professional judge can use written law as a way to guide the lay judges considering all panel members hold equal authority and rights.

In this way, legal pluralism is invited into the legal process in a manner that was not intended when constructing the lay judge system. It is a legal pluralism that is not understood as a natural consequence of a globalized, diverse society. It is

instead seen as unfortunate deviations from a system that relies on the national written law as a golden standard to enforce prescribed behaviour.

4. Method

The methodological framework for this thesis is a thematic analysis of criminal court case documents, specifically in cases where lay judges overruled the professional judge in the district courts. In order to generate a situated and relevant selection of the available material, a brief quantitative overview will be included to situate the study in relation to previous literature and official statements regarding dissent in district courts. The quantitative evaluation provides the basis for the selection of the research material. It is also used to control for missing material and other flaws in the database that are relevant with regard to the validity of this study. The findings provide the basis for the selection process for the research material used in the qualitative analysis, which will be the main source of analytical material for the thesis.

4.1. Selection of research material

The research material consists of court case documents from Swedish district courts, specifically in cases where lay judges have overruled the professional judge and directly affected the final verdict. The court cases are publicly available and accessible through the database *InfoTorg*. In order to conduct a feasible study with an appropriate scope for its purpose, a selection of district courts was chosen through their potential relevance to the research subject, namely the level of dissenting verdicts in comparison to the overall number of court cases during the same period. To identify relevant material, cases are gathered from district courts with the highest rates of dissent based on an overview of all district courts within the chosen time frame. The data is then gathered from cases within the chosen courts where the professional judge presents a dissenting opinion. The selection of the material is in this way essentially *subjective* in that it is based on relevance concerning the research aims (Denscombe, 2016). The period from which cases are as recent as possible to maintain relevance with regard to contemporary legislation as well as the current social context. To gather a selection that is within a feasible scope of this thesis, the time frame is limited to the dissenting verdicts in 2021.

In order to find relevant cases, specific keywords were chosen based on two initial court cases exemplifying the phenomenon, found through news articles. There were some initial complications using the database *InfoTorg*. Using the exact phrase "Skiljaktig mening" (dissenting opinion) when searching the database resulted in much relevant material being excluded. This seems to be a flaw in the database search engine. To gather all relevant data, free keywords "skiljaktig" (dissenting) and "mening" (opinion) were instead used, which produced all criminal court cases where both words were present, either together or separate. This also excluded relevant material, as some court case documents do not use the phrase "skiljaktig mening" and instead only write that there has been dissent ("skiljaktig" or "skiljaktiga"). All cases where the word "mening" was excluded do therefore not show in the results. Searching the database using only the keyword "skiljaktig" during the year 2021 resulted in 1942 results, which is significantly more than when using both keywords "skiljaktig" and "mening" (1712 results) as well as when using the phrase "skiljaktig mening" (1177 results).

The problem with this search method is that there is no guarantee that all results concern dissenting opinions between the judging panel. For example, the word dissent can be used in many instances that do not concern dissenting opinions in the judging panel. Another search was therefore conducted using the keyword "Skiljaktig" while also excluding all results where the word "mening" occurred. The results can in this way be controlled for irrelevant case documents. This search yielded 270 results. This material was then manually controlled for overlap with the search using "skiljaktig" as a lone keyword without exclusions in order to examine whether any of the search results included court cases free of dissent (and therefore irrelevant for this study). In this search, one case did not contain a dissenting opinion and was removed from the overall result. One final search was conducted using the key phrase "inte enig" (not unanimous) and excluding results containing the word "skiljaktig". This yielded three results, which were also controlled for overlap. One relevant court case was found which did not show up in previous searches and is included in the overall results.

The final results were sorted in accordance with each district court and compared to the corresponding total number of criminal cases. In other words, the total number of criminal court cases was identified in each district court, which was then used to calculate the percentage of dissenting cases within each court.

In 2021, 40,4 per cent of all closed cases in the district court were tried with the help of a lay judge panel, which amounted to 49,258 court cases (Domstolsverket, 2022). The process of gathering cases with a dissenting panel through the database InfoTorg generated 1942 results in the same year. Considering the issues with the database as well as the fact that some court cases are inaccessible by reason of the Public Access to Information and Secrecy Act (SFS 2009:400), this can only be considered the bare minimum number of dissenting cases. This consequently amounts to a minimum dissent rate of 3,94 per cent across all district courts.

The district courts with the highest dissent rates were, in order, Malmö district court, Attunda district court, Solna district court, Skellefteå district court, and Uppsala district court. Among the chosen district courts, the search results were manually analysed for cases that constitute the main material for the qualitative analysis, which is when lay judges overruled the professional judge in the final verdict. Among these court cases which included a dissenting panel, the average percentage of cases where the professional judge was overruled was 21,18 per cent. Some court case documents are not included in the analysis because of errors in the documents, missing appendixes where the dissenting opinion is listed, or other issues making an analysis of the relevant text impossible. Additionally, the selected material for the qualitative analysis is limited to cases where the dissent concerns violent crimes, including sexual assault and threat of violence, since this was the most prevalent type of crime in the overall material. The final number of court cases used for the thematic analysis is 56.

4.2. Thematic analysis of criminal court case documents

As opposed to other qualitative analytical methodologies such as grounded theory or discourse analysis, the thematic analysis does not include a specific course of

action. As a result, it is easy to claim to utilize thematic analyses without presenting a categorical approach outlining *how* the thematic analysis is executed (Bryman, 2011; Clarke, Braun, & Hayfield, 2015). Still, thematic analysis is a fairly straightforward method that involves identifying and categorizing different repeated patterns into specific themes (Bryman, 2011). It is primarily designed to identify shared meanings, experiences, thoughts, and behaviours through the codification of gathered data, and is therefore most suitable for data sets including multiple sources (Kiger & Varpio, 2020).

In the context of this study, the analysis is applied with a predetermined theoretical framework in mind which decides the direction and purpose of the study. This approach can also be described as a *deductive* application of thematic analysis (Clarke, Braun, & Hayfield, 2015; Kiger & Varpio, 2020) to evaluate the chosen theories' accuracy in explaining the lay judges' effect on the Swedish rule of law. The thematic analysis is primarily structured based on the explicit roles of the professional and the lay judges respectively; while the professional judge is a representative of the law and the legal system in court, the lay judges are representing societal values of the people. With legal pluralism as the main theory, the preliminary themes were further decided to reflect the different underlying sources of the reasonings that result in dissenting opinions among the panel.

