The lawless frontier of the #MeToo campaign

By Richard Hoffman
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The comment below provides an analysis of the #MeToo movement as an immense violation of traditional bourgeois democratic legal norms.

There are developments in the legal sphere, over the course of the crisis of US capitalism during the past 25 years, which stun the sensibilities of those committed to uphold the legal-constitutional foundations of democracy. Some of these readily spring to mind: the stolen election of 2000 when the US Supreme Court ruled that US citizens did not have a legally protected right to vote; the executive actions at Guantanamo Bay, in violation of the ancient right of *habeas corpus*. The extra-judicial killings sanctioned by the Obama administration in violation of the right to due process.

The #MeToo Campaign, a movement backed by the Democratic Party, has advanced another fundamental attack on the rule of law—upon the central democratic legal principle that there can be no punishment without a law; *nulla poena sine lege*.

The light-minded and cynical attitude of the leaders of #MeToo was breathtakingly revealed in the recent calls for complaints and exposures by the *New York Times* for "gray-zone sex" experiences, where college students from around the world were invited to submit material, including text messages and photographs, where they had agreed to have sex, but the consent came with some hesitation, qualms or remorse.

The exposures have nothing to do with any violation of an existing law, and in a column in the *Times* on February 4, Dr Catherine MacKinnon wrote gleefully: "#MeToo has done what the law could not," as if that were self-evidently a wonderful thing. One needs to think a little more seriously, however, before climbing on this bandwagon of self-congratulatory abandonment of centuries old legal principles, which were won in bloody struggles against the oppressions of the state.

It is timely to recall, in the current climate of ignorant, post-modernist contempt toward law and constitutionalism, the dictum of Justice Felix Frankfurter in 1952:

> A constitutional democracy like ours is perhaps the most difficult of Man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The founders of this nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing.

The hysterical and accusatory character of the #MeToo movement reminds one of precisely why the rule of law and constitutional rights became the bulwark of a free and democratic society, against both the predations of the state and the justice of the lynch mob. It also highlights why law, based on concrete and definite norms and principles rather than arbitrary and capricious categories and subjective thoughts, became the institutional foundation, in democratic societies, for regulating social behavior, the powers of the state, and the criminal law.

Fundamental to the rule of law was the ascendancy of reason over irrational and subjective thought, in the creation of a normative regime regulating social conduct.

Criminal responsibility

Anglo-American criminal law developed principles over centuries, resulting in certain definite acts, coupled with specific states of mind, constituting criminal offences and, therefore, punishable. In democratic-bourgeois societies, which had abandoned overtly religious elements in their legal systems, universal normative conceptions led to the development of specific offenses, such as homicide, property offenses, personal injury, assault and so on. In the area of sexual offenses, the essential normative element is consent, and the criminal law, in enlightened jurisdictions, has no concern with consensual adult behavior.

In the development of specific crimes, modern criminal law required an essential mental element for the commission of a felony, such that a crime was constituted by a forcible act committed with a guilty mind (*"mens rea"*). #MeToo has had practically no regard to the actual state of mind of the alleged perpetrator, but views as primary the state of mind of the accuser and, in particular, the accuser's feelings. On the critical issue of consent, the attitude of #MeToo is that it is largely, if not entirely, irrelevant. The "gray zone" sexual experiences sought by the *New York Times* are concerned exclusively with the state of mind of the accuser.

Indeed, #MeToo is substantially a vast inquisition, where the issue of consent has largely been abandoned as a central consideration. "Gray zone" sex is assumed to have been by consent, and so there is an express recognition that there was no breach of any law, but the punishment will be meted out through public humiliation and ridicule. It must surely shock the conscience of any right-minded person that a man, who had no reason to think there was any question about consent, should subsequently be held out to public exhibition and derision because of the undisclosed state of mind of a previous sexual partner. The subjective, personal and arbitrary are being advanced as an alternative basis for establishing criminal liability.

