The Judge, the Occupier, his Laws, and their Validity: Judicial Review by the Supreme Courts of Occupied Belgium, Norway, and the Netherlands 1940-1945 in the Context of their Professional Conduct and the Consequences for their Public Image

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Introduction

Under the German occupation in World War II, the supreme courts of the Netherlands, Belgium, and Norway were forced to form an opinion on the relation between the occupier’s ordinances on the one hand and domestic and international law on the other. The overall attitudes of these three supreme courts towards the occupier are reflected in this one topic: their positions and decisions concerning judicial review of the occupier’s ordinances. For each court, I will give an outline of its behaviour and its own justifications and discuss the consequences of these for their public image. The three case studies will lead to a tentative conclusion about which were the most important factors leading to a positive or a negative image.

The International Law of Belligerent Occupation

Central to the legal relation between occupier and occupied territory is Article 43 of the Hague Regulations (HR) of 1907. This article still serves as the basis of the international law of occupation, and is clarified, but essentially unaltered by Article 64 of the 4th Geneva Convention of 1949. It defines the position of any occupying regime as follows: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country”. The two main problems of interpretation and application, already experienced in the First World War, concern “public

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1 Radboud University Nijmegen, the Netherlands.
3 The French text reads “vie publique”. This is often misleadingly translated as “public life”, which has a much narrower scope.
order and civil life” and “unless absolutely prevented”. The first phrase is not very specific, to say the least. Occupiers and occupied have had very different ideas about which matters should be under the occupier’s control and regulation. Therefore “public order and civil life” can acquire a very different content in either party’s interpretation because it leaves a large measure of discretion to occupiers and judges in the occupied territory. The problem probably seemed less serious at the time HR Article 43 was framed. The 1907 wording is almost identical to Articles 2 and 3 of the Brussels Declaration drafted at the Brussels Peace Conference in 1874. The period 1874-1907 was a time when society was not nearly as extensively regulated and meticulously organised and administered by governments as it is today, although social legislation was upcoming. “Maintaining public order and civil life” could at that time be understood as a minimalist version of the nineteenth century minimal state. Occupations were expected to last not more than a few months, in which period the occupier would have the task of keeping society running without making many or significant changes until the end of the war, at which point it would be decided by peace treaty who would rule the country in question from that point onwards. This would enable a returning lawful government to more or less continue where it had left off, without having to deal with a completely changed state-organisation.

Less than a decade after the Hague Regulations were finalised, the First World War showed their flaws: occupiers, notably the German regime in Belgium, interpreted Article 43 in ways unforeseen and in its own interest, against the interests of the Belgian state and population. Also, in order to uphold public order and civil life, it appeared impossible for the occupier to abstain from making major changes to the administration of an occupied country during a “total” war, lasting years and not months, and thoroughly disrupting society and the economy. The same holds true for the Second World War occupations. This meant that in these circumstances the occupier’s governmental task according to international law could not be as minimal as the terms “public order” and “civil life” suggest.

As a consequence, long-term occupations made the need felt for judicial review of an occupier’s measures during the occupation, and not just

7 Eyal Benvenisti, op.cit., p. 33-34, 46, 47.
afterwards (the *ius postliminium*), because the effects were more profound and lasting than in short-term occupations. As there was, and still is, no independent inter- or supranational reviewing institution, the only officials possibly having the power to legally scrutinize an occupier’s ordinances are the judges of the occupied country’s courts. Whether occupiers are prepared to accept the outcome of those reviews, is a different question.

Despite the disillusions of the First World War, no revision or extension of the Hague Regulations was undertaken, out of respect for the newly founded League of Nations, which the world hoped would solve future international conflicts and prevent wars. The Second World War disillusioned these hopes. Under German occupation, the question of judicial review of ordinances issued by the occupying regime in the light of HR Article 43 unavoidably emerged. As there was no rule of international law regarding judicial review by national courts, state practices were ambiguous. In the next sections, I will discuss the most important court decisions in the Netherlands, Belgium, and Norway concerning the judicial review of the German occupier’s legislative measures, in the context of their professional conduct in general.

**The Dutch Hoge Raad**

Because Hitler viewed the Dutch as a Germanic *Brudervolk*, he chose to establish a civilian occupation administration instead of a mere military regime. This was meant as a favour: the Germans thought that their westerly neighbours might be persuaded to convert to National Socialism, for which cause a purely military occupation would probably seem too oppressive. As a part of this strategy, the Dutch ministries were left intact. This meant that, the Queen and her cabinet having fled to London, the secretaries-general of each ministry (the highest Dutch civil servants) became acting ministers. They had to answer to four German *Generalkommissare* who in turn were led by *Reichskommissar* Arthur Seyss-Inquart. The *Reichskommissar* delegated legislative powers to his *Generalkommissare* and to the secretaries-general, who from that moment on enjoyed more extensive powers than their former ministers.