The studied material consists of official documents, which should only consist of carefully deliberated statements. In contrast to other popular data gathering methods such as interviews or fieldwork, this material mostly excludes unguarded thoughts and emotional reasonings. The analysis is therefore tentative when inferring meaning in statements and should instead rely on themes that are explicit to some extent. In other words, this study mainly applies a *semantic* form of thematic analysis in that the themes are found and identified through mainly direct statements or references in the text (Kiger & Varpio, 2020).

Utilizing the "framework" method of thematic analysis as presented in Bryman (2011, p. 529), the data will be coded and synthesized into a matrix of identified

themes and subthemes. The identification of themes and subthemes is a part of the analytical process. The main question for the analysis concerns the ways lay and professional judges conduct assessments relating to the final verdict, as well as what underlying reasons these assessments may be grounded in. The matrix will further include a distinction between the professional and the lay judges in each case in order to evaluate the differences, or indeed, the similarities in their reasoning. This distinction is naturally divided in court cases with dissenting judgments, as the documents include the final verdict and the reasons for dissent as separate sections.

4.3. Validity and methodological limitations

The limits of thematic analysis as the applied method arrive at the very problem all qualitative research find challenging to overcome; they are heavily reliant on the interpretations of the researcher, which in turn is affected by internalized beliefs and values. In addition, findings generated by qualitative studies are constrained by the context in which it was gathered and are difficult to replicate, quantify or generalize (Bryman, 2011). However, qualitative studies remain not only relevant to the social sciences but crucial in the attempts to adequately analyse and explain social phenomena. Considering the fundamental differences between quantitative and qualitative methodologies in both purpose and application, assessments of validity and reliability should adapt to these disparities. In qualitative research, it is thus more appropriate to evaluate validity in terms of *internal* accuracy and coherence. In other words, internal validity is established through the compatibility and correspondence between the researcher's observations and the applied theoretical framework (Bryman, 2011). In terms of reliability, qualitative research must provide accounts that can be considered "reputable procedures and reasonable deductions" (Denscombe, 2016, p. 411). The court case documents used in this study are publicly available and easily accessible. This increases the reliability of the analysis provided that all assessments and deductions are adequately accounted for since the analysis consists of a semantic approach to the research material.

Another issue that requires careful consideration is the reliability of the research material. Official court documents are not supposed to reflect personal opinions and emotional reasoning. Indeed, due process demands impartiality to the greatest possible extent, and any sentiments expressed in court should only reflect public common sense. Text documents as research material are moreover not as reliable a source compared to interviews or observation studies, as it is secondary data and thus not designed nor produced for the specific purpose of the study (Denscombe, 2016). However, conducting research more similar to fieldwork or holding interviews would be impossible in this context since deliberations by the judging panel are confidential by law (Sveriges Domstolar, 2021a). To conduct observation studies or interviews regarding classified information in specific court processes lies beyond the scope and possibilities of this study. However, the court case documents are the official summation of the trial, where assessments of evidence, reasonings regarding guilt, and overall grounds for verdict are presented. It is also required to include documentation of any dissenting opinions and their underlying reasonings. These documents are what officially becomes bound by law and what is used during any potential petitions for appeal. Using court documents of criminal cases can therefore be considered appropriate material for the purpose of identifying any direct effect by lay judge deliberation on the rule of law.

There are also a variety of practical limitations which occurred during the course of the study. The only available database providing access to Swedish court cases and verdicts is essentially designed for word search only, which is the method utilized to gather data. A limitation with this method is that there can still be relevant material that does not show in the results and are thus not included, but there is no viable or realistic method for controlling for these potential errors. There were also some purely technical issues with the database, including how the word search did not function as intended and how cases were organized differently depending on the time frame. In addition, the database is not designed for the type of quantitative ”funnel” searches applied in this study. It is expected to already know specific court cases or at least the section of law relevant for the study when using the database.

In other words, it is designed only for highly specific qualitative case studies or comparative research.

When comparing the database InfoTorg to the official report published by the Swedish National Courts Administration (Domstolsverket, 2022), the database produced overall results inconsistent with the report. In addition, the official report does not include how many criminal court cases consisted of a dissenting panel. As a result of incoherency when conducting quantitative searches in the only available database and missing official statistical information, any quantitative results are only estimates. However, the estimates are still relevant as they establish an existing minimum of dissent rates, as well as provide a realistic and defensible basis for the data selection.

4.4. Ethical considerations

According to Denscombe (2016), ethical considerations should be grounded in four fundamental principles. First, the study should protect the interests of the participants. The second is ensuring that participation in the study is voluntary and based on informed consent. Third, the researcher should avoid false promises and uphold scientific integrity toward participants. Lastly, the study must be conducted in accordance with the law.

The chosen research material is publicly available and has therefore been approved for public use in accordance with the Public Access to Information and Secrecy Act (SFS 2009:400). Even so, all personal information will be excluded. The purpose of the study is to analyse lay judges' effect on the rule of law and the legal system; it is not to analyse the characteristics, background, or identities of the lay or professional judges themselves. Because this study does not use materials that require active participation from any individual nor needs any consent because of its public status, the second and third ethical principles should not affect the integrity of the research. The fourth principle is also covered by the fact that all analysed material has already undergone a confidentiality assessment by the Courts of Sweden. However, the first principle can apply if the study is incorrectly

conducted to an extent that could harm the integrity of the lay judges in their democratic function. The analysis cannot make rash assumptions and infer latent meaning that cannot be substantiated, since it harms not only the validity of the study but also may affect the integrity of the lay judge role unnecessarily.

5. Analysis

Among all analysed court cases, dissent concerning guilt constitutes the majority (46 out of 56 cases). In over half of the analysed cases (33 of 56 cases), the professional *and* one lay judge wanted to impose a guilty verdict or harsher punishment but were overruled by the remaining two lay judges. This is an interesting reflection of how procedural law directly and greatly affects trial outcomes; as mentioned, in cases when there is no majority, the verdict becomes the mildest available option.

The preliminary assumption for this analysis was that arguments presented in court are presumably meant to reflect the intended roles of each panel member. The analysis of argument construction in district court is therefore presented below in accordance with arguments three overarching themes relating to the underlying sources for their arguments: 1) explicit legal sources, 2) social values and normative assumptions, and 3) personal opinions lacking grounded reasonings.

It is important to note that the cases in the selection generally utilized several arguments spanning at least two of the central themes and several sub-themes in their presented reasonings related to the verdict. This variety in arguments leading up to the overarching assessment of a case was common for professional and lay judges alike. Among the analysed court cases, over 50 per cent of all arguments presented by both lay and professional judges fit into the third category of seemingly personal opinion. The second category highlighting societal values and norms constitutes almost 40 per cent of lay judges' arguments and 25 per cent of arguments made by professional judges. Lastly, legal sources are utilized by lay judges in seven per cent of the analysed arguments, while professional judges referenced legal sources in almost 17 per cent of their arguments presented in their dissenting opinion.

