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The Intended Pariahs

Norway's Legal Settlement with Passive Nasjonal Samling Members after 1945*

Lars-Erik Vaale** and Baard Herman Borge***

> "It has been given access to […] create an unnecessary pariah caste in the country."
>
> Oslo City Court judge Bjarne Didriksen in July 1945.[1]

1. Introduction

The Allies' and affiliated nations' legal settlements with the Axis powers and their supporters in formerly occupied countries that followed in the wake of the Second World War, both at an international and a national level, took many different forms. One of the most striking differences was the sheer scale of the settlements, reflecting different ideas about who and how many should be penalised. Broadly speaking, some processes focused on individuals in leadership positions, while others made a wider range of individuals criminally liable. At one extreme were the Nuremberg trials of 1945–1946, in which the Allies indicted 24 of Nazi Germany's top leaders for crimes against peace and humanity. At the other end of the scale were far more wide-ranging trials of indigenous collaborators in former German-occupied countries.[2] In Norway a passive membership of the NS party was sufficient to be penalised in several ways. Elsewhere in former German occupied Western Europe, i.e. Denmark, Belgium, France, Luxembourg and the Netherlands, passive members of collaborationist parties could

* We are most grateful to Associate Professor in modern European political history, DPhil Marcus Colla, at the University of Bergen, for his highly qualified comments when preparing this article.

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1 Didriksen, Bjarne, "Isfronten," in *Morgenbladet 24 July* 1945.

2 Henke, Klaus-Dietmar and Hans Woller, "Einleitung," in Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg, edited by KLAUS-DIetmar Henke and Hans Woller, Munich, dtv 1991, 9–13; Pendas, Devin O., "Seeking Justice, Finding Law: Nazi Trials in Postwar Europe," in *The Journal of Modern History* 90, 2, 2009, 350–356, 360.

also be prosecuted after liberation, but with varying degrees of consequence.[3] Generally, formal party membership was a more central penalty criterion in Norway than in other places, and this raised specific legal challenges that we discuss below.[4] In addition to historical and legal literature, our analysis is based on a number of sources, mainly the archives of the exile government's Ministry of Justice and its minister, Terje Wold (1899–1972), published treason judgments, the National Archives' treason archive and contemporary media coverage of the trials, as well as material from the public debate about them. Overall, the selection of sources relating to the implementation of the legal settlement has been made to concentrate on the Supreme Court and its principle judgments, as they provided guidelines for the lower courts and the police. On 7 June 1940, three days before the Norwegian military forces surrendered to the German Wehrmacht, a British cruiser brought Johan Nygaardsvold's (1879–1952) Government and King Haakon V (1872–1957) to safety in England. The government established itself in London and remained there until the end of the war in 1945. In the absence of the legitimate government, a collaborationist regime quickly was established, dominated by Vidkun Quisling (1887–1945) and NS. His regime not only co-operated with the German occupier, but also attempted to transform Norwegian society in line with NS' own fascist-like ideology. In 1941–1945, the exile government's Ministry of Justice prepared several provisional regulations for use in a future post-war legal settlement with Norwegian collaborators and German war criminals. While the provisional decrees 1941–1943 were prepared by the government itself, most of the later decrees 1944–1945 were written by the Home Front, i.e. the resistance movement in occupied Norway. All the legal provisions were formally adopted by King Haakon as head of state.[5]

In connection with the preparations for the legal settlement, Nygaardsvold's Government was particularly concerned about how to deal with the tens of thousands of compatriots back

3 Mason, Henry L., *The Purge of Dutch Quislings: Emergency Justice in the Netherlands,* The Hague, Martinus Nijhof 1952, 74–75, 83–84, 130–133; Tamm, Ditlev, *Retsopgøret efter besættelsen*, København, Jurist- og økonomforbundets Forlag 1984, 708–713; Romijn, Peter and Gerhard Hirschfeld, "Die Ahndung der Kollaboration in den Niederlanden," in *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, edited by Klaus-Dietmar Henke and Hans Woller, Munich, dtv 1991, 282, 292–294, 301–304; Andenæs, Johs., *Det vanskelige oppgjøret: Rettsoppgjøret etter okkupasjonen,* 2. ed., Oslo, Tano-Aschehoug 1998, 190–193; Huyse, Luc, "The Criminal Justice System as a Political Actor in Regime Transitions: The Case of Belgium, 1944–1950," in *The Politics of Retribution in Europe. World War II and Its Aftermath*, edited by István Deák, Jan T. Gross and Tony Judt, Princeton, New Jersey, Princeton University Press 2000, 162, 168, 171.

4 Larsen, Stein Ugelvik, "The Settlement with Quisling and his Followers in Norway: Denazification as a Legal – and a Political – Process," in Modern Europe after Fascism 1943–1980s. Vol. 2, edited by Stein Ugelvik Larsen and Bernt Hagtvet, Boulder, Colorado, Social Science Monographs 1998a, 1524; Dahl, Hans Fredrik and Øystein Sørensen, "Et parti av lovbrytere," in *Et rettferdig oppgjør? Rettsoppgjøret i Norge etter 1945*, edited by Hans Fredrik Dahl and Øystein Sørensen, Oslo, Pax 2004, 93; Graver, Hans Petter, "Forholdet mellom demokrati og rettsstat i nyere norsk historie," in *Hvor går demokratiet?*, edited by Hans Petter Graver, Gunn Elisabeth Birkelund and Gro Havelin, Oslo, Dreyer 2023, 31.

5 Borge, Baard Herman and Lars-Erik Vaale, "Stretching the Rule of Law: How the Norwegian resistance movement influenced the provisional treason decrees of the exile government, 1944–1945," in *Scandinavian Journal of History* 46, 1, 2021, 105–106.

home in occupied Norway who chose to join NS, an act the government was strongly inclined to regard as treason. It therefore wanted to punish all party members collectively. Like other governments in exile in London, the Norwegian Government imagined that a clear distinction could be made between loyal and disloyal citizens, and its plans for a future settlement with presumed traitors were characterised by this dichotomous notion.[6] In this context, the government placed great emphasis on information provided by Norwegians who arrived in the United Kingdom (UK) from 1941 onwards. The latter, who probably spoke on behalf of an elite circle in Oslo that later became the Home Front's leadership, wanted the NS party to be explicitly declared illegal and all its members to be punished with sufficient severity.[7] If a Norwegian citizen, in addition to joining the NS, had acted in a way that supported the occupying power, the German warfare, or violated specific provisions of the Norwegian Penal Code of 1902, he or she could normally be penalised without further ado. However, the problem with adopting a kind of collective punishment was that many of the new NS members, who often had joined for pragmatic or other non-ideological reasons, were so-called passive, i.e. they could not be blamed legally for anything other than their membership itself. Could a legal settlement that punished the latter group still be facilitated, and if so, how?[8]

2. The Exile Government's Preparations for the Legal Settlement

The chosen solution to punish all NS members was in the first instance a separate provisional decree on treason, prepared by the government and adopted on 22 January 1942. This was then replaced on 15 December 1944 by a new decree, composed by the Home Front's secret law committee in Oslo and later (21 February 1947) made into law with only minor changes. However, as we will show below, the legal challenges of prosecuting passive NS members were not finally resolved in either of the two decrees. The Ministry of Justice's archives and other sources also show that there was disagreement among Norwegian exile lawyers about the wording of the first treason decree, and between the Ministry and the Home Front's legal committee about the content of the second.[9]

The first question the Ministry's lawyers had to consider when they started work on a future legal settlement in 1941 was whether existing Norwegian criminal legislation could be used against the NS members. If that was not the case, new legal provisions would be necessary. The main clause concerning treason in the Civil Penal Code of 22 May 1902 was § 86, a broad provision stipulating that anyone who during a war "assists the enemy in advice

6 Huyse, Luc, "Belgian and Dutch Purges after World War II Compared," in *Retribution and Reparation in the Transition to Democracy*, edited by Jon Elster, Cambridge, Cambridge University Press 2006, 165.

7 Borge, Baard Herman and Lars-Erik Vaale, *Grunnlovens største prøve: Rettsoppgjøret etter 1945*, Oslo, Scandinavian Academic Press 2018, 26–27, 36–38.