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9 See, for example, Gerhard Hirschfeld, *Nazi rule and Dutch collaboration: the Netherlands under German occupation, 1940-45*, Oxford, Berg, 1988, Ch. 1 and 4; Konrad Kwiet,
The German civil administration formulated their powers in the terms of HR Article 43: the first three German ordinances emphasized the tasks of restoring and protecting “public order and civil life” with respect for Dutch law. The intent to adhere to the Hague Regulations with regard to the occupation of Holland was even published in the Frankfurter Zeitung. On the other hand, German army and SS officers were less inclined to be persuaded by arguments of international law. The chief of the German occupying forces, General Friedrich Christiansen, famously held that “International Law exists only in newspapers”, and a member of the SS declared that “we determine [the content of] International Law”. Formally, however, the occupier’s legislative powers were based on, and limited by, the Hague Regulations, as were the legislative powers of the Dutch secretaries-general, as these were derived from the occupier’s powers.

At an early stage of the occupation, the Hoge Raad (the Dutch Supreme Court) took a devastating blow, with the Germans dismissing its president, L.E. Visser, because he was a Jew. By appointing a much more cooperative successor, the occupier succeeded in frustrating any unanimous protest by the Hoge Raad as an institution. Later, more deutschfreundliche and even Nazi-sympathetic justices were appointed, further decreasing the court’s ability to take a stand against the occupier.

Faced with an all-powerful occupier, the question arose whether Dutch judges had the legal power to review ordinances promulgated by the occupation regime in the light of HR Article 43 when specifically requested in a court case. In several newspaper and law review articles in 1940 and 1941 this right was negated by prominent Dutch jurists. They even acclaimed the good cooperation with the occupier, praising his respect for the international law of occupation. Importantly, this was before it became fully apparent that the German occupier was planning to turn Holland into a national-socialist state.

Reichskommissariat Niederlande: Versuch und Scheiterhalle nationalsozialistischer Neuordnung, Stuttgart, Deutsche Verlags-Anstalt, 1968, Ch. 3.
10 Verordnungsblatt für die besetzten niederländischen Gebiete, ordinances 1/1940 - 3/1940.
exploit its economy and exterminate its Jews. These lawyers assumed that loyal cooperation would ensure that the Germans would stay within international legal boundaries and that they would continue their relatively benign administration of occupied Holland. An illegal brochure by an international lawyer and an extensive internal report by a member of the Hoge Raad, both in 1941, also stated that review was not possible, nor wise, during the occupation.14

From the beginning of the occupation, Dutch courts applied decrees of the German and Dutch authorities without reviewing them. This attitude was probably the result of the judiciary’s faith and hope that the Germans would keep their rule within the limits of international law, as they had generally done in 1940 and 1941.15 The first, and last, case before a Dutch court involving a final decision on the question of review against the Hague Regulations was the infamous Toetsingsarrest (“Judicial Review Case”) by the Hoge Raad of 12 January 1942.16 In this case, the appellant requested the review of the ordinance establishing the special economic courts that had convicted him. The exact question was whether the economic court system had really been a necessity in order to protect “public order and civil life”. In other words: was the occupation administration “absolutely prevented” from using solely existing Dutch law and courts to fight economic crime? The procureur-generaal (Procurator General), who gives advisory opinions to the Hoge Raad, was of the opinion that the Dutch government would have done the same if the country had not been occupied, as the economic crime rate had exploded and the ordinary criminal courts were overloaded with cases. Moreover, he did not even consider the creation of economic courts an infringement on Dutch law, which rendered judicial review unnecessary.

The Hoge Raad found a different way around reviewing, ruling that “[t]he Netherlands courts are not allowed to put a wet [‘statute’, meaning Dutch legislation as well as the occupier’s ordinances] to the test of a treaty like […]

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14 Gezina Hermina Johanna van der Molen, Bezettingrecht, 1941 (illegal brochure), published in Derk Venema, Leny de Groot-van Leeuwen, Thomas Mertens (ed.), op. cit., as well as the internal Supreme Court report.
15 The German occupier took care to prevent Dutch courts handling any cases concerning the marginalisation of the Jews. Derk Venema, Rechters in oorlogstijd…, §4.4.4.
the Hague Regulations […]”. Under normal circumstances, however, Dutch legislation could be reviewed against treaty law. Therefore, the extension of this supposed prohibition to the occupier’s ordinances (which the court rightly considered “under the circumstances” to be valid Dutch law) was not convincing from a strictly legal point of view. The other arguments were not very compelling either: “Neither the history nor the wording of HR Article 43 affords any foundation for the assumption that the framers of the Convention intended to confer upon the courts which had remained in function in the occupied territory […] jurisdiction to judge the measures taken by the occupant […].” Treaties never mention the power of domestic judges to review their country’s legislation for compliance with it. The Hoge Raad’s final argument was that parliament never even so much as considered a power of review in its discussion of the Hague Conventions. This does not provide evidence of the absence of the power to review either. When this judgment became known to the public, it was immediately heavily criticized. The Hoge Raad was reproached for not having taken the lead in making a stand against German injustices, thereby not taking its responsibility as the highest judicial authority seriously, and frustrating the people’s feeling of justice. This remains the subject of heated debate.

