The post-Holocaust Development of Legal Remedies as a Learning Process

Published by Prof. Dr. Thilo Marauhn and Dr. Ayşe-Martina Böhringer

Working Paper

No. 03, June 2024

# A Summary of *"Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland Band III – Der Werdegang des Entschädigungsrechts"*

Hanin Hagjija-Alaoui

The following article provides a brief summary of the third volume of the series "Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland" published, among others, by the Federal Ministry of Finance in six volumes, and is accordingly focused on the general development of compensation law.

JUSTUS-LIEBIG-UNIVERSITÄT GIESSEN

HOLOCAUST REMEDIES

Project of the Education Agenda NS-Injustice

Funded by:

Federal Ministry of Finance

on the basis of a decision of the Bundestag

Foundation EVZ Remembrance Responsibility Future

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## About the Author

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# A. Introduction

From an ethical, political, and legal point of view, the right to compensation and the associated responsibility was a complex challenge for Germany. In order to atone for the moral guilt of the German nation, material, moral and legal issues had to be clarified. However, debates and discussions on the subject dragged on and delayed progress in the field of compensation law. To this day, the German post-war period is characterized by these negotiations and the historical and moral responsibility that the creation of the regulations entailed. The following article provides a brief summary of the book “Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland Band III – Der Werdegang des Entschädigungsrechts” (“Legal Remedies for National Socialist Injustice by the Federal Republic of Germany Volume III – The Development of Compensation Law”) which deals with these issues and the general development of compensation law. The author limits herself to selected paragraphs of this volume.

# B. The Concept of Remedies

First of all, it must be borne in mind that the background of legal remedies and compensation policy first had to be internalized by the German population.

The moral side of remedies and the ethical and moral aspects of remedies represented a major challenge for Germany. The German people felt a sense of obligation and wanted to help make amends for past evil. In addition to the foreign policy aspect of legal remedies and the establishment of the German constitutional state, the focus was on the acknowledgement of having done wrong.[1]

At this time, legal remedies were not only seen as legal remedies themselves but also as part of the restoration of German sovereignty controlled by the Allied powers.[2] Many people in Germany were ashamed of their wrongdoings during the Nazi era and had a guilty conscience.[3]

Furthermore, the debates on remedies led to domestic dilemmas and tensions. Konrad Adenauer described the obligation to pay reparations as a debt of honour of the German people.[4] However, even at that time, there was a conflict within the country. Neo-National Socialists, in particular, who desecrated the graves of deceased Jews, often made it seem as if Germany was unwilling to pay its debt. It was

[1] Ernst Féaux de la Croix, in: BMF in Zusammenarbeit mit Walter Schwarz (eds.), Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland Band III – Der Werdegang des Entschädigungsrechts, München 1985, pp. 5 et seq.

[2] Ibid., pp. 123 et seq.

[3] Ibid., p. 5.

[4] Ibid.

precisely this image that needed to be improved internationally.[5] Furthermore, on 27 September 1951, Konrad Adenauer issued a declaration against racial agitation in favour of education and reparation, in which the ethical side of material reparation was also discussed. A debate arose in which it was stated that Germany's deeds could not be revalued on the basis of blood money.[6] This is where the general debate about the concept of remedies first arose. In the early years of remedies policy, the term was valued by opponents of Nazi policies and was an acknowledgement of guilt. The idea of German self-purification was part of the motivation behind the choice of term. Later on, this has developed in the opposite direction. Remedies as a term is often criticized because it seems to trivialize the fate of the Holocaust victims. The problematic nature of the term thus reflected the dichotomy of the German nation on the one hand and the dishonesty that the Jewish side sometimes associated with the compensation policy on the other. However, a collective dissatisfaction quickly became apparent here, which was caused by the process and, above all, the delays in compensation payments. After the Nazi regime came to an end in 1945, it was clear to the Jewish survivors that compensation could now begin. However, the victims initially only received an identity card, which gave them increased food rations and more living space.[7]

## C. Who is Responsible for the Payment?

Firstly, compensation had to be regulated by law. In this regard, a debate arose as to whether the individual states or a nationwide overall regulation should regulate compensation. This was initially considered too complex.[8]

Decisions of this kind should be made quickly, as it was also discussed in the Stuttgart Special Committee that those affected should not wait too long for their compensation.[9] At the same time, a three-point programme was drawn up, through which immediate measures were taken for the compensation of bodily injury and loss of liberty.[10] From November 1947 to May 1948, consultations were held on whether a German bi-zonal or nationwide solution should be sought. The consultations with the American military government OMGUS lasted until the beginning of March 1949. A number of points were reviewed, and a first revised draft was presented in April 1949.[11] This draft was subsequently