8 Borge and Vaale 2018, 39.

9 Borge and Vaale 2018, 24–28, 36–39, 45–48.

or deed" shall be sentenced to a minimum penalty of three years' imprisonment. Another provision that was often highlighted in the discussions was § 98 of the same Act, which states that anyone who by illegal means seeks to bring about or contribute to a change in the Constitution of the Norwegian state shall be punished by imprisonment for at least five years. Regardless of which section of the law was used against the NS members, however, the prerequisite for conviction was that the accused had understood that the act was punishable at the time of the offence (subjective guilt). It was not sufficient that the law criminalised the act (objective guilt). The offence had to be committed intentionally or negligently for the defendant to be convicted.[10]

On 10 January 1941, Wilhelm Keilhau (1888–1954), the Norwegian war lawyer in London, wrote to the Ministry of Justice requesting new treason legislation. So far, the existing provisions had not deterred people at home from joining the NS and now the government had to clarify the difference between treason and loyalty, he argued. On 13 March 1941, the Ministry then appointed Keilhau as chairman of a six-member legal committee to investigate if the Penal Code should be supplemented. Due to disagreement in the committee about whether the Penal Code could be used against the NS members and thus also about the need for new penalty provisions, however, it took a full nine months before a recommendation was presented. Based on the committee's proposal, Minister of Justice Terje Wold and his colleagues now prepared two provisional decrees, one of which imposed a penalty for membership in NS or other organisations that "assist the enemy." Both ordinances entered into effect from 22 January 1942. The Quisling Decree (forræderianordningen) that applied to NS members did not explicitly mention intent as a condition for punishment but was to be applied "in conjunction" with the Penal Code's §§ 86 and 98. Such a reference to existing treason legislation was not included in the committee's original proposal, but added by Wold's ministry.[11] The ordinance introduced two new penalties, i.e. loss of public trust and fines of up to NOK 1 million, penalties that could be used either instead of, or in addition to, those of the Penal Code.[12]

When Wold announced the Quisling Decree in a speech on BBC Radio on 23 January, he declared that every single NS member, including the passive ones, would be excluded from the society they had shown themselves unworthy of belonging to. In other words, they would become a pariah caste. Wold also stated without reservation that all NS members were traitors who had violated § 86 of the Penal Code.[13] As mentioned, conviction under this act required intent, but it remained unclear how this requirement was to be met in cases against

10 Boye, Thorvald and Arnet Olafsen (eds.), *Almindelig borgerlig straffelov og Lov om den almindelige borgerlige straffelovs ikrafttræden af 22. mai 1902,* Kristiania, Grøndahl 1903, 36–39 (§§ 40–48), 53, (§ 86), 57 (§ 98).

11 Andenæs, Johs., "Rettsgrunnlaget for landssvikoppgjøret," in *Aftenposten* 19 February 1949.

12 Borge and Vaale 2018, 30–39; Seemann, Anika, *Law and Politics in the Norwegian 'Treason Trials', 1941–1964*, DPhil-dissertation in history, University of Cambridge 2019, 54–55.

13 AV/RA-PA-1493/F/Fb/L0001, Kringkastingstale av Terje Wold ang. kgl. anordning av 22/1 1942, BBC Radio, London, 23 January 1942; Seemann 2019, 55–56.

passive NS members. However, the preparatory works to the 1942 Decree indicate that the Ministry of Justice was less categorical than Wold in his radio speech when it came to penalizing NS membership. In its response to the Keilhau Committee, the Ministry believed that it was not sufficient simply to establish whether someone had been a member of NS. It was also necessary to consider whether the person in question had provided unlawful assistance to the enemy. In addition, it was pointed out that not all NS members were traitors in the sense of the Penal Code.[14]

The same doubts about the use of § 86 of the Penal Code were expressed in a memo from 14 October 1943, written by Finn Hiorthøy (1903–1991), head of the Ministry's Legislation Department. In his opinion, the provision could not be used against passive NS members, because it required actions that covered the offence content of the section. Instead, Hiorthøy wanted to use § 94 of the Penal Code, which makes it a criminal offence to enter into an association with the aim of committing an offence against §§ 83, 84, 86 or 90 of the same Act.[15] Some Norwegian exile lawyers outside the Ministry of Justice were also critical of the new treason provision. Among them was the Home Front's representative in the government, Paul Hartmann (1878–1974), who, somewhat paradoxically, was personally opposed to punishing all NS members. As he saw it, this was not a practical policy, because the legal settlement would then be far too extensive and resource intensive.[16]

The second and final provisional Treason Decree (landssvikanordningen), which replaced the first on 15 December 1944, established, like its predecessor, that NS membership in itself was illegal. The new decree, like the old one, was to be used in conjunction with the Penal Code, which also this time was assumed to already prohibit membership. The penalty was up to 3 years imprisonment, loss of civic trust and unlimited fines. Unlike the 1942 Decree, the new one had retroactive effect to 9 April 1940. It also contained detailed rules on a financial settlement, whereby NS members with reference to Norwegian law of damages were made collectively responsible for what the war had cost Norway.[17]

The right to punish treason with fines, a principle that later had great significance for the settlement with the passive NS members, was announced in the Home Front's motives, but was not legalised until the later supplementary Criminal procedure decree (rettergangsanordningen), of 16 February 1945. The use of fines would make prosecution faster and more effective, it was stated. The Home Front assumed that most treason cases could be settled in this way, i.e. without a trial and "unnecessarily extensive case handling."[18] In the motives, the Home Front's legislative committee also considered whether, in addition to §§ 86 and 98 of the Penal

14 AV/RA/S-3212/D/De/L0299/0002, Provisorisk anordning om tillegg til straffelovgivningen (med kommentarer), London, 22 January 1942.

15 AV/RA/S-3212/D/De/L0299/0002, P. M. Forholdet mellom de alminnelige forræderibestemmelser og prov. anordning av 22. januar 1942, from Finn Hiorthøy to the Ministry of Justice, London, 14 October 1943.

16 Borge and Vaale 2018, 37–38.

17 Justis- og Politidepartementet (publ.), *Samling av provisoriske anordninger, kgl. res. m.v.* 1940–1945, Oslo, Departementet 1945, 103, 113–114; Seemann 2019, 59–60.

18 Justis- og Politidepartementet (publ.) 1945, 99–107, 133, 159, 211; Seemann 2019, 61.

Code, §§ 94 and 104 could be used, which penalise those who enter into an alliance with the purpose of committing treason. The Committee considered NS to be such an alliance, but doubted whether the latter two provisions, which relate to complicity, could be used when the criminal purpose has been realised. The conclusion was therefore that the question was of little interest, as it was in any case clear that NS membership itself was covered by §§ 86 and 98.[19]

From the preparatory work for the Treason Decree of 15 December 1944, it can generally be concluded that the Ministry of Justice did little to challenge the Home Front's draft law and its extensive justification. One difference, however, is that while the Ministry's comments did not address the question of the NS members' subjective guilt, the Home Front's legal committee explicitly rejected the idea that individual intent must be demonstrated. For those NS members who were to be sentenced under the Act, i.e. the vast majority, it was sufficient to establish their membership to convict them, according to the grounds. The Ministry, for its part, would probably leave the question to the courts.[20]

At the end of the war, how the government's provisional treason regulations were to be applied in relation to the Penal Code and its criminal intent requirement was open to political and legal interpretation by the two other state powers, i.e. the Parliament (Storting) and the courts. In June 1945, the Storting, which had been elected in 1936, convened for a short summer session before the general election in the autumn. This gave the parliamentarians the opportunity to consider the returning government's temporary penal provisions before the courts did. Theoretically, the Storting could have amended or even rejected the treason scheme and the other new provisions, but instead, in two resolutions in June and July, it bowed to the government's wish that all of them should be approved as laws until a new Storting could consider them. As a result, they were not debated until they had been in force for 1–2 years and would therefore have been difficult to amend in the interests of equal treatment. In any case, all the provisional decrees, including the one on treason of 15 December 1944, were made into permanent laws in the years 1946–1948, virtually unchanged. Thus, from August 1945 onwards, it was solely up to the courts how passive NS members were to be dealt with based on new and older penal provisions.[21]

3. Historiography

For many decades after the legal settlement was finalised in the 1950s, Norwegian lawyers and historians were not very interested in researching it.[22] The topic we address in this ar-

19 Justis- og Politidepartementet (publ.) 1945, 142.
20 Justis- og Politidepartementet (publ.) 1945, 108–132.
21 Borge and Vaale 2018, 73–103.
22 Maerz, Susanne, *Okkupasjonstidens skygger: Fortidsbearbeidelse i Norge som identitetsdiskurs*, Oslo, Unipub 2010, 66–72, 174–187, 196–197, 253–258; Graver, Hans Petter, "Rettsoppgjøret i Norge etter krigen – tid for et nytt juridisk blikk," in *Lov og Rett* 54, 2, 2015a, 65–67; Seemann 2019, 8–14.

ticle, i.e. the legal problems associated with the mass prosecution of passive NS members, has until recently mostly been treated superficially and with little critical distance. One important reason for this is the dominant role played by criminal law professor Johs. Andenæs (1912–2003) as the country's undisputed authority in the field until his death. In a series of articles, lectures, and newspaper articles from 1945 onwards, not to mention a widely quoted book from 1979, revised in 1998, Andenæs communicated his views on the legal aspects of the settlement.[23] Andenæs himself was involved on the prosecution's side during the treason trials, first as an adviser to the Director of Public Prosecutions and later as a judge in the Supreme Court. He was subsequently critical of some of the details of the settlement, but primarily acted as its defender. One of the areas where Andenæs rejected all legal criticism was the Government's and the courts' handling of the passive NS members. As we shall see, he himself made a decisive contribution to this as first-voting judge in a landmark judgment (Kristi Wassendrud) by the Supreme Court in 1946.[24]

