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HOW THE NORWEGIAN RESISTANCE MOVEMENT INFLUENCED THE PROVISIONAL TREASON LAWS OF THE EXILE GOVERNMENT, 1944-1945

This article examines the role of the Norwegian resistance movement 'Hjemmefronten' (the Home Front, HF) as a political interest group during the exile government's formulation of provisional laws meant for the post-war reckoning with Norwegian collaborators and foreign war criminals. The article argues that the resistance through its judicial committee in Oslo had a decisive impact on the final versions of three decrees that, though constitutionally contested, formed most of the legal basis for the legal settlement after 1945. The article shows how the intervention of the HF in the legislative process during 1944 and 1945 exacerbated the constitutional difficulties associated with the penal decrees passed in London. Compared to other Western European countries occupied by Nazi Germany the influence of the resistance over the wording of treason laws almost certainly is unique.

Keywords Second World War, occupation, collaboration, legal settlement, transitional justice, provisional statutes, constitutional issues.

Introduction

Two months after the German attack on Norway began 9 April 1940, Prime Minister Johan Nygaardsvold (1879-1952) and his cabinet escaped to London, where they remained for the duration of the occupation, officially recognized as Norway's representative government by the Allies and most of the neutral states.[1] In exile, the Nygaardsvold government passed 1941-1945 a series of provisional penal laws designed for a future judicial reckoning with native

collaborators, who were seen as traitors, and German war criminals. King Haakon VII (1872-1957), fled Norway with the government, and signed all the decrees.[2] However, there was uncertainty whether § 17 of the 1814 Constitution ('The King may issue and repeal ordinances relating to commerce, customs, all livelihoods and the public administration and regulation, although these must not conflict with the Constitution or with the laws passed by the Storting') allowed the executive power to issue penal laws from abroad when the parliament was not assembled. In the evening on the day of the German invasion, the Storting unanimously gave the cabinet absolute authority in an extraordinary session at Elverum northeast of Oslo, but the constitutional status of that authorization ('Elverumsfullmakten') was still unclear.[3]

The immediate background for the new legislation on treason was that a collaborationist regime dominated by Vidkun Quisling's (1887-1945) small, fascist-like party *Nasjonal Samling* (national unification, NS) not only sided with the occupier but also tried to reshape Norwegian society. Already in the evening on the day of the invasion Quisling, an Army Major and former minister of Defence held a radio speech where he declared himself head of a new NS government. Although he had to step down only a week later when the German civilian administration (*Reichskommissariat Norwegen*) was established, Quisling and his followers from September 1940 to May 1945 controlled the government and state administration, albeit under strict German supervision.[4]

The treason decrees passed in London were intended to clarify how Norwegian citizens, institutions and firms should relate to the Germans. Especially in the first months of the occupation, but even in 1941, the dividing line between acceptable and nonacceptable collaboration was far from obvious to all Norwegians. Two examples of early cooperation with the occupant, often criticized in retrospect, are the Supreme Court's establishment of an executive agency to lead the civil administration in the German occupied parts of the country, *The Administration Council* ('Administrasjonsrådet') already on 15 April 1940, and the

Storting's negotiations with Reichskommissar Josef Terboven (1900-1945) about establishing a *National Council* ('Riksråd'), during the summer of 1940.[5]

In general, the position of exile governments is difficult as they are located outside the territory they claim to represent.[6] Wartime London eventually became the base of ten refugee governments with varying legal status, out of which nine represented European countries, among them the Netherlands, Belgium, France and Norway.[7]

Operating from London, escaped state authorities faced a number of challenges. They had to convince the British government and its Allies of their legitimacy, but also needed to maintain unity among their cabinet members while trying to win over the people in their home territories.[8] For expatriate politicians and senior civil servants, the issue of how to punish improper collaboration with the German occupant also became an important concern, as part of arrangements for their future return to home following a German defeat.[9] By preparing and announcing, primarily through radio broadcasts and the illegal press, a resolute judicial reckoning with nationals who had committed betrayal, the London governments could also demonstrate political vigour and hope to improve their standing in the public opinion at home.[10] Especially in the first war years, there was a common tendency to regard the exile regimes as more or less irrelevant and inferior to home resistance.[11]

A common denominator of all the exiled authorities' planning for post-war treason trials was the conviction that their existing national legal codes did not suffice to handle widespread collaboration during a lengthy German occupation, especially because many actions of individuals, companies or institutions only in the context of modern, 'total' warfare took a collaborationist dimension.[12] Since lawmakers of the past could not have foreseen such developments, new special regulations were required to supplement the old.[13] Furthermore, all the Western European countries discussed in this article, i.e. Norway, Belgium, the Netherlands, France and Denmark, interpreted some basic principles of the rule of law meant to guarantee

legal security for the individual differently than before the war. For instance they all, according to American historian Peter Novick (1934-2012), in one form or another, resorted to retroactive legislation.[14] As a result, jurists, not only in Norway but also in the other countries, expressed constitutional concerns. However, the gravity of the legal critique and the succeeding amount of debate varied.[15]

Whereas the first Norwegian provisional statute was enacted in October 1941, the Belgian, Dutch and French exile authorities adopted their first treason decrees in April 1941, December 1943 and June 1944 respectively. In all the four national cases, other decrees followed the initial one. Denmark, which also was occupied by Nazi Germany, did not have an expatriate government and thus only after the liberation in May 1945 got a special treason legislation, even though it had been prepared in secrecy earlier in the spring by the resistance's *Freedom Council* ('Frihedsrådet'), and the politically appointed *Civil Servants Committee* ('Embedsmandsutvalget'). The Danish Parliament (Rigsdagen) passed the main new law, formed as an addition to the civilian penal code, on 6 June 1945.[16]

In all five countries, the law-making process as well as the ensuing implementation of the decrees were, given the situation, of an extraordinary nature. The prosecution of traitors and war criminals is an example of so-called transitional justice, a political science term used to describe how re-established democracies deal with crimes committed by their authoritarian predecessors.[17] A typical feature of transitional justice is that the procedures chosen often deviate from the normal legal practice. Such deviations reflect the tension between standard principles of justice in a society of law and other considerations, which often in the wide sense are of a political nature.[18] As was the case with the legal settlements in Western Europe following World War II, politicians and lawyers who in normal times adhere to certain principles of law may under a transition back to democracy reinterpret them for pragmatic reasons.[19]