5 Ibid., p. 5.
6 Ibid., p. 152.
7 Ibid., p. 15.
8 Ibid., pp. 38 et seq.
9 Ibid., pp. 39 et seq.
10 Ibid., p. 39.
11 Ibid., p. 40.

approved and promulgated by the military government. This laid the foundations for German compensation law, which could be used to “compensate” for damage to life, health, freedom, property, assets and economic advancement.[12] Initially, compensation rules were developed at the state level, some of which were very specific and had been continuously expanded.[13] In North Rhine-Westphalia, in particular, there was a strong desire for a general and standardised compensation law.[14] Lower Saxony also tended to favour a uniform compensation regulation, while Hamburg, in particular, had no inclination to do so.[15]

The creation of a coordination office as a central centre for reparations was proposed. Initially, however, coordinated co-operation between the federal states was not made possible.[16] The German Basic Law came into force on 24 May 1949. Only then was the federal government able to take legislative action alongside the federal states in the area of legal remedies in accordance with Article 72 of the Basic Law if there was a need for this for certain reasons. This was not possible for certain reasons, for example, in the case of regulation by individual federal states or the risk of impairment of other federal states and the individual federal state governments.

However, the problem again arose as to whether the federal government or the federal states should bear the costs. Initially, it was recommended that the federal states should bear the financial burden as a local matter to the respective areas of damage. Moreover, the federal government should be responsible for the compensation. A counter-opinion claimed that, in accordance with Article 120 of the Basic Law, the burden of the consequences of the war should be borne entirely by the federal states.[17] On 29 July 1953, a compromise was reached in the Conciliation Committee. The federal government was to bear the costs of the compensation, among others, for special groups of persecuted persons, minus the 10% interest quota of the federal states. Beyond that, the burdens should fall to the federal states on a temporary basis.[18]

[12] Ibid., pp. 40 et seq.
[13] Ibid., pp. 54 et seq.
[14] Ibid., p. 57.
[15] Ibid., p. 58.
[16] Ibid., pp. 42 et seq.
[17] Ibid., p. 75.
[18] Ibid., p. 81.

# D. The Development of the Federal Compensation and Supplementary Federal Act

The Federal Council was to draft the Federal Compensation Act. In November 1950, the Federal Council was to set up a special remedies committee that should be responsible for all matters of remedies, including drafting proposals for legislative measures. This was necessary because the composition of the existing committees of the respective federal states did not yet fit this idea.[19] On 18 June 1952, a law with 38 paragraphs was drafted for the resistance fighters against the Nazi regime. This reformatting was important in order to compensate people who were not included in the compensation due to the concept of persecution and the disregard for freedom and equality.[20]

Negotiations with the occupying powers were concluded in July 1952. According to the draft law, the federal and state governments should compensate those who were persecuted or subjected to oppression on the basis of their faith, race or political views. At this point, specific questions were still relatively unclear, such as what exactly should be regulated by federal law.[21] Nevertheless, the Additional Federal Compensation Act ("Bundesergänzungsgesetz" – BErgG) could be passed in 1953.

## I. Criticism and Revision of the Additional Federal Compensation Act

In 1954, the Jewish Claims Conference criticised the BErgG for the first time.[22] A number of suggestions for improvement were raised, and the following proposals were subsequently agreed upon: Firstly, the basic structure of the law should be retained. Ultimately, however, improvements were to be made to the law.[23] Draft amendments by the SPD and the CDU discussed when the compensation regulations should be extended financially.[24] However, these same discussions led to delays in the final payments and the general revision of the amendment and caused resentment on the victims' side.[25] It was also problematic that victims of NS persecution abroad were discriminated against. They were not included in the draft amendment to the BErgG with the argument that this would exceed the capacity of the Federal Republic

[19] Ibid., p. 68.
[20] Ibid., p. 65.
[21] Ibid., pp. 67 et seq.
[22] Ibid., p. 83.
[23] Ibid., p. 84.
[24] Ibid, pp. 85 et seq.
[25] Ibid., p. 86.

of Germany.[26] In 1955, a draft initiative was referred to the Reparations Committee, which was followed by many consultations.

