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Chapter 1
Grandfather

1.1 The Paradox: A Law Abiding Criminal

Grandfather was a convicted man. Still, he was a man of honor. Not only was he a man of honor, but he was also an auditor. First as municipal auditor in the city of Rjukan, then as head of audit in the Norwegian Confederation of Trade Unions, LO. An auditor enforces the law. An auditor must be of impeccable character, reliable and accurate. He was also a member of the Tinn municipal council and the conciliation board for tax complaints. He had the trust and was one of the pillars of his community.

Grandfather was proud of many things, his children, grandchildren and much more. He had been on the Norwegian aid committee for Spain and organized support for the Spanish people during the civil war against Franco. During the second world war, he continued in his position in the nazified LO and was the liaison to the illegal Trade Union Committee, which coordinated the resistance work in the trade union movement. An important task was to protect LO and the confederations against the National Socialist rulers supplying themselves from the union coffers. He protested when the nazified leadership wanted to use LO's money to support *Nasjonal Samling* (NS, Quisling's Party) and their activities. NS started tapping the Shipping Association instead, perhaps they met less resistance there.

But one of the things he was proud of puzzled me. He was proud he had a criminal record. On 9 August 1928, Tinn District Court sentenced him to pay a fine of NOK 50. This corresponds to approximately NOK 2000 today (200 Euro). Good money for a father with a wife and 3 children to support in a time of economic hardship and wage cuts. He was born in 1893, so there was no question of any youthful sin. As an adult, he had committed a crime for which he had been punished, and he was proud of it.

For me as a young law student, this seemed strange. Not only was he proud, but he told of it to a youth at the start of a legal career. What kind of respect for law and

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justice would this instill in the future jurist? My grandfather was a person I looked up to.

"There was no true justice. It was class-domination by biased law," said grandfather. At that time, it was the Marxist-Leninists who talked about class oppression, class judges and student-worker unity. They went around the reading rooms and canteens at the university and collected money for striking workers at *Norsk Hammerverk*, *Norsk Champignon* and *Vinmonopolet* and talked about armed revolution and support for *Khmer Rouge* in Kampuchea. But grandfather had little sympathy with them, moreover, no one was at this time subjected to punishment, neither the striking workers themselves nor the sympathizing students. Had grandfather been like the Marxist-Leninists in his youth? I couldn't get that to add up.

1.2 Partial Courts and Class Rule?

Nor did my grandfather's statement about biased law agree with what I learned as a young law student. I knew of course about the revolutionary line of the Labor Party and its connection with the Russian Revolution in the early 1920s. I also knew that prominent Labor Party politicians and communists, such as our later Prime Ministers Einar Gerhardsen and Oscar Torp, the labor leader Martin Tranmæl and a number of others, had been sentenced to prison terms in the great military strike case (see Rt. 1924 p. 861) for having encouraged conscripts to refuse to perform military service.

A case against the communists Kyrre Grepp, Olav Thorsen and Rudolf Nilsen was central to the syllabus. The three were accused of having introduced communist propaganda from Russia. As there was no law which expressly forbade this, the prosecution had brought charges under a law which regulated the importation of various types of goods. The law was given to regulate the importation of goods during the First World War to secure supplies to the country and protect the country's economy under the conditions that prevailed during the First World War. The Supreme Court acquitted the accused.

Strong accusations about class justice and about courts being an instrument of the capitalist ruling class have over time been directed at the judicial apparatus. These accusations assert that the courts are not independent and neutral. Generally, such claims lack substance in the history of Norwegian law, although there are certain notable exceptions (Ringvej 2005). Our highest court was fairly balanced in dealing with opposing viewpoints in the class struggle, writes Erling Sandmo, author of the major work on the history of the Supreme Court of Norway in the twentieth century, refuting claims that the court was an instrument of class domination (Sandmo 2005, p. 246).