The Germans, on the other hand, were pleased with this ruling, considering it a legitimation of their legislative policy, or at least a confirmation of its legality. The Dutch Nazi secretary-general of Justice referred to it in his 1944 brochure on the occupation and the Hague Regulations, and Reichskommissar Seyss-Inquart used it in his defence at Nuremberg. Only in non-public communication did the Hoge Raad protest against policies of the German regime, on some occasions referring to HR Article 43 and/or other

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17 Derk Venema, Rechters in oorlogstijd…, Ch. 3, deals with this Hoge Raad ruling extensively. See also Derk Venema, “Het Toetsingsarrest”, in Ars Aequi, 2009-12, p. 846-849.
20 For an overview of the historic and contemporary debates, see Derk Venema, Leny de Groot-van Leeuwen, Thomas Mertens (ed.), op.cit.
articles, as some other courts also did\textsuperscript{23}. One justice was arrested and taken hostage twice for his involvement in the resistance activities of the Protestant church. He resigned shortly after returning to office the second time in 1944.

A verdict by the Leeuwarden appeal court in 1943 dampered the German authorities’ enthusiasm for Dutch courts\textsuperscript{24}. The Leeuwarden judges had lowered the prison sentence for a thief, thereby sparing him a stay in a detention camp near Ommen. This camp had been set up for lack of prison cells and was run by Dutch Nazi personnel who underfed and brutally assaulted the inmates. Many detainees were hospitalized and even died during their incarceration at Ommen. The appeal court not only mentioned the aggravated circumstances in the camp in justifying the lower sentence, but also stated that it did this “for conscience’s sake”. This was immediately understood as moral criticism directed towards the occupier’s policies in general. The Germans were infuriated and the responsible judges were given their notice. Ironically, the protest verdict endangered the closing of the camp, which had been prepared for months by a careful lobby of judges, Hoge Raad justices, and public prosecutors\textsuperscript{25}. The resistance hailed the words of protest as an enormous relief after the Hoge Raad’s discouraging decision against judicial review\textsuperscript{26}.

Only on the verge of liberation did a Dutch judge dare to again mention judicial review in a ruling. In 1944, the Dutch lawyer A. Schenkeveld filed several suits for pharmacists against the Nazi “Pharmacists Chamber” that forced pharmacists to become members if they wished to continue their profession\textsuperscript{27}. These organisations acted like the German Kulturkammer did towards artists (which had also been copied in Holland by the occupying authorities). The pharmacists demanded that the obligation to pay membership dues to the Chamber be ruled unlawful because of, amongst other things, a conflict of conscience. None of these cases was ever decided in a regular procedure, but at least seven court decisions in preliminary injunction


\textsuperscript{24} Published in NJ 1951, 643. See for the Leeuwarden Appeals Court and its famous judgment Herman Louis Christoffel Hermans, Om des gewetens wille. De geschiedenis van een arrest in oorlogstijd, Leeuwarden, Friese Pers Boekerij 2003.

\textsuperscript{25} Derk Venema, Rechters in oorlogstijd…, p. 230.

\textsuperscript{26} Herman Louis Christoffel Hermans, Om des gewetens wille…, p. 130-132.

proceedings were reached, five of which were published during the occupation. In five cases, the conflict of conscience was deemed legal ground for the suspension of the pharmacists’ obligation to pay dues to the Pharmacists Chamber. The most important ruling was made by judge F.J.M. van Nispen tot Sevenaer of Arnhem’s district court. The court stated it knew that “a great number of people have fundamental objections [to National Socialism]”. Moreover, it declared that the Pharmacists Chamber “does not serve any military interest”, is contrary to “the spirit of Dutch law”, and amounts to an “infringement on the freedom of conscience”. Schenkeveld also demanded that the court review the ordinance that had created the Chamber against HR Article 43. The two lawyers representing the Pharmacists Chamber, both of them members of the Dutch National Socialist Movement, argued that the court was under an obligation to follow the decision of the Hoge Raad in the Judicial Review Case. The court replied (in accordance with Dutch law) that it is not bound by precedent and added that the civil chamber of the Hoge Raad might well rule differently from the criminal chamber on the matter of judicial review. The plaintiff’s claim in this preliminary injunction proceeding was sustained because of the possibility that the Pharmacists Chamber Ordinance be ruled unlawful due to non-compliance with HR Article 43 by a judge in the regular proceedings.28

On the same day as the Arnhem District Court ruling, 4 September 1944, the state of emergency was declared because of rumours of an Allied invasion. Two weeks later, the battle of Arnhem commenced, reducing the courthouse to ashes. This probably prevented the Germans from noticing the judgement and taking measures against the judge and the court.

Very soon after liberation, the Hoge Raad defended it cooperation with the Germans in a lengthy pamphlet. This was immediately heavily criticised by lawyers in other pamphlets, with the justices being called outright collaborators who had cowardly surrendered to the enemy.29 The government, the Queen and many resistance lawyers unsuccessfully tried to organize a purge of the Hoge Raad. In the end, only Nazi-appointed collaborators were prosecuted and no investigation was carried out into the conduct of the court as a whole. After a yearlong disagreement with the government all remaining

28 NJ 1944/1945, 653.
29 De Hooge Raad: antwoord aan Mr. N.C.M.A. van den Dries, Amsterdam, Vrij Nederland, 1945, and C.M.O. van Nispen tot Sevenaer, Waarom de Hooge Raad faalde, een beschouwing naar aanleiding van Mr. van den Dries’ pleidooi voor “de Hooge Raad tijdens de bezetting”, Zutphen, Thieme, 1945, both published in Derk Venema, Leny de Groot-van Leeuwen, Thomas Mertens (ed.), op cit.
pre-war appointees were allowed to resume their offices, to the bitter disappointment of many former resistance members. For decades the *Hoge Raad*’s maxim was “don’t mention the war” and would hear nothing of research into its wartime history. Only very recently did the court officially request a legal historian to write a monograph on this subject.\(^{30}\)

The conduct of the Belgian and Norwegian supreme courts has often been praised as examples of how the *Hoge Raad* should have behaved.\(^{31}\) The next sections will show whether that corresponds with their reputations at home.