In later academic publications by lawyers and historians dealing with the legal settlement, the fate of the passive NS members is usually a peripheral topic, and the presentation of it largely follows Andenæs' views. The first historians to deal with the subject in more detail were Hans Fredrik Dahl (b. 1939) and Øystein Sørensen (b. 1954), in an anthology from 2004. They contended that the prosecution of passive NS members was in accordance with the Penal Code's view on complicity, but their opinion finds little empirical, theoretical or comparative support. As we have already shown, the idea of defining NS membership as complicity in a criminal act was explicitly rejected during the preparation of the Treason Decree of 15 December 1944. Dahl and Sørensen's view is also contradicted in legal theory. In his PhD-dissertation in law from 1999, Erling Johannes Husabø (b. 1962) stated that the legal distinction between the main deed itself and aiding and abetting to this from the Criminal Law of 1842 was upheld in the Penal Law of 1902, albeit in a slightly weaker wording. Husabø documented this by referring to the preparatory documents of the 1902 Penal Code, a verdict from 1909 and later legal literature (by for instance Jon Skeie, 1871–1951, Francis Hagerup, 1853–1921, and Johs. Andenæs) confirming this understanding of complicity. It was repeated as late as 2023, in a book about the Norwegian Penal Code, Husabø published with his fellow law professors Linda Gröning (b. 1975) and Jørn Jacobsen (b. 1977) at the University of Bergen.[25] The Dahl–Sørensen thesis is further undermined when applying a comparative perspective. According to professor of jurisprudence at the BI Norwegian Busi-

23 Andenæs, Johs., "Rettsoppgjøret med landssvikere og krigsforbrytere i Norge," in *Nordisk Tidsskrift for Strafferet* 23, 1945, 197–220; Andenæs, Johs., "Rettsoppgjøret i Norge. Et supplement," in *Nordisk Tidsskrift for Strafferet* 24, 1946, 97–106; Andenæs, Johs., *Et liv blant paragrafer: Juridiske stridsspørsmål slik jeg så dem*, Oslo, Gyldendal 1987; Andenæs, Johs., *Alminnelig strafferett,* 4. ed., Oslo, Universitetsforlaget 1997; Andenæs 1998.

24 Borge and Vaale 2018, 183–184; Borge, Baard Herman and Lars-Erik Vaale, "Mørke skygger over rettsoppgjøret etter krigen," in *Nordlys* 20 December 2019.

25 Dahl and Sørensen 2004, 94; Getz, Bernhard, "Om den saakaldte Delaktighed i Forbrydelser," in *Norsk Retstidende* 31, 1–5, 1876, 1–64; Augdahl, Per, "Bernhard Getz," in *Norsk Biografisk Leksikon*, vol. 4, Oslo, Aschehoug 1929, 432; Røstad, Helge, "Landets første Riksadvokat – reformatoren Bernhard Getz," in

ness School, Johan Boucht (b. 1976), the division between the main perpetrator and an accomplice is also present in other Nordic countries, with similar legal cultures.[26]

From 2015 onwards, law professor Hans Petter Graver (b. 1955) published several works in which he criticised various aspects of the treason trials, including the one we are discussing here. However, Graver did not go as deeply into the subject as we do in this article, but only formulated a brief legal criticism. According to him, the passive members were labelled as traitors and punished without any real legal basis. Criminal intent could not be inferred from NS membership alone without assessing the subjective judgements of the perpetrators, he explained.[27] In their large monograph from 2018 the political scientist Baard Herman Borge (b. 1963) and the historian Lars-Erik Vaale (b. 1975) critically analysed the relationship between the legal reckoning and various sections of the Constitution of 1814. The judiciary's treatment of the passive NS members was touched upon in many contexts but is not the focus of that book.[28] The last academic publication that should be mentioned is the DPhil-dissertation from Cambridge University in 2019 by historian Anika Seemann (b. 1985). While neither defending nor criticising the post-war reckoning, she nonetheless concluded that the criminalisation of NS membership was one of its most legally problematic and politically inflamed issues.[29]

Our study is the first to take an in-depth look at how a principle of collective punishment regardless of criminal intent, previously unknown in Norwegian jurisprudence, came to characterise the Norwegian treason settlement and give it its unique scope. That the principle was at the heart of the settlement is rarely acknowledged, and even less emphasised by previous research. In the following review of treason convictions, the assessment of passive NS membership was normally one of several charges. It may be assumed in some cases, such as the Supreme Court's very first principle judgment on 9 August 1945, that other criminal circumstances influenced the court's assessment, particularly where these were of a more serious nature. Nevertheless, the assessment of membership itself was consistently treated separately and taken very seriously by the courts.

Lov og Rett 6, 1967, 394–396; Ross, Alf, "Om samvirke i forbrydelse", in Alf Ross, Forbrydelse og straf: Analytiske og reformatoriske bidrag til kriminalrettens almindelige del, København, Nyt Nordisk Forlag Arnold Busck 1974, 118–119; Husabø, Erling Johannes, Straffansvarets periferi: Medverking, forsøk, førebuing, Bergen, Universitetsforlaget 1999, 7–8; Gröning, Linda, Erling Johannes Husabø and Jørn Jacobsen, Frihet, forbrytelse og straff, 3. ed., Bergen, Vigmostad & Bjørke 2023, 320–321.

26 Boucht, Johan, "Medvirkningslæren i finsk, norsk og svensk rett – en komparativ undersøkelse," in *Tidsskrift for Strafferett 20*, 4, 2020, 355, 357–368, 376–378.

27 Graver 2015a, 75–76.

28 Borge and Vaale 2018, 36–52, 110–116, 138–147, 201–203, 215–221, 234–236, 251, 281–287.

29 Seemann 2019, 51, 53–57, 58–60, 110–117, 239–244.

4. The Courts and Passive NS Membership

During the legal purges after Norway's liberation 8 May 1945, the courts often breached a central principle of Norwegian jurisprudence, by not individually assessing the guilt of the accused. This became evident already in the first treason case, against the former Gestapo interpreter and passive NS member in Oslo, Reidar Haaland (1919–1945), when they addressed the question of criminalisation of NS membership per se.[30] Eidsivating Court of Appeal, set with three professional and four lay judges, tried his case 16 July 1945. It ruled unanimously in favour of the claim by the Public Prosecutor's Office that NS membership after 8 April 1940 was punishable as aid to the enemy during war, according to § 86 on treason in the Civil Penal Code. The court justified its ruling by referring to Vidkun Quisling's coup d'état and his suspension of the mobilisation order issued by the democratic government 9 April 1940 and that NS was the only legal party in Norway from 25 September 1940, with him as leader. NS then developed into an organisation, that supported the enemy and collaborated with the occupant, and every single member of the party was important to further that cause, the court argued. It rejected Haaland's contention to have acted in national interest when joining NS 6 December 1940 and maintained that he must have known this was illegal.[31] In this way, the court fulfilled the absolute requirement of intent.[32]

Haaland appealed his conviction to the Supreme Court 9 August 1945, where it was upheld by nine of the thirteen judges. The majority vote basically followed the arguments from the Court of Appeal and was represented by the first-voting judge, Axel Theodor Næss (1874–1945), in the proceedings. He dismissed the objection from Haaland's defence attorney, Carl A. Torstensen (1890–1962), that complicity was not mentioned in connection with the treason clause (§ 86) in the Civil Penal Code of 1902. For Næss and his eight other supporters, the membership in NS was sufficient to convict Haaland based on § 86, regardless of his subjective guilt. According to them, the legal description of a traitorous act in this clause clearly covered him being a NS-member. The second-voting judge, Edvin Alten (1876–1967), advocated the minority position. He agreed with the defence and emphasised the major difference in responsibility between the NS leaders and the regular party members. The first category directly supported the enemy, but the latter group could not, by any reasonable standards, be convicted for collaboration, because they were in such a remote connection to the NS leadership, Alten declared.[33] To resolve an issue concerning political crimes in a

30 AV/RA-S-3138-01/D/Da/L0017/0008, Dnr. 125, Reidar Haaland; Walnum, Jacob, "De prinsipielle rettsspørsmål som landssvikoppgjøret reiste, og deres avgjørelse i Høyesterett," in *Om landssvikoppgjøret*, published by Justis- og Politidepartementet, Gjøvik, Mariendal 1962, 94–97; Borge and Vaale 2018, 110–112.

31 AV/RA-S-3138-01/D/Da/L0017/0008, Dnr. 125, Reidar Haaland, Transcript of the Eidsivating Court of Appeal verdict, 12 July 1945.

32 Seemann 2019, 111–112.

33 AV/RA-S-3138-01/D/Da/L0017/0008, Dnr. 125, Reidar Haaland, Transcript of the Supreme Court verdict, 9 August 1945.

capital punishment case like Haaland's, where torture was the main issue, still seems like a conspicuous choice by the prosecuting authorities.

