Immoral Law, Illegal Morals? NS Forced Labor Compensation and the Law

By Viktor Winkler

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I. Why look back?

[1] As the *Bundestag* (German Parliament) has finally achieved the sought-after Rechtssicherheit (legal certainty) with respect to ending the threat of foreign claims being brought against German corporations, and as the first compensation payments have been made, the alarm over restitution for National Socialist forced labor seems to have quieted itself. At least, public discussion and media coverage has grown silent on the issue. Since The end of Judge Kram's recent "revolt" seems to have signaled the end of the forced labor issue. Well, our attention is limited. Had it not been a long and winding and somewhat tiring road marked by lawyers having it out with other lawyers? And had there not been enough confusing and embarrassing fits and starts, all that turbulence along the way? Now that the first claims are being paid, apparently there is not much to theorize about. While this is likely not true about the legal element of the matter, (1) this article argues that it is also not true for theorizing about the issue. Instead, legal theory could primarily look at forced labor compensation as a highly rewarding piece of scientific research. This concerns not only the compensation process itself, but certain striking aspects of the public perception expressed in the discussion surrounding the compensation-process.

[2] From this perspective, this article will outline (Section II) how and why the compensation process has been a "legal process", (Section III) how we could apply modern knowledge about the nature of the Law to explain the conclusions reached regarding the jurisprudential nature of the process and, finally, (Section IV) what should be done with these conclusions.

II. "See you in Court": Legal Certainty and Historic Responsibility

[3] Quite remarkably, the issue of compensation for NS forced labor has widely been dominated by a single term, *Rechtssicherheit* (legal certainty). The concerned corporations (as defendants), circled the wagons around themselves in the association known as the *Stiftungsinitiative* (foundation initiative), which, once introduced, was carried along through the entire process by the gales of politics, with "legal certainty" as its rudder.. A legal term, indeed, but one of only the most vague legal consequence. The main point made by the term was that the concerned corporations were willing to make their payments only in exchange for the promise that they would be free from further legal risks. In a way, the legal nature of this was (and still is) rather more a contract than a duty enforced, a voluntary grant more than the consequence of legal obligation. Of course, it could not be the latter of these legal forces, since the courts have made it abundantly clear that there was no positive legal obligation for the corporations to make compensation: the claimants were covered neither by labor nor by civil law; either their claims were blocked by the exclusive terms of post-war reparation treaties or they were subject to fatal limitations. In any case, at the end of the day, no single claim could be acknowledged from the grounds of law. The legal circle was closed.

[4] Why, then, the concern for "legal certainty"? It derived, primarily, from the US courts and their minimum-contact theory for establishing a jurisdictional nexus. Thus (not for the first time) the US courts slipped their tentacles into the closed-market of German law, potentially cracking the old tortoise's shell. In order to keep it closed, the *Stiftungsiniative* (foundation initiative) demanded *Rechtssicherheit* (legal certainty). At the same time, speaking of *Rechtssicherheit* made sure from the very start that the public discussion stayed within the boundaries of "the Law". From the moment the concept of legal certainty was introduced by the initiative, the question was framed for the German public not as *how* but *if* the forced laborers should be compensated. Therewith, the parties to the foundation initiative crafted the issue as a mere legal matter, they very battle (as noted above) the claimants would necessarily lose. They had no legal claims at all, making any eventual payments nothing but grants at the good-will of the foundation initiative, nothing less and nothing more.

[5] That must have seemed odd to anyone who thought of this as, first and foremost, a moral issue. In fact, for the last few decades education about the "Third Reich", whether in schools or *via* the variety of more or less ambitious television programs, the question of guilt has rarely been treated from a purely legal standpoint. Gustav Radbruch's famous (once popular and today sometimes still latent) assumption about lawyers' defenselessness in the face of grave horrors, which he felt derived from the law's lack of moral (that is non-positivist) standards, seems a self-fulfilling, self-defeating but self-evident claim. The common view was: the holocaust could be committed because people had followed the law; and they had followed the law because their exaggerated and stubborn belief in the law (or legal "positivism") had ordered them to do so. Scientific research has shown that, at least for the judges of the "Third Reich", this equation simply was not a full explanation. (2) However, this myth conveyed a perception of the legal circumstances that "lead to the holocaust", a perception that disposed of any consequential legal meaning. *Understanding* the crimes of the "Third Reich" became a *moral* and not a *legal-scientific* question. (3) It was natural to

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view the Law, consisting of the mechanical application of rules to facts, as inadequate to the task of reckoning with this historic moral catastrophe.

[6] Now, it seems, everything is different. The path one takes to obtain compensation is a legal process and the actors involved are undeniably legal actors: plaintiffs' attorneys, corporate lawyers, governments (the *Bundesregierung* and the U.S. State Department), as well as the *Bundestag* (German Federal Parliament) and the U.S. Congress. And at the center of the storm, of course, the victims, the nearly innumerable forced laborers spread across Eastern Europe and the rest of the world, here serving in the role of "claimants". As this legal process was chained to the aim of *Rechtssicherheit* from its initiation, a *legal* concept, the moral questions that arose just as quickly vanished into the legal dust of trial dates, hearings, files and ongoing negotiations. When this happened the moral issues had not disappeared, they had instead been marginalized, shunted off to the irrelevant edge of the forum that had taken shape to "address" the suffering of so many people.