Another unusual aspect of the exile governments' law-making in London, in addition to the absence of public debate or hearings at home, was that the Parliaments in the occupied countries could not perform their normal legislative functions, i.e. introduce laws of their own or amend, approve or reject government draft laws. With the national assemblies of Norway, Belgium, the Netherlands and France out of function, none of them took part in the drafting and adoption of decrees regarding treason by the governments and their jurists. Hence, all acts from London had to be approved retrospectively by the Parliaments after the war.[20]

In all the discussed countries, including Denmark from early 1945, organized resistance was an extra-parliamentary interest group, which took a special interest in the development of new treason laws and tried to exert influence over them. Typically, national resistance movements pushed for strict laws, harsh punishments, mass internments of suspected collaborators, a thorough 'cleansing' of the civil service and the use of special courts. Nevertheless, the regularity of contact between governments and resistance movements differed between countries, as did the resistance's actual influence over the decrees.[21]

Historiography

Overall, the nexus of problems discussed in this article have been given little attention in the historiography of the legal settlement in Norway. 'Curiously neglected' is the phrase recently used by German historian Anika Seemann (b. 1986), to which we completely adhere.[22] Considering the scope and societal significance of the post-war reckoning, it is striking how little empirical research until recently was available.[23] After 1945, neither historians nor lawyers showed a noteworthy interest in researching the subject.[24] Whereas the first comprehensive overview of the settlement, written by professor of law Johs. Andenæs (1912-2003), was published as late as 1979, more specific and critical studies to some extent are still lacking.[25] Among the areas that have received little academic attention are the exile government's

preparations for a settlement from 1941 on, the interference of the HF in the government's law formation process 1944-1945 and the many constitutional issues associated with the provisional treason acts.[26]

The Nygaardsvold cabinet's conceptualization of treason laws 1941-1945, was an undertaking that must have demanded a great amount of both time and energy, but has gathered little scholarly interest. This is clearly illustrated by the omissions of historian Olav Riste (1933-2015), who, in his two volumes from 1973 and 1979 on the history of the exile government, did not mention the settlement or the decrees. In his extensive study of the HF leadership, published in 1977, historian Ole Kristian Grimnes (b. 1937) gave a very brief account of the legal committee. He did not investigate further the dynamic between the committee and the government, concerning the forthcoming settlement in that study or his later works.[27]

Two volumes about the Norwegian Civil Service in London 1940-1945, was published in 1980 and 2004, written by jurist and Deputy Director General Jan Debes (1925-1999) and historian and archivist Ole Kolsrud (b. 1941) respectively. Debes described the political power struggle between the government and HF, but paid no interest to its consequences for the coming legal purge. Kolsrud gave an account of the treason decrees, which, in his view, were the result of a fruitful legal cooperation, not a heated political struggle, where the government abroad and the resistance at home, found common ground.[28]

While Andenæs' classic book contains a few critical notions, it is essentially a defence for the post-war trials.[29] He gave a short account of the law-making process in London, and the HF's influence on the exile government's treason decrees. But, Andenæs did not really question the role of the HF, from a legal point of view. As for the constitutional critique against the decrees, Andenæs only referred to it summarily. Neither the latter criticism nor the HF's possible contribution to the emergence of constitutional controversies were made into subjects of more in-depth discussions.[30]

In later contributions to the body of literature on the trials, historian Hans Fredrik Dahl (b. 1939) also brought up constitutional issues, but only in passing. Besides, his views mostly coincided with those of Andenæs.[31] More recently, the treason trials have been analysed anew both thoroughly and critically from other angles by professor of law Hans Petter Graver (b. 1955) and historian Anika Seemann respectively, but neither deal more specifically with the topic of this article which thus can be said to fill a void in the literature.[32]

The first Norwegian treason decrees, 1941-1943

We will discuss nine provisional statutes on treason, in our article. Whereas the first six, enacted 1941-1943, were all prepared by the exile government, the three decrees from 1944-1945 were largely the work of the resistance.[33] The six early decrees covered in this paragraph are the following:

Table 1: Treason decrees passed 1941-1943.

1.	Death penalty decree 1 (3 October 1941)	4.	Quisling decree (22 January 1942)
2.	Death penalty decree 2 (3 October 1941)	5.	Civil servant decree (2 February 1943)
3.	Death penalty decree 3 (22 January 1942)	6.	Criminal procedure decree (2 February 1943)

In March 1941, less than a year after its arrival in London, the Nygaardsvold government appointed an advisory committee of Norwegian exile jurists with a mandate to clarify whether the existing civil and military penal codes of 22 May 1902 would be sufficient to punish various forms of treason committed by compatriots. The foremost question was how to handle the members of the NS legally.[34] However, the Ministry of Justice singlehandedly formulated and approved (3 October 1941) two decrees (Death Penalty 1 and Death Penalty 2) nine months before the committee delivered its report. Several of the members doubted the necessity of new laws. Both of the decrees radically expanded the opportunity to use capital punishment.[35]

When the government's legal committee finally submitted a paper, it concluded that the old regulations had not deterred people at home from joining the NS movement. To remedy that shortage, the committee had drafted a new law that served as the basis for two additional government decrees passed on 22 January 1942. Whereas one of them (Death penalty 3) introduced the capital punishment in even more areas, the other, sometimes referred to as the 'Quisling decree' (QD), made the formal membership in NS and similar organizations a criminal offence, punishable by a combination of various, partly new sanctions.[36]

The final two treason laws initiated solely by the exile government, i.e. the *Civil Servant Decree* (CSD) and the *Criminal Procedure Decree* (CPD), were both approved by the King 2 February 1943. In a nutshell, the CSD stipulated that all public officials who after 22 January 1942 had been members of the NS, or who after 9 April 1940 were appointed by someone without legal authority immediately should be suspended once the German occupation had ended. Furthermore, any civil servant, illegally dismissed by the NS regime, should be reinstated in his or her old position.[37]