The arguments for sentencing passive NS members from the Haaland case were repeated in the second treason trial put before the courts, against the head of the supply board in Aker (Oslo), Consul General Carl Stephanson (1877–1956). He joined NS late September 1940 and stayed a member until May 1945. A unanimous Aker District Court 24 July 1945 found his party membership punishable, according to the Treason Decree of 15 December 1944 (§ 2). The court argued that Stephanson's culpability was also evident after the treason clause (§ 86) and the clause concerning illegally changing the Norwegian Constitution (§ 98) in the penal code, even if these clauses were not mentioned in the indictment. Stephanson was subjectively aware of his objective guilt, the court stated.[34] Contrary to the first, the two latter clauses prerequisited an active, not a passive, will and action from the accused to secure a conviction, according to renowned pre-war legal scholars as Peder Kjerschow (1857–1944) and Jon Skeie.[35] They were both quoted by Supreme Court Judge Alten in the Haaland Case and made an integral part of the reasoning for the minority position there.[36] Stephanson was sentenced after the 1944 Treason Decree by the District Court to six months in prison, deprivation of civic trust for ten years, a fine of 75 000 kroner, confiscation of 7 000 kroner and to pay a compensation of 80 000 kroner.[37]

Stephanson's appeal was dealt with by the Supreme Court in two stages, treating the criminal and compensation issues separately, but his passive NS membership was at the core of both.[38] In the first proceeding, 27 august 1945, the court upheld Stephanson's prison sentence and reduced the civic trust deprivation. Helge Klæstad (1885–1965), first-voting judge, voiced the majority view that Stephanson by joining NS was liable for the political actions and economical dispositions made by the party during the occupation 1940–1945. Punishment for this had equal legal foundations in the 1902 Penal Code and 1944 Treason Decree, Klæstad argued. A unanimous court agreed with him that Stephanson had to be convicted as a NS member, but four judges wanted to reduce the prison sentence to 120 days and the fine to 50 000 kroner. Interestingly, judge Einar Hanssen (1874–1952), who voted for punishing Stephanson's NS membership, had opposed doing so when sentencing Haaland, because he

34 AV/RA-S-3138-01/D/Db/L0106/1297, Anr. 2486, Carl Stephanson, Transcript of the Aker District Court verdict, 24 July 1945.

35 Kjerschow, Peder, *Almindelig borgerlig straffelov av 22. mai 1902 og Lov om den almindelige borgerlige straffelovs ikrafttreden av 22. mai 1902,* Oslo, Aschehoug 1930, 86–111 (on the requirements for criminal liability); 283–286 (§ 86), 301–302 (§ 98); Skeie, Jon, *Den norske strafferett. 2: Den specielle del,* Oslo, Norli 1938, 537–561 (§ 86), 562–565 (§ 98).

36 AV/RA-S-3138-01/D/Da/L0017/0008, Dnr. 125, Reidar Haaland, Transcript of the Supreme Court verdict, 9 August 1945.

37 AV/RA-S-3138-01/D/Db/L0106/1297, Anr. 2486, Carl Stephanson, Transcript of the Aker District Court verdict, 24 July 1945.

38 Borge and Vaale 2018, 110–112, 114–116, 286–287.

then deemed it "incorrect" to perceive his political passivity as support for the enemy. But Hanssen now felt compelled to pass equal judgments in both cases.[39]

On 3 August 1945 the Department of Justice made changes in the Treason Decree from 1944 concerning the collective compensation liability (§ 25). Initially, that decree allowed demanding compensation as far as the defendant had economic funds. This did, in reality, amount to expropriating everything they owned, breaching the constitutional prohibition (§ 104) on deprivation of a real estate and an entire wealth due to a crime. The new decree, however, stated that the level of compensation was to be determined by the nature of the crime, the guilt of the accused, his or her financial situation and other circumstances.[40] Minister of Justice, Johan Cappelen (1889–1947), allowed the Supreme Court to use the new decree when treating Stephanson's appeal in the matter of compensation. This measure was supported by several of the judges, but would, most certainly, not have been allowed in a more normal situation, given the non-retroactivity clause in the Constitution (§ 97).[41] The views on compensation followed the same lines as in the Haaland case. On 8 September 1945, the majority position, supported by eight judges, headed by Emil Stang (1882–1964), argued that Stephanson was responsible for the damages NS caused for Norway and its citizens. On the other hand, Sigurd Fougner (1879–1959) and two other judges disagreed, arguing that there was no causal connection between Stephanson's NS membership and such damages, neither by subjective responsibility nor by negligence.[42]

The Penal Code's intent requirement was resolved in different ways during the early trials we have reviewed so far. The first Haaland judgment established wilful treason contrary to the defendant's own statement. However, in later judgments, intent was taken for granted, without any discussion of the defendant's motive for joining NS.[43] Even after that, the problem of establishing the criminal intent of passive NS members was, as we shall see, not addressed in a consistent manner by the courts. Given that the government in exile in the 1942 and 1944 Decrees was concerned that §§ 86 and 98 of the Penal Code needed additions, it is also peculiar that the Supreme Court in the two first principle cases (Haaland and Stephanson) focused on whether the criminalisation of NS membership can be justified in the Penal Code. Regardless of the courts' motives, the Attorney General, Sven Arntzen (1897–1976), in August 1946 saw the decisions as an approval of the Treason Decree's reference to the Penal Code. To him, this meant that thousands of passive NS members without any real

39 AV/RA-S-3138-01/D/Db/L0106/1297, Anr. 2486, Carl Stephanson, Transcript of the Supreme Court verdict, 27 August 1945.

40 Borge and Vaale 2018, 69, 286–287; Borge and Vaale 2021, 110–111.

41 Sandmo, Erling, Siste ord: Høyesterett i norsk historie 1905–1965, Oslo, Cappelen 2005, 344.

42 AV/RA-S-3138-01/D/Db/L0106/1297, Anr. 2486, Carl Stephanson, Transcript of the Supreme Court verdict, 8 September 1945.

43 Examples of such verdicts are Rt. 1945, 26–43, 52–58 (Carl Stephanson); Rt. 1946, 1075–1077 (Ingrid Eiken); Riksadvokatens Meddelelsesblad (RM.) 17, 1946, 107–111 (Nils Narverud); RM., h. 28, 1947, 59–62 (Wilhelm Landaas); RM. 29, 1947, 42–43 (Karl Hæreid); RM. 29, 1947, 49–50 (Ole Anton Kjørnæs).

assessment of intent could be punished under the decree, with additional authorization in the Penal Code.[44]

In the 1944 Decree there was no direct distinction between members of NS or its Youth Organization (NSUF), but the courts had a possibility to reduce the sentence under the decree's specified minimum or to drop it altogether if the accused had not yet reached 18 years of age at the time of his or her joining NSUF.[45] Ottar Lie Motland (1924–2002) had done that 1 October 1940, when he was 16. The Gulating Court of Appeal 2 August 1945 found him guilty of treason after turning 18 years on 7 April 1942, because he remained a member after that date, even if it acknowledged that Motland did not fully comprehend the significance of this choice and the purpose of NS. The court chose to use the Treason Decree of 1944, not § 86 in the Penal Code of 1902, to convict him for the NSUF membership. His service as a front fighter on the Eastern Front in the Soviet Union was subsumed under the latter clause, though.[46] The court handed down a sentence of 2 ½ years in prison, which was augmented to 3 ¼ years by the Supreme Court 19 September 1945. Although Motland's punishment was increased, first-voting judge Helge Klæstad and his four colleagues stated that the subjective conditions for punishment under §§ 86 and 98 were in principle not present in cases against NSUF members.[47] In other similar cases and towards ordinary NS members this autumn and later, the Supreme Court criticised the lower court for not having assessed the subjective guilt of the accused, but found no reason to repeal the sentences, because they were deemed just and right.[48] These results prompted a clarification from the Public Prosecutor, concerning NSUF members. In a circular 15 November 1945 from this office, it was decided to refrain from prosecution of the accused, who was under 18 years when entering NSUF.[49]

The question of punishability for NS members according to § 98 in the Penal Code about illegally changing the Norwegian Constitution was settled by the Supreme Court in Bjarne Hausken Knudsen's (1917–1991) case 20 September 1945. He joined NS in autumn 1933, renewed his membership in April 1940 and stayed on as a County Youth Leader for the party until May 1945. Knudsen also did front service in the Soviet Union 1941–1942 and was a second in command of Germanske SS Norge (Germanic SS Norway, GSSN), in Rogaland County 1942–1945. GSSN was a suborganization of NS. On 2 August 1945 Gulating Court of Appeal found it proven beyond doubt that Knudsen, through his NS membership, had par-

44 "Medlemskapet i NS og straffbarheten nok en gang," in *Morgenbladet* 1 August 1946.

45 Vaale, Lars-Erik, *Myndighetene og NS-barnene i Norge etter 1945: Utredning på oppdrag fra Arbeids- og Inkluderingsdepartementet,* 16. februar 2023 *(The Government and the NS Children in Norway after 1945: Report submitted to the Ministry of Labour and Social Inclusion,* 16 February 2023), 9–10.

46 AV/RA-S-3138-28/D/Da/L0071/0006, Anr. 461, Ottar Lie Motland, Transcript of the Gulating Court of Appeal verdict, 2 August 1945.

47 AV/RA-S-3138-28/D/Da/L0071/0006, Anr. 461, Ottar Lie Motland, Transcript of the Supreme Court verdict, 19 September 1945; Walnum 1962, 99.