However, it was not possible to finalise these deliberations by the end of March, as was initially planned.[27] In September 1955, the Federal Ministry of Finance declared that the new version would cost at least three billion DM in additional expenditure for the BErgG. This was followed by a request for a review of whether some compensation could be set at a lower level. The final draft followed on 27 September 1955 with 100 substantive and formal changes.[28] On 14 December 1955, the first reading of the bill by the Bundestag followed. On 12 May 1956, a written final report followed; however, the belief in an indemnity peace was a delusion at this time. Nevertheless, the revision still came into being in 1956 and is known as the "Bundesentschädigungsgesetz" (BEG).[29]

## II. Legal Gaps and Previously Disregarded Victim Groups

At the end of 1958, at the beginning of the third legislative period, there were again requests for amendments. Associations of victims of the Nazi regime pressed for the ambiguities in the BEG to be clarified.[30] The Federal Complementary Act was not fully developed politically and socially.[31] Among others, an expansion of the concept of Nazi persecution causality was demanded, as well as the extension of the presumption of persecution-related death.[32] Finally, for example, in 1965, a new law was agreed upon that introduced new provisions regarding, among others, time limits for compensation.[33] The legal framework was, therefore, subject to constant changes and adjustments in order to close the gaps.

For instance, solutions were sought with regard to the so-called "Westgeschädigte". Already the first uniform federal legal framework, the BErgG, excluded this group. The "Westgeschädigte" were all deported Jews and resistance fighters who were persecuted in German-occupied territories.[34] Resistance fighters did not fall conceptually into the category of Nazi victims entitled to compensation and therefore required a legal entitlement for the compensation regulation.[35] For this reason, forced

[26] Ibid., p. 204.
[27] Ibid., p. 87.
[28] Ibid., pp. 89 et seq.
[29] Ibid., pp. 90-91.
[30] Ibid., p. 96.
[31] Ibid., pp. 95 et seq.
[32] Ibid., p. 99.
[33] Ibid., pp. 109 et seq.
[34] Ibid., pp. 201 et seq.
[35] Ibid., p. 201.

labourers, deportees and resistance fighters were to be included in the revision. Furthermore, there were also crucial gaps with regard to foreign victims living abroad, which posed a legal and moral problem for the laws. For instance, concentration camp prisoners and forced laborers with French nationality who were not resident in Germany on the statutory deadlines could not apply for compensation.[36]

## III. The Federal Council for Matters of Legal Remedies

On 31 October 1951, the establishment of a standing committee of the Federal Council for questions of legal remedies was requested. This committee was to deal with important issues such as the financial contributions by the Federal Government to the compensation payments of the federal states and should draw up proposals for legal standards.[37] The committee was set up shortly afterward, and it addressed three main topics.[38] Firstly, the redirection of the reparation part of the then ongoing legislative procedure for the Equalisation of Burdens Act; secondly, the creation of a remedies senate at the Federal Court of Justice (Bundesgerichtshof – BGH); and finally, the establishment of a compensation scheme at the federal level.[39] In order to fulfill the main task of the committee, which was to draft a comprehensive Federal Compensation Act, a subcommittee was set up for this purpose. At the beginning of April 1952, the first draft on “Damages to Economic Advancement” was available.[40] Other sections on damages to body and freedom, as well as damages to property, were to follow, and a more elaborate draft was submitted to the Federal Government, where it was initially not processed.[41] The committee existed until the fall of 1969.

## IV. The Israel Treaty and Hague Protocols

The Israel Treaty concluded between the State of Israel and the Federal Republic of Germany was the first agreement aimed at a global compensation settlement to take place between Israel and Germany. Furthermore, the two Hague Protocols, which focused on compensation for individuals, and, inter alia, the further development of the compensation laws governing claims were agreed upon between the

[36] Ibid., p. 203.
[37] Ibid., p. 68.
[38] Ibid., p. 69.
[39] Ibid., p. 69.
[40] Ibid., p. 70.
[41] Ibid., p. 72.

Claims Conference and Germany.[42] Both agreements were signed in Luxembourg on 10 September 1952.[43]

## V. Transfer Agreement

There was no explicit mention of the issue of remedies in the declarations of the Allied Powers.[44] The Western occupying powers had left the area of compensation to German legislation. The situation was different in the area of restitution of seized, still identifiable assets. These were regulated by provisions under occupation law.[45] Judicial control of restitution was to be exercised by the German courts in the first and second instance. Courts of the Allied states were responsible for the appeal proceedings.[46] Compensation laws existed in the occupation zones at the federal state level. These were not uniform. At the parliamentary level, the SPD parliamentary group raised the question of whether the federal government was prepared to supplement the state compensation regulations with federal legislation.[47] At the beginning of 1951, work on revising the occupation statute was accompanied by efforts to replace the occupation regime. The issue of reparations was also included in the negotiation programme.[48]
In October and November 1951, the transfer agreements were finally drawn up on the basis of the Allied powers' concept of remedies. The third part of the draft dealt with internal restitution, and the fourth part of the draft transfer agreement addressed compensation.[49] The third and fourth parts of the transfer agreement were completed, and on 26th May 1952, Chancellor Adenauer and the foreign ministers of the Three Powers signed the transfer agreement as part of the so-called Bonn Agreements. After some delays, a new treaty was signed on 23 October 1954. However, nothing was changed in the previously drawn-up parts of the transfer agreement addressing remedies.[50]