In the CPD, the last of the six early decrees, saw the introduction of an exclusive criminal procedure for treason cases. Its main purpose, based on the expected high number of cases, was to speed up their processing, among other measures by permitting arrests without a prior court decision and detention of suspects for up to 90 days. Moreover, the defendants' right to appeal a verdict was considerably limited.[38]

Even though minimal discussion about the exile government's creation of the six early treason decrees occurred in these special circumstances, individual Norwegian politicians, lawyers and civil servants in London did express legal doubts, with reference to specific paragraphs in the constitution. For example, the government's introduction of new criminal law was not only criticized as unnecessary but also for being retroactive and thus in conflict with the Constitution's § 97 ('No law must be given retroactive effect').[39]

Frequently, the treason acts issued by the London government 1941-1943 built on a wider understanding of the penal code and constitutional clauses than had been the norm before the war, a tendency that gained prominence in 1944-1945 as the resistance became directly involved in the law-making process.[40] In the following analysis of constitutional complications in connection with the purge, we focus on a series of legal issues that either arose or became more challenging owing to the interference of the Home Front.

Later decrees on treason, 1944-1945

We will now consider the last three treason laws, which all replaced previous versions prepared by the government 1941-1943. The new ones contained constitutionally controversial principles:

Table 2: Treason decrees passed 1943-1945.

7.	Civil Servant Decree 2 (24 November 1944)
8.	Treason decree (15 December 1944)
9.	Criminal procedure decree 2 (16 February 1945)

Around New year 1942-1943 Chief Justice Paal Berg (1873-1968), leader of an elite-dominated civilian resistance group in Oslo called 'Kretsen' (*the Circle*) from summer 1941, secretly commissioned a Supreme Court judge (Ferdinand Schjelderup, 1886-1955) and a lawyer (Øystein Thommessen, 1890-1986) to review carefully the Norwegian penal code for treason as well as related decrees from the exile government. However, as neither of the two saw any need to supplement the penal code's § 86 on treason in war and also found some of the new special laws from London unconstitutional, they were in the summer of 1943 replaced by three other jurists who from then on became the first members of the resistance's legal committee. By fall the same year, the group's membership had stabilized with four participants, i.e. one

Supreme Court judge (Erik Solem, 1877-1949), two lawyers (Sven Arntzen, 1897-1976, Jens Christian Hauge, 1915-2006) and one high-ranking civil servant (Wilhelm Thagaard, 1890-1970). Their broad mandate, given to them by the Circle, was to not only review the laws on treason but also revise them. Since the committee members all belonged to, or had close ties with the Circle, in reality they gave themselves the assignment. Interestingly, none of the four was a specialist in the field of criminal justice.[41]

Already in the summer of 1940, Paal Berg and other elite persons, mainly in Oslo, who later became key players of the resistance, had been in contact with the expatriate government. After the formation of the Circle a year later Berg's group corresponded sporadically with London until a continuous communication began in the summer of 1942 via the Norwegian embassy in Stockholm.[42]

In two letters sent from Oslo 3 May and 2 October 1944, the Circle, which at that time had merged with two other resistance groups into a national leadership board of the HF, lead by Berg, presented an extensive law drafted by the legal committee entitled 'Punishment and other measures against NS members' and recommended that an according provisional statute be passed as soon as possible.[43]

Since the draft secretly prepared in Oslo concerned the same offences as two government decrees, the *Quisling Decree* of 22 January 1942 and the *Civil Servant Decree* (CSD) of 2 February 1943, a new law would automatically annul the latter two and take their place.[44] Nevertheless, the exile Department of Justice accepted the HF's original draft and with only marginal alterations made it into two new provisional statutes: the *Treason Decree* (TD) of 15 December 1944 and the *Civil Servant Decree 2* (CSD 2) of 24 November 1944. Both were more comprehensive, and on most counts, stricter than their precursors.[45]

Whereas the TD continued the principles laid down in the earlier statute, it also contained several new elements that were constitutionally challenging. One of them was the

introduction of a collective compensation liability (§ 25), after the liberation calculated at 280 million Norwegian kroner (NOK), to be paid by the former members of the NS. In that way, each registered party member should, irrespective of his or her actions or motives, be made responsible for all losses incurred by the public as well as private individuals. An underlying assumption was that the entire NS movement could be defined as an illegal conspiracy. Thus, even the so-called passive members indirectly had participated in the criminal decisions of the party leadership.[46]

Given that the TD, the most central of all the provisional penal laws, was issued less than five months before the end of the German occupation, several of its paragraphs raised accusations for being retroactive and hence in violation of the Constitution's § 97. Even the expatriate Department of Justice for that reason had doubts as to whether the new regulations, especially the ones regarding withdrawal of improper profits (§§ 14-24) could be applied to events that occurred before the decree was approved. In such cases, the Ministry therefore would leave it to the courts to decide if the rules were unconstitutional.[47]

However, the most common critique against the TD as an 'ex post facto' ('from a thing done afterward') law pointed to its § 25 on compensation payments and claimed that that provision was not in accordance with previous Norwegian law and thus retroactive. As argued by some jurists, the TD's § 25 also raised a second legal problem as the financial responsibility were to be asserted as far as the defendant concerned had funds. This principle was in their opinion contrary to § 104 of the Constitution ('No one should be deprived of their real estate or their entire wealth because of a crime') which prohibits punishing someone by depriving them of everything they own.[48]

The second provisional statute based on the draft law from Oslo, the *Civil Servant Decree 2* (CSD 2) of 24 November 1944, also introduced judicially controversial elements. In its letters from May and October, the HF had criticized the London Government's own decree

on disloyal bureaucrats for being too lax and called for a number of revisions. All the HF's objections against the previous law had been taken into account by the Department of Justice, in the November decree. Consequently, a civil servant risked being discharged for membership in the NS, if he had not left the party before the QD of 22 January 1942.[49]