48 Rt. 1945, 171–173 (Finn Mathiesen and Arne Wilhelm Nilssen); Rt. 1945, 180–183 (Finn Christophersen); Rt. 1945, 228–231 (Henry Carsten Taugbøl); Rt. 1945, 246–249 (Olav Trygve Harveland); Rt. 1945, 365–367 (Harald Anker Gundersen, Bjarne Kaase and Oddvar Rogn Moen); RM. 44, 1948, 67–70 (Otto Finnerud).

49 Vaale 2023, 11.

ticipated in the party's illegal work to change the Constitution and knew that he acted wilfully. For this, he was given a prison sentence of 8 years and loss of civic trust. The Supreme Court upheld this conviction, only reducing his loss of civic rights. Even though Knudsen was not among the passive NS members, from now on they were also assumed to have violated § 98 in the Penal Code. However, Alten emphasised that a NS member must have been aware that he or she contributed to the illegal changes to be punished for violation of § 98.[50] The Knudsen sentence had very limited significance though, because § 98 was seldom used against passive NS members during the rest of the purges.[51]

Several cases were repealed by the Supreme Court in autumn 1945 and spring 1946, on the basis that the lower courts had omitted to discuss if § 86 of the Penal Code or the 1942 Quisling Decree should have been used as legal grounds for the convictions.[52] First-voting judge Edvin Alten made that clear in the case against passive NS member Magnus Værnes Eide (1915–1992) in the Supreme Court 29 November 1945. The lower court "had not been aware that to sentence the defendant after the indictment, it was necessary to address the question whether his actions were at all subsumable under § 86." This court had only referred to the 1944 Treason Decree.[53] Not assessing if the decree imposed harsher punishment than the penal code, could also contravene the retroactivity prohibition (§ 97) in the Constitution, that made this illegal. Conversely, if the penal code did not formally cover passive NS membership, the Decrees of 1942 and 1944 were both, in reality, retroactive.[54]

In the case against the 75-year-old and unmarried woman, Kristi Wassendrud (1870–1952), 11. September 1946, the Supreme Court however further deviated from its previous understanding of the legal preconditions for convicting passive NS members. She joined NS in autumn 1941 to keep her radio. A unanimous court, led by judge Johs. Andenæs, now stated that the Treason Decree of 1944, with additional reference to the one from 1942, was sufficient. According to Andenæs, no reference to §§ 86 and 98 in the Penal Code was necessary, contradicting this requirement in the 1944 Decree, because Wassendrud lacked intent. The court also accepted the peculiar conclusion and contradictory reasoning in her verdict from Eiker, Modum and Sigdal District Court 15 February 1946. On the one hand, the court stated that Wassendrud's "spiritual and physical vigour" implied that she knew supporting NS was not the right thing to do. On the other hand, it argued that Wassendrud's "high age" probably prevented her from understanding that party membership, in fact, was tantamount with treason. She could therefore not be said to have acted with the intent of supporting the German

50 AV/RA-S-3138-28/D/Da/L0060/0011, Anr. 376, Bjarne Hausken Knudsen, Transcript of the Gulating Court of Appeal verdict, 2 August 1945, Transcript of the Supreme Court verdict, 20 September 1945; Walnum 1962, 97–98.

51 Andenæs 1998, 135–136.

52 Rt. 1945, 263–264 (Magnus Værnes Eide); Rt. 1945, 264–265 (Johannes Alfred Lervik); Rt. 1945, 285–287 (Leif Oskar Erlandsen); Rt. 1945, 304–307 (Alf Marcelius Dahlberg); Rt. 1946, 385 (Fridtjof Kjæreng); RM. 18, 1946, 17–19 (Ole Kvammen Maukdal).

53 Rt. 1945, 264 (Magnus Værnes Eide). Translated by the authors. Cf. also Walnum 1962, 86–87.

54 Graver, Hans Petter, *Dommernes krig: Den tyske okkupasjonen 1940–1945 og den norske rettsstaten,* Oslo, Pax 2015b, 161–167; Borge and Vaale 2018, 233.

occupant. The Supreme Court upheld her fine of 5 000 kroner and deprivation of civic rights but removed her pay of compensation for 7 000 kroner.[55]

Farmer Anna Harbak (1883–1954) was a passive NS member from 1942 to 1945. She did not accept a fine from the police and therefore appealed to the Mandal District Court, which 11 September 1946 upheld the fine, a pay of compensation and deprivation of civil rights. On 18 December 1946, the Appeal Committee (judges Edvin Alten, Reidar Skau and Fredrik Sejersted) of the Supreme Court rejected trying her appeal but removed the pay of compensation.56 Both courts referred to the Wassendrud judgment, that was solely based on the treason decrees of 1942 and 1944. The Supreme Court also did this later, in four similar cases, from February 1948, September 1948 and February 1949 respectively.[57]

These six passive NS members were thus convicted only under the treason decrees of 1942 and 1944, without additional authorisation in the Penal Code, a possibility that is not specified in either of the decrees. All these judgments are problematic, as both the provisional orders clearly assume that any NS membership entails a violation of § 86 of the Penal Code. In all six cases, and particularly in Wassendrud's, the lower court had made a genuine assessment of intent and concluded that there was none. Nevertheless, the Supreme Court found these six defendants guilty of violating the Treason Decree of 1944, but in this context the provision was only interpreted as a formal prohibition against NS membership. Paradoxically, neither of the defendants were found to have committed treason. They were therefore not convicted under the Penal Code but were nevertheless labelled as traitors. Intent was in these cases thus not given any weight in relation to the question of guilt. Through these judgments, the Supreme Court had created two different types of breaches of the provisional order, with different degrees of severity but the same penalties. "Treason" could either be a crime, sentenced with supplementary authorisation in the Penal Code, or an offence committed without intent.[58] The latter variant meant that the court now introduced punishment for a previously non-criminal action.

Regardless of the Wassendrud judgment and the five others mentioned above, however, most passive NS members had their cases settled by a fine from the police.[59] Like the Treason Decree from 1944, or the corresponding Treason Act from 1947, this also referred to sections of the Penal Code and thus implicitly assumed intent. The presumption of wilful treason was only problematised if, like Ms Wassendrud, they did not accept their fine and the case had

55 AV/RA-S-3138-13/D/Da/L0077/0012, Lnr. 719/45, Kristi Olsdtr. Wassendrud, Penalty charge notice, 8 November 1945, Transcript of the Eiker, Modum and Sigdal District Court verdict, 15 February 1946, Transcript of the Supreme Court verdict, 11 September 1946; Walnum 1962, 98.

56 RM. 28, 1946, 133–136 (Anna Harbak); "20 000 kroner i bot og erstatning," in *Sørlandet* 12 September 1946 (Anna Harbak); "Kvinne frå Finsland for retten," in *Agder Tidend* 13 September 1946 (Anna Harbak); "Saki mot Anna Harbak, Finsland," in *Agder Tidend* 7 January 1947 (Anna Harbak).

57 RM. 44, 1948, 67–70 (Otto Finnerud); RM. 44, 1948, 103–106 (Ole Larsen Heimli); RM. 50, 1948, 147–151 (Knut Flått); RM. 52, 1949, 60–66 (Rasmus Fredrik Winther).

58 Mordt, Hans Kiær, *Det urettferdige rettsoppgjør,* Oslo, Heim og Samfund A/S 1955, 78.

59 Aulie, Andreas, "Registrering av landssvikforbrytelsene med gjerningsbeskrivelse og statistikk," in *Om landssvikoppgjøret*, published by Justis- og Politidepartementet, Gjøvik, Mariendal 1962, 247.

to be brought before a court. Even if the court then were to find that there was no intent, it could still impose a penalty under the Treason Decree.[60]

5. The Public Debate about Passive NS Members

Primate of the Church and Bishop in Oslo, Dr. Eivind Berggrav (1884–1959), played a crucial and defining role in the debate about the legal reckoning after the liberation in May 1945. He advocated an extensive purge with a collective judgment of all NS members, to satisfy the public outcry for retribution and avoid using the death penalty. Party membership was tantamount with treason and taking part in "a conspiracy against the Norwegian People," Berggrav argued. For him, subjective beliefs were irrelevant when assessing the formal guilt of the accused, despite this being a legal precondition for punishing criminals in the Civil Penal Code of 1902. Berggrav also made another error, claiming that § 86 in this law equated being an accessory to treason with actually committing it.[61] As stated earlier, there is no mention of complicity in this clause. "Justice before forgiveness" was his theological approach to the purges, and, combined with law and politics, it made for a special trinity, that did not prevent traitors or war criminals from being executed or passive NS members from being prosecuted. Berggrav's views became formative for the public debate about the reckoning with NS for years to come.[62]

Dr. Kristian Schjelderup (1894–1980), the Bishop of Hamar, in September 1947 agreed with Berggrav that a reckoning with the traitors was necessary, but they disagreed on the legal basis for and the social consequences of this purge. Schjelderup maintained that there, within "every humane legal society," had been a matter of course to consider the subjective motives behind an action. After the war, Schjelderup continued, this principle had "broken