In May 1928, over 4000 construction workers went on strike to protest an arbitration award that reduced wages and collective agreements by between 12 and 21 percent. 1928 was a dark year for the Norwegian labor movement. Unemployment was high, the workers' organizations were divided, and the workers had had to

endure several years of declining wages. The authorities had already stopped strikes with forced arbitration for several years, and so this time too.

The striking workers received wide-spread sympathy and support. Since the strike was illegal, the trade unions could not support them financially or in any other way. A new law made them liable to pay damages to the employers if they did not do everything within their means to prevent and contest illegal actions. The unions therefore had to publicly distance themselves from the strike. As the striking workers were not formally unemployed, they received no support from the welfare services, and there was great hardship. The government even issued an order to the local governments not to support the striking workers or their families. But support groups were organized, and money was collected for strikers and their families, even though this was a criminal offence under the new laws. The support came from all over the country, including the small industrial town of Rjukan, up in the mountains of southern Norway. The town is famous for its innovative production of fertilizer from thin air, with the aid of hydro-electric power.

We let professor and Rjukan historian Helge Dahl narrate the events (Dahl 1984, p. 163):

> On 12 June 1928, *Rjukan Arbeiderparti og Samorganisaison* (The Labor Party and the local coordination body between the party and the trade unions) organized a mass meeting with speeches by Kristian Hansen (chairman of *Rjukan Arbeiderparti*) and Jakob Friis (editor of *Rjukan Arbeiderblad*, the local newspaper of the labor movement). The meeting joined the protest that had been raised around the country against the two laws (Arbitration Act and Penal Code § 222 II), expressed its warmest sympathy for the construction workers' action and recommended the trade unions to give the strikers all possible support. Furthermore, the meeting decided to start a fundraising. 1,100 people contributed and were named in the *Rjukan Arbeiderblad*. Shortly afterwards, the police cracked down and fined 100 people. The next day they fined another 100.

According to *Arbeider-Avisa*, a socialist newspaper, this was the worst job the police had experienced, "because everywhere they are met with sneer and laughter".[1] The encounters had repercussions in the courts when those fined refused to accept the fines.

Dahl continues: "In August, Dalastøl (Knut Dalastøl, business manager of *Rjukan Arbeiderblad*) and municipal auditor Torjus Graver stood before the district court in Tinn. One had contributed 3 kroner, the other 2. The court was administered by magistrate Egil Elster, the prosecutor was police chief Berg, and the defense lawyer Emil Stang, the well-known Labor Party politician. Lay judges were not summoned as the prosecutor claimed that it was difficult to obtain lay judges who would not allow political consideration to come into play."

The Criminal Procedure Act had been amended in 1927, with a rule that lay judges should only be summoned in misdemeanor cases "if the court deems it necessary". The judge could therefore refrain from summoning lay persons. Dalastøl and Grandfather each represented their group of fined, those who had been fined NOK 100 and those who had been fined NOK 50. The magistrate wanted these two

[1] Arbeider-Avisa Tuesday 3 July 1928.

as test cases before the rest, in groups of 5 and 5, were to be summoned until all 200 who had received fines had received their judgment.

Further, according to Dahl: "The two defendants used the opportunity to agitate against the arbitration law and even lectured the court on Ricardo's iron law of wages. The preliminary injunction was upheld for both, and they were also ordered to pay NOK 10 each in legal costs. They appealed the verdict all the way to the Supreme Court."

This is how Helge Dahl describes it. David Ricardo was one of the nineteenth century's most influential economists. He had a great influence on, among others, Karl Marx. His "iron law" stated that wages in an unregulated capitalist market would always remain at the level of subsistence and would not rise higher.