5.1. Theme 1: Legal sources

The first theme comprises any reasonings explicitly grounded in references to law or legal precedence. Surprisingly, legal references are less commonly used for assessments in court compared to the other identified themes. This is moreover not only the case for lay judges but also for their professional counterparts. While professional judges explicitly utilize legal sources as grounds for assessments to a greater extent than lay judges, it occurs far less often than the use of other reasonings, which are less explicit and objective.

In cases where professional judges refer to legal sources, the main arguments concern how the applicable law should be interpreted within the context of the case. For example, in response to a case of unlawful threat (*olaga hot*) where the lay judges argued that the defendant did not have intent to carry through the threat and should therefore be acquitted, the dissenting professional judge argues:

> The assessment of whether a threat has been *devoted* (typically) to inducing severe fear in the one threatened means that it is irrelevant whether the one threatened has become scared. That the one threatened has become scared is however an indication that the threat has been of such nature that is pertained to in the legal clause. In the assessment, one should only consider the actual circumstances and based on how the situation appeared from the perspective of the one threatened. A significant aspect can for example be what measures are referred to with the threat and the manner in which the threat is expressed. It is not relevant whether the perpetrator has had any intention of carrying through with the threat.
>
> Malmö District Court, case no. B 12337-20, p. 6

The professional judge essentially argues that the lay judges' reasonings have misunderstood how the law in question should be applied. Notably, the professional judge does not explicitly reference any legal authority or method that may support this claim. It is nevertheless fairly evident that this statement is not without grounds, either in terms of a legitimate source or simply education and experience.

In other cases where legal sources are used, lay and professional judges' main dissent specifically concern the interpretation of applicable law. Another example case included two counts of violation of a child's integrity (*barnfridsbrott*) as a result of domestic violence between the parents. In this case, the lay judges argued that the defendant should be acquitted from one of the two counts since the child in question had not directly witnessed the act of violence:

> With regard to [plaintiff 2], he has stated in a direct question in child interrogation that he did not see the quarrel between mother and father. He stated, among other things, that something was standing in the way. In such circumstances, it cannot be considered beyond reasonable doubt that he witnessed the act.
>
> Solna District Court, case no. B 9182-21, p. 14

The professional judge alone argued that the law concerning the violation of a child's integrity should not be interpreted in this literal sense, since an explanation for how it is meant to be applied is presented as a part of the legislative history:

> The penalty clause in ch. 4 Section 3 of the Criminal Code regarding violation of a child's integrity offences presupposes that the child must have witnessed the main crime for liability to be imposed. However, the legislator has been clear that the requirement for what is to be considered a testimony must be set relatively low. The legislative preparatory work shows that it is sufficient that the child has only seen or heard part of the criminal course of events. In addition, it does not need to be proven that there was any insight on the child's account that a crime has occurred. The legislator has especially commented on the situation that a child tries to protect themselves by distracting themselves with other things, by pointing out that in such circumstances it should often be the case that the child should be considered to have witnessed the act. (prop. 2020/21:170 p. 24 f.)
>
> Solna District Court, case no. B 9182-21, p. 17

Professional judges also utilize case law in their assessments, often to dispute lay judges' non-legal reasoning with regard to guilt or punishment. One example concerns a sexual assault case, where the lay judges argued that there was not

enough evidence to convict even though they deemed the plaintiff as credible, since no one outside of the plaintiff and the defendant had directly witnessed the incident.

> In addition to the parties' stories, the evidence in sexual crime cases is often based on the plaintiff's telling other people who are heard as witnesses after the incident. It is then not in the real sense a question of an investigation aimed at the alleged act, since the witnesses have not made any own observations of the event itself. However, such information, together with the witnesses' own observations of, for example, the plaintiff's behaviour and reactions after the incident, may in some cases constitute indirect support for the plaintiff's account. According to the Supreme Court, a credible statement from the plaintiffs, in conjunction with what has otherwise emerged in the case, may be sufficient for a conviction. (See e.g. NJA 2017 p. 316, NJA 2010 p. 671 and also NJA 2009 p. 447 I and II.)
>
> Attunda District Court, case no. B 268-21, p. 10

The professional judge's response includes clear references to Supreme Court cases specifically assessing testimonies in rape cases, as such crimes are of a unique and sensitive nature and therefore require uniquely developed assessment methods. In this case, the arguments presented in the dissenting opinion were supported by one lay judge. Nevertheless, the remaining two judges deemed that this argument had no bearing in relation to how they assessed the situation and instead voted not to convict. In addition, the lay judges' reasoning did in this case not refer to any legal sources.

The role of lay judges is to be representative of society, and as such provide a social influence on the legal process. The role of the professional judge is to be a representative of the legal system and act as a guide to anchor verdicts so that they do not fall outside of explicit written law. Consequently, the expected relationship between lay and professional judges would presumably be that lay judges provide insight into societal values and norms, which can be overruled by the professional judge only in cases where the results fall outside of the law.

The above cases instead illustrate several scenarios where lay judges overrule their professional counterparts despite the provided guidelines as to how applicable law

and precedence should be presented. In these cases, it is clear that the main concern is how to understand and apply law, which by design should not be lay judges' expertise nor their role within the context of the courtroom. However, these cases were still decided by outvoting the professional judge in how to interpret the law. These cases provide an insight into how the lay judges in reality do not need to adhere to the professional judge's advice regarding law interpretation and instead vote in accordance with their own understanding of how the law should be applied. In this way, lay judges act outside of their intended role when attempting to interpret law even though their purpose is to explicitly not be concerned with or experienced in the legal field.

This theme has so far only described scenarios where the professional judge provides assessment and arguments based on law but are ignored by the lay judges. However, there were also instances where these roles are reversed. In some cases, lay judges made clear references to legal precedence and other governmental guidelines in their assessments. For instance, the lay judges in one case raised concerns about the plaintiff's and the witness' testimonies:

> […] great care must be taken when identifying persons whom the person performing the identification does not already know before, as it is very easy for the person performing the identification to make a mistake (see, for example, the cases RH 1997: 11 and RH 2011: 35). [...] Even during the photo confrontation, [the plaintiff] and [the witness] had already been shown pictures of [the defendant], which means that the evidential value of the photo confrontation is very low.
>
> Attunda District Court, case no. B 2867-18, p. 7

In this case, the professional judge did not respond to this concern with any explicit legal arguments. Moreover, the professional judge provided no legal arguments at all in their dissenting opinion. It is here important to note that the professional judge may very well implicitly be grounding their arguments in either legal sources or simply their own legal background. However, the issue is that they do not present an adequate response to the lay judges' legal argument in the court case document.