Under the new, stricter decree (CSD 2), government employees could also be fired because of unpatriotic conduct even if they had never been NS members or had committed any other criminal offence. Constitutionally, the most problematic change was that suspended officials were no longer entitled to pay. In February 1943, the Ministry had assumed that they were, when preparing the original *Civil Servant Decree*, referring to a longstanding legal practice as well as § 22 of the Constitution ('Dismissed senior officials shall receive two thirds of their previous pay until the next Storting determines whether pensions should be granted'). Now, in November 1944, the Ministry doubted whether the Constitution allowed denying pay if the person under suspension had not been a member of the NS, but nonetheless followed HF's advice also on this point.[50]

The third and last of the major treason laws prepared by the HF's legal committee in Oslo was the new *Criminal Procedure Decree 2* (CPD 2) of 16 February 1945, a revised version of its forerunner from 26 February 1943. A controversial point, also within the cabinet, was that in treason cases a court of jurisdiction for reasons of efficiency should replace the jury system in the Court of Appeal. Again, the Department of Justice in London gave its approval despite legal concerns. Yet, from a constitutional point of view, two other features of the new law drafted by the HF in the summer of 1944 were more problematic.[51]

First, the HF's draft introduced an automatic suspension of the right to vote for any citizen indicted for treason (§ 10), even though this civil right under the Constitution's § 52 ('Voting rights can only be suspended by public prosecution') would only be lost when a person was charged. Despite the fact that the Ministry postponed the proposal and thus did not include

it in the provisional statute of 16 February 1945, a later London decree of 4 May 1945, also instigated by the HF, nonetheless legislated the suggested principle.[52]

In its second constitutionally debatable paragraph (§ 18), the draft authorized the police to give a prison sentence for treason of up to six months in the form of a penalty charge notice without a trial. The *Criminal Procedure Law* of 1 July 1887 required a court decision for handing down punishments, except fines and confiscations. But, given that the new principle could be defined as a penalty without judgement, it would then also be in violation with § 96 in the Constitution ('No one may be sentenced except according to law, or be punished except after a court judgment').[53]

Still, when the Ministry's lawyers in this one case rejected a legal arrangement suggested by the HF, they found the constitutional obstacle to be a lesser issue. Instead, the Ministry characterised the proposal as partly questionable legally and hardly practically necessary. However, even prison sentences without a foregoing court trial later, which is by a post-war law of 14 February 1946, became a legislated principle. The only difference from HF's original proposal was the extending of the maximum incarceration length meted out by the police to one year. As a result, the police and courts applied that part of the draft from 1944 on criminal procedures during the legal settlement.[54]

During its entire existence 1943-1945, the HF's legal committee distinguished itself from the London government's Ministry of Justice by understanding the constitution even more comprehensively. In an undated internal deliberation from 1944, the Oslo committee emphasized the necessity of giving various constitutional provisions a wider interpretation than before the war, in order to punish acts of treason, now characterised as 'obvious crimes'. How an act could be a crime if not illegal under a law, was not clarified. Regarding retroactivity, the deliberation concluded that § 97 of the constitution only forbad backdated laws that one had to consider as unfair, otherwise not. The committee legitimized this argument, by referring to the

legal literature by the late Ragnar Knoph (1894-1938), a leading scholar and law professor in pre-war Norway. He had however explicitly stated that no exemption from the retroactivity clause could be made in the field of criminal justice. The committee, for whom Knoph continued to be the primary source, blatantly disregarded his reservation.[55]

Also, as indicated by the correspondence between Oslo and London 1943-1945 on the formulation of new treason acts, the exile government normally followed the recommendations from the HF, even where the Department of Justice had reservations regarding a decree's constitutionality. Consequently, the Nygaardsvold government, with only marginal changes, enacted the draft laws sent from Oslo. An example of how the Ministry justified making controversial changes to existing legal texts based on advices from the HF's legal committee is a message sent from London 2 October 1944.[56]

In the correspondence, which was an answer to the HF's criticism of the government's *Civil Servant Decree* of 2 February 1943, the Ministry took a self-critical attitude and agreed that the original provisional statute ought to be revised in accordance with the legal committee's guidelines. The act from 1943 was in 1944 described as 'incomplete, too narrow and unsatisfactory'. While admitting that there previously had been disagreements in 'some minor issues' between the government and the HF concerning the purge of the public service, the former would now 'bow to the perception at home', even when it came to those questions.[57]

The influence of the resistance

The provisional treason acts passed in London raised many questions as to their constitutionality and principles of justice in general. At least to some extent that was due to the influence exerted by the HF in 1944-1945. In the public debate on the special laws after the liberation, critical jurists claimed that eight constitutional clauses had been stretched or even broken. In addition to the six clauses referred to above, the constitution's separation of powers

laid down in §§ 3, 49, 75 and 88, as well as the protection of private property contained in § 105 (‘Any person obligated to surrender property for public use, shall receive full compensation from the Treasury’) were also brought into the discussion.[58]

Out of the eight clauses that different individual lawyers emphasized in their critique of the London decrees, only two, §§ 17 and 105, were exclusively associated with the exile government's legislative activities and not the HF’s intervention in those. The latter paragraph (§ 105) was highlighted by critics of a decree of 9 March 1945 solely prepared by the government on the treatment of hostile property.[59] Under that provision, later supplemented by two laws, German citizens residing in Norway could be declared enemies and deprived of all their wealth without compensation, irrespective of when they had settled in the country. As to the constitution’s § 17, it was the government’s sole decision to take up the right to enact penalties on its own from abroad while the Storting was not gathered, although the paragraph in question did not overtly authorize the executive to pass criminal law.[60]

Concerning three other clauses, namely the separation of powers between state organs as well as §§ 96 and 97, the debatable interpretation of a constitutional principle inherent in one or more decrees was a shared responsibility between the government and the HF. Obviously problematic, in light of the statutory power distribution, was the direct and often decisive involvement of the resistance. Being a non-state actor, it did not have the legal authority to draft laws, according to § 17 in the Constitution. Yet, this role was claimed by the HF itself and accepted by the government.[61]

Regarding the other two paragraphs under consideration, §§ 96 and 97, especially the *War Criminal Decree* (WDC) of 4 May 1945, drew legal criticism on those two grounds. Unlike the other penal decrees from London in 1944-1945 the WCD, that became the basis for sixteen death sentences against foreign nationals, had been prepared exclusively by the government without interference of the HF. Since the war crimes of the defendants almost without exception

had been committed months or even years before the passing of the law, its use by the courts according to critical lawyers amounted to punishment without law in violation of § 96 as well as retroactivity forbidden by § 97.[62]