60 See for instance Rt. 1946, 656–659 (Halvor Bagaas); Rt. 1946, 1075–1077 (Ingrid Eiken), Rt. 1946, 1081–1087 (Carsten Eugen Kristiansen); Rt. 1946, 1098–1099 (Margit Belsby); RM. 29, 1947, 120–124 (Bent Knutsen). All these defendants had to pay a fine and lost their employment in different sectors of the public service. Cf. also for instance "Fikk boten nedsatt," in *Drammens Tidende* 16 March 1946 (Anna Margit Hansen); "Yngvar Bergsund nekter å vedta landssvikforelegget," in *Ringerikes* Blad 5 April 1946 (Yngvar Bergsund); "Yngvar Bergsund fikk 22.000 kroner i bot og erstatning," in *Ringerikes* Blad 9 April 1946 (Yngvar Bergsund); "Boten ble opprettholdt," in *Akershus Amtstidende* 12 August 1946 (Hans Martin Martinsen Barli); "Fru Johanne Mørch var passivt medlem av NS," in *Moss Arbeiderblad* 10 October 1947 (Johanne Mørch); "Landssvik," in *Gudbrandsdølen* 7 February 1948 (Rolf H. Frisvold); "Landssviksaker ved Eidsvoll herredsrett," in *Romerikes Blad* 16 March 1948 (Borghild Solvang); "Medlem av N.S., men ikke nazist," in *Glåmdalen* 22 April 1948 (Alf Andor Helgedagsrud); "Fire søsken må ut med 60 000 kr.," in *Drammens Tidende* 8 May 1948 (Thorvald Grini); "Meldte seg inn i NS," in *Hamar Arbeiderblad* 8 May 1948 (Johanne Berge); "Fru Emmy Haugan i Eggedal fikk 175 000 i mulkt og inndragning," in *Buskeruds Blad* 13 November 1948 (Emmy Charlotte Haugan).

61 Berggrav, eivind, *Folkedommen over NS. Menneskelig og moralsk: Hva vil være rett av oss?,* Oslo, Land og Kirke 1945, 10–12, 17, 32–37.

62 Dahl, Hans Fredrik, *De store ideologienes tid*, vol. 5 of *Norsk idéhistorie,* Oslo, Aschehoug 2001, 322, 330–332.

down," creating an opinion where "every passive member of N.S. is an inferior human being, a traitor, punishable, disregarding the personal circumstances which was deciding or what the person concerned otherwise had done."[63] He based this conclusion on discussions with imprisoned NS members and their relatives, conducted on trips within his own diocese, covering a large share of the total membership numbers there. According to Schjelderup, many, not all, NS members were idealistically motivated, and as a cleric he supported the repenting sinners among them, not the unrelenting apologetics.[64] Berggrav's idea about collective guilt had a much deeper impact on Norwegian society than Schjelderup's thought on individual innocence when actually dealing with the passive NS members.[65]

In his commented edition of the 1944 Treason Decree, newly appointed presiding judge in Eidsivating Court of Appeal, Erik Solem (1877–1949), followed the Berggrav line. He argued that the intent requirement in §§ 86 and 98 of the Penal Code was satisfied through the membership itself, making every individual in the party responsible for their leader's actions, thus also giving legal legitimacy to the decree.[66] Solem also publicly promoted his views in the liberal newspaper *Verdens Gang*, established in June 1945 by former resistance fighters.[67] At a lawyer's convention in Moss late July 1945, Magistrate Tarald Lundevall (1876–1953), supported and elaborated on Solem's views. Using the Treason Decree against NS members was unproblematic for him, but he conceded that it was a contested issue between lawyers whether joining NS was actually covered in the description of support for the enemy in the Penal Code. Lundevall, however, underlined that it was not necessary to demonstrate a certain consequence of one member's action, because this, nonetheless represented an individual contribution to a collective goal: Strengthening the power of NS and supporting the rule of the occupant.[68] No doubt, Solem's and Lundevall's perspectives on the purges were in touch with the dominating line in the press, which was overwhelmingly on the Attorney General's side during 1945.[69] But more critical views were also voiced in the journals and newspapers.[70]

63 Schjelderup, Kristian, *Tiden kaller på kirken,* Oslo, Aschehoug 1949, 61–63. Translated by the authors. Schjelderup originally delivered his speech, "Tiden kaller på kirken," at the Diocese meeting in Hamar 16 September 1947, cf. "Bispedømmemøtet i Hamar sender resolusjon til regjeringen," in *Samhold* 18 September 1947.

64 Repstad, Pål, *Mannen som ville åpne kirken: Kristian Schjelderups liv,* Oslo, Universitetsforlaget 1989, 332–338.

65 Heiene, Gunnar, *Eivind Berggrav: En biografi,* Oslo, Universitetsforlaget 1992, 379–381.

66 Solem, Erik, *Landssvikanordningen: Prov. anordn. av 15. desbr. 1944 med tillegg,* Oslo, Tanum 1945, 23–25, 39–42, 52–55, 59.

67 Solem, Erik, "Rettsoppgjøret," in *Verdens Gang* 27 June 1945; Solem, Erik, "Landssvikerne og deres straff," in *Verdens Gang* 28 June 1945; Solem, Erik, "Rettsoppgjøret," in *Verdens Gang* 30 June 1945; Eide, Martin, *Blod, sverte og gledestårer: VG, Verdens gang 1945–95,* Oslo, Schibsted 1995, 38–43, 50–65.

68 Lundevall, Tarald, *Sorenskriver Lundevalls foredrag på juristmøtet i Moss 26. juli 1945,* Moss, A/S Moss Boktrykkeri 1945, 8–12.

69 Fremo, Skjalg, *Presseskikk: En rapport om presseetikk og personvern – med stikkprøver fra norske aviser gjennom hundre år,* Fredrikstad, Institutt for Journalistikk 1994, 90; Dahl, Hans Fredrik and Henrik G. Bastiansen, *Hvor fritt et land? Sensur og meningstvang i Norge i det 20. århundre,* Oslo, Cappelen 2000, 145–151.

70 Borge and Vaale 2018, 130–150; Seemann 2019, 121–130.

In June 1945, Doctor of Law, Gunnar Astrup Hoel (1896–1968), rejected the notion that the 1944 Treason Decree was an "amnesty law." He contended that its "special purpose" was to hit passive NS members for actions that were not punishable according to the 1902 Civil Penal Code and, in addition, completely disregarding its intent requirement.[71] Shortly after, in July, Hoel was supported by Supreme Court attorney Gerhard Holm (1876–1948) and Magistrate Bjarne Didriksen (1884–1956), who both added that this measure would create an unnecessary pariah caste in their society.[72] Holm was in favour of sentencing the leading NS members, whose treachery was undisputable, but saw no point in prosecuting the passive ones, given the many negative legal and social consequences this would cause. Labelling all the NS members as traitors and automatically assuming that they understood themselves to be so, was not an acceptable solution for the purges, according to Holm.[73] Magistrate Jørgen Christian Grøner (1892–1968) widened Holm's perspectives, by comparing the Norwegian Penal Code of 1902 to the English Magna Charta of 1215. A "foundation for all civilised criminal law," argued Grøner, was the principle that a deed could not be punished if it was not already legally defined as a crime. Closely connected to this was the precondition of subjective guilt, which had to be proven by the prosecution, not only stated. Grøner got ample opportunity to put this principle into action, as presiding judge in many treason cases, also involving passive NS members, within his judicial district in inland Norway, Sør-Østerdal.[74]

Retired professor of criminal law at the University of Oslo, Jon Skeie, published a pamphlet on the purges in August 1945. His view was that the accused were "much worse off," if judged by the Treason Decree (1944) than the law (1902) when it came to individual punishability. The decree relieved the prosecutor of his duty to actually prove guilt, in contrast to the law. If it was not proven that a passive member of NS understood the illegality of the party membership, then acquittal was the only outcome for the court, according to Skeie.[75] Local prosecutors did not necessarily share Skeie's legal worries. Chief of Police in the city of Arendal, Nils Onsrud (1909–1975), stated that an NS member, even if he or she "had not

71 Hoel, Gunnar Astrup, "Rettsoppgjøret," in *Norsk Sakførerblad,* 16, 2, 1945, 32–37, cf. also Blandhol, Sverre, "Rettspragmatismen i Fredrik Stangs, Ragnar Knophs og Gunnar Astrup Hoels forfatterskap," in *Tidsskrift for Rettsvitenskap,* 117, 3, 2004, 16–18.

72 Holm, Gerhard, "Isfronten," in *Morgenbladet* 3 July 1945. Se also Holm, Gerhard, "Isfronten igjen: Et par replikker," in *Morgenbladet* 30 July 1945; Didriksen, Bjarne, "Isfronten," in *Morgenbladet* 24 July 1945.