In this way, court cases such as this indicate instances where lay and professional judges exchange their intended roles, which still result in legally binding verdicts.

5.1.1. Swedish law and legal pluralism

When adhering to theorizations surrounding public sentiments on justice, the lay judge system should be a satisfactory solution to incorporate public values without inviting unreasonable subjectivity in court, for criminal cases and otherwise. The lay judges are meant to act as representatives of society while being guided by the professional judge so that no verdicts actively break with the written law. However, there are few cases with dissenting opinions where legally anchored arguments are explicitly used. There is thus no clear evidence indicating that most panel members, not even the professional judges, consistently ground their arguments in law when arguing for a dissenting opinion, which would be in accordance with their intended role in the judge panel.

It seems as though legal sources in arguments do not necessarily hold any additional authority or importance within the context of a trial in comparison to other, arguably more subjective, sources. In this way, intrinsic legal pluralism can here be observed across the panel as sources and reasonings grounded in law are rarely used. Moreover, this is especially evident in cases where legal arguments are provided by the professional judge but are still overruled by the lay judges. This outcome occurs even though lay judges should not be able to go against the available legal guidelines provided by the professional judge. Similarly, when roles are reversed, professional judges are not expected to address legal arguments presented by lay judges in kind and present them in the resulting court case documents.

5.2. Theme 2: Social norms and values

The second theme includes references to social factors applicable to the case at hand. This includes explicit and implicit references to societal values and norms, or what the panel participants may consider as such within the context of each case. It also includes arguments which highlight unusual social circumstances that the panel

members consider important or relevant to their assessments. Within this theme, the focus is the panel members' *intention* to incorporate social factors that they perceive as related to societal sentiments on justice. This theme is far more common among both lay and professional judges than the use of legal sources. However, social arguments occur more often among lay judges than their professional counterparts.

The fundamental idea of the relationship between the panel members is that lay judges contribute their understanding of societal values to the deliberations concerning the verdict, while professional judges counteract with legal arguments when necessary. This can be observed to some extent, although not to the extent that it can be assumed to be the norm during trials. One textbook example can be identified wherein the lay judges provided a proposed punishment based on moral arguments, while the professional judge dissented using legal references. This case concerned several counts of incitement against an ethnic or national group (*hets mot folkgrupp*) by an identified far-right nationalist supporter. In the section where the reasonings behind the chosen sanctions are presented, the lay judges conclude with:

> The district court finds that the crimes have a total penalty value of two months' imprisonment. Several of the crimes are grossly offensive to people of colour and people of Jewish descent. The crimes are therefore of such a nature that imprisonment should be chosen as a punishment. Probation together with a fine or community service cannot be considered a sufficiently intrusive sanction.
>
> Uppsala District Court, case no. B 7580-20, p. 7

The lay judges are here solely relying on the offensive nature of the crime with regard to the targeted groups when deciding that imprisonment should be the sole alternative. They are thus representing fairly established societal values that regard the targeting of marginalized groups to be reprehensible and unacceptable. However, the professional judge instead argues that such subjective verdicts cannot be made unless the crime itself is considered "an offence of such a nature that there is a presumption of imprisonment" [*artbrott*]. Only these types of crimes can result in imprisonment as the presumed sanction in lieu of the alternatives, as they have been established as such by the Supreme Court.

> In the case NJA 2006 p. 467, the Supreme Court has stated that there are no statements from the legislator that give reason to generally assess incitement against an ethnic group as [an offence of such a nature that there is a presumption of imprisonment] and there is no established practice according to which incitement against ethnic groups should be considered such a crime. According to the Supreme Court, there are also no other circumstances in general with regard to the crime of incitement against an ethnic group that is considered to be relevant to this issue. Incitement against ethnic groups is thus typically not [an offence of such a nature that there is a presumption of imprisonment]. [...] The penalty should therefore not be determined as imprisonment.
>
> Uppsala District Court, case no. B 7580-20, p. 8

This is another example illustrating that legal arguments hold no greater authority than others within district court trials when there is dissent among the panel. It can certainly be argued that this is the very purpose of the lay judge system, as it exists to intervene when law drifts away from societal values. In the cases where the dissent is so clearly aligned with the roles of the panel participants, there exists definite value in a system that incorporates attitudes and sentiments from society in its entirety. However, cases where the judges' respective roles are as clear and outlined as in this case are few; most cases instead illustrate much more subjective standpoints from lay and professional judges alike.

The most common arguments which utilize social factors instead make assumptions about what constitutes normative behaviour, reactions, and feelings in the circumstances surrounding the criminal incident. In other words, both lay and professional judges tend to assess the evidence within the context of what they find reasonable and in line with normative behaviour.

> It is possible that the police perceived [the defendant] as upset and irritated, and that they therefore perceived that he resisted during the intervention. However, there has been no reason at all for [the defendant] to act violently partly because he did not commit any crime, partly because his family and in particular his children were present at the scene.
>
> Uppsala District Court, case no. B 6559-20, p. 4

In the above example, the lay judges value the defendant's testimony higher than two police officers concerning a charge of violent resistance (*våldsamt motstånd*). The main motivation for their assessment is that it does not seem *reasonable* that anyone who has not committed any crime would display aggressive or violent behaviour when stopped by the police.

Similarly, a professional judge in another case assessed intent based on assumptions of what does and does not constitute a panic attack:

> [The defendant] has stated that due to her panic attack she did not understand why the police would take off her clothes and that she reacted instinctively [...] Based on what [the defendant] and [the plaintiff] have said, it must have been clear to [the defendant] that she was subject to the exercise of authority even though she did not understand the purpose of this. Thus, even though [the defendant] suffered a panic attack, she has not misunderstood reality or lacked control over herself but was aware of what was happening and of her own actions. That [the defendant] then lurched and kicked in an attempt to tear themselves free from, among other things, [the plaintiff]'s grip must be judged as intentional action to prevent the exercise of authority.
>
> Solna District Court, case no. B 61-21, p. 6

All panel members commonly adhere to assumptions regarding "normal" behaviour in criminal cases, which in and of themselves are decidedly abnormal situations. The issue with utilizing normative behaviour as an argument is that there exist infinite conceptualizations of what constitutes "normal" in different social contexts. This issue is manifested in several cases of sexual assault included in the material, wherein lay and professional judges all make differing claims as to how to assess guilt and intent based on what each individual of the panel considers reasonable or believable. For example, one case outlined dissent with regard to how to assess the plaintiff's testimony. Two lay judges were critical of her statements and reasoned:

