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Volker Roelcke / Sascha Topp /
Etienne Lepicard (eds.)

Silence, Scapegoats, Self-Reflection

The Shadow of Nazi Medical Crimes on Medicine and Bioethics

With 8 figures

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Rehabilitation and Indemnification for the Victims of Forced Sterilization and "Euthanasia". The West German Policies of "Compensation" *("Wiedergutmachung")*

Preliminary remarks

Before discussing the West German policies of rehabilitation and indemnification for Nazi victims, especially for forced sterilization and "euthanasia" victims, we should mention a few preliminary points.

In principle it should first be noted that the cornerstones of this policy were not formulated by the German parliament (*Bundestag*) or by the federal government, but by the Western Allies. In the course of negotiations on the Bonn Treaties in the early 1950s, the Western victors laid down the conditions for expanding the sovereignty rights of the Federal Republic of Germany. The core of the Allied indemnification policy was defined in the *Überleitungsvertrag* (Transitional Agreement).[1] In the fourth section of this Agreement, the Western Allies obliged the Federal Republic to pay financial indemnification to persons who had been persecuted for their "race", worldview or faith and who consequently suffered damage to their life, body, health, freedom, property, assets or economic advancement. As a participant at the negotiations later remembered, West German politicians for their part unsuccessfully attempted to at least have the most venomous of the demands removed. The indemnification policy was therefore based on the Allied understanding of indemnification at the time and on the cornerstones set by the Western victors. This also means that their stance towards forced sterilization and Nazi "euthanasia" was at least rudimentarily reflected in this basic constellation.

On the other hand, the task of creating a uniform legal framework that would transform the Federal Republic's original liability for indemnification from an enforceable liability based on private law into a general, statutory obligation fell upon the shoulders of West German lawmakers.

This meant that the *Bundestag* as a legislative institution was essentially given

1 See Auswärtiges Amt (ed.), *Verträge der Bundesrepublik Deutschland: Serie A: Multilaterale Verträge*, Bonn et al.: Heymanns 1957.

the chance to interpret the legal claim from a socio-political viewpoint.[2] However, this opportunity for interpretation – within the bounds of Allied specifications – was also restricted by the limited capacity of West German society to pay compensation for all damages caused. In this respect the indemnification laws are generally an indicator of the status of West Germany's *Entschädigungspflicht* (indemnification obligations) compared with other social tasks.

The political discussion at the time focused especially on the question of which groups of persons, on this basis, would be included in the indemnification legislation and which would not, and which would be included only with limited rights. The operative question was therefore: what constitutes "typical Nazi injustice"? In order to make this more precise, the requirement was added that the groups of persons concerned would have to have been "persecuted" by the National Socialists. In other words, it did not suffice that a victim had suffered damages/losses caused by state functionaries: there had to have been an *explicit will to persecute* resulting from National Socialist ideology. Thus, the indemnification legislation oriented itself on Nazi ideology, or at least on what might be regarded as such. It was therefore always an expression of the ability to recognize Nazi crimes as such.

Although the actual indemnification legislation was finalized with the *Bundesentschädigungsschlussgesetz* (Federal Compensation Settlement Act) of 1965, up to the present day there are still political and legal debates on German indemnification obligations – ranging from the intensive efforts of victims excluded from indemnification to obtain recognition to more general debate triggered by various processes of societal change. A well-known example is the foundation *Erinnerung, Verantwortung und Zukunft* (Remembrance, Responsibility and Future), a foundation established in 2000 which, after decades of efforts, secured compensation payments for victims of forced labor in the Nazi period. A practical consequence of this was that in addition to the original indemnification legislation, a graded buffer system of benefit institutions had to be created which also reflects the degree of societal recognition and rehabilitation of various groups of victims.

As far as the victims of forced sterilization and Nazi "euthanasia" are concerned, this means that their classification as regards indemnification cannot be seen as static – for example, on the basis of how they were considered under federal indemnification laws – but that we are dealing here with changes that have continued for decades and been shaped by the socio-political discourse of the day. I would like to distinguish between three different developmental stages:

2 See Otto Küster, *Wiedergutmachung als prinzipielle Rechtsaufgabe*, Frankfurt/M.: Schulte-Bulmke 1952, no pag.

1. formation of a discriminating basic constellation in the 1950s and '60s which is expressed in the parliamentary resolution to the Federal Compensation Act (BEG);
2. correctional approaches at the time of the coalition between Social Democrats and from the early 1970s to the early1980s and the beginning of a new social orientation within the context of the debate on the so-called "forgotten victims" in the 1980s;
3. rehabilitation without equivalent progress in indemnification from the 1990s through till the present.

The basic constellation

The core of compensation legislation for injury to persons as laid down in the Transitional Agreement consists of the *Bundesergänzungsgesetz* (BErG; Additional Federal Act for Compensation of Victims of National Socialism) of 1953 which was hastily approved under Allied pressure, followed by the *Bundesentschädigungsgesetz* of 1956 (BEG; Federal Act for Compensation of Victims of National Socialism), which supplemented the BErG, and finally the *Bundesentschädigungsschlussgesetz* (BEG-SG; Federal Compensation Final Law) of 1965, which led to a certain expansion of benefits but also closed the indemnification process by setting a 1969 deadline for submission of claims.

The legal position of victims of forced sterilization and "euthanasia", as already mentioned, essentially depended on whether the damage they had suffered was judged to be specifically the result of National Socialist persecution and was based on the *Gesetz zur Verhütung erbkranken Nachwuchses* (GzVeN; Law for the Prevention of Genetically Diseased Offspring) – the so-called *Erbgesundheitsgesetz* (Genetic Health Law) – which was enacted on 1 January 1934. One of the peculiarities of this law was that it had already been drafted by the Prussian Health Council at the time of the Weimar Republic.[3] However, the version approved in 1934 differed from the Weimar version particularly in the following points: it opened up the possibility of forced sterilization and added a catalogue of so-called hereditary diseases. Although the evolution of the law shows the influence of eugenicist and racist ideology on contemporary thought and in particular on scientific and medical thought, one would have expected a critical debate on this subject not least because of the post-1945 practice which was based on the law.

What obstacles had to be overcome – both in Germany and elsewhere –

3 See Udo Benzenhöfer, *Zur Genese des Gesetzes zur Verhütung erbkranken Nachwuchses*, Münster: Klemm & Oelschläger 2006.

becomes clear if we look at the efforts made by the United Nations (UN) since 1949 to have the concept of "race" declared obsolete. To what extent particularly the Federal Republic failed to heed these efforts is evident in the wording of the BEG itself. As already mentioned, one of the reasons justifying a right to compensation continues to be, even today, "persecution for reasons of race". Such a formulation implicitly assumes the existence of races. In view of this persistence of old ideologies, it is not surprising that the range of what could be defined as racism was not part of the discussion. Hans Giessler, for instance, in a book series published by the Federal Ministry of Finance, interpreted the official view with the words: "Even someone who was sterilized for reasons of biological heredity was not defined as having been racially persecuted, although the sterilization may indeed have been carried out for the purpose of keeping the race clean of defective genetic characteristics. The sterilized person was not classified as belonging to an inferior human race."[4]

Of central importance in this context is a hearing of the Parliamentary Committee for Compensation held in 1961. Participants included specialists who were expected to take a stand on indemnification for victims of forced sterilization and "euthanasia". The hearing became a plea for a new sterilization law, and indeed one that included forced sterilization.[5] Berlin professor Dr. h.c. Hans Nachtsheim, stressing his decades of experience as a geneticist and eugenicist, claimed that "Every civilized nation needs eugenics, in the nuclear age more so than ever", and expressed support for forced sterilization. It is therefore not surprising that he had no sympathy for the compensation claims of persons

4 Hans Giessler, "Die Grundsatzbestimmungen des Entschädigungsrechts", in: Walter Brunn et al., *Das Bundesentschädigungsgesetz: Erster Teil*, in: Bundesminister der Finanzen in Zusammenarbeit mit Walter Schwarz (eds.), *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland*, vol. 4, Munich: C.H. Beck 1981, 20.

5 For the following see "Protokoll der 34. Sitzung des Ausschusses für Wiedergutmachung am 13. 4. 1961", Parlamentsarchiv des deutschen Bundestags, Ausschußprotokolle 3120; see also www.euthanasiegeschaedigte-zwangssterilisierte.de/dokumente/bt-protokoll-13-04-1961.pdf (30 August 2014). In general see Katja Neppert, "Warum sind die NS-Zwangssterilisierten nicht entschädigt worden? Argumentationen der fünfziger und sechziger Jahre", in: Matthias Hamann, Hans Asbek (eds.), *Halbierte Vernunft und totale Medizin: Zu Grundlagen, Realgeschichte und Fortwirkungen der Psychiatrie im Nationalsozialismus*, Berlin/Göttingen: Schwarze Risse 1997, 199 – 226; Rolf Surmann, "Was ist typisches NS-Unrecht?", in: Margret Hamm (ed.), *Lebensunwert – zerstörte Leben: Zwangssterilisation und "Euthanasie"*, Frankfurt/M.: Verlag für akademische Schriften 2005, 198 – 211; Stefanie Westermann, *Verschwiegenes Leid: Der Umgang mit den NS-Zwangssterilisationen in der Bundesrepublik Deutschland*, Cologne/Weimar/Vienna: Böhlau 2010; Henning Tümmers, "Spätes Unrechtsbewußtsein: Über den Umgang mit den Opfern der NS-Erbgesundheitspolitik", in: Norbert Frei, José Brunner, Constantin Goschler (eds.), *Die Praxis der Wiedergutmachung: Geschichte, Erfahrung und Wirkung in Deutschland und Israel*, Göttingen: Wallstein 2009, 494 – 530; Henning Tümmers, *Anerkennungskämpfe: Die Nachgeschichte der nationalsozialistischen Zwangssterilisationen in der Bundesrepublik*, Göttingen: Wallstein 2011.

who had been sterilized during the National Socialist period. Nachtsheim was not the only expert at the hearing who could claim this type of experience. Another resolute defender of the GzVeN was Marburg professor of psychiatry Werner Villinger, who introduced himself to the Committee as – among other qualifications – associate judge of the so-called *Erbgesundheitsgerichte* (hereditary health courts) in Hamm and Breslau since 1936 which had in fact been established in the context of Nazi "hereditary policies". Not only did he declare that compensation claims were unjustified, but he saw them as a particular psychiatric risk to applicants, who he claimed might then suffer "compensation neuroses" as a result of concessions being made to the victims.

Although there were also experts who were opposed to these opinions, the Parliamentary Committee for Compensation came to the conclusion that the GzVeN was not inconsistent with the rule of law. In a second step of the argument, however, the Committee declared that this was a secondary conclusion, and it justified the need for a developing a hierarchy of victims based on financial reasons. As compensation for "genuine victims of persecution" was limited by lack of funds, it would not be justified "to indemnify persons who had been sterilized because of a genetic disease for their sterilization. […] Within the scope of a general compensation scheme […] this would cause a financial burden of between 1 billion and 1 $\frac{1}{4}$ billion marks, with up to 60 % of this compensation amount paid to insane or feeble-minded persons or to severe alcoholics."[6]

For the victims of the Nazi forced sterilization and "euthanasia" programs, this meant that they were not recognized by compensation legislation as having been persecuted "for racial reasons", and that they were not considered entitled to compensation. Section 79 of the 1953 BErG allowed them only compensation for hardship, provided that they had been sterilized without having been made to appear before the so-called genetic health courts. Specifically, Section 79 (3) no. 7 stipulated that victims might be eligible to receive hardship payments if they "had not been persecuted within the meaning of the Act and had been sterilized […] without prior legal proceedings under the Law for the Prevention of Genetically Diseased Offspring of 14 July 1933".[7] The same applied to "dependent survivors of persons who had fallen victim to the Nazi 'euthanasia' program if it must be assumed that if the killing had not taken place these persons would currently be receiving maintenance".[8]

6 See Norbert Schmacke, Hans-Georg Güse, *Zwangssterilisiert – Verleugnet – Vergessen: Zur Geschichte der nationalsozialistischen Rassenhygiene am Beispiel Bremen*, Bremen: Brockkamp 1984, 165.

7 BErG, printed in: Hendrik George van Dam, *Das Bundesentschädigungsgesetz*, Düsseldorf: Verlag Allgemeine Wochenzeitung der Juden in Deutschland 1953, 236.

8 "Härteausgleich nach § 171 Absatz 4 Nr. 1 BEG § 5 Absatz 1 Nr. 2 Gesetz zur allgemeinen

In addition to assistance for the purchase of household items, hardship benefits under the BEG included subsistence allowances. Loss of earning capacity was not recognized. Pensions for damage to body or health under section 32 BEG were thus excluded in principle. This regulation was adopted under Section 171 (4) no. 1 BEG. In 1957, the *Allgemeines Kriegsfolgengesetz* (AKG; General Law Regulating Compensation for War-induced Losses) slightly expanded the scope of entitlement. Pursuant to Section 5 (1) no. 2 AKG, Nazi victims who did not qualify under section 1 BEG could receive benefits "if sterilization, although based on the Genetic Health Law, had been performed in violation of the provisions of this law or in a medically flawed manner".[9] These persons were thus considered to be victims of "other government injustice" and explicitly not victims in the sense of a "typical Nazi injustice".

The reasons justifying payment of "hardship benefits" to these victims are a reaffirmation of the *Erbgesundheitsgesetz* (GzVeN) and thus per se a justification of the violation of an individual's right to physical integrity: a victim could claim hardship benefits only if errors had been made in the application of the law. These arguments formed the basis of decisions by the compensation offices, and in individual cases they even went beyond the legal restrictions. For instance, one regional financial office argued in its notice of rejection that since the GzVeN was not illegal as such, the applicant could not claim under the General Law Regulating Compensation for War-induced Losses. Court rulings went along the same lines. For example, the Bremen regional court notified one applicant that it only verified whether the medical officer responsible for the pertinent report had acted under the rules applicable at the time.[10]

Such reasoning was not only an insult to persons who had been persecuted on grounds of racial hygiene: it also marked the final point in the development of compensation legislation. Over the years, attempts to achieve a change were rejected with reference to the opinion of the Parliamentary Committee for Compensation referred to above. Furthermore, the limited possibilities for application that had been allowed had, as a result of their restrictive formulation and interpretation, no practical significance. Moreover, every victim of racial hygiene who submitted applications for compensation or subjected to so-called follow-up assessments was often confronted with this same attitude and sometimes even faced the same doctors that had previously been responsible for their sterilization. For these persons, therefore, the first decades of the Federal Republic were not a time of rehabilitation and indemnification, but indeed a period

Regelung durch den Krieg und den Zusammenbruch des Deutschen Reiches entstandener Schäden (AKG)", *Bundesgesetzblatt* I, 1747.

9 See Hermann-Josef Brodesser et al., *Wiedergutmachung und Kriegsfolgenliqidation: Geschichte – Regelungen – Zahlungen*, Munich: C.H. Beck 2000, 163.

10 Schmacke, Güse, 1984, 155.

of discrimination and disparagement. These years are therefore quite correctly referred to as the time of the "second ordeal" or – from the other perspective – as the period of the "second guilt" (Ralph Giordano).[11] Indeed, the debate about this type of persecution was marked by an astonishingly high degree of continuity in persons and ideologies from the time of National Socialism.

Correctional approaches and new orientations in society

Although the Final Federal Compensation Act (BEG-SG) had intended to draw a political closing line under the politics of restitution, criticism was not silenced. During political debates about a possible inclusion of victims of forced sterilization and Nazi "euthanasia" into this legislation, some members of parliament were not prepared to accept their exclusion. Among them were politicians from the *Christlich Demokratische Union* (CDU; Christian Democratic Union) and the *Christlich Soziale Union* (CSU; Christian Social Union) as well as Social Democratic politicians (*Sozialdemokratische Partei Deutschlands*; SPD). Social Democratic critics gained influence following the establishment of a coalition of the Social Democrats and Liberals in 1969. But this was not only a consequence of the leading role of the SPD in the new government: it can also be explained by a change of paradigms within the political culture. Federal chancellor Willy Brandt (SPD) was particularly associated with the hope that after the last two decades of federal politics that many had found restorative, a progressive political counter-project would come into being that would also apply to restitution policies. But although influential Social Democrats like the then parliamentary party leader Herbert Wehner (SPD) had articulated the party's criticism of the political concepts of compensation during the Adenauer period, the coalition government chose to ignore the problem. What remained was only a small scope for change, which in principle confirmed the BEG-SG.

New initiatives also emerged from within society. Of particular importance was a petition from police officer Valentin Hennig in support of a relative who had become a victim of forced sterilization.[12] Against the backdrop of the 1974 *Bundestag* statement that the so-called *Erbgesundheitsgesetz* (GzVeN) was suspended, members of the German parliament took up the petition. In connection with a reformulation of the mitigation of hardship regulation for Jewish victims

11 Ralph Giordano, *Die zweite Schuld oder Von der Last Deutscher zu sein*, Hamburg: Rasch und Röhring 1987.

12 See Valentin Hennig, *Zur Wiedergutmachung von Zwangssterilisation im Nationalsozialismus: Eine Dokumentation*, Berlin: Frieling 1999; see also Horst Biesold, *Klagende Hände: Betroffenheit und Spätfolgen in bezug auf das Gesetz zur Verhütung erbkranken Nachwuchses, dargestellt am Beispiel der "Taubstummen"*, Solms: Jarick Oberbiel 1988.

of persecution, they succeeded in having victims of forced sterilization included in the compensation settlement. The Federal Ministry of Finance issued the decree to this effect on 26 August 1981.[13]

Although the German government still explicitly refused to acknowledge any obligation to grant compensation, it was prepared to grant a one-time assistance of 5,000 marks under the condition that the applicant would thereafter relinquish any further claims. The government also granted ongoing assistance in special cases where the aggrieved person was, at the time when his application was considered, recognized as still suffering considerably due to persecution in the sense of Article 1 of the BEG-SG. In this case monthly payments were possible.

But once again, all this did not silence criticism, which indeed intensified due to a social shift of values initiated by the "1968 movement". The point of departure of members of "the '68 generation" was not determined by a political discourse about restitution, but instead by attempts made by a great variety of social groups to account for National Socialist crimes in general. What these groups had in common was the intention to do away with the historical and political burden which had characterized the "CDU-State" – as it was often called. The *Gesundheitstag* ("day of health") in Berlin in 1980, for instance, stood under the motto "Medicine and National Socialism".[14] Homosexuals, who until 1969 had been prosecuted under the National Socialist version of Article 175 of the German Civil Code, refused to simply forget the injustice done to them and fought for their rehabilitation and indemnification. In 1987, victims of forced sterilization and Nazi "euthanasia", after being defeated in their fight for inclusion in the BEG – which had led to the dissolution of their organization – once again united in the *Bund der 'Euthanasie'-Geschädigten und Zwangssterilisierten*, or BEZ (Association of victims of "euthanasia" and forced sterilization).[15] Historical research such as that of Gisela Bock[16] on forced sterilization under National Socialism or more general research by Detlev Peukert[17] emphasized,

13 See idem, "'Härteregelung' für Zwangssterilisierte", in: *Recht und Psychiatrie* 1, 1983, 73 – 76; in more general terms see Brodesser et al., 2000, 162 – 168.

14 See Gerhard Baader, Ulrich Schulz (eds.), *Medizin und Nationalsozialismus: Tabuisierte Vergangenheit, ungebrochene Tradition?* (= Dokumentation des Gesundheitstages Berlin 1980, vol. 1), Berlin: Mabuse-Verlag 1980.

15 See Sascha Topp, *Geschichte als Argument in der Nachkriegsmedizin: Formen der Vergegenwärtigung der nationalsozialistischen Euthanasie zwischen Politisierung und Historiographie*, Göttingen: Vandenhoeck & Ruprecht unipress 2013, 224 – 228.

16 Gisela Bock, *Zwangssterilisation im Nationalsozialismus: Studien zur Rassenpolitik und Frauenpolitik* (= Schriften des Zentralinstituts für sozialwissenschaftliche Forschung der Freien Universität Berlin, 48), Opladen: Westdeutscher Verlag 1986.

17 Detlev Peukert, *Volksgenossen und Gemeinschaftsfremde: Anpassung, Ausmerze und Aufbegehren unter dem Nationalsozialismus*, Cologne: Bund-Verlag 1982; english translation:

albeit in different ways, the racial character of the crimes committed in the name of *Rassenhygiene*. Besides, new research associations developed such as the *Arbeitskreis zur Erforschung der nationalsozialistischen "Euthanasie" und Zwangssterilisation* (Group for research on National Socialist "euthanasia" and forced sterilization)[18] or the project group for the "forgotten victims" of National Socialism[19]. Psychiatrist Klaus Dörner was an early critic of his profession and its deeds under National Socialist rule. Together with *Deutsche Gesellschaft für Soziale Psychiatrie* (the German Society for Social Psychiatry) he confronted German politics and society with the crimes and tried to break the silence. In many ways he called for rehabilitation and indemnification of the victims.[20]

In Hamburg, an initiative for the recognition of all victims of National Socialism was more politically oriented. In their Curiohaus Appeal of 8 May 1985, this amalgamation of individuals from different social spheres demanded a fundamentally new Compensation Act that should include all of the formally excluded or only partly included victims. As an immediate measure, the initiative recommended a hardship reserve fund. This would enable as many as possible of the even then already aged victims to receive swift financial help in a non-bureaucratic way before the new law was established. In addition, it demanded that all discriminatory laws from the period of National Socialism be abolished. All this can be found in the brochure *Wiedergutgemacht? NS-Opfer der Gesellschaft noch heute.*[21]

To make these issues better known and accepted, the signatories of the Hamburg Initiative could rely on a combination of new media and innovative political structures, of which the most advanced was the recently founded left-wing daily *Taz* (*die tageszeitung*), and the likewise newly founded party of the Green movement. Not surprisingly, it was the parliamentary group of the Greens that called for a special meeting to discuss the internal contradictions of the Compensation Act, which was to be held in September 1985, the 50th anniversary

Inside Nazi Germany: Conformity, Opposition, and Racism in Everyday Life, trans. by Richard Deveson, New Haven: Yale University Press 1987.

18 Topp, 2013, 213 – 224.

19 Projektgruppe für die vergessenen Opfer des NS-Regimes in Hamburg (ed.), *Verachtet – verfolgt – vernichtet: Zu den "vergessenen" Opfern des NS-Regimes*, Hamburg: VSA-Verlag, 1986.

20 See for example Klaus Dörner (ed.), *Gestern minderwertig – Heute gleichwertig? Folgen der Gütersloher Resolution.* Dokumentation und Zwischenbilanz des Menschenrechtskampfes um die öffentliche Anerkennung der im 3. Reich wegen seelischer, geistiger und sozialer Behinderung zwangssterilisierten oder ermordeten Bürger und ihrer Familien als Unrechtsopfer und NS-Verfolgte, 2 vols., Gütersloh: Jakob van Hoddis 1985 and 1988.

21 Hamburger Initiative "Anerkennung aller NS-Opfer" (ed.), *Wiedergutgemacht? NS-Opfer – Opfer der Gesellschaft noch heute*, Hamburg: Initiative "Anerkennung aller NS-Opfer" 1986.

of the Nuremberg racial laws.[22] This led to parliamentary advances that aroused a great deal of public attention. For instance, a draft law was presented which was to regulate adequate provision of benefits for all victims of National Socialism. In addition, the Greens brought in a petition for the abrogation of the sterilization law (GzVeN) and the repeal of all decisions made under this law. At the same time, the parliamentary group of the Social Democrats (SPD) demanded that the options for improved benefits should be examined and in a second step proposed a special foundation fund for the reduction of injustices caused by the policies of indemnification.[23]

Despite strong public resonance, the result of these advances fell short of expectations. Apart from the hardship fund introduced in the states that had a coalition government formed by the Social Democrats and the Greens, the *Bundestag* passed a resolution on 5 May 1988 in which all forced sterilizations carried out under the *Erbgesundheitsgesetz* (GzVeN) were classified as a "national socialist injustice", but without drawing the necessary political consequences in terms of indemnification. On 7 March 1988, only the regulations for the mitigation of hardship were revised, giving access to the hardship fund to all those who had been excluded from the BEG).[24] This facilitated ongoing monthly payments in cases where applicants could prove their personal hardship. The result was that this category of persons was granted a one-time payment of 5,000 marks and ongoing financial assistance in special cases taking into account the nature and severity of the injustice. On this basis, victims of forced sterilization were paid 100 marks per month starting in 1990; from 1998 onwards they received 120 marks. Under special circumstances this amount could be increased under the terms of BEG Section 7 (3). However, other legal benefits related to personal hardship were offset against this amount.

These regulations are all very complicated. As a rule therefore, no practical consequences evolved for the applicant. Payments for victims of Nazi "euthanasia", for instance, were considerably lower than those for victims of forced sterilization. Up to 2002, for example, the former could receive a one-time payment. But since this assistance was dependent on the family income, it excluded nearly all victims. For this group there were in actual fact no ongoing

22 See Die Grünen im Bundestag, Fraktion der Alternativen Liste Berlin (eds.), *Anerkennung und Versorgung aller Opfer nationalsozialistischer Verfolgung: Dokumentation parlamentarischer Initiativen der Grünen in Bonn und der Fraktion der Alternativen Liste Berlin*, Berlin: Die Grünen im Bundestag 1986.

23 Deutscher Bundestag, *Drucksache* 10/4638; see also Die Grünen im Bundestag, Fraktion der Alternativen Liste Berlins (eds.), 1986; further Deutscher Bundestag, *Drucksache* 13/6824.

24 "Richtlinien der Bundesregierung über Härteleistungen an Opfer von nationalsozialistischen Unrechtsmaßnahmen im Rahmen des Allgemeinen Kriegsfolgengesetzes (AKG) – Härterichtlinien", in: *Bundesanzeiger* 119, 19 March 1988.

payments. A glance at the exceptional provisions illustrates what a steeplechase such an application meant and how disappointing the result often was. For instance, entitlement to financial assistance depended on the precise date of the assassination of the parent or parents concerned.[25]

Translated into figures: In 2003 the federal government reported that, until 1988, 8.805 victims of forced sterilization had received compensation under the 1980/81 regulation, and that after the 1988 revision, i. e., between 1988 and 2002, 4.971 victims had received a one-time payment of 5.000 marks. This amounts to 13.776 people, a small number compared to the overall number of approximately 400.000 victims. Of these, 1.733 persons had received an ongoing payment by 2002. In respect of victims of Nazi "euthanasia", 161 persons received the one-time payment, and twenty of them received an additional ongoing payment.[26] Considering the many political debates on and revisions of the grounds for a decision on indemnification, these figures illustrate a strong determination to exclude these groups of victims from compensation. In 1990, this regulation was also applied to the territory of the former German Democratic Republic (GDR).[27] For victims of forced sterilization and Nazi "euthanasia" living here, this meant that they remain disadvantaged even under the new political regime.

Rehabilitation without equivalent progress in indemnification

In the 1980s already, compensation for victims of National Socialism was, in some quarters, not considered a mere legal obligation of the state or a moral debt, but also a necessary part of the process of coming to terms with the crimes of National Socialism. This was seen as a way of preventing future crimes of the same or a similar nature. Groups connected to the feminist movement, for instance, established a connection between forced sterilization and Nazi "euthanasia" on the one hand and new medical techniques such as prenatal diagnosis or in-vitro fertilization. In addition, there were scandals because of the continued validity of National Socialist verdicts against respected personalities, such as the verdict against the well-known Lutheran pastor and theologian Dietrich Bonhoeffer, which received special attention. For other victims, the general reassessment of the context of persecution encouraged rehabilitation. This was the case for the victims of National Socialist military jurisdiction. In this case, the debate about the so-called *Wehrmacht* exhibition lead to the

25 See Surmann, 2005. 208.

26 See Bundesministerium der Finanzen (ed.), *Entschädigung von NS-Unrecht: Regelungen zur Wiedergutmachung*, Berlin 2003, 42 and 43.

27 See Brodesser et al., 2000, 164. See also *Bundesanzeiger* 235, 19 December 1990.

conclusion arrived at by the *Bundestag* that World War II had been a war of extermination for which the Germans were responsible. This in turn had consequences for the evaluation of the behavior of those who had refused to participate in the war. The sentences against conscientious objectors and war deserters were consequently quashed.[28] Not least, new topics like the living will or assisted dying necessitated both the elimination of continued National Socialist elements in jurisdiction and a stronger demarcation from the crimes of National Socialism.[29]

These efforts culminated in the *Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege* (Law for the abrogation of National Socialist wrongful judgments in criminal justice), which was passed in 1998.[30] This act was very important for the victims of forced sterilization, because it quashed all the judgments which had led to forced sterilization. Parliamentary groups emphasized and the German *Bundestag* and the *Bundesrat* (Federal Council) ascertained that the forced sterilizations had been an injustice of National Socialism and therefore an expression of the condemned National Socialist concept of 'life unworthy of living'. This evaluation also needed to find a legal expression. The decisions for sterilization under the former sterilization law could not endure.

It had taken 43 years after the abolishment of the so-called *Erbgesundheitsgerichte* (genetic health courts) before their verdicts were also quashed. But the new resolution did not lead to an improvement of the legal situation for cases of indemnification. Even moderate attempts by the BEZ were turned down with, in some cases, rather arrogant arguments. The Federal Ministry of Finance for instance argued that an application could not be approved because this group of victims was in a comparatively privileged position.[31]

Furthermore, the legal position of the Bundestag with regard to forced sterilization was not yet clearly defined. The 1974 *Bundestag* resolution had merely suspended the sterilization law insofar as it was still an active part of federal law.[32] This meant that from a legal point of view the law still existed. The BEZ

28 For the latest research results, see Joachim Perels, Wolfram Wette (eds.), *"Mit reinem Gewissen": Wehrmachtrichter in der Bundesrepublik und ihre Opfer*, Berlin: Aufbau 2011.

29 For example Andreas Frewer, Clemens Eickhoff (eds.), *"Euthanasie" und die aktuelle Sterbehilfe-Debatte: Die historischen Hintergründe medizinischer Ethik*, Frankfurt/M./New York: Campus 2000.

30 *Bundesgesetzblatt* I, 28 August 1998, 2501.

31 Letter of Federal Finance Minister Hans Eichel, dated 29 May 2001, Archive of BEZ, copy in the private archive of Rolf Surmann.

32 See Andreas Scheulen, "Zur Rechtslage und Rechtsentwicklung des Erbgesundheitsgesetzes 1934", in: Hamm (ed.), 2005, 212–219; Lotte Incesu, Günther Saathoff, "Die verweigerte Nichtigkeitserklärung für das NS-Erbgesundheitsgesetz – eine 'Große Koalition' gegen die

therefore demanded from the parliamentary parties that the *Bundestag* should declare the law void. But the *Bundestag* did not act until the *Nationaler Ethikrat* (National Ethics Council) supported the demand[33] – with reference to contemporary ethical debates – and other organizations concerned about the politics of memory who had a special connection to the parliamentary parties – such as the *Gegen Vergessen – für Demokratie* society ("Against oblivion and for democracy") – joined in the support. Parliament then – in 2006 – declared that the law had never been part of the legal system of the Federal Republic because it went against the German Constitution.[34] This resolution was without doubt an important success for the BEZ, because it put an end to the legal basis for forced sterilization crimes. But once again, the consequences for the policy of indemnification were not taken into consideration.

Therefor the critical debate about the policies of indemnification can still not be considered closed. It has, on the contrary, been intensified by this resolution. For as I have shown, the victims of forced sterilization and Nazi "euthanasia" have over many years been excluded from payment of compensation in the context of the BEG precisely because it was argued that the so-called *Erbgesundheitsgesetz* (GzVeN) was compatible with the constitutional state. Paradoxically, the first exceptions from the general refusal to grant compensation were based on the argument that juridical or medical mistakes had been made in the application of this law. Those who now declare that this law was never compatible with the legal system of the Federal Republic should consequently admit that an error of law was committed with disastrous consequences for the victims and draw the necessary political consequences with regards to compensation. This is more so the case since the second argument for the rejection of such compensation, namely that German society could not afford this financial burden, is no longer valid, as by now only very few of the victims are still alive. Nevertheless, both government and parliament still seem to cling to their political position of the 1990s with regard to victims of crimes of racial hygiene, when Germany initially refused to follow the suggestion of the United States that "unfinished business" should be settled and mistakes in indemnification policies made in the 1950s and 60s in the context of the global political and ideo-

Zwangssterilisierten", in: *Demokratie und Recht* 16(2), 1988, 125 – 132; Svea Luise Hermann, Kathrin Braun, "Das Gesetz, das nicht aufhebbar ist: Vom Umgang mit den Opfern der NS-Zwangssterilisation in der Bundesrepublik", in: *Kritische Justiz* 43(3), 2010, 338 – 352.

33 "Erklärung des Nationalen Ethikrates zum Appell des Bundes der 'Euthanasie'-Geschädigten und Zwangssterilisierten e.V. zum 'Erbgesundheitsgesetz'", 24 November 2005, Tätigkeitsbericht 2005, 13; www.ethikrat.org/dateien/pdf/taetigkeitsbericht-2005.pdf (21 August 2014).

34 Based on Deutscher Bundestag, *Drucksache* 16/3811, 13 December 2006, "Ächtung des Gesetzes zur Verhütung erbkranken Nachwuchses vom 14. 7. 1933".

logical situation prevailing at the time should now be corrected. Only in the face of global political, economic and juridical pressure was the German government prepared to make concessions.

The BEZ, however, was not satisfied with this resolution and continued to demand a compensation scheme that would match the levels provided under the BEG and take into account the decades of discrimination suffered by this group of victims. On 27 January 2011 – Holocaust Memorial Day –, in a decision showing excellent PR timing, the *Bundestag* increased ongoing benefits for victims of forced sterilization from 120 to 291 euros.[35] Recipients of these payments also included persons described in the *Bundestag* resolution as victims of Nazi "euthanasia" measures and referred to in the implementation directive of the Federal Ministry of Finance as injured parties of the Nazi "euthanasia" policy.[36] This, however, avoided the necessity for a fundamental correction and represented no more than a further improvement of the hardship guidelines of the *Allgemeines Kriegsfolgengesetz* (AKG). For the BEZ, this meant that the Bundestag resolution basically failed to do justice to the task of designing a suitable compensation policy. They argued that the victims were still not being recognized as victims of "typical Nazi injustice", nor did they receive appropriate benefits.

There are two further problems arising from the *Bundestag* resolution. One of them results from the expansion of the group of persons eligible for ongoing payments to include persons described in the resolution as "victims of 'euthanasia' measures". This term is not used in the classification of compensation legislation and therefore the Federal Ministry of Finance replaced it with the usual designation "persons affected by 'euthanasia'". There are two groups of people covered by this designation. Originally these were the families of victims of Nazi "euthanasia" crimes, and later on persons who were to be killed but managed to escape their fate were also included. The introduction of the problematic notion of "direct injury" – in the sense of the logic of the crime, persons injured by "euthanasia" were affected only indirectly – reversed what had previously been the equal treatment of these two groups in terms of compensation, with the consequence that now only the second group of victims was eligible for the new benefits. It must be noted that the overall group of persons affected by "euthanasia" meanwhile represents no more than a very small group of people. When the resolution was passed, there were approximately 250 relatives who would have been entitled. Because of the new restriction, only three

35 Deutscher Bundestag, *Drucksache* 17/4543, 26 January 2011.

36 "Neufassung der Richtlinien der Bundesregierung über Härteleistungen an Opfer von nationalsozialistischen Unrechtsmaßnahmen im Rahmen des Allgemeinen Kriegsfolgengesetzes (AKG-Härterichtlinien)", 28 March 2011; www.verwaltungsvorschriften-im-internet.de/bsvwvbund_28032011_BMF.htm (30 August 2014).

persons were ultimately granted benefits. After having had to fill out extensive questionnaires, the others were turned down. In the 1980s, this ministerial or administrative way of processing claims of victims by refusing to accept even the details of their claims was referred to as "guerilla warfare against the victims" (Christian Pross)[37]. It has become a central focus of criticism against the implementation of the parliamentary resolutions. This ongoing manner of processing claims continues to be irritating.

But there is another, more fundamental problem with the resolution. In his speech to the *Bundestag*, CDU/CSU Member of *Bundestag* Manfred Kolbe felt it was necessary to highlight one of the sentences of the motion in his own words: "We wish to retain the second Act to amend the Federal Compensation Act as a final law",[38] referring to the BEG-SG of 1965 and its explicit refusal to recognize the victims of racial hygiene crimes as victims of the Nazi regime. Not only does this somehow relativize the subsequent federal resolutions, particularly with regard to the GzVeN, because in the mid-1960s the *Bundestag* decision was explicitly inspired by a different understanding of this law; nor is there any recognizable wish for distance from the manner in which the resolution was passed at the time – which can be seen as particularly scandalous in the reflection process