On their part, HF's lawyers in Oslo complicated the legal problems related to §§ 96 and 97 respectively, by introducing prison sentences without a trial and the collective compensation payment in their draft laws. These had, up till then, been two unknown principles. As for the remaining three of the eight constitutional clauses referred to in the post-war legal debate, §§ 22, 52 and 104, they were all, as shown above, inextricably linked to HF's intervention in the law-making process. Critical lawyers pointed out that denying a suspended civil servant his or her salary conflicted with §§ 22, that the automatic loss of the right to vote for anyone indicted for treason violated § 52, and, finally, that the London provisions on collective compensation were not only backdating but also incompatible with § 104.[63]

In summary, the HF' legal committee in 1944-1945 managed to have both numerous and substantial changes made in the special penal laws passed by the London government. Schematically, the responsibility of the resistance compared with that of the government for constitutionally challenging principles found in the provisional statutes is illustrated in table 3 below.

Table 3: Distribution of responsibilities.

Constitutional principles held up by critics of the London decrees		**Initiator of controversial law or paragraph**	
		Exile Government	*HF's legal committee*
§ 17	Provisional legislation	+	-
§§ 3, 49, 75, 88	Separation of powers	+	+
§ 22	Pay during suspension	-	+
§ 52	Suspension of voting right	-	+
§ 96	Legality	+	+
§ 97	Retroactivity	+	+
§ 104	Loss of property	-	+
§ 105	Compensation for loss of property	+	-

As indicated in table 3 above, revisions and additions initiated by the HF in various decrees on treason added considerably to the legally disputed status of the settlement.

Comparative perspectives

How does the impact of the Norwegian HF on the contents of provisional statutes, and its significant legal consequences, compare to the equivalent influence of resistance organizations in the other four countries under discussion? While in several cases there is limited research on the role of the resistance in the preparation of national decrees on treason and war crimes, some similarities and differences are still identifiable. In the case of Belgium, Hubert Pierlot's (1883-1963) exile government wanted to concentrate power in its own hands and mostly did not let the resistance interfere with the making of special laws for the post-war trials.[64]

As for the Netherlands, although the government in London wanted to be in harmony with resistance leaders at home it also sought to discipline them and limit their say over the impending reckoning.[65] Nevertheless, both mass internment of suspected collaborators as well as the establishment of 'Peoples' Tribunals' with lay judges were prepared for by government decrees as a courtesy to the Dutch resistance.[66] In the two remaining countries, France and Denmark, the resistance played a larger role in the legal preparations for the settlement than in Belgium and the Netherlands.

In occupied France, all major resistance groups early in 1944 were consulted by General Charles de Gaulle's (1890-1970) provisional London government (*Comité français de libération nationale*, C.F.L.N.) regarding whether the settlement could be done within the context of the pre-war penal code, i.e. without the use of new retroactive legislation. Since the penal code already was broad enough to deal with most collaborationist activities, the unanimous answer was affirmative. However, the government and the resistance alike saw a need for interpretive modifications. While both parties agreed on the specific interpretations,

the resistance also insisted that minor forms of collaboration should be penalized. In response to such demands, the government 26 June 1944 issued a 'National Indignity Decree' mostly based on a draft law from an underground group. Even though a so-called national degradation could lead to a number of sanctions, it was defined not as a legal punishment but a moral condemnation. Hence, the decree and the later slightly revised corresponding law were not considered formally retroactive.[67]

In comparison with the Norwegian case, that of Denmark appears to be the most similar, even though its special laws began to materialize only shortly before the liberation. As in Norway, there were secret negotiations between politicians and resistance leaders about the treason legislation. With respect to the use of new and backdating laws, amongst them a temporary reinstatement of the death penalty, the two parties' respective legal committees who met in Copenhagen 30 April 1945 were in agreement. Unlike Norway, the *Civil Servants Committee* and the *Freedom Council*, both agreed that membership in the Danish Nazi Party (*Danmarks Nationalsocialistiske Arbejderparti*, DNSAP) as such, was not punishable. Yet, a contentious question was how to deal with collaborationist actions of politicians and civil servants during the three years of official 'cooperation policy' before Nazi Germany 29 August 1943 placed Denmark under direct military occupation. In this question the politicians, who would rather not punish deeds carried out before the abovementioned date, surrendered to the demands of the stronger resistance. The latter's initial influence, however, was somewhat reduced by revisions made by the government before the treason law (*Straffelovstillægget*) 26 May 1945 came up for parliament's consideration.[68]

To sum up, so far, also in the four other countries the resistance had at least some bearing on the making of special laws, be it through formal contact with their governments or indirectly, in the capacity of a societal actor politicians wanted to take into account. However, the Norwegian HF remains the only example of a resistance group that not only inspired the

contents of provisional penal statutes but also made its government withdraw previous decrees to replace them with new ones based on the resistance's own draft laws. Former Chief of the Norwegian Police 1943-1945 and Chief Prosecutor 1946-1967, Andreas Aulie (1897-1990), argued, in hindsight, that HF's contribution improved the provisional decrees, originally drafted by the exile government. He was himself one of the main contributors, with close ties to the HF. Terje Wold was a self-confidant Minister of Justice and an independent gentleman, but wise enough not to deal with the Treason Decree (TD) of 15 December 1944 on his own. 'He had to have the Home Front onboard', Aulie wrote in his memoirs.[69]

How are we to understand the Norwegian resistance's unusually great impact on treason decrees? For one thing, even though resisters' groups in none of the German occupied countries were entirely united, the resistance movement in Norway, as noted by Oxford historian Martin Conway (b. 1961), was of a 'peculiarly homogenous nature'. Apparently, while various groups due to the HF's umbrella organization were more united than in Belgium or the Netherlands, the degree of unification among equivalent groups in France and overall in Denmark was more comparable to that in Norway.[70] Assuming that a unified movement was better equipped to affect legal provisions for the post-war reckoning than a divided one, that difference could be one of the reasons why resistance in the latter three countries, as shown above, achieved more influence than in the former two.