> The information provided by the plaintiff about alleged involuntary intercourse seems vague. […] She has stated during police interrogation that she fell asleep after the first involuntary intercourse, which is a very strange statement. Since she was not subjected to violence, it appears incomprehensible that she did not leave the

> apartment immediately if she had been subjected to involuntary intercourse.
>
> Uppsala District Court, case no. B 767-20, p. 8

The two sceptical lay judges are here assuming that a victim of rape should behave in a certain way. The fact that the plaintiff's statements contradict their expectations decreases the reliability of her testimony. In the dissenting opinion presented by the professional judge and the remaining lay judge, they argue against this assumption:

> It may be considered common knowledge that someone who is sexually abused often suffers from severe fear and "freezes", i.e., becomes completely passive and in this state has more difficulty putting various details into memory. We believe that what the plaintiff has stated provides support that she has been in such a state and that she has provided information in a way that can be expected of someone who has been sexually abused.
>
> Uppsala District Court, case no. B 767-20, p. 10

This argument finds strong support in contemporary research on sexual assault victims (see e.g., Galliano et al, 1993; Schiewe, 2019; Gbahabo & Duma, 2021; Karl Umbrasas, 2022). However, the dissenting opinion makes no references to research nor any legal sources. Instead, they claim that this established fact "may be considered common knowledge", thus reducing their argument into a normative assumption. It is also fairly clear that this argument is indeed not "common knowledge", considering how two out of four panel members do not deem this argument as merited. This case, along with other cases coloured by assessments regarding norms and reasonable behaviour, is met with an evident difference in conceptions of what constitutes 'normal'. It is also clear that lay judges can have vastly different perceptions of norms and values compared both to each other as well as the professional judge.

One additional tendency to invoke social factors into arguments was observable among mainly lay judges. Judges can sometimes choose to utilize social circumstances they deem relevant to the case in their deliberations surrounding the verdict. 'Social circumstances' in this context refer to arguments that utilize facts

regarding the involved parties' background, status, ethnicity, or other circumstances as a basis for their arguments. These arguments are instead referring to case-specific circumstances which are used to assess the involved parties' resulting *perception* of the incident. This can include arguments regarding language barriers between the involved parties, or assumptions of how the feelings of the plaintiff, the defendant, or the witnesses can affect their experience and consequent recount of the incident. In more extreme cases, social background was used to defend certain behaviour within the context of the criminal incident.

> What can be considered parents' rights versus a teenager's is also something that cannot be considered solely based on the Swedish way of looking at it. The mother and stepfather [the defendant] are from Ukraine and have lived in Sweden for a short time [The plaintiff] has lived in Sweden during the same time and learned the language, which meant that in the short term he learned his rights and thereby gained a not insignificant superiority over his parents. The parents, on the other hand, could not have been assumed to have learned how such issues should be handled in Sweden, e.g. through reports of concern to the social services, contacts with the school, BUP, etc. This means that they have to get some leeway in relation to parents who grew up in Sweden.
>
> Solna District Court, case no. B 10973-21, p. 10

This example concerns a case of domestic abuse between a teenager and his stepfather. In this case, the lay judges are continuously using assumed social circumstances based on the involved parties' background in their assessment of the case. One concerning aspect of this specific case is that two lay judges are dismissing all evidence based on the argument that specific social circumstances should excuse certain groups from adhering to the Swedish law. This argument leads to an acquittal despite protests from both the professional judge and the remaining lay judge, who in turn uses both legal and social arguments in their dissent. In this way, it is evident that it is possible to invoke subjective social factors in an attempt to rationalize or justify criminal behaviour in criminal court trials which will result in a legally binding verdict, at least until it is overturned in an appellate court.

5.2.1. Societal values, or assumptions of normative behaviour?

The idea that generalizable, comprehensive conceptions of the entire population's moral values can be represented by three people is the foundation of the lay judge system in district courts. What can be observed here is how lay judges adhere to their *perception* of what constitutes norms and social values. It is their own subjective understanding of societal values and what is "normal" that is represented in their assessments, with few explanations regarding *how* these values can be considered societal.

When considering the discussion on public sentiments on justice, it can be argued that this is the very purpose of the lay judges, as no single person (or three for that matter) can represent the whole public in a court case. Instead, the lay judges are expected to include their subjective inputs and perceptions and thus represent a small portion of the population who would agree with these assessments. This fundamental idea of lay judges can also be observed in the government's own explanations and discussions regarding the lay judge pool; the main focus is always on the representativeness in terms of demographics and ideology.

What can be observed in the application of this system indicates that the subjectivity introduced into the district courts does not always adhere to any societal representation whatsoever, and instead can become a potential platform for extremist influence. There are even instances when discriminatory or potentially illegal verdicts are ruled without intervention, which then cannot be reversed outside of an appellate court.

These findings show that lay judges can be unconsciously influenced by their personal opinions of what constitutes moral values and normative behaviour as a result of their background. However, they also show how professional judges are subject to utilizing their own idea of what is "right" or "common sense", which makes them depart from their role as purely a legal guide for the panel. It can thus be concluded that all members of the panel possess the prerogative to introduce subjective arguments and opinions as a basis for their assessments, and thus include

a plurality of social and subjective sources for their assessments beyond what is intended within the context of the lay judge system. In other words, they can introduce many unintended sources of morality into law in practice, even without adequate explanations outlining how their arguments are legitimate in terms of objectiveness, morality, or societal representation. From the perspective of "strong" legal pluralism, this is an understandable, maybe even unavoidable result of including social factors in court trials. The lay judge system is built on the assumption that the public's sentiments on justice are cohesive enough to be represented by the panel. It has instead become evident that many court cases involve a variety of social aspects that influence verdicts which do not correspond with each other, nor are they always congruous with applicable written law.

5.3. Theme 3: Personal opinion, or unclear source?

The last theme is by far the most common among both lay judges and professionals. This theme constitutes fundamentally opposing assessments of testimonies, evidence, or established circumstances pertaining to the incident at hand. Specifically, it includes assessments that seemingly do not refer to anything other than situational interpretation, subjective feeling, and underlying personal experience.

Dissent is most common in assessments of testimonies by the involved parties and witnesses. In many cases, both the verdicts and the dissenting opinions were mainly based on this form of subjective assessment. In many cases, the dissent concerns fundamentally different assessments of the credibility of testimonies, especially in relation to the requirement of providing proof of crime *beyond any reasonable doubt*. For example, in one case of unlawful threat, the entire verdict was based on this manner of assessment.