### The Belgian Cour de Cassation

In contrast to the Netherlands, Belgium experienced two German occupations, and on both occasions the question of judicial review of the occupier’s ordinances was decided by the Belgian *Cour de Cassation* (Supreme Court).\(^{32}\) The first time, in 1916, the court ruled that Belgian judges were not competent to review them in the light of the Hague Regulations. Their main argument was that treaties were contracts between states and judges are not competent to “encroach upon the prerogative of the competent national power”\(^{33}\). Only after the occupation had ended could the former occupier be held liable for damages according to Article 3 of the Hague Convention IV. According to the *Cour de Cassation*, HR Article 43 gave the occupier full legislative authority, which entailed that his decrees were to be treated as Belgian Law.

During the second German occupation, Belgium was not given a civilian occupation government until the Allies had almost reached the border. Until that moment, Alexander von Falkenhausen acted as chief of the military

\(^{30}\) Resulting in Corjo Jansen, Derk Venema, *op. cit.*


\(^{32}\) This paragraph is based on Corjo Jansen, Derk Venema, *op. cit.*, Part 2, §5.2. For much of the following I am indebted to J.N.M.E. Michielsen, *op. cit.*, Ch. 2. See also Werner Warmbrunn, *The German Occupation of Belgium 1940-1945*, New York, Peter Lang, 1993, Ch. III, esp. 104-124.

administration. In the years of occupation, HR Article 43 played a more indirect role in judicial review by the Belgian courts. On the day of the German invasion, May 10, 1940, the Belgian government, like the Dutch, fled the country, but unlike the Dutch queen, the Belgian king did not leave. Just before the ministers took off, parliament enacted a statute delegating emergency legislative powers to the secretaries-general of the ministries. The Germans were quite content with this arrangement, because the military administration was not equipped to take on the task of civil legislator. Now they would not have to legislate as much themselves as they had had to during their previous occupation of Belgium, when there was no legislative authority left in the occupied country34. On 12 June the occupier reached an agreement with the secretaries-general and the judiciary on the administration of Belgium, laid down in the so-called “Protocol”: the measures of the German authorities would be executed like Belgian laws, so long as they did not transgress the boundaries set by the Hague Regulations, and the secretaries-general would submit all their legislative measures to German scrutiny35. The important difference here is that the legislative powers of the Belgian secretaries-general were not derived from the occupier’s, as was the case in the Netherlands, but from the Belgian government36.

The secretaries-general were not competent to create formal laws but only decrees (arrêtés) that were not immune to constitutional review, like formal laws were. The Cour de Cassation recognised this legislative power, and noted that the secretaries-general had the obligation to ensure, as part of the occupation regime, public order and public life according to HR Article 43, thereby ensuring that the administration of occupied Belgium would stay largely in the hands of Belgians who could keep it in accordance with Belgian law and Belgian institutions. Importantly, the Cour de Cassation left open the possibility that Belgian judges might review the decrees for compliance with the statute on delegation and with the Belgian constitution37.

In its decision of 30 March 1942, the Cour de Cassation reviewed a decree creating a new economic administrative criminal law – akin to the measures

35 Mark van den Wijngaert, Het beleid van het comité van de secretarissen-generaal in België tijdens de Duitse bezetting 1940-1944, Brussels, 1975, p. 28-31. See also J.N.M.E. Michielsen, op.cit., p. 10-12.
that gave rise to the Dutch decision in the Judicial Review Case\textsuperscript{38}. Although the decree precluded recourse to the Cour de Cassation, the Court did not recognise this, arguing the preclusion was alien to the subject and purpose of the decree, thus declaring itself competent to hear the case and review the decree. Although it upheld the decree, the Court’s decision recognized Belgian courts’ power of review. The possibility of constitutional review thus permitted the lower courts to let certain economic crimes go unpunished and to render several newly created economic institutions legally non-existent. On 30 May 1942, 2,000 such cases were already pending in Belgian courts, according to the chief of the Military administration, Dr. Eggert Reeder\textsuperscript{39}.

Either he exaggerated or the number had increased enormously in a very short time, for only two weeks earlier the collaborating law review Het Juristenblad, the same review that later published Reeder’s speech, mentioned only “dozens” of cases\textsuperscript{40}.