[7] At the same time, the terms *justice* and *responsibility*, naturally, have not vanished from the discussion. As always, *speaking* of justice remained the easiest of things to do. But in the landscaped crafted by the *Stiftungsiniative* (foundation initiative) *justice* does not mean "justice by law!" As the *Stiftungsinitiative* saw it, *justice* even meant something less than the proletarian "see you in court!" Instead, *justice* has been linked with the core term of popular invocations, *responsibility*. Not surprisingly, speaking of *responsibility* has had its use, mainly for those who tried to make sure that, at least, their *responsibility* was not one of legal nature. (4) Instead *responsibility* was spun back to a vaguely moral, enduring *mea culpa*, albeit an admission inaccessible to anyone with a law code at hand. Not accidentally, the foundation born out of the *Stiftungsinitiative* is called "Remembrance, Responsibility and the Future". Thus Law and morals have been separated. During the post-war "*Bewältigungs*-period" (the period during which the NS history was "managed" or "sorted-out") moral approaches, which generally excluded legal-scientific examinations of the legal culture that "lead to" the catastrophe, were preponderant. Now the Law is ascendant.

III. A blind man and his walking stick: The Law today

[8] In fact, aside from any malevolent intentions on the part of the *Stiftungsiniative*, the victims as well as the corporations had no choice in this. They were (and still are) taking part in a complete, and uniquely *global* process, highlighting both the successes and failures of modern law. The success lies with the ongoing and increasing absorption of tasks that were once entirely exercised by what we are used to calling moral norms. As these effectively lost their societal universality, Law has stepped in to fill the gaps; in so doing it has had to handle enormous new changes at one time. (5) This development is almost entirely due to the democratization and rationalization that has swept the playing fields of the last decade. These trends seemed to go hand-in-hand, but its effect was a growing legal autocracy and exclusiveness in terms of social adjustment. Today, very few (if any) social impulses can forego the Law; any social movement is registered, traced and eventually it obtains its identity *exclusively* from the Law. This is why the victims had no choice other than to pursue, what they saw as justice, *by law*.

[9] At the same time, *because* it has become the global medium of human life, law itself is differentiated in such a complex way that its own mechanisms are growing less and less accessible. Secularized and freed from a meta-approach in order to guarantee democratic review, law can find its own parameters *only from within*. There is, in this specialized and largely isolated sphere of *legal* argumentation, a natural inability to internalize what are traditionally seen as moral and/or historical implications, as would seem essential to any discussion of the compensation for NS forced labor.

[10] This becomes intelligible when we stop viewing the legal system as a static construction but rather start looking at it as a network of communications. After some entity has initiated the communication, the fate of the system depends on two crucial skills:

A. The capability of accepting and rejecting other communications.

The ability to distinguish communication enables the legal system to reduce today's complexity and thereby constitute its own, "individual" rationality. In other words: "A social system can tell whether it deals with communication or teeth brushing." (6) Without this ability, the external impulses would be nothing but *Rauschen* (static). The significance of this rule is underlined by the fact that today's global system not only depends upon but consists of these distinct waves of communication that must be sorted. Without the ability to distinguish, one is left with literally thousands of threads to follow through the maze. This is why the law has to translate external impulses into "law"; otherwise, it simply does not understand. In this light, understanding is nothing other than distinction itself. (7) What the Law understands is the polarity of legal and illegal. It is his binary code. Beyond that, the legal system will simply reject communications. As Niklas Luhmann has so aptly put it, "something can be legal or it can be illegal but it cannot be both." (8)

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B. The ability to reproduce its communications.

The system must have the ability to *produce* communications *from within* again and again, in order to "keep going". In other words, the system must be able to constantly recreate itself (so-called "Autopoiesis"). (9) This operation must be self-referential and the moment the system stops operating this way it stops working, it comes to a halt.

[11] Once viewed as such a cluster of ongoing professional communications, with increasing differentiation, there are more and more communications the legal system has to reject because it cannot understand them. As a result, there is communication about justice *inside* and *outside* the legal system, and in view of the advanced complexity of each internal communication they are very unlikely to match. Naturally, as soon as the forced laborers raised their long-unheard cry for justice, it could only be heard by the legal system in the terms with which it is bound, perpetually, to work. Karl-Heinz Ladeur described this character of modern self-referential systems as being like "a blind man using a stick to test the stability on which he walks. He draws the distinction of stable/unstable and constructs a whole recursive system of orientation on the basis of this chain of operations which allows him to walk but does not permit him a full description of his environment". (10) Still, presently, in the ongoing troublesome payout process, the victims have to meet those systemic standards of the Law (first by transforming themselves into claimants) or otherwise they will have very little chance of being acknowledged. Indeed, the Law can deal with compensating forced laborers. But a theoretical examination shows the strange way in which it is doing so. It is capable of understanding, of *seeing* the victims, just as Ladeur's blind man *sees* really so little, but just enough, with his walking stick.