[42] Ibid., pp. 147 et seq.
[43] Ibid., p.169.
[44] Ibid., p.123.
[45] Ibid., pp.124 et seq.
[46] Ibid., p. 125.
[47] Ibid., p. 126.
[48] Ibid., p. 127.
[49] Ibid., p.129.
[50] Ibid. p.138.

## VI. Payments Induced Protests in the Arabic World

About ten years later, an agreement on the compensation issue was slowly coming into sight. The discussions centered around a revision of the compensation law framework.[51]
Following the Bundestag elections in the autumn of 1961, a working group was included in the discussions. On the second day of negotiations in the working group, there was already an amendment plan. The idea in this concept seemed to lead to a more productive way of working, and thus, no unrest could occur due to delays.[52] However, a press release by the politician Dr. Goldmann stating that compensation amounting to several billion was to be distributed led to strong protests in the Arab world.[53]
On 28 May 1962, the main questions concerning the so-called “Wiedergutmachungsschlussgesetz” were discussed.[54] These discussions resulted in a new draft law, which was to be assessed by the Federal Government with proposals for improvements. This draft was passed to the Bundesrat in June 1963; the first reading of the draft at the Bundestag did not take place until November 1963. In the following period, every provision of the BEG was successfully reviewed, and improvements were made, including the establishment of a special fund of DM 700 million for persons not previously entitled to claim under the BEG.[55]
In the end, the new law, promulgated in the Federal Law Gazette in September 1965, brought several amendments, among other things, to statutory time limits for compensation.[56] In 1970, supplementary regulations clarified which detention centres were to be included in the concentration camps and which were not. This was intended to further simplify the compensation processes.[57]

# E. Criticism of Germany’s Compensation Policy

In contrast to the Allied Powers, Germany only wanted to compensate people who had suffered gross human rights violations. Furthermore, Germany wanted to keep reducing the amount of compensation for domestic compensation. This led to renewed criticism from the Allies, who criticised Germany’s

[51] Ibid., p. 98.
[52] Ibid., p.100.
[53] Ibid.
[54] Ibid., p. 102.
[55] Ibid., pp. 106 et seq.
[56] Ibid., pp. 109 et seq.
[57] Ibid., p.110.

attitude to compensation. In November 1949, Konrad Adenauer offered the Jews goods with a value of DM 10 million to rebuild Israel as a sign of peace. However, this was seen as an insult and rejected.[58] Furthermore, Israel passed two notes to the government of the occupying powers – the January note asked for a federal compensation law to fill the gaps between the restitution law and the compensation law. The March note asked for an account of what had happened. Israel felt entitled to demand reparations because of the refuge it had given to Holocaust survivors. Without the fulfilment of the final demand of DM 1.5 billion, it was considered impossible to reintegrate Germany.[59]

# F. International Reparations

In the international context, compensation was first offered to Switzerland and Italy. Austria was initially not to be included. Now, an offer of lump-sum payments from state to state had begun.[60] The respective countries had different priorities and wishes, which were reflected in the compensation payments. Luxembourg prioritized the following topics: social insurance, care for war victims, compensation and compensation for damage resulting from German acts of violence committed during the occupation.[61] In contrast to Luxembourg, Norway demanded that Norwegian nationals who had been deprived of their freedom and suffered damage to their health on account of their race, faith and ideology be compensated. Furthermore, all legal claims on Norway's part were to remain unaffected by law.[62] Danish nationals and, in special cases, non-Danish nationals were to be compensated for bodily injury and damage to health.[63]

Austria's compensation was met with controversy. The territorial principle of the BEG was to be abandoned in favour of current and former citizens. This was criticised by the Germans. In general, it emerged in October 1958 in talks between Vienna and Germany that opinions on this compensation differed.[64] In 1960, Austria expressed the wish for a German lump sum payment of DM 500 million to equalize burdens, make reparations and fulfil claims arising from social insurance. However, Germany did not want to fulfil these demands. Solutions were sought from 8-18 May in Vienna.[65] One of the solutions proposed was for Germany to contribute 15% of Austria's actual expenditure. It was also