The German occupier argued that it would be a violation of its duties under the Hague Convention to let this pass: public order and public life were threatened by this sabotage of the economic legislation. For this reason the German military administration issued a decree on 14 May 1942 proscribing judicial review of the secretaries-general’s decrees\textsuperscript{41}. The previous month, the occupying forces had already shown their discontent by arresting two judges from separate courts that had reviewed and invalidated some of those decrees. Neither survived the war. In addition, several attorneys were arrested who represented parties contesting the validity of the secretaries-general’s decrees. The Cour de Cassation protested and called on the Belgian courts not to apply any penal measures included in decrees promulgated by the secretaries-general. Threats of more arrests, executions, and deportations of judges were made by the German military. Several members of the Cour de Cassation were arrested for organizing a strike fund\textsuperscript{42}.

\textsuperscript{38} See also Cass. (2e Ch.) 30 mars 1942, Pasicrisie Belge, 1942, I, p. 75ff., Mosler, “Der Konflikt…”, p. 11-12; J.N.M.E. Michielsen, op.cit., p. 56-57.

\textsuperscript{39} Dr. Reeder, “De houding van de magistratuur ten overstaan der besluiten van de secretarissen-generaal. Het standpunt van de Militä rverwaltung”, in Het Juristenblad (Vol. 2), 1942, column 1102.

\textsuperscript{40} E. Boonen, “Werkelijkheid en grondwettelijkheid. De administratieve rechtsmachten”, in Het Juristenblad (Vol. 2), 1942, column 994. Another possibility is that the Juristenblad was not fully informed.

\textsuperscript{41} Mosler, “Der Konflikt…”, p. 610; J.N.M.E. Michielsen, op.cit., p. 58.

These events led the Secretary-General of Justice Gaston Schuindi to intervene and try to resolve the conflict between the Germans and the Cour de Cassation. Schuind argued that HR Article 43, together with pre-war legislation that ordered government officials and judges to remain in office during war-time, necessitated the judiciary to let the secretaries-general do their job in securing public order and public life. This was, moreover, in the interest of the Belgian people’s well-being, which was to be considered “the highest law of the land”. Schuind proposed a compromise to which the Cour de Cassation initially agreed. From then on, the secretaries-general’s decrees would be based on the statute of 7 September 1939 on the King’s special powers, instead of on the delegation statute. The secretaries-general would be regarded as acting on the King’s behalf, acquiring the competency to regulate various matters of public order and public life in war-time. Decrees based on this statute could not be reviewed, according to Schuind, although this is highly contestable, as it is also highly contestable that the statute on the King’s special powers could be used as a basis for the secretaries-general’s decrees. Nevertheless, this way the secretaries-general would not have to fear the effect of their legislation, and thus public order, being compromised by the anti-German sentiments of the courts. For the courts, the advantage was that now the ban on judicial review was no longer based on a German decree, but on Belgian law.  

The Cour de Cassation, however, decided to retain for the Belgian judiciary a certain power of review: the courts could still invalidate the secretaries-general’s decrees when they effectively altered the political order or gave new institutions the power to apply penal sanctions. Finally, after further pressure from the occupier, the Court consented to abandoning the power of judicial review concerning decrees issued on the basis of the statute on the King’s special powers, and the military administration suspended its ban on the review of the secretaries-general’s decrees. New economic criminal legislation was issued on the basis of the statute on the King’s special powers, and the judicial crisis seemed to have ended. This compromise was called “the Pact”. Critics, however, regarded it as a “Pact with the devil” or even “downright capitulation”.

43 J.N.M.E. Michielsen, op.cit., p. 56-67.
Later that same year, the Secretary-General for the Interior, Gerard Romsée, designed decrees creating larger administrative entities centred around several major Belgian cities, starting with Antwerp. He based this first decree not on the statute on the King’s special powers, but on the delegation statute, thus leaving room for judicial review, which the Cour de Cassation had not given up for decrees based on the latter statute. Towards the end of 1942, the military administration ordered several courts to suspend proceedings concerning this decree for two months, because they feared it would be reviewed, and disqualified, as it obviously altered the political organisation of the country and thus was contrary to Belgian law and the Belgian Constitution. On 11 December 1942, before the two-month suspension period was over, the Brussels Cour d’appel (appeal court) ruled as the occupier had feared. Publications of and regarding the judgement were censored. In the collaborating law review Het Juristenblad, its publication was introduced by the editors as “proof of the ‘unreality’ which some magistrates advocate”. The judges responsible were arrested immediately and held hostage together with several other judges and lawyers. As a protest numerous courts and lawyers went on strike, which was in turn outlawed by the military administration with reference to its task of maintaining public order and public life. After mediation by the Secretary-General of Justice, the Cour de Cassation and other courts resumed their work and eventually the Cour d’Appel judges were released.

Again, the Germans sought to regulate the validity of the secretaries-general’s decrees. They issued a decree ordering the courts to apply and not to review the decree concerning the administrative reform of various municipalities. Nevertheless, less than a week after confirming the Pact, the Cour de Cassation ruled on 1 February 1943 (in a judgement that has been called the “Belgian Toetsingsarrest”) that the latter decree was contrary to the statute on delegation and other Belgian laws. But the court did give “factual effect” to the decree because of “force majeure”, resulting in letting the municipality of Antwerp represent one of its formerly neighbouring municipalities that had been incorporated by “Greater Antwerp” on the basis of the decree.