A second explanatory factor most likely are the varying conditions for communication between the four exile governments and the resistance in their homelands. In that regard, the individual country's terrain and geographical location was imperative. In addition, resistance activists in the Netherlands and Belgium faced more problems than their counterparts in France and Norway. From the Netherlands, which were surrounded by German controlled territory on all sides, the escape routes were few, not least because Dutch peoples' access to the coast was restricted. Accordingly, it was difficult for resistance groups to open lines of physical contact

with their government in Britain, which for its part lacked reliable information about events at home.[71] Radio communication proved to be of little help because of the effective German counterintelligence. Belgium's geographical situation, combined with the Flemish coastline being closed to the public, limited possibilities for communicating across the channel. Many attempts were made to set up a wireless contact between the London government and clandestine groups but a permanent radio connection was not established until 1944.[72]

From France, which has a longer and hence less controllable coastline than the Low Countries, it was a bit easier for resistance leaders to cross the English Channel by boat at night. They could also make their way to London via the neutral neighbour states Spain and Portugal, or at times even be picked up by British aircraft that landed on secret airfields after dark. However, more commonly, contact with de Gaulle's government was maintained via radio. As regards Norway, with its lengthy and ragged coastal extension towards the Atlantic and an equally long common border through mountainous terrain with neutral Sweden, geographical conditions for contact between resistance and government were at least as good as in France. Especially important in that respect was Norway's proximity to Sweden, where the exile government's embassy in Stockholm already in 1941, possibly even in 1940, became a communication hub for the exchange of messages to and from London.[73]

The third and probably most central reason for the variation between resistance movements in different countries concerning the kind of impact discussed here could be the sheer willingness of politicians, whether in London or Copenhagen, to let resisters influence the legislative process. On this point in particular, the case of Norway seemingly stands out. General de Gaulle in 1943 managed to create a unified resistance movement in France that later took part in preparations for the legal reckoning and Danish politicians as represented by a legal committee in early 1945 accepted an invitation from lawyers of the resistance to discuss the formulation of new treason laws. The Dutch and Belgian governments in exile both remained

hesitant to cooperate with fragmented groups of resisters at home about which they had little reliable information.[74]

In contrast to the other exiles, the Norwegian government early on established good relations with, and listened to advice from the home resistance. As stated by Norwegian historian Olav Riste, the Nygaardsvold government throughout the war made an effort and sometimes even bent over backwards to accommodate its policies to the views of the resistance leadership. The special relationship between the exile cabinet and central figures of the resistance, primarily chief justice Paal Berg, started as early as in the summer of 1940. Already in July 1941 Nygaardsvold let the Circle, the aforementioned elite group lead by Berg, send one of its members (Paul Hartmann, 1878-1974) to Britain to take a ministerial post in the cabinet as representative of the home resistance. Another indication of the government's attentiveness towards the resistance is that even the first London decrees of 22 January 1942 had taken requests from the Circle to restore the death penalty and criminalize the membership of the NS into account.[75]

The fact that the decrees based on HF's draft laws were not passed in London before the last two occupation years, has been attributed to changing power relations between the resistance and the exile government, in favour of the former.[76] Policy differences did occur between the two, but their condemnation of and contempt for the NS was equally strong, even though the HF often were more inclined to redefine constitutional principles than the government. Harmony between London and Oslo about the treason laws was seldom, if ever, really threatened. In addition, a practical explanation behind the late demands from HF to amend several decrees is that the legal committee in Oslo first had to be set up and allowed some time to prepare its drafts. Once the latter reached London, the exile government gave in to nearly all the HF's requests for revisions. Apparently, as seen from the former's perspective no vital interests were at stake.

The difference between articles regulating prison sentences and loss of civil rights for party members, in the QD of 22 January 1942 and the TD of 15 December 1944, shows clearly that the governmental attitude towards the NS was no milder than that of the resistance. In this case, the government's provision was at least in some ways stricter than the successor decree drafted by the HF, notwithstanding that the TD as mentioned raised additional constitutional questions. Whereas under the QD every single NS member automatically would have a number of civil rights withdrawn, the TD made it possible for prosecutors to limit the loss of rights, and as a minimum remove only the defendant's right to vote. Further, the QD stipulated that NS members, who, in addition to the obligatory civil rights loss, would receive a prison penalty, set its duration to a minimum of three years, whereas the TD had an upper limit of three years for a prison sentence.[77]

Conclusion

The empirical findings presented in this article may be summarized in the following points:

1) We have pointed out, more explicitly and detailed than in previous literature, the dominant influence of the HF on the London government's wartime design of treason decrees.
2) We have shown how the resistance's interventions overall made the decrees both stricter and more constitutionally problematic.
3) We have demonstrated that when seen in a comparative light, Norwegian resisters most likely exerted more influence over their national treason legislation than resistance movements in the other Western European countries occupied by Nazi Germany.

Comparing the degree to which each of the national judicial processes broke with constitutional principles is difficult, but apparently none of the countries at issue saw a more

extensive and heated public debate about such issues than Norway.[78] In the legal debate that started once the reckoning with suspected traitors was ongoing, almost all the critics focussed on the use of provisional statutes.[79]

Organized resistance unquestionably left its mark on the Norwegian provisional treason statutes, but their fate from the liberation 8 May 1945 onwards is another story. To what extent did HF through its impression on the London provisions manage to shape the actual settlement? Like the other countries, previously discussed, the special legislation as well as legal practices underwent changes during the post-war implementation of the reckoning in Norway as well.[80] Most notably, already 3 August 1945 a government decree mitigated the constitutionally contentious provision for a collective compensation payment found in the TD of 22 November 1944 that otherwise could have ruined the former NS members.[81] Further, the new decree also gave the court more flexibility when applying the TD's provisions for the loss of civil rights.[82]