[58] Ibid., p. 150.
[59] Ibid.
[60] Ibid., p. 209.
[61] Ibid., p. 210.
[62] Ibid., pp. 216 et seq.
[63] Ibid., pp. 223 et seq.
[64] Ibid., p. 294.
[65] Ibid., p. 298.

proposed that Germany could pay DM 3 million for the registration of the collection centres, and a declaration on the non-application of the waiver of reparation claims by Austrians was drawn up. From these articles, 10 points were finally drawn up, which contained an overall agreement on the necessary payments by Germany to Austria.[66] At a ministerial meeting, the questions of how the inclusion of the persecuted persons who had emigrated from Austria should be handled and what type and scope the final clause should have were to be clarified.[67] In the end, Germany paid DM 95 million for expenses arising from the amendment to the Austrian Victim Welfare Act, and 600 million schilling were agreed upon for the Austrian Relief Fund Act.[68] However, many countries were of the opinion that Austria had to bear the burden itself. Germany, on the other hand, saw Austria's compensation as a humanitarian task. The Kreuznach Agreement helped the Austrian expellee, even though this was actually Austria's responsibility.[69]

# G. Conclusion

Overall, the volume "Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland Band III: Der Werdegang des Entschädigungsrechts" sheds light on the reparation policy after the Second World War and the ethical, legal and political dilemmas that accompanied it as well as the delays that resulted from lengthy debates and revisions of draft laws. Compensating for past injustices, therefore, involved a large number of decisions and represented a diplomatic balancing act. Germany had to fulfill its moral obligation to recognize the Nazi crimes and, at the same time, prevent national protests. The legal side of remedies was delayed by revisions and disagreements regarding competences, responsibility for costs and cost levels, which led to resentment on the part of the victims and the occupying powers. To this day, problems and ambiguities in the compensation laws are responsible for the victims not being properly compensated.

[66] Ibid., p. 299.
[67] Ibid., p. 300.
[68] Ibid., p. 303.
[69] Ibid., p. 308.


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# Project “The post-Holocaust Development of Legal Remedies as a Learning Process (Post-Holocaust Remedies)”

The research project “The post-Holocaust Development of Legal Remedies as a Learning Process (Post-Holocaust Remedies)” is carried out by the Chair for Public Law and International Law, Justus Liebig University (JLU) Giessen in cooperation with scholars from Reichmann University in Herzliya/Israel and the Instituto Colombo-Alemán para la Paz (CAPAZ) in Bogotá/Colombia. The project, conducted by Prof. Dr. Thilo Marauhn and Dr. Ayşe-Martina Böhringer, began in late summer 2022 and is dedicated to the in-depth analysis of compensation law in connection with the Holocaust and the legal framework that has been developed since 1945 for dealing with the consequences of Nazi crimes.

The project, funded by the Foundation Remembrance, Responsibility and Future (EVZ) and the Federal Ministry of Finance (BMF) from August 2022 until June 2024 as part of the Education Agenda NS-Injustice, focuses on the critical analysis of the development of political and legal instruments in dealing with the consequences of the Nazi atrocities. The following questions, among others, are addressed: After the atrocities of the Holocaust, what lessons can be learned from the compensation law measures taken to date? Which instruments are suitable for legal remedies? An important main feature of this project is the international summer school, which offered students from Israel, Colombia and Germany the opportunity to take an in-depth look at the legal process of addressing Nazi crimes. The program covered two weeks each at Reichmann University in Herzliya, Israel and JLU Giessen and included a variety of courses and excursions to relevant institutions to ensure a practice-oriented perspective. The summer school took place from 18.08.2023 to 14.09.2023. This unique way of teaching the subject of this project should also inspire future generations to engage in research-based learning, practice-oriented knowledge transfer and academic responsibility.

Special thanks go to Dr. Avraham Weber, Hanin Hagjija-Alaoui, Lena Albrecht, Marzena Duszynski, Lina Kost, Sabrina Ohm, Finn Luis Reis and Julia Rosenfeld for their valuable contributions to the content and organization of the project.

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**https://holocaust-remedies.com**
**https://www.instagram.com/holocaust_remedies/**

**ISSN (Online): 2510-988X**
**ISSN (Print): 2510-9871**



**This publication does not represent the opinion of the Foundation Remembrance, Responsibility and Future (EVZ) or the Federal Ministry of Finance (BMF). The author bears responsibility for any statements contained herein.**

Project of the Education Agenda NS-Injustice

Funded by:

Federal Ministry of Finance

on the basis of a decision of the Bundestag

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