No punishment without a law

Fundamental to all civilised systems of criminal law is the doctrine *nulla poena sine lege*—no punishment without a law. There are hundreds of offenses on the criminal statute books. Assault, sexual assault and indecent assault are serious criminal offenses, attracting heavy sentences upon a conviction.

"Inappropriate behavior," is not a category of conduct known to the criminal law. Nor, for that matter, is making a person feel uncomfortable. Awkward advances without a guilty mind is also not a criminal offense. In the absence of criminal intent, the law in democratic societies does not seek to regulate the whole range of human behavior and interaction. For example, the law does not punish parents who are emotionally neglectful of their children, causing hurt feelings and possible subsequent emotional difficulties for such children in later life.

Enlightened legislatures leave a multitude of spheres of human-social interaction and behavior alone, because modern rational sensibilities accept that a very large part of human existence is properly a private matter, in which the state should keep out. The #MeToo campaign wants to substitute itself for the state and impose its own code. For all its pretense to be a liberal and progressive movement, it is in fact utterly reactionary, intolerant, aggressive, and, I think it can fairly be said, fascistic in its approach to the question of law and legality.

#MeToo has expressly rejected the role of due process, the presumption of innocence, the careful, dispassionate consideration of evidence, the right of a defense, and the central democratic axiom that there should only be punishment where there is a law. Peoples' lives are being investigated and destroyed by accusation alone, and in circumstances where no crime is even attempted to be identified.

The inchoate, indeterminate characterisation "inappropriate behavior" has been advanced as an ersatz legal category to justify ridicule, humiliation, destruction of reputation and the evisceration of peoples' lives. Amongst the victims are those who have made extraordinary contributions to society, culture and humanity. All this means nothing to #MeToo, which is motivated by hubris, and intellectually underpinned by an arrogant post-modernist relativism, which barely conceals its vicious underbelly.

The last time in western society an open and direct attack on the doctrine "no punishment without a law" was undertaken, was in Nazi Germany, under the leadership of the Nazi crown jurist Carl Schmitt. As leader of the "*Rechtserneuerung*" project (Legal Renewal), Schmitt articulated a distinctly National Socialist (Nazi) legal philosophy. Such a philosophy had to represent a total break with the norms of the "*Rechtsstaat"* (Rule of Law State) and he made it clear that one of its fundamental principles—no punishment without a law—would have to be completely rethought, if not discarded. Schmitt provided the legal theory backing the Nazis' quest to have Van der Lubbe, the man convicted of the Reichstag fire, hanged. This required a retroactive change to the sentence for politically motivated arson, which the judges refused. Schmitt advanced the following politico-legal analysis:

> Everyone understands that it is a requirement of justice to punish crimes. Those who, in the Van der Lubbe case constantly spoke of the *Rechtsstaat* did not place primary importance on the fact that an evil crime must find a just punishment. For them the issue lay in a different principle which, according to the situation, can lead to the opposite of a just punishment, namely the *Rechtsstaat* principle of no punishment without a law, *nulla poena sine lege*. By contrast those who think justly in a case see to it that no crime remains without a just punishment. I pit the *Rechtsstaat* principle against the principle of justice: *nulla crimen sine poena*—no crime without a punishment. The discrepancy between the *Rechtsstaat* and the Just State then becomes immediately visible.
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> [Carl Schmit, *Nationalsozialismus und Rechtsstaat*; Juristische Wochenschrift 63, 1934]

The #MeToo campaign, a movement of the privileged, upper middle class, is of a piece with the general assault on constitutional norms and legal principles undertaken by the ruling class since the stolen election of 2000. This self-absorbed and self-righteous milieu long ago abandoned any adherence to constitutionalism. Its outlook was most cogently expressed by Obama's attorney general, Eric Holder, when he declared that due process did not require courts. #MeToo agrees with that perspective.

The great crisis and decomposition of American capitalist society is creating monsters. Donald Trump is one such monster. The #MeToo witch hunt is another. They are both on the road to creating a "Just State" according to the Schmittian conception.