After the verdict, a protest meeting was held in the community house, where lawyer Emil Stang, who had represented the accused, and editor Friis of the *Rjukan Arbeiderblad* spoke to a full house. The meeting adopted the following resolution:

> Workers at Rjukan, gathered for a meeting in a number of around 400, strongly object to Magistrate Elster's arbitrary behavior during the trial against two of the workers' trustees. First, the magistrate refused to let the workers have their case dealt with according to a democratic legal principle, as he failed to summon lay judges. But apart from this, the verdict that has been handed down is a mockery of the perception of justice of the entire working population of Rjukan.[2]

"Friis wrote an outraged editorial as a comment on the judgement," continues Helge Dahl. "Among other things, he pointed out that the enragement over the unfair sentences was probably going to be felt in the workplace. The workers' awareness of the law meant nothing to the small group of people in power who owned the factories and the law and the villas, and thus also the chief of police and the magistrate."

The meeting threatened with strike if any of the convicted were to be sent to prison. Of course, they would not pay voluntarily. *Telemark Arbeiderblad* gave the following comment: "Considering that legal proceedings are pending against 300 of the approximately 1000 contributors, the resentment that the first judgment triggered will undoubtedly grow over time and could entail the most serious consequences."[3]

Could this be the whole story? Did they try to punish people for having given a few kroner in support to people who otherwise were going to starve? A fundraiser had been held, and many people had made contributions. Why in particular did grandfather and one other person end up in court, had they done something that does not appear in the story, which could justify prosecution and punishment?

[2] Telemark Arbeiderblad Saturday 11 August 1928.

[3] Telemark Arbeiderblad Saturday 11 August 1928.

1.3 In Search of an Answer

Trying to find an answer to this led me to the history of the penitentiary laws. In connection with the description of these laws professor of constitutional law and legal philosophy Frede Castberg wrote that the laws contributed to sharpening the revolutionary attitude in large parts of the labor movement and that "within large parts of the labor movement, however, the hope and belief on a revolution was a reality" (Castberg 1974, p. 77). He quoted the young Einar Gerhardsen, later prime minister, who had said that all legal avenues are closed to proper working people who are starving and freezing. "They have the choice between going under or following the only path that remains: Through the law to the prisons. Follow it!".

Gerhardsen, Tranmæl and the others were political agitators with ties to the international workers' movement. But grandfather? He was a farmer's son from simple circumstances in the rural county Telemark, from a deeply religious background, who had secured an education and a respectable position as municipal auditor.

Today nobody talks about class struggle in Norway, and law and the legal order is generally in high trust and accepted as neutral. But we do not have to go far before we find conflicts and battles over the legal institutions. Those in power in highly polarized societies such as Hungary and Poland use the law to enforce their policies and attack the courts. If we travel back in time, we find episodes in our own history where the court and the courts were an arena for political struggle. It was to the penitentiary laws that I had to go to learn about the use of the court as a partisan instrument in the social struggle in Norway, a struggle which politicized both the law and the courts in a way that we see in countries like Poland and Hungary today. By studying what happened back then, we can learn something about how our own society and legal order react when the autonomy of the law is put under pressure.

It was with the penitentiary laws as a background that later law professor Kristen Andersen wrote in 1932 (Andersen 1932, p. 32):

> It is not at all recommendable that the legislators seek to deprive one party in the conflict of the most important means to assert its interests, without the same authorities at the same time doing anything to strengthen or improve this party's position. This approach does not achieve any solution, but on the contrary an intensification of the conflict.

The story of the Penitentiary Laws is the story of how the legislature, by promoting one party's cause in a strongly polarized society, threatened the autonomy of the legal order. The conservative side set the rule of law at stake to protect employers' interests against an increasingly strong working class and trade union movement. But the judicial system reacted in a way that the conservatives saw as resistance to the laws. It is striking how a legal complex, in the public and in the courtrooms, with participation far into the judiciary, right up to the Supreme Court, engaged against the attack on the law's autonomy. Threats and accusations of illegitimate interference in the functioning of the courts were made in the Norwegian Parliament (Stortinget), in the conservative press, and in municipal councils around the country.

This is a situation we recognize from today's Poland and Trump's USA. The Norwegian rule of law was at a tipping point.