Nevertheless, the HF's decisive influence over the law formulation in London 1944-1945 had a fundamental impact on the actual reckoning's legal basis. Since all the treason decrees were passed as laws by Parliament and approved as constitutional by the Supreme Court, overall the settlement was implemented in accordance with the, in many cases, controversial principles laid down in the original provisional statutes. Even the two elements of the TD made somewhat less severe by the August decree were both applied with profound consequences for many defendants.[83] Thus, just like the London decrees the judicial reckoning was based on the HF's legal committee's flexible and situational interpretation of the 1814 constitution as well as of standard principles of justice. In fact, the resistance's influence over the implementation of the legal settlement was not limited to the provisional statutes. Following Nygaardsvold's resignation as Prime Minister on 12 June 1945, Paal Berg was asked by King Haakon VII to form a broad coalition government, with heavy representation from the HF. Even though Berg gave up his endeavour after a few days, due to scepticism amongst the traditional

party politicians, he and other leading figures of the HF nevertheless exerted considerable political and bureaucratic influence for years, especially in the sector of law and order. Many leading HF jurists, including most members from the legal committee of the resistance, got key positions within the justice system, once the occupation ended.[84] During the treason trials they thus administered and passed out sentences based on laws, drafted by themselves. This practice was clearly questionable in view of the aforementioned principle of power distribution enshrined in the Constitution. All objections about the incapacity to make fair judgements from the defendants and their defence lawyers were, with one exception, overruled by the courts after 1945.[85] That discussion, however, is beyond the scope of this article.

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Notes

[1] Conway 2001, p. 256; McDonnell 2009, p. 1906.

[2] Borge & Vaale 2018, p. 25 (notes 48-49).

[3] Borge & Vaale 2018, pp. 157-167 (notes 645-684). President of the Parliament (Storting), Carl Joachim Hambro (1885-1964), from the Conservative Party (Høyre) had initially proposed the Elverum authorization 9 April 1940. Since then, the exile government made use of it far beyond its legal boundaries, to issue the treason decrees, in his view. Publicly, Hambro had supported this 'pious deceit' ('fromme bedrag') but privately, he made no effort to hide his discontent, in communication with the Prime Minister. Cf. Letter from C.J. Hambro to Johan Nygaardsvold, New York, 13 April 1944, in: AAB/ARK-1354/D/Da/L0017/0005.

[4] Borge 1998, pp. 206-208; Grimnes 2018, pp. 303-354.

[5] Debes 1980, pp. 61-62; Grimnes 1999, pp. 48-52; Berntsen 1991, pp. 552-560, 595-596; Sandmo 2005, pp. 55, 255-284; Theien 2010, pp. 37-53.

[6] Talmon 1998, pp. 221, 225; Jacubec 2019, p. 4.

[7] Jacubec 2019, p. 1.

[8] Wieviorka 2017, pp. 72-90; Kesteloot 2018, p. 26.

[9] Kesteloot 2018, p. 29.

[10] Borge & Vaale 2018, pp. 34-35 (notes 80-85).

[11] Jacubec 2019, p. 2.

[12] Huyse 2000, p. 162.

[13] Novick 1968, p. 209; Tamm 1997, p. 703.

[14] Novick 1968, p. 209.

[15] Borge & Vaale 2018, pp. 294-295 (notes 1251-1257).

[16] Tamm 1997, p. 69.

[17] Borge & Vaale 2018, p. 13 (note 12).

[18] de Figueiredo 2001, pp. 387-392; Elster 2004, pp. 129-135.

[19] Venema 2011, pp. 88-93.

[20] Mason 1952, pp. 123-131; Tamm 1997, pp. 120-130.

[21] Novick 1968, pp. 140-151; Romijn 2000, pp. 140, 142-145; Elster 2004, pp. 212-214; van Haecke 2014, p. 106; Borge & Vaale 2018, pp. 25-26 (notes 51-53).

[22] Seemann 2018, p. 8.

[23] de Figueiredo 2001, p. 283.

[24] Bryld 2007, pp. 96-97; Maerz 2007, pp. 365-376; Graver 2015b, p. 157.

[25] Andenæs 1979; Andenæs 1998.

[26] The first in-depth assessment of the settlement's constitutional aspects was published just two years ago by legal historian Lars-Erik Vaale and political scientist Baard Herman Borge, cf. Borge & Vaale 2018. For detailed references to the unpublished primary sources, listed at the end of this article, we refer to the notes in this book, pp. 301-364.

[27] Riste 1973; Riste 1979; Grimnes 1977, p. 164; Grimnes 1983, pp. 52-54; Grimnes 2018, pp. 257-261.

[28] Debes 1980, pp. 167, 193, 231-240; Kolsrud 2004, pp. 321-330.

[29] Sørensen 1998, p. 318.

[30] Andenæs 1979; Andenæs 1998.

[31] Dahl 2004; Dahl 2006; Dahl 2017; Dahl 2018.

[32] Graver 2015a; Graver 2015b; Seemann 2018; Seemann 2019.

[33] Andenæs 1998, p. 75.

[34] 'Innstilling fra den av Justisdepartementet den 12. mars 1941 oppnevnte straffelovkomité', London, 5 December 1941, in: RA/S-3212/1/D/De/L0301.

[35] Vaale 2004, pp. 31-32, 36-37; Borge & Vaale 2018, p. 32 (notes 71-73).

[36] Borge & Vaale 2018, pp. 43-44 (notes 115-121); Seemann 2019, p. 5.

[37] Borge & Vaale 2018, p. 41 (notes 107-108).

[38] Borge & Vaale 2018, p. 48 (note 139).

[39] Borge & Vaale 2018, p. 37 (notes 89-93).

[40] Borge & Vaale 2018, pp. 26-28, 34, 38, 57 (notes 54-60, 79, 94-97, 174-180).

[41] Dahl 2004, pp. 21-22; Njølstad 2008, pp. 160, 205-208, 270-279; Hem 2012, pp. 568-571; Borge & Vaale 2018, p. 175 (notes 708-710).

[42] Hem 2012, pp. 495-504, 523-527.

[43] Stortinget 1948, pp. 402-403, 410, 477-478.

[44] Stortinget 1948, pp. 36-37, 403.

[45] Borge & Vaale 2018, pp. 43-48, 49-52 (notes 116-121, 144-145, 151-152).

[46] Solem 1945, pp. 40-42; Dahl 2004, pp. 21-22.

