



The Authority of Law

A story about a judge who made a wrong decision – or was it the right one?



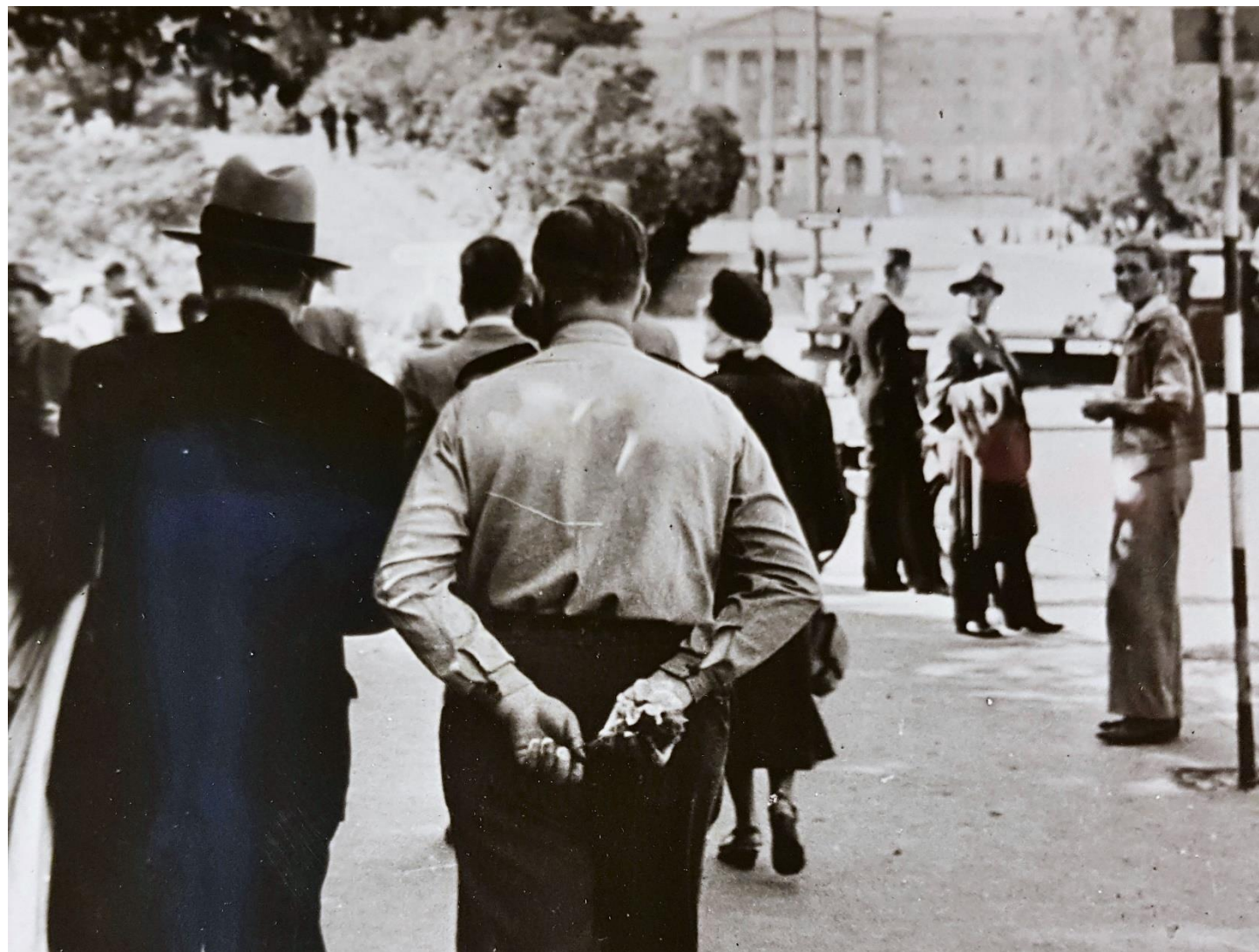
The Authority of Law – and the Ideal of Justice

A story about a judge who made a wrong
decision – or was it the right one?



- A story from occupied Norway
- A discussion of positions in legal philosophy about authority and justice

The war of the roses 03.08.1942




Reaction of the authorities

TELEGRAFVERKET
Telegram

1/2 S. P. årsm. 3111 1942

D 54 OSLO NR 02881 35/33 3 1430

TIL ARBEID
MOT
TUBERKULOSEN
BRUK
TELEGRAM-



L.nr.

= DRAMMEN POLITIKAMMER DRAMMEN =

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3 / 8	1942	1575	av	91			/

BLOMSTERDEMONSTRASJONER IDAG MA STOPPES DEMONSTRANTENE
INNBRINGES OG ILEGGES EN BOT KRONER 50 SUBSIDIÆRT 15 DAGES
FENGSEL NEKTES FORELEGGET VEDTATT INNSETTES VEDKOMMENDE PÅ
STATSPOLITIETS REGNING TELEFONISK UNDERRETNING AV
RESULTATET IMORGEN = STATSPOLITISJEFEN +

50 15 +

Bl. nr. 23 a. E. Sem A/s. 1942.