The history of the penitentiary laws is therefore not only part of the history of the labor movement, but also of the history of the Norwegian rule of law, a history of the relationship between law and politics. It is a story about when, in our recent past, the court became part of a polarized struggle between battling social forces. Antagonisms were great across Europe at the time. An absolute and irreconcilable contradiction between social classes' conception of law will sooner or later, "if no reconciliation is achieved, turn into a struggle with physical weapons," wrote the renowned professor of jurisprudence Ragnar Knoph in 1923 (Knoph 1923, pp. 28–29). In many countries it went wrong, and fascist regimes developed to fight the working class. In Norway, this development stopped, the state did not step up the use of force to enforce laws which in their content were both biased and contrary to basic justice. The Penitentiary Laws put both democracy and the rule of law to the test, and the country emerged stronger from it.

This is a story about civil disobedience, and how it can strengthen democracy and the rule of law. The Swedish legal sociologist Håkan Hydén has emphasized that civil disobedience is always a signal that there are conditions in society that the legislators have overlooked or have not considered (Hydén 2022, p. 211). When the law is profoundly unjust, even law-abiding citizens may feel justified in breaking it to convince those in majority of its injustice. This is the text-book example of civil disobedience, as, for example, the famous philosopher John Rawls defines it in his classic work on justice. Just democratic institutions can also occasionally produce unjust results, and majorities in democratic bodies can converge on solutions that turn out to be wrong. In such cases, breaking the law can be both justified and morally praiseworthy, and it can do democracy a service, according to Rawls. Civil disobedience stabilizes and strengthens democracy, he claims. The fight over the penitentiary laws joins the series of examples that prove Rawls right. This is the story that this book tells in the following chapters.

The book is one result of my work on Judges under Stress—the Breaking Point of Judicial Institutions.[4] For several years, I have investigated the methods authoritarian rulers use to force judges to apply oppressive and unjust legislation and how judges respond to such pressure (Graver 2015). Under what conditions is the rule of law brought to its knees? The work has taken me to the fascist and Nazi Europe of the nineteen thirties and forties, the communist regimes of the Cold War and the current pressure on the courts in countries such as Poland and Hungary.

Apart from during the German occupation, Norway has not had an authoritarian regime in modern times. The courts are highly trusted as independent and neutral, and the *Storting* or the government have to little extent challenged them. If one were to find situations in Norwegian history where the independence of the courts and

[4] Judges under Stress JuS - the Breaking Point of Judicial Institutions - Department of Private Law (uio.no).

trust in the judges were threatened, I thought that one would have to go to the great class struggle in the period between the First and Second World Wars.

I had a notion that the judicial system at that time, more then than now, was the target of political controversy. A sign of this was that the Labor Party several times put forward proposals to limit judicial review with legislation. In addition, my grandfather, who for a large part of his life worked in the federation of trade unions (LO), told me about oppressive legislation and about courts that applied them biased and uncritically. My grandfather's story is part of this book, as an example of the many who threw themselves into an illegal fight against unjust laws.

I found what I was looking for. In 1927, the Storting passed a set of laws which changed the rules of the game between the employers and the workers, by turning the legal order into a tool for one social class in the fight against the other. Thus, the legislators deviated from the classic rule of law ideals of equality and autonomy of the law. These laws were called the Penitentiary Laws, based on a conception of earlier German law where striking workers were brought to the penitentiaries. The passing of these laws led to a forceful reaction from the labor movement and from people far beyond it, who refused to accept the legitimacy of the laws and who engaged in mass violations of the law. It also led to demands in the trade union movement to take control of the courts. The laws were perceived as the politicization of the law in the service of Capital, which had to be met with politicization from the labor movement. This could have led to the collapse of the rule of law in Norway, with the end of a neutral and independent judiciary.

The penitentiary laws and the fight against them have been extensively reported, both at the time and in later historical works. Even though what I am presenting is well-known, I have not found any corresponding in-depth treatment of the political and legal material. Putting the conflict in a rule of law perspective, as I do, involves a new look at the political history and legal history of the interwar period and gives a deeper understanding of the relationship between law and politics.