> As stated above, the plaintiff's information provides strong support for the prosecution. However, that is not enough for a conviction. The presented evidence consists of [the witness]'s statements. As she has not been able to specify when [the plaintiff] should have been

> threatened by [the defendant], the prosecutor's evidence is not sufficient.
>
> Solna District Court, case no. B 6964-20, p. 6

The dissenting opinion was then based on an assessment of the very same statements, but with a fundamentally different outcome:

> [The plaintiff]'s information provides strong support for the prosecutor's allegations. Although [the witness] could not state exactly when the threat should have taken place, she has confirmed [the plaintiff]'s statement that [the defendant] called her and said that he would kill her. In view of this, the prosecutor's evidence is sufficient.
>
> Solna District Court, case no. B 6964-20, p. 8

Some verdicts also show an implicit priority ordering of testimonies and other evidence. In these cases, Lay judges generally follow generalized assessment methods up until the final arguments resulting in the verdict. When presenting the verdict, the arguments only utilize a small portion of the information presented in court. The remaining evidence is not considered, regardless of whether it has previously been deemed credible; it is simply not addressed in the final verdict. One example is a sexual assault case, where a variety of evidence is presented in the form of testimonies from the involved parties as well as witnesses, journal entries from medical and psychiatric examinations, and text messages. most of the evidence was acknowledged by the full panel as credible, and to the plaintiff's advantage. However, the defendant is acquitted by two lay judges with the following argument:

> Both [the defendant] and the plaintiff have overall given the impression of being credible. A central aspect is also that [defendant]'s version of the incident is supported by what his stepfather has told regarding what the son has relayed from the incident. [...] Even the plaintiff's behaviour after the intercourse, going into the parental home with him and also offering to accompany him to the station, provides some support for [defendant]'s version that the intercourse was in fact voluntary on her part.
>
> Solna District Court, case no. B 9561-21, p. 15

The last sentence is not corroborated by anyone other than the defendant, and the rest is still solely based on the defendant's retelling of events. While the lay judges state that they value both testimonies equally, this indicates that they value the defendant's testimony over the victims, as well as also all other witnesses, evidence, and circumstances that the professional judge later argues *should* decrease the reliability of the defendant's testimony. All assessments brought forth in the dissenting opinion reference information that was not mentioned in the lay judges' verdict.

It is not only the lay judges who apply subjective assessments in trials. The analysis even indicates that professional judges make unfounded assessments to an even greater extent than lay judges overall. As an example, one case of assault where mainly focused on the fact that the plaintiff had left differing testimonies during the police interrogation compared to the main hearing. The latter testimony was more to the defendant's advantage. The lay judges accept this revised version of events as an adequate basis for the verdict based on a prescribed legal methodology which states that "When statements made during interrogations or the preliminary investigation are cited at the trial, great care must be taken in the evaluation of these statements." (B 4651-20, p. 8). Conversely, the professional judge does not accept the very same explanation:

> Unlike the majority, I consider, even while taking into account the caution that shall be observed when evaluating statements from interrogations during the preliminary investigation, that the statements provided by [the plaintiff] during the preliminary investigation should provide the basis for the district court's assessment. [The plaintiff] has, in police interrogations held on the same day and the day after the incident, provided information that provides support for the prosecutor's allegations of crime. His explanation at the main hearing as to why what he said during the preliminary investigation was fabricated seems to be an afterthought. It is also the case that the story that [the plaintiff] submitted at the main hearing contains contradictions and seems to have been prepared.
>
> Solna District Court, case no. B 4651-20, p. 10

The professional judge does not provide any explicit reasons as to *why* they judge the same testimony so differently. In addition, this also indicates an implicit prioritization of certain testimonies over other evidence or prescribed assessment methods, seemingly grounded in subjective reasons alone. While the professional judges' assessments are generally more detailed and comprehensive than lay judges', the overall lack of objective sources remains.

The types of ungrounded assessments outlined in this theme also usually occur in assessments of mor tangible evidence such as forensic findings, medical-, psychiatric-, and risk assessments, recordings, and photographs. These forms of evidence are generally used to improve or decrease the credibility of testimonies from either the prosecution or the defence. For example, in a case when guilt was already established, the dissent concerned whether the extent of the criminal act as presented by the prosecution could be supported by the presented evidence.

> The additional supporting evidence in the form of medical records and photographs shows that [the plaintiff] shortly after the incident showed injuries and bruises on his face, which provides support that he was subjected to violence during the incident. However, it is not possible to conclude from the pictured injuries that it was a question of all the violence that [the plaintiff] reported. On the other hand, the district court considers that it is proven that [the defendant] threw the glass at him.
>
> Attunda District Court, case no. B 5611-20, p. 4-5

The assessment made by the lay judges in this case established that the additional accusations of assault could not be supported by the photographs presented as evidence. This assessment also resulted in a lower sentence. However, two panel members, including the professional judge, did a fundamentally different assessment of the same photographs:

> The statements [made by the plaintiff] are also supported by several photographs, which in our opinion prove that there was more violence than just the glass that hit [the plaintiff's] face. The photographs and the journal entry provide support for injuries consistent with the

> statements regarding additional violence in the form of several fist blows.
>
> Attunda District Court, case no. B 5611-20, p. 7

Physical circumstances relating to the criminal incident are also used by both lay and professional judgments in their assessments. These circumstances are used as a basis for both assessments of testimonies as well as together with other evidence to assess guilt or decide punishment. As is the main issue for this theme, different panel members tend to assess the same circumstances in contradictory ways. In one example case, two lay judges argue that the plaintiff's statements regarding how she was a victim of sexual assault by a taxi driver should be doubted.

> As stated above, the district court must assume that [the defendant] drove the car at normal speed. This challenges the validity of [plaintiff's] story and also provides support for [the defendant]'s version of events. [The defendant] may, while driving the car at normal speed, have difficulty touching [the plaintiff] throughout the journey in the way she has talked about.
>
> Attunda District Court, case no. B 268-21, p. 8

This statement was contradicted by the remaining panel members, who argued that this circumstance should have no bearing on the outcome of the case. There is once again no telling whether there are any underlying reasons which produce these contradictory assessments. There is furthermore no observable difference between how lay and professional judges assess evidence. This conclusion is in part derived from the fact that there are no notable differences in the reasons provided in the court case document. It is also in part drawn from the fact that there is one lay judge who agrees with the professional judge in more than half of the analysed cases. In other words, there is a majority of cases where one lay judge shares their assessments with the professional judge, which indicates that there is no clear divide between how lay judges and professionals assess cases to reach a verdict.