46 That the court did not respect this period was probably due to a (deliberate?) mistranslation of the order. J.N.M.E. Michielsen, op.cit., p. 77.
47 According to the Abschlussbericht der Militärverwaltung. J.N.M.E. Michielsen, op.cit., p. 73-74.
48 Het Juristenblad, (Vol. 3) 1943, column 745-748.
50 Cass. 1 février 1943, Pasificerie Belge 1943, I, 44 ff.
The *Cour de Cassation* was very dissatisfied with this outcome, and decided to write and make public a letter of protest to the German authorities, dating from 20 March 1943. In this letter the Court condemned the unjust measures by the occupation regime because they were contrary not only to the Hague Regulations, but also to “the overriding duties of conscience”\(^{51}\). It earned the Court great respect in the Netherlands, where a similar gesture from the *Hoge Raad* was craved in vain. After the war, *Cour de Cassation* president Jamar was awarded the Civilian Cross first class. In the eyes of later Belgian historians, however, Belgian judges were “not so heroic pragmatists” who opted for the “lesser evil” and in effect “capitulated”\(^{52}\).

**The Norwegian *Høyesterett***

Although information about the occupier and the judiciary in Belgium and the Netherlands was available in both countries, the Norwegian situation remained largely unknown in Holland and Belgium until after the liberation. The Norwegian *Høyesterett* played a much greater, though short, political role from the beginning of the occupation\(^{53}\). On the night of the German invasion, a collaborating indigenous government was set up by Vidkun Quisling, who did not have much authority with the Norwegian people and initially did not get any formal support from the German occupier. Several days later, the *Høyesterett* and especially its president Paal Berg, initiated the setup of an Administrative Council, designed to govern the occupied parts of Norway in the absence of the King and the ministers who had fled to the unoccupied north. Also, this Council was an instrument to oust Quisling’s unpopular Nazi government. Berg succeeded in acquiring the consent of the German occupier with this plan, but was forced to agree to thank Quisling for “taking his responsibility as a patriot” in a radio speech.

In June the King and the government left the country to join the Dutch and Belgian governments in exile in London, and the army surrendered to the Germans. By then, Hitler had appointed Josef Terboven as the Norwegian Reichskommissar, who now demanded the formal abdication of the King and the replacement of the lawful government and the Administrative Council by a State Council. At this early stage, the relation between Berg and the other

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\(^{51}\) Donner archive, letter from R. Hayoit de Termicourt (l’Avocat Général) et Jamar (Président) to Von Falkenhausen, 20 March 1943. Corjo Jansen, Derk Venema, *op. cit.*.


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justices was not without friction: in negotiating with the authorities, he sometimes acted more as a private person than as a representative of the whole Høyesterett. This was also the case with Berg’s endorsement of a plan to persuade the king to abdicate, as demanded by the German authorities. The King’s refusal to step down became an important symbol of Norwegian resistance and the Høyesterett was unable to save the Administrative Council. Taken together with Berg’s public praise for Quisling and the lack of unity amongst the justices, these were not the ingredients for the Høyesterett gaining a heroic reputation of. Yet that was exactly the outcome at the end of 1940.

Terboven deposed the King, dismissed the government, and appointed his own ministers. Unlike the situation in the Netherlands and Belgium, in Norway there was no legal transfer of legislative authority to the highest remaining civil servants in the ministries. The Høyesterett discussed the constitutional situation and concluded that Norwegian courts were obligated to review measures of the occupier against the rules and principles of international law. Not much later, the justices would have the opportunity to act on this opinion.

On 14 November 1940, the collaborating Minister of Justice, Sverre Riisnæs, issued a decree abolishing the system of lay participation in the judiciary. Lay judges and other lay participants were no longer to be chosen in elections, but appointed by the minister himself, and in some proceedings they could not act at all. The Høyesterett wrote to him that this ran contrary to the Norwegian justice system and to the Hague Regulations. Riisnæs did not accept this criticism. One of the justices was even arrested, although the exact reasons were unclear. Only weeks later, the Høyesterett was secretly informed of a letter Terboven was planning to send the justices, banning them from reviewing any government ordinances. The same source also announced a lowering of judges’ retirement age from 70 to 65 by Minister Riisnæs. The following year, similar measures were taken in Belgium and the Netherlands, but only in the Netherlands did they take effect on the courts\[^{54}\]. The objective of these ordinances was of course to make room for more loyal judges. The justices invited Riisnæs to a meeting, but instead the aforementioned letter from Terboven arrived, also prohibiting the Høyesterett to take any stand in this matter. On 12 December, the justices sent in their letter of resignation. They emphasized the constitutional duty of the courts to review all legislation, even during an enemy occupation. Consequently, they could do nothing but resign. Terboven wanted to arrest the justices immediately, but Riisnæs

\[^{54}\] Derk Venema, *Rechters in oorlogstijd…*, §5.2.2; J.N.M.E. Michielsen, *op.cit.*, p. 44-45.
convinced him not to, and tried to reopen negotiations. Predictably, however, the Høyesterett was not to be persuaded. The Minister then argued that in the present circumstances the judges were not the ones in power, to which President Berg retorted: “But the moral power lies with the judge”. On the last working day before Christmas, 21 December 1940, the Høyesterett collectively, unanimously, and openly left their offices, not to return until after Norway’s liberation in 1945. This action, according to Norwegian collective memory, “stands out for posterity as the most vital and far-reaching in the history of the Supreme Court”\textsuperscript{55}. All justices were left unharmed by the Germans for the remainder of the occupation, even though President Paal Berg went on to become the leader of the Norwegian resistance.