73 Holm, Gerhard, "Isfronten igjen," in *Morgenbladet* 21 July 1945. Similar views were expressed by, for instance, Supreme Court lawyers Joachim Arnold Rubach (1872–1964), Martin Sterri (1897–1961) and Fritz Wilberg (1879–1948) and lawyer Lars Aga (1868–1958), prison director Hartvig Nissen (1874–1945) and publicist Ella Anker (1870–1958), cf. Rubach, Joachim Arnold, "Isfronten," in *Morgenbladet* 7 July 1945; Sterri, Martin, "Vanskelige problemer," in *Nationen* 27 July 1945; Wilberg, Fritz, "Rettsoppgjøret med de små landssvikere og høyesterettsdommen," in *Nationen* 13 August 1945; Aga, Lars, "Hjemmefronten, isfronten, fremtidsfronten," in *Bergens Tidende* 7 August 1945; Nissen, Hartvig, "Straffens formål og dens fastsettelse: Gjenreisingen (1)," in *Morgenbladet* 21 July 1945; Nissen, Hartvig, "Straffens formål og dens fastsettelse: Gjenreisingen (2)," in *Morgenbladet* 23 July 1945; Anker, Ella, "Svikt i samvittigheten," in *Morgenbladet* 17 July 1945.

74 Grøner, Jørgen Christian, "Individuell behandling," in *Morgenbladet* 18 July 1945; Næss and Thime 1991, 205.

75 Skeie, Jon, *Landssvik,* Oslo, Norli 1945, 12–14, 43–46.

done anything wrong or been active in any way," would be prosecuted after the 1944 decree.[76] In Bergen, Chief Superintendent in the Police, Erik Dahlen (1903–1983), felt certain that "even a one-hour membership in NS" was punishably by this decree.[77]

From a Danish point of view in Copenhagen, this way of reasoning seemed very strange, Otto Marstrand-Svendsen (1919–2004) wrote in a letter to the conservative Oslo newspaper *Morgenbladet*. The future national economist and principal informed that members of the Danish Nazi Party, DNSAP (Danmarks Nationalsocialistiske Arbejderparti) were not punished solely for their membership. "We punish actions, for violence, denunciation, murder and terror. But a Nazi disposition as such is not punished." Marstrand-Svendsen added that the Danish purge was diametrically different from the Norwegian one: "People have the right to have been a member of a political party that sympathised with the enemy but does not have a right to have supported the enemy in action."[78] In a discussion about the purges, held by the Norwegian Association of Criminalists 13 December 1945, City Court judge in Copenhagen, Theodor Petersen (1904–1980), confirmed that the Danish courts applied this principle in their treason cases.[79] Present was also aforementioned lawyer Gerhard Holm, who disputed the Stephanson verdict and hoped the Supreme Court would pass a new one, negating that passive NS membership was treason. Holm also criticised Bishop Berggrav for creating a condemning atmosphere, with a profound negative impact on the public debate about the legal reckoning with this group.[80] The Bishop replied in the Christian newspaper *Vårt Land*, but in a somewhat contradictory way. On the one hand, Berggrav underlined that passive NS member's subjective motives did not alter their objective guilt. On the other hand, he suggested leniency towards them after a year had passed, mildening or repealing their verdict, if "the subjective conditions were present." Berggrav concluded that justice was best served by not accommodating "unreasonable pity" with the passive party members.[81]

So did the Oslo lawyer Paul Christian Frank (1879–1956). He advised the critics of the purge to respect the "clear guidelines" for dealing with these members, given by the Prosecutor General and the Supreme Court. They could be punished both according to the Penal Code and the Treason Decree of 1944, with the possibility of more leniency after an individual assessment of each case. These guidelines were, "undoubtedly," supported by "the majority of the population," according to Frank.[82] This conclusion was countered by defence lawyer

76 "Politimester Onsrud: De som skal straffes vil bli straffet," in *Agderposten* 7 July 1945.

77 "Landssvikavdelingen i Bergen sender ut masseforelegg," in *Bergens Arbeiderblad* 15 October 1945.

78 Marstrand-Svendsen, Otto, "Nordmennene kjenner oss ikke," in *Morgenbladet* 8 November 1945; Lauridsen, John T., "Opgør og udrensning: De danske nazister efter befrielsen i 1945," in *Den jyske Historiker* 71, 1995, 74–79, 82–85.

79 "Løslatelse på prøve og påtaleunnlatelse er det rette overfor de mindre landssvikere," in *Aftenposten* 14 December 1945, cf. also Petersen, Theodor, "Om Landsforræderi," in *Ugeskrift for Retsvæsen. Afdeling B*, 1946, 35, 38–40.

80 Holm, Gerhard, *De passive NS-medlemmer og rettsoppgjøret,* Oslo, Jacob Dybwads Forlag 1946, 8–11, 19–20. His lecture was delivered 13 December 1945 but printed in this brochure the following year.

81 "De passive NS-medlemmer var voldens kausjonister og må straffes, hevder biskop Berggrav," in *Vårt Land* 14 December 1945; Berggrav, Eivind, "De "passive" NS," in *Vårt Land* 19 December 1945.

82 Frank, Paul, "Rettsoppgjøret med landssvikerne," in *Morgenbladet* 11 December 1945.

Olaf Klingenberg (1886–1968) from Trondheim in late December 1945. He saw several major legal challenges with the purges, all highly relevant to the judiciary's handling of passive NS members. Firstly, that it was not the ordinary Public Prosecutor and District Attorneys administering the legal reckoning, but special ones. They were recruited from resistance circuits and lacked experience dealing with regular penal issues. Secondly, Klingenberg argued that the lower courts, not the Supreme court, as maintained by Frank, were best suited to treat questions about subjective guilt and individual punishment, because they had direct access to the accused and witnesses in each case. Thirdly he disagreed with the notion from the Haaland and Stephanson verdicts, where the court had fulfilled the absolute requirement of intent by stating that every Norwegian must have known about the general punishability of NS membership. For Klingenberg such a view was founded on "insufficient knowledge about human nature," a trait most desirable in every criminal judge.[83]

Most of these jurists were members of the Association of Lawyers, but the organisation as such did not engage in the public debate about the legal reckoning. Little is therefore known in detail about their initial and concrete opinion about its principal frame and practical outcome, as pointed out by historian Harald Espeli (b. 1955). The freedom of speech within the Association was, however, limited. When a member criticised the authorities' handling of the purge, he was reprimanded by the board and left the Association.[84]

Over time, growing concerns about the legal processes against the NS members grew in the newspaper columns and journal pages. This brought the former Chief Prosecutor, Sven Arntzen, and the present Minister of Justice, Oscar Christian Gundersen (1908–1991) to the forefront of the debate in February 1948. Arntzen disputed vehemently the perception that a premise for the purges was collective guilt for all NS members. On the contrary, their cases presumed "careful individual treatment," and he maintained that this principle had been followed by the courts. Every member was, nonetheless, responsible for NS' collaboration with the occupant by supporting the party, according to Arntzen. The reckoning with them had to be carried through until the end, maintained Gundersen, to avoid a dissolution of the concepts of justice. Later the same year, in December 1948, Supreme Court lawyer Trygve August Mørdre (1900–1977) challenged Arntzen's and Gundersen's understanding of the reckoning. International law and the Penal Code both had clear definitions of collaboration with the enemy and was known to a majority of Norwegians, unlike the Treason Decree of 1944, made abroad and not publicised at home before the liberation in 1945. This created two problems, argued Mørdre. Firstly, that the condition for punishment "far too strongly" was related to whether the accused was an NS member or not. Secondly, that too much

83 Klingenberg, Olaf, "Rettsoppgjøret og avisdiskusjonen," in *Adresseavisen* 29 December 1945.

84 Espeli, Harald, "Retts- og landssvikoppgjør på flere arenaer," in *Våpendrager og veiviser. Advokatenes historie i Norge*, edited by Harald Espeli, Hans Eyvind Næss and Harald Rinde, Oslo, Universitetsforlaget 2008, 221, 225–226.

weight was assigned to the membership itself in the new decree, whereas the old penal code gave more consideration to "the evil intent behind the act."[85]

Minister of Justice Gundersen did not miss another opportunity to defend the purges when he gave a lecture at the Oslo circuit of the Lawyers Association in January 1949. "Only in extreme cases of inattention and stupidity or youthful ignorance" could the NS members be exempted from their responsibility for the occupation and nazification of Norway. Gundersen further stated that there was no reason to doubt the legal basis in §§ 86 and 98 for sentencing passive NS membership, which the Supreme Court had not disputed after the first principle judgments.[86] He blatantly disregarded that such doubts were voiced on several occasions in the lower courts, as shown earlier in this article. They were also more common within the legal profession, than Gundersen acknowledged. This became apparent in a scientific study of 150 Oslo lawyer's attitudes to the purges, conducted by philosopher Herman Tønnessen (1918–2001) at the Institute of Social Research in Oslo and published in 1950. His survey included one-sixth of all the lawyers in the capital, with an overrepresentation of prosecutors. When asked if it was right to punish the passive NS members, 45,3 % replied yes and 42,6 % no. Tønnessen's result indicated that there was greater divide among the jurists about the "people's verdict" on NS than bishop Berggrav had propagated.[87] As pointed out by German historian Anika Seemann, this was indeed "one of the most divisive issues" of the purges and the post-war debate about it.[88]

6. Conclusion

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

Firstly: Through their additional reference to the Civil Penal Code of 1902, undoubtedly intended to legitimise the special laws by showing continuity with existing legislation, the provisional treason decrees of 1942 and 1944 created a tension between the Penal Code's mandatory intent requirement and the legislator's intention to punish all passive NS members.