IV. What is to be done?

[12] For those of us born after the war, watching the numerous forced laborers in this painfully ambiguous position between a commonly felt need for compensation and the legal hurdles that stand in the way of its provision, we get a vivid impression of the law's inability to deliver the idea of justice of which everyone in the German discussion insisted upon speaking. All these discussions have made use of a wide range of ignorance regarding the real quality of and functional differentiation between law and morality. They are mainly underlined by a latent (mis-)perception of the law as an institution still having a common, inherent and encompassing idea, whether it be one of legal unity, legal heritage or apriroric justice. This essay has aimed at pulling the curtain back in order to reveal that the law is unable to provide such an inherent idea, especially in the face of incessant differentiation. Today, the law is a scattered body of specialized and refined communications between numerous actors that have very different approaches to *their* legal communication. In other words, today's law is an *entity* without *unity*. Its ability of performing moral standards in an effective and coherent manner is extremely limited. In the light of the compensation for NS forced laborers this quality of the law is not only striking but also painful.

[13] So, what is to be done? The starting point would seem to be, even more existentially, the sorrowful question of former Federal Constitutional Court Justice Ernst-Wolfgang Böckenförde: "*Kann der Mensch so leben?*" (Can man live like that?)". (11)

[14] I think, however, that the way out is not the first question. First it is for us to decide whether we want to get out at all? In order to answer this question we first need to craft an image of the law, a more precise impression of where we are, with regard to the law. My impression is that public opinion is generally shaped in the absence of any real knowledge about the law. Perhaps a more accurate look at our legal history would help. In any case, as long as we do not know where we are, we should not just start going anywhere. Therefore, our findings should not be a source of mournful pity but a reason to illuminate the systemic structure of the law, the nature of justice we want to enforce by it and the way this could be done in a highly differentiated and pluralist society. This would be part of a true *responsibility*, for the past as much as for the future.

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(1) Consider, especially, the recent allegations regarding irregularities within the management of the *Stiftungsiniative*. *See*, *Die deutsche "Arroganz" stößt bei Ex-Zwangsarbeitern auf Unverständnis, FRANKFURTER RUNDSCHAU p. 4 (21 November.2001); US-Senat schaltet sich im Streit um Zwangsarbeiterentschädigung ein, HANDELSBLATT p. 6 (15 October 2001); Polish Survivors Of Nazi Labor Could Lose Funds Group Says Exchange Rate Threatens Compensation, WALL STREET JOURNAL EUROPE p. 25 (17 August.2001).*

(2) Bernd Rüthers, DIE UNBEGRENZTE AUSLEGUNG (1973); Manfred Walther, Hat der juristische Positivismus die deutschen Juristen im "Dritten Reich" wehrlos gemacht?, in RECHT UND JUSTIZ IM DRITTEN REICH p. 323 (Dreier/Sellert eds., 1989); see also Ingeborg Maus, id. p.80.

(3) For a sophisticated pladoyer for "scientification"of the "Third Reich", see Martin Broszat, Plädoyer für eine Historisierung des Nationalsozialismus, in NACH HITLER – DER SCHWIERIGE UMGANG MIT UNSERER

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GESCHICHTE (Borszat ed., 1988).

(4) For the general (mis-)use of the term "responsibility" in today's legal discourses, see Klaus Günther, Verantwortlichkeit in der Zivilgesellschaft (Inaugural lecture, 1999 – available at www.uni-frankfurt.de/fb01/guenther).

(5) For the social and economic implications of this development (and in my opinion, still a fundamental text), see Dieter Grimm, RECHT UND STAAT DER BÜRGERLICHEN GESELLSCHAFT (1987); Niklas Luhmann, Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft, 4 RECHTSTHEORIE 131 (1973).

(6) Thomas Vesting, Kein Anfang und kein Ende. Die Systemtheorie des Rechts als Herausforderung für Rechtswissenschaft und Rechtsodgmatik, 5 JURA 300 (2001).

(7) Niklas Luhmann, Was ist Kommunikation?, in N.Luhmann, SHORT CUTS p. 47 (2000).

(8) Niklas Luhmann, Kommunikation über Recht in Interaktionssystemen, in: N.Luhmann, AUSDIFFERENZIERUNG DES RECHTS p. 57 (1999).

(9) For the concept of "reflexive law", see, Gralf-Peter Callies, Lex Mercatoria: A reflexive Law Guide to an autonomous legal system, 2 GERMAN L. J. 17 (1 November 2001), available at http://www.germanlawjournal.com/past_issues.php?id=109.

(10) Karl-Heinz Ladeur, The Theory of Autopoiesis as a an Approach to a Better Understanding of Postmodern law, EUI Working paper LAW No. 99/3, p.12.

(11) E.-W. Böckenförde, Das Bild vom Menschen in der Perspektive der heutigen Rechtsordnung, in RECHT-STAAT-FREIHEIT p. 66 (Böckenförde ed., 1991).

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