A new supreme court was created by the occupation government, called the kommissariske høyesterett (Commissary Supreme Court, CSC), to which only loyal collaborators were appointed\textsuperscript{56}. Justice Minister Riisnæs even found two anti-Nazi lawyers who supported his view that there was a sound legal basis for a supreme court without the power of judicial review. Only two of the new justices were real ideologues, the others having to be persuaded to become members of the CSC. Nonetheless, their judgements do not seem to have deviated much from the lines set out by the Høyesterett. The new court, at first, even ruled against the state in a number of criminal cases regarding violations of the occupier’s decrees. Unlike the situation in the Netherlands, where the Dutch National Socialist Movement succeeded in having members and political allies appointed in many of the courts\textsuperscript{57}, the Norwegian occupation regime did not appoint any like-minded jurists to positions in the lower courts. In Belgium hardly any Nazis were appointed judge either\textsuperscript{58}. The most striking change was the sharp decline in the number of civil cases. This was probably due to the fact that parties in litigation distrusted or politically opposed the collaborating justices, or feared that their judgements would all be annulled upon liberation. Apparently, the public prosecutor did not share those sentiments, as the number of criminal cases stayed the same. The ratio of civil and criminal cases changed from 10:7 to 1:2. The CSC gradually grew more rigorous.

One verdict by the CSC stands out: the Norwegian Judicial Review Case\textsuperscript{59}. This case, which was pending when the Høyesterett resigned, was termed a

\textsuperscript{55} Stephan Tschudi-Madsen (ed.), The Supreme Court of Norway, Oslo, Aschehoug 1998, p. 41.
\textsuperscript{56} For this court, the primary literature source is Erling Sandmo, op.cit., Ch. 9.
\textsuperscript{57} Derk Venema, Rechters in oorlogstijd…, Ch. 5.
\textsuperscript{58} J.N.M.E. Michielsen, op.cit., §2.5.
\textsuperscript{59} Published in ZAöRV 1942/43, p. 599-610, directly following the Dutch Judicial Review Case.
“farewell present” from the Høyesterett to the new justices, because it forced the CSC to rule on their own constitutional position. Again, as in the Dutch and Belgian judicial review controversies, the case centred around measures intended to improve food distribution and reduce economic crime. The appellant had been convicted for violation of price prescriptions by a court lacking lay judges. The occupier’s decree abolishing lay judges in these proceedings was, in his view, contrary to HR Article 43. Much like the Dutch case a year later, the Norwegian public prosecutor argued that the decree did not violate HR Article 43, because it had been proposed by the national price authorities themselves, and that it was absolutely necessary. The CSC did not agree. It stated that Norwegian judges could not review any of the occupier’s decrees. The duty to review the validity of relevant law should not be extended to international legal relations. The only competent organ to assess compliance with the Hague Regulations was the occupation regime itself. If the courts were to have the power of review, they might interfere in a sphere where they lacked expertise: the sphere of the executive power, which was responsible for protecting public order and civil life. So reviewing the occupier’s ordinances would in effect harm public order and civil life instead of helping to protect it. The German authorities were so pleased with this important decision that they had it published in a brochure under the title The Høyesterett renders a judgement of historical importance. Contrary to the Dutch Hoge Raad, the CSC did, however, leave some room for judicial review: it would be acceptable only with regard to ordinances that obviously transcended “the bounds of a reasonable observation of [executive] duties”.

In 1943, the Aker District Court decided to make explicit use of this reservation. A man called Peter Øverland left his farm to an agricultural society. One of his descendants challenged the will after Øverland had died. He tried to acquire the farm, arguing that there existed an old allodial privilege in Norwegian customary law that was aimed at keeping land in the same family, which would grant him ownership rights. He succeeded, upon which the agricultural society protested with the help of the collaborationist Norwegian authorities. They promptly issued an ordinance that reversed the previous decision, granting right of ownership to the society. The heir went to court, demanding the farm back on the grounds of the ordinance’s violation of HR Article 43. The court agreed with him, considering itself competent to review the decree, because of it was “obviously in contradiction to Article 43.

61 District Court of Aker, 25 August 1943 (Øverland’s Case), AD 1943-1945, case 156.
of the Hague Regulations”. Abrogation of the allodial law by the occupier was judged unnecessary to fulfil his duty to “re-establish and ensure public order and safety”.

The German occupation caused a major shift in the reputation of the Høyesterett. Before the war, it was regarded as a somewhat old-fashioned institution that, in reviewing legislation, favoured certain social classes over others. After resigning, the Høyesterett acquired a mythical standing as resistance heroes and representatives of all Norwegians, and it has not lost this reputation since. The post-war Parliamentary Commission of Inquiry concluded that “[t]he Supreme Court deserves the gratitude of the people”. Only one incident reminds us of the fact that things could have turned out very differently: after Paal Berg’s retirement, one of his former colleagues in the Høyesterett demanded that an official investigation be conducted by the Court of Impeachment into his conduct during the war. This demand was mainly fuelled by irritation with Berg’s autonomous deliberations with the enemy. It did not harm his public image, however.