5.3.1. Exacerbation of unintended legal pluralism

It can be argued that the absence of adequate explanations could be a result of lacking reflexivity among the panel. The panel members might not only exclude explanations for their arguments in their verdicts, but they may also not reflect on the underlying reasons for their assessments themselves. According to John Griffiths (1986), understanding law as dominant over other social influences leads to the misunderstanding that social influences are not present within the legal system outside of controlled and conditional inclusion. Griffiths argues that to fully understand legal pluralism, one must acknowledge that social influences are always an implicit part of the legal system. Social norms and societal expectations are the foundations of law itself, which makes it hard to expect the exclusion of social values and norms when utilizing these very laws in practice.

This last theme, however unexpected, is further proof that unintended legal pluralism can manifest in court cases among both lay and professional judges. All panel members conduct a variety of assessments based on reasonings that are not accounted for in the final verdict. Regardless of their underlying reasonings, they seem to assume that the argument itself is enough justification for their opinion. They do not see the need to adequately account for the sources of their assessments. This also opens up for more social influences on law that may have been intended with the lay judge system; based on the official verdict alone, there is no way of knowing if the arguments are grounded in law, societal values, sub-cultural influence, or simply personal opinion.

6. Concluding Discussion

The results of the thematic analysis show a variety of argument constructions and underlying reasonings. Most importantly, these reasonings do not correspond with the panel members' assigned roles to any greater extent. Professional judges, whose role is to act as a legal guide and a representative of law and the legal system, utilize normative and personal evaluations much more often than they reference legal sources. Similarly, lay judges with no legal knowledge utilize personal opinion and their own interpretation of legal sources continuously in their assessments in court. In addition, lay judges do not necessarily adhere to *societal* norms and values in their assessments. They instead utilize personal assumptions of what they *perceive* to be normative. They also occasionally include social factors that they deem relevant to the case, even though these cannot or should not be considered as a variable according to the law.

In all cases included in the analysis, the lay judges overruled the professional judge in the final verdict. This occurred regardless of the professional judge's arguments, legal or otherwise. In addition, a majority of cases included dissent not only between the professional and the lay judges but also among the lay judges themselves. Against the backdrop of these findings along with the knowledge of the differing, established roles of the panel members, what can be said about the relationship between the lay judge system and the rule of law? And how can the similarities between lay and professional judges' argument construction be considered within the context of the discussion relating to the lay judge system's legitimacy?

6.1. A production of subjective influence

The main purpose of lay judges is to provide insight for the people into the legal system, as well as influence over verdicts in cases where the law is insufficient or inapplicable. They are otherwise meant to adhere to the legal guidelines of the professional judge to protect the legal system from the politicization of court

processes and other undue influences. This is a system constructed to incorporate influences from society without negatively affecting the rule of law, and instead strengthen the legitimacy of the current law in practice.

With regard to the first research question, it can be observed that the application of this system becomes much more subjective than what was likely intended in the construction of the current system. The overall assessment of both lay and professional judges' arguments indicates no significant differences in sources used for arguments, nor any notable disparity in the rate each source is used. In other words, the analysis shows that lay and professional judges tend to use similar types of arguments in fairly equal proportion. They also indicate that the most common form of argument is not legally anchored reasonings, nor references any societal values or norms. Instead, most arguments are situated assessments of specific case details which does not provide any legal, societal, methodological, or otherwise objective source for their reasonings.

Concerning the second research question, the findings show that the hierarchal ordering of law over other moral authorities does not work as intended in cases where lay judges overrule the professional judge concerning legal arguments or interpretation of law. The sole purpose of the professional judge - to act as a legal guide and intervene when verdicts go against the law - is not reflected in reality. The professional judge can in practice be overruled regardless of how legitimate their legal arguments are, not only in cases where all lay judges agree but also in some cases where there is no majority. The findings further indicate that lay judges rarely utilize objective arguments for "common sense" or societal values; they instead seem to rely on their subjective, situational impression of each case.

In sum, the lay judge system contains some structural flaws which could invite individual subjectivity and inconsistent rulings into the court process. This is especially concerning when considering how there exist no real requirements for the panel members to extensively explain their reasonings and rulings in court case documents. The fact that the panel members are not required to adequately account

for their reasonings means that there are no tangible legal structures preventing law in practice from including personal opinion without real adherence to democratic representation in the legal process. Moreover, additional sources for arguments can come from both lay judges and professionals. In this way, additional sources other than law are utilized in the legal system in a manner not intended by the prescribed lay judge system, which means legal pluralism is introduced into the legal system without oversight, control, or method. This affects the transparency and consistency of applied law, which in turn could harm the public's insight into the legal process as well as their perception of the legal system.

Just like the current contradictory literature on lay judges' representative nature, this study finds no conclusive explanation as to how lay judges effectively fulfil their prescribed role. Lay judges are in practice not required to adhere to any societal sentiments in their arguments, nor necessarily any legal argument or interpretations provided by the professional judge. However, there is also no indication that professional judges adhere fully to their role by consistently providing legally or methodologically anchored reasonings for their dissent.

It can be *presumed* that the professional judge should have better judgments regarding presented evidence based on their education and experience. This presumption would be in line with Diesen's (2015) studies specifically analysing assessment accuracy. If this is the case, it can be argued that cases where lay judges go against the professional judge in how evidence and testimonies should be assessed to the point of overruling the verdict constitute a threat to the lay judge system's legitimacy. Conversely, the assumption that professional judges possess a higher capability to understand and interpret presented evidence does not mean they are always correct. This point is particularly important when situated within the current context, where professional judges in many cases do not adequately present any legal or methodological reasons for their assessments, as is their role within the panel.

It is also important to note the importance of public perception of the legal system, as well as the influence of the media. As previously mentioned misconceptions the public might have regarding the effectiveness and efficacy of the legal system could exacerbate the threat to rule of law to a greater extent than actual flaws in the current system. The authority and legitimacy of the legal system, which has a direct effect on the rule of law, are dependent on public perception. In a divided society regarding crucial questions relating to law and its implementation, mistrust and misunderstandings increase. Media coverage of flawed, erroneous, or extreme court rulings can cause real harm to the public's perception of the legal system's legitimacy, which in turn affects rule of law.