In 1927, Supreme Court judge Edvin Alten wrote an opinion about the independence of the courts. Here he commented on the appointment of judges and lay judges. "Any political consideration, any thought of party reward must be banned by those who are responsible for the selection og judges," he wrote. "Not all municipal councils and not all governments can say they are free of having sinned against this requirement."[5] Political appointments and attempts to fill the courts with judges loyal to a particular political party are a negation of the rule og law. I started with a hypothesis that the Labor Party, to sabotage the law, used its power to gain political control over the courts, and that many jurors refused to apply the law by acquitting cases where the law had clearly been violated and the defendant was guilty. Thus, the labor movement succeeded in sabotaging the law by appointing lay judges who were loyal to the movement. This was what the great authority in constitutional law, Professor Frede Castberg, wrote in his book "Law and revolution in Norway" (Castberg 1974, p. 74). When I checked in the proceedings of the Storting, this

[5] Dagbladet Saturday 11 June 1927.

was confirmed. It was also the story the conservative party and the farmers' party put forward in their election campaign in 1930. The events therefore seemed well suited to shed light on what happens when there is a political battle over the courts and the judges come under political pressure. My study of the sources proved this to be a false track.

The source material for this book is reports and propositions from the government to the Storting, the debates in the Storting, court rulings, contemporary literature and the press. I have also made use of secondary literature to a certain extent. Thanks to the digitalization of virtually all newspapers by the Norwegian National Library, a vast of material on court cases and debates in local government councils is readily available.

Investigations of the elections in the municipal councils for lay judges in 1928 and 1931 showed that the allegation of political abuse of power was consistently incorrect, while investigations of legal practice confirmed that there were several acquittals. However, these were mostly due to the courts interpreting the laws restrictively in relation to what the parliamentary majority had assumed when they passed the laws, i.e., that it was the professional judges and not the lay judges and members of the jury who were the cause of the acquittals. The labor movement had no role in the appointment of professional judges.

Thus instead, a fascinating story emerged about the effects of civil disobedience against unjust majoritarian decisions within liberal democracy and the workings of a legal complex to defend the court's autonomy against partisan legislation. The book tells this story.

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Chapter 2
The Years of Great Struggle

2.1 Law and Industrial Action

The first major legislation on labor-capital disputes in Norway was the Labor Disputes Act of 1915. This law brought the law into the conflict between labor and capital. Until then, the relationship between employers and workers was largely a private relationship between the parties. The formation of trade unions was not prohibited but was often opposed by the employers. Attempts by the labor movement to obtain legal protection for the right to organize were repeatedly taken up in the Storting (the Norwegian Parliament) but voted down.

The Labor Disputes Act was not a biased piece of class legislation, and it was not intended to prevent the implementation of the labor movement's demands (Ousland 1975, p. 328). All this changed with the penitentiary laws of 1927. Then the capital-owning class succeeded in turning the law into a weapon against the working class and shifted the class struggle into the legal order. Under such conditions, the law loses its character of neutrality, and its character of being relatively independent of other social and political processes in society is challenged. That is what happened in 1927–1928, in the legislation and in the courts.

The important legislation on mediation, arbitration and the creation of the labor court, the Labor Disputes Act of 1915, was not the result of any hostile thinking towards the workers and their organizations. On the contrary, the law was a codification of the development that the parties had stood for, it was a "society-grown law", as Professor Kristen Andersen wrote in his book on the history of the Labor Disputes Act (Andersen 1965, p. 120).

The Labor Disputes Act established a framework for resolving conflicts between employees and employers. It introduced the distinction between legal disputes and interest disputes, which is still the main distinction in modern collective labor law. Legal disputes concern the validity, understanding or existence of a collective agreement or about claims based on a collective agreement. Interest disputes are

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