[47] Borge & Vaale 2018, pp. 45-47 (notes 129-137).

[48] Borge & Vaale 2018, p. 137 (note 550).

[49] Borge & Vaale 2018, p. 42 (note 111).

[50] Borge & Vaale 2018, p. 43 (notes 113-114).

[51] Borge & Vaale 2018, pp. 50-51 (notes 146-152).

[52] Borge & Vaale 2018, pp. 51-52 (notes 156-158).

[53] Justis- & Politidepartementet 1945, p. 179; Borge & Vaale 2018, p. 51 (notes 153-155).

[54] Borge & Vaale 2018, pp. 51, 206-214 (notes 152, 820-869).

[55] Knoph 1939, pp. 61, 65-66; Graver 2015b, p. 162; Borge & Vaale 2018, pp. 46, 57 (notes 131-132, 176).

[56] Borge & Vaale 2018, pp. 42-43.

[57] Borge & Vaale 2018, p. 42 (note 111).

[58] Borge & Vaale 2018, pp. 20-21, 135-145 (notes 40, 543-588).

[59] Justis- & Politidepartementet 1945, p. 115.

[60] Borge & Vaale 2018, pp. 157-160, 287-288 (notes 645-662, 1234-1238).

[61] Borge & Vaale 2018, p. 175 (notes 707-710).

[62] Borge & Vaale 2018, pp. 26, 52-55 (notes 159-167). Two central critics, who otherwise defended most of the purge, was the before mentioned Johs. Andenæs and his colleague at the University of Oslo, Professor Frede Castberg (1893-1977). In a letter to the Parliamentary Standing Committee of Justice 29 June 1945 they argued that using the retroactive *War Criminal Decree* (WCD) would cast 'a shadow over the legal purge' ('en skygge over rettsoppgjøret') for the future, because it flagrantly violated the Constitution. Cf. Letter from Johs. Andenæs & Frede Castberg to the Standing Committee of Justice in the Parliament (Storting), in: RA/S-3212/D/De/L0309. Thirteen war criminals, condemned to death, with the WCD as legal foundation, were executed, one committed suicide and two had their death sentences commuted to life imprisonment by Royal pardon. Cf. Nøkleby 2004, pp. 65-66, 71-75, 154; Vaale 2004, pp. 37-38, 170.

[63] Borge & Vaale 2018, pp. 281-287 (notes 1206-1233).

[64] van Haecke 2014, p. 106.

[65] Romijn 2000, pp. 140, 142-145; van Galen Last 2000, p. 204.

[66] Romijn & Hirschfeld 1991, pp. 288, 293.

[67] Novick 1968, pp. 140-151.

[68] Tamm 1997, pp. 79, 85-95, 115-136.

[69] 'Han måtte ha Hjemmefronten med seg', cf. *Brev til etterslekten fra Andreas Aulie*, vol. I, Bergen, 17 November 1974, p. 138, in: NBO, Manuscript collection, Ms. 4° 3976, Andreas Aulie.

[70] Conway 2000, p. 135; Lagrou 2000, p. 53; Conway 2001, pp. 260-261; Conway & Gotovitch 2001, pp. 7, 35; Atkin 2006, p. 467; Kesteloot 2018, p. 28.

[71] Barnouw 2001, p. 239; Kersten 2018, p. 37.

[72] Lagrou 2000, pp. 37, 52; Barnouw 2001, p. 241; de Vidts 2004, pp. 89-90.

[73] Stortinget 1948, pp. 5, 12-13; Barstad 1991, pp. 244-245; Crowdy 2007, p. 25. Norway had a better communication line to England than, for instance Belgium, but still, The National Chief of Police in Norway, located in London 1942-1945, Andreas Aulie, characterised the Norwegian law-making process as strange: 'Consultations on legal texts across the North Sea, even at a time when this pond made a front line between two enemy states' ('Rådslagning om lovtekster tvers over Nordsjøen, og det til og med mens denne dammen danner en frontlinje mellom to fiendtlige makter'). Cf. Aulie 1974, p. 138.

[74] Novick 1968, pp. 19, 140-151; Tamm 1997, pp. 9, 92-93; Romijn 2000, pp. 140, 142-145; Barnouw 2001, p. 239; van Haecke 2014, p. 106.

[75] Dahl 1987, pp. 195-199; Riste 2000, p. 149. Interestingly, the HF-representative in the cabinet, Paul Hartmann, already on 10 October 1941 opposed basing the purge on the new decrees, finding it 'best to stick to' the provisions of the old penal code from 1902. Cf. 'Straff

for forræderi under krigen og okkupasjonen', P.M. from Paul Hartmann to Terje Wold, London, 10 October 1941, in: AAB/ARK-1354/D/Da/L0014/0002.

[76] Seemann 2019, p. 6.

[77] Borge & Vaale 2018, p. 44 (notes 120-121).

[78] Borge & Vaale 2018, p. 295 (notes 1256-1257).

[79] Borge & Vaale 2018, p. 58, 140 (notes 565-566).

[80] Huyse 1998, p. 2; Huyse 2006, p. 164.

[81] Mordt 1955, pp. 86-89.

[82] Seemann 2019, p. 8.

[83] Borge & Vaale 2018, pp. 68-69 (notes 241-247, 252-260).

[84] Grimnes 1977, pp. 493-514; de Figueiredo 2001, p. 388-392; Hem 2012, pp. 617-622, 626-636.

[85] Borge & Vaale 2018, pp. 174-183 (notes 702-739). In 1983, professor of law and later Ombudsman in Denmark, Hans Gammeltoft-Hansen (b. 1944), found it principally problematic that the Chief Prosecutor in Norway 1945-1946, Sven Arntzen, had also been a member of the HF law-making committee 1944-1945 and criticized Johs. Andenæs for omitting a discussion of this constitutional challenge in his book on the legal purges, cf. Gammeltoft-Hansen 1983, pp. 310-311. Law professor Hans Petter Graver shares Gammeltoft-Hansen's view in this regard, and has pointed out that the unification, not the separation, of executive, legislative and judicial powers was extensive during the post-war reckoning, cf. Graver 2015b, pp. 157-161.