44 charged in Ålesund and junior judge
Langeland



The authority of the Law

- Penal Code §350: disturbing the peace with brawling, shouting, insulting behaviour or other improper conduct
 - Established law: public demonstrations are peace disturbances
 - The use of prohibited pictures is «improper conduct»
- Regulation of the Reichskommissars prohibiting propaganda in support of the deposed King
- Supreme Court, People's Court and rulings of other courts
- The evaluation of the evidence was obviously wrong
 - «we had difficulties remaining serious at all times»

Reactions

- Judges placed under arrest – released after a rebuke
- The acquitted were fined by the police
- The head of police of Ålesund was reprimanded

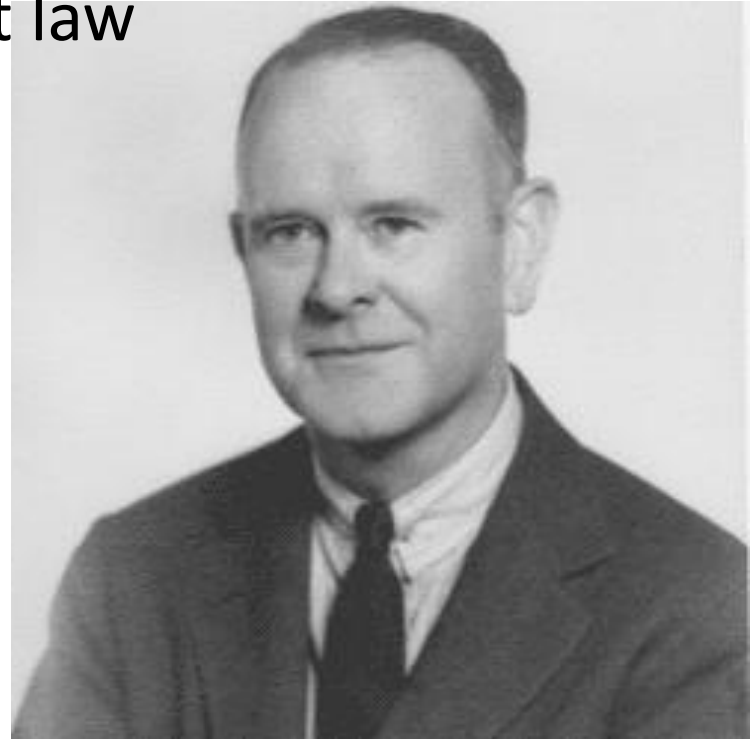
Can the immoral be law?

- H.L.H. Hart (1907-1992): Law and morality are separate



HLA Hart (1957) «Positivism and the separation of law and morals», *Harvard Law Review*, Vol. 71, s. 593–629 og LL Fuller (1957) «Positivism and fidelity to law – a reply to Professor Hart», *Harvard Law Review*, Vol. 71 s. 630–672.

- Lon Fuller (1902-1978): What contradicts «the inner morality of law is not law



Can the immoral be law?

- Hart: Immorality raises a question of personal morality



HLA Hart (1957) «Positivism and the separation of law and morals», *Harvard Law Review*, Vol. 71, s. 593–629 og LL Fuller (1957) «Positivism and fidelity to law – a reply to Professor Hart», *Harvard Law Review*, Vol. 71 s. 630–672.

- Fuller: Immorality raises a question of interpretation



Can the immoral be law?

- Hart: Morality can be a source of law at the penumbra of a legal rule
- Fuller: Morality is an integral part of law



HLA Hart (1957) «Positivism and the separation of law and morals», *Harvard Law Review*, Vol. 71, s. 593–629 og LL Fuller (1957) «Positivism and fidelity to law – a reply to Professor Hart», *Harvard Law Review*, Vol. 71 s. 630–672.



Hart to Langeland:

(supported by young Dworkin)



- Utilise all means of interpretation,
 - bend the sources, if necessary lie,
 - adapt the evidence,
 - in the last instance, break with the law
-
- If morality so demands

Fuller to Langeland:

- the product of a system so oblivious to the morality of law that it is not entitled to be called a law?
- In contradiction with inner morality of law:
 - retroactive statutes curing past legal irregularities,
 - a willingness of the regime to disregard even its own enactments,
 - a rule by terror



What if the regime is not so bad,
but the rule is?



Gustav Radbruch (1879-1949)

- A 'law' that would extricate itself from the essential requirement of justice, namely, the equal treatment of equals. It thereby lacks completely the very nature of law; it is not merely flawed law, but rather no law at all.

Statutory Lawlessness and Supra-Statutory Law (1946) Oxford Journal of Legal Studies, Vol. 26, No. 1 (2006), pp. 1–11

David Doublet (1954-2000)

- Rettsstatsverdiene er del av rettens evalueringsgrunnlag

Kaarlo Tuori

- Kritisk positivisme: Grunnverdier og begreper er del av rettens dypstruktur

Dworkin

- Law, but too unjust to be enforced, or
- too unjust to be law
- Depends on whether *structuring principles of fairness* support the upholding of edicts of the ruler (Justice for Hedgehogs p. 411). The justice/injustice of the edict must always be settled by moral argument

An alternative approach:

- Although precedent forecloses Marion Hungerford's Eighth Amendment challenge to 18 U.S.C. § 92 under which she received almost all of her 159-year term of imprisonment, it cannot be left unsaid *how irrational, inhumane, and absurd the sentence in this case is*, and moreover, how this particular sentence is *a predictable by-product of the cruel and unjust mandatory minimum sentencing scheme* adopted by Congress. (Concurring statement of judge Reinhardt)

United States Court of Appeals, Ninth Circuit,
13. Oct 2006, US v. Hungerford 465 F.3d 1113

Summing up

- Hart: You have no moral duty to uphold the law, but you can have a moral duty to break with it,
 - But, can it be up to the morality of the individual judge to break the law?
- Fuller: Immoral law is unlaw; you must interpret the law to conform with morality and disregard immoral «law»
 - But, how can a judge in a subordinate position do this? And can moral duty depend upon legal philosophical position?
- Hungerford: Morality is not your responsibility, you must follow the law no matter how absurd and irrational,
 - But, can you lay all the responsibility upon others?