Secondly: This tension was never finally resolved. The result was several inconsistencies in the legal system's treatment of the many defendants who belonged to this group.

85 "NS medlemmene straffes ikke for sine meninger, men for sine gjerninger," in *Aftenposten* 3 February 1948; "Fhv. riksadvokat Arntzen om rettsoppgjøret," in *Nationen* 3 February 1948; "Statsråd Gundersen: Klare begreper om landssvik-oppgjøret en garanti for framtiden," in *Morgenbladet* 20 February 1948; Mørdre, Trygve, "Oppgjøret," in *Aftenposten* 8 December 1948; Arntzen, Sven, "Oppgjøret," in *Aftenposten* 13 December 1948.

86 Gundersen, Oscar Christian, "Noen betraktninger omkring rettsoppgjøret med landssvikerne," in *Tidsskrift for Rettsvitenskap* 61, 1949, 488, 490, 491, 492.

87 Tønnessen, Herman, Holdninger til rettsoppgjøret (1945–1948): Belyst ved intervjuer av 150 Oslo-jurister, Oslo, Skrivemaskinstua 1950, 19, 48, 50, 61; Cf. also Dahl 2001, 330; Espeli 2008, 225–226.

88 Seemann 2019, 110.

Thirdly: When the two decrees were prepared in London, the Ministry of Justice held in preparatory works in both 1941 and 1943 that passive NS members could not be punished under § 86 of the Civil Penal Code, a provision that was listed as an additional authorisation in both decrees.

Fourthly: The Home Front's legal committee, on the other hand, was categorical in 1944 that formal membership was sufficient to punish under the decree. The committee thus wanted to disregard the intent requirement, despite the supplementary authorisation in the Civil Penal Code.

Fifthly: In the first principal judgments in the autumn of 1945, the Supreme Court ruled that § 86 applied to passive NS members but resolved the intent requirement by simply attributing a treasonous intent to the defendant, without actually testing it.

Sixthly: In 1946, the Court went a step further by ruling that intent was not a necessary condition for penalising passive members under the 1944 Decree. The reasoning was that the penalty provision could alternatively be used without any reference to the Civil Penal Code.

Seventhly: A number of experienced lawyers and judges publicly criticised the legal treatment of the passive NS members, but their criticism mostly was ignored or dismissed, and therefore had few practical consequences.

In the Judicial Committee's 1947 recommendation for a Treason Act, with only marginal exceptions identical to the Treason Decree of 15 December 1944, the legal inconsistencies described above have left clear traces. According to the committee, the best solution would have been to base the entire legal settlement on the provisions of the Penal Code, i.e., without the use of provisional criminal laws. However, it assumed that the outcome would have been largely the same, including for the passive NS members. About the intent requirement in § 86 of the Penal Code, the committee correctly states that to be punished, the defendant must have understood that he or she was helping the enemy by being a member of NS. Shortly afterwards, however, reference is made to § 2 of the Treason Act, where, according to the committee, the condition for liability is only that the person understood that he or she was a member of NS. What is not problematised is that such an interpretation, which disregards the intent requirement, means that far more people could be punished. Another consequence that the committee does not mention is that passive NS membership can be punished either as a serious crime, i.e., intentional treason, or as a minor offence due to negligence, with the same penal framework. The Judicial Committee also claimed that the passive NS members received milder treatment than if only the treason section of the Penal Code, with a minimum sentence of three years' imprisonment, had been applied against them.

Counterfactually, it is impossible to know for sure what would have happened had the provisional treason decrees not been passed in London, but the courts' treatment of passive NS members who had resigned before the 1942 Quisling Decree came into being may provide a clue. Since conviction for treason in these cases would have required proof of intent, most of them ended with the prosecution being dropped.[89] As early as November 1945, At-

89 Andenæs 1998, 222.

torney General Arntzen informed the subordinate prosecuting authority that he had largely refrained from prosecuting NS members who had resigned earlier than 22 January 1942.[90]

In the end, the legal settlement with the NS members, including the passive ones, was carried out with considerable consistency.[91] The figures in official statistics vary somewhat, as does the categorisation of cases. It is stated that 26,000 passive members were punished for treason, mainly by police fines, based on the 1944 Treason Decree. If, as estimated by researchers, an additional 3,500 had their cases dropped or dismissed, usually due to criminal insanity or doubts as to whether they really had been members, this group accounted for only 14.5 per cent of all passive members. In addition, there are a few acquittals of passive NS members by judgment in lower courts, a maximum of a few hundred, but probably fewer.[92]

The fact that the courts in the latter cases acquitted the defendant because there was no intent makes them unique. In other cases, as we have shown, wilful treason was mostly established by the police or the court without really considering the defendant's motives. In the numerous cases that were settled by a fine, this routinely referred not only to the Treason Decree of 1944 but also to section 86 of the Penal Code. As a rule, objective guilt, in the form of passive NS membership, was sufficient grounds for punishment. Contrary to both normal practice when using fines and the desire to streamline the legal settlement, the accused were in some areas allowed to give statements to the police.[93] However, as will be demonstrated, their own motives for joining the NS rarely influenced the sentencing.[94]

Even where the judges in a court case did not establish criminal intent, we have shown that a passive NS member could nevertheless be convicted under the Treason Decree of 15 December 1944, but then without its reference to the Penal Code. Upon liberation in spring 1945, an unknown number of passive NS members were interned for several weeks, often under difficult conditions. Later, regardless of the legal basis for their punishment, all

90 Since a waiver of prosecution implies that a criminal offence has been committed, several thousand people who had resigned from NS prior to the 1942 decree were nevertheless indirectly labelled as guilty of treason without the possibility of having their case retried. Cf. Knutzen, Ragnar, "Påtaleunnlatelsene i landssviksaker," in *Vårt Land* 26 January 1950.

91 Approximately 90 per cent of all adult NS members, active and passive, were punished, either by conviction or fine. Larsen, Stein Ugelvik, "Die Ausschaltung der Quislinge in Norwegen," in *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg,* edited by Klaus-Dietmar Henke and Hans Woller, Munich, dtv 1991, 253; Dahl and Sørensen 2004, 98.

92 Larsen, Stein Ugelvik, *Database med opplysninger om NS-medlemmer og frontkjempere,* 2018 (upublisert) (*Database with information about NS Members and Front Fighters,* 2018 (unpublished)). In total this database only mentions 326 acquittals for NS membership.

93 Hestvik, Finn, *Rekrutteringen til Nasjonal Samling under okkupasjonen 1940–45: En analyse av rekrutteringen til NS i Salten under okkupasjonen,* MPhil.-thesis in history, University of Bergen 1972, 118, 154–155, 159; Rognaldsen, Stein, Nasjonal Samling i Bergen under krigen, MPhil.-thesis in political science, University of Bergen 1972, 84–88; Nielsen, May-Brith Ohman, *Trauste menn ved Svarvarnuten: En undersøkelse av årsakene til den store oppslutningen om Nasjonal Samling i Setesdal i årene 1933–1945,* MPhil.-thesis in history, University of Bergen 1989, 142–143.

94 According to Stein Rognaldsen's study of the NS members in Bergen, the police interrogations were fairly summary when it came to the motives of passive members. Rognaldsen 1972, 85–86. This is consistent with the fact that intent was regarded as established where party membership was proven. Moreover,

the sanctioned passive members were fined. They also lost their right to vote in the parliamentary elections in the autumn of 1945 and were disenfranchised for 10 years. Many were also ordered to pay "collective compensation", dismissed from their positions or deprived of other rights, most often the right to practise in their profession, for a given number of years. Most importantly, however, all the passive NS members who did not escape punishment were officially labelled traitors, a stigma that would lead to a plethora of social problems for themselves and their families throughout the post-war period. Consequently, in many ways, the NS members did become pariahs, as the government in exile had intended for them when it adopted the two treason decrees.[95] Due to the inclusion of practically all passive party members, one in seven or eight Norwegian families was affected by the trials, as one or more family members were punished for treason. Thus ended probably the most comprehensive legal settlement, not only with Nazism in Europe after 1945, but also in a wider global historical perspective.[96]

the proportion of NS members convicted or fined in an area was fairly similar everywhere, and was not affected by whether the police conducted interviews with everyone. Larsen 2018 (unpublished). Cf. also Borge, Baard Herman and Lars-Erik Vaale, 'Overgangsjustis i Telemark 1945–1952', in *Heimen* 60, 3, 2023, 141.

95 Historians Dahl and Sørensen concluded that they were rendered "honourless for the rest of their lives." Dahl and Sørensen 2004, 97.

96 Dahl, Hans Fredrik, Bernt Hagtvet and Guri Hjeltnes, *Den norske nasjonalsosialismen: Nasjonal samling 1933–1945 i tekst og bilder,* Oslo, Pax 2009, 206; Seemann 2019, 17–18.

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