While the material in this study showcases several flaws in the current lay judge system, it cannot be ignored that dissenting opinions among the panel are overall a fairly rare occurrence. Furthermore, cases where the professional judges are overruled only constitute less than 1 in 4 of cases with dissent. Studies on public sentiments on justice by both Balvig et al (2015) and Olaussen (2014) show that people's sense of justice across Scandinavia is more in line with current legislation than public discourse would suggest. This would also explain low dissent rates in Swedish courts; if general sentiments on justice still correspond well with the law, there is rarely a need for dissent among the judge panel. The fact that overall sentiments on justice are still in agreement with the legal system should in this sense have a moderating effect on potential threats to the rule of law. As long as societal values remain mainly cohesive, the current flaws in the system should remain as flaws rarely exploited.

Furthermore, while there exist no clear regulations that guarantees that lay judges are adequate representatives of public sentiments, there is nothing that indicates that the removal of lay judges would improve the rule of law. Diesen (2001b) and Anwar, Bayer, & Hjalmarsson (2018) argue that no legal system is without flaws and biases. There is thus no evident guarantee that professional judges are exempt from bias. This argument is only strengthened by the conclusions reached in this

study. Therefore, if court judgments cannot adhere entirely to methodology and science, there is room for lay judges in court.

6.2. Beyond the dichotomy of democracy and technocracy

Previous literature on lay judges can be summarized into a discussion contesting the value of democracy against the legitimacy of technocracy. Lay judges represent the democratic aspect wherein society can influence law, while the technocratic argument highlights how the education and experience of professionals yield increased accuracy, consistency, and legitimacy with regard to law in practice. However, this discussion assumes that the prescribed roles of each position are strictly outlined and adhered to in practice. This study's findings instead suggest that the roles of the lay and the professional judge are not necessarily followed when dissent occurs in court.

Another finding that has not been discussed in previous research on lay judge systems is the fact that surprisingly little information from the panel deliberations is required for the official verdict. Considering that the court case documents are the only documentation of a trial and its verdict, it is curious that the panel is not required to adequately explain the reasons for their arguments and assessments – especially when there are dissenting opinions. Professional judges could instead be expected to clearly ground all arguments in their education and experience, just as lay judges should also provide clear reasonings that show how their arguments correspond to their prescribed role in court. When the panel members are not expected to provide any explanation or arguments for their assessments that prove that this is the case, there is room for questions regarding the arguments' legitimacy. This norm results in court verdicts wherein the actual reason for the differing assessments is not presented as a part of the official documentation; the verdicts do not demonstrate that panel members have been grounding their assessments in sources appropriate for their prescribed role.

These findings can be explained by the theorizations of both public sentiments on justice along with the "strong" approach to legal pluralism. The main use for public

sentiments on justice in this thesis is the issue of utilizing few to represent many. The current system assumes that representation can be achieved through a democratic representation grounded in demographics and ideologies. The assumption that the personal opinions of a specific group of politically affiliated persons represent the entire Swedish population can be argued to be underdeveloped reasonings blind to the modernizations and developments occurring in society.

What is particularly unique in these findings is the observations of manifested legal pluralism inside a system that understands legal pluralism as hierarchical, structured, and strictly categorized. The understanding of rule of law within the Swedish legal system is that the law maintains the highest authority in the legal process and protects individuals from capricious, subjective influence from an inconsistent society. The consequent understanding of legal pluralism, which provides the foundations for the lay judge system, assumes that law always holds authority over other, social influences within the legal system. By utilizing the "strong" approach to legal pluralism, a new perspective can be introduced where the true importance of social factors and internalized norms can be considered when discussing the rule of law.

What can be observed by utilizing Griffiths' (1986) approaches to legal pluralism is that the Swedish legal system generally understands law and the legal system through a "weak", juridical approach to legal pluralism. In other words, the law is considered an authority in and of itself and superior to other moral authorities, especially within the context of the legal system. Similarly, the entire system is constructed upon the fundamental understanding of law as state-bound, nationally cohesive, and self-validating. Conversely, the current lay judge system is an acknowledgement of the fact that law *needs* to correspond with contemporary values and normative sentiments on justice. In this system, lay judges symbolize an attempt to influence law in practice so it corresponds with public sentiments to a greater extent.

The flaw in this system can be explained within the construct of this "weak" legal pluralism and its consequent understanding of the law. For a strong rule of law to be established within this system, it is completely reliant upon an assumed unity and coherence of normative values and sentiments on justice in the society it governs. If society instead is splintered and divided on matters of law and justice, especially concerning controversial, political topics, the authority of lay judges can instead become a threat to the rule of law. As a result, the variety of values and norms within society becomes a form of legal pluralism in practice within the legal system, as court verdicts are decided based on contradictory moral values and without regard for the law.

6.3. Implications for socio-legal discussions on national legal systems

The importance of including normative aspects in analyses of rule of law is a fundamental aspect of socio-legal perspectives on regulatory systems. However, what should be further considered based on the findings in this thesis are the complications that occur when analysing social norms and values as nationally cohesive or neatly divided in accordance with prescribed social groups within society.

It should also be noted that there is an evident loss of relevant information in the court case documents. Verdicts were in some instances based on referrals to information not included elsewhere in the document. While professional judges' assessments in most cases included more extensive and detailed accounts, unclear and underdeveloped reasonings occurred among both professional and lay judges. In many cases, the professional judge's dissent referenced a large amount of information and assessments that were not at all mentioned in the reasonings provided by the lay judges' verdict earlier in the document. This means that further analysis of court rulings and panel dissent must include classified information gathered through fieldwork and interviews. It would therefore be of importance to conduct studies in collaboration with Swedish authorities in order to develop and utilize more effective methodologies. Collaborative studies would also increase the

conflation of state investigation and other research, which could help consolidate the discrepant results colouring current research discourse and contribute to increased knowledge and understandings of the current systems flaws, strengths, and future potential.

The main argument for a lay judge system is one of democracy with an increased influence of contemporary societal values, which assumes a coherent, consistent, and undivided nation in terms of values and a sense of justice. In globalized, diverse societies of the modern world, it can be argued whether this is ever the case. The arguments for and against the lay judge system are too entrenched within the constructs of the *national* legal system, which consequently ignores the realities of modern societies and its influences. In societies where influence can stem from anywhere in the world with the help of the internet, and where each nation possesses a plurality of languages, ethnicities, values, and cultures, a legal system that relies on national solidarity has perhaps started to become inadequate. Similarly, assuming that certain demographics indicate a specific set of values and beliefs had also resulted in an underdeveloped attempt to include the social sphere into the legal system.

What should instead take a more central position among research within this field is a more inclusive understanding of what truly constitute sources to law. This could generate further deliberations and discussions on how the many social influences on the legal process can contribute to a strengthened rule of law, as long as it is conducted in a manner that fully understands how the social world influences the deceptive rigidity of the legal system.

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