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63 Stephan Tschudi-Madsen (ed.), op.cit., p. 43.
The Judge, the Occupier, his Laws and their Validity

### Table 1

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<thead>
<tr>
<th>Court actions</th>
<th>The Netherlands</th>
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The courts’ actions and justifications and the occupier’s measures, in correlation with the courts’ reputations.

### Actions, justifications and the public eye

An interesting relation that should be researched more thoroughly (and in more occupations) exists between, on the one hand, the actions of the supreme courts, the way they justified themselves and the occupier’s measures against them, and, on the other hand, the public opinion of those courts, as presented in Table 1. This relation is illustrated by the professional dilemma that generally haunts civil servants and judges under enemy rule⁶⁴. The dilemma was: *either* to remain in office to try and make the best of a bad situation – but in the meantime being forced to cooperate with the ever more repressive occupier, thus dirtying one’s hands, *or* to resign (or risk dismissal for non-loyal behaviour or resistance activities), thereby publicly showing criticism against the occupier and preventing the stigma of collaboration – but at the

same time making room for a collaborationist who might make things worse for all concerned. (In some respects this position may be comparable to the position of the manager of a restaurant owned by a criminal who frustrates the manager’s attempts to run a decent business.) The Dutch *Hoge Raad* identified strongly with the first option, the “lesser evil”, dirtying its hands to prevent what was expected to be the greater evil – replacement by collaborationists. It is not evident, however, that the latter really was a greater evil. In their defence pamphlet, the *Hoge Raad* stated that without them, people would stop paying their debts. After the *Høyesterett’s* resignation, no legal chaos ensued and the German repression did not get worse because of it.

The *Hoge Raad* acted pragmatically for what it considered the benefit of the people: legal certainty and protection of rights. As part of this cautious strategy it did not allow any of its own criticism of the occupier to be made public. The court further justified its attitude by referring to pre-war government instructions to all government personnel to remain in office as long as possible and to abide by the letter of the law concerning judicial review. This amounts to a legal positivist stance: the validity of legal rules is believed to be determined by procedural criteria and not by moral norms. Put crudely, positivist arguments for a legal decision have the form “because it is the law”. This did not appeal to the imagination of the resistance or anyone else.

The Belgian *Cour de Cassation* and the Norwegian *Høyesterett* also used positivist arguments in their protests, only natural for a court of law, especially in civil law countries. They argued, for example, that judicial review was their constitutional right and duty. However, contrary to the *Hoge Raad*, they also made use of natural law arguments and showed their indignation publicly. Natural law theory is often portrayed as the counterpart of legal positivism, because it does consider moral norms (natural law) to be relevant criteria for the validity of legal rules. In the letter that was made public, the *Cour de Cassation* called the German policies contrary to “the overriding duties of conscience” and Paal Berg explicitly invoked the “moral power” of the judge, which was publicly displayed in the court’s resignation. This combination of public protest and moral or natural law critique seems to be an import prerequisite of public approval.

A metaphor that was applicable only to the Dutch and Belgian situation is that of the fyke net. At the start of the occupation, things did not seem that bad and

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cooperation seemed the obvious and reasonable option. A few years later, however, the courts discovered that they had swum into a fyke net and were now stuck in a situation they had not foreseen. This danger did not materialize in Norway, because the Høyesterett had recognized the danger early on and refused to even enter the net. Therefore, they could not become implicated in the occupier’s policies by cooperating in their execution. This may account for the difference in public appreciation of the Supreme Courts’ roles in Belgium and Norway, although both courts made public and moral protests and retained the right of judicial review. The Cour de Cassation’s dirtying of its hands has been described as a “pact with the devil” and as “not so heroic pragmatism”.

A final but important factor in the Supreme Courts’ resistance potential is the presidency. In the Netherlands, organising protest was severely frustrated by the new president’s loyalty to the occupier, and by the appointments of other loyal collaborators. In Belgium and Norway, on the other hand, the presidents were not replaced and played important roles in opposing the occupier’s policies.

**Conclusion**

The attitude of each Supreme Court towards judicial review appears to contain all or most of the important factors determining the public image they acquired: the Hoge Raad on its own initiative rejected the power of review to avoid friction with the occupation regime, and did not step down, which contributed to a negative public image. The Cour de Cassation did review, but was pressured into giving factual effect to illegal legislation, and did not resign, which led to less fierce criticism, but by no means an unblemished reputation. The Høyesterett explicitly reserved the right of judicial review and stepped down because of the occupier’s demand that that right be abandoned. This earned the court a lasting image of war heroes.

Although it cannot be demonstrated, even with hindsight, that any one of the possible attitudes was more to the benefit of the population during the occupation than the other, it is clear that after liberation judges and courts who had “accommodated” to the enemy were put in a bad frame – even when they had protested against injustices. A stance of unwavering patriotism was sure to buy much more credit. In the end, in all three countries, the need for a principled, patriotic, and public stand against injustice was more strongly felt than the necessity of concealed pragmatics for the material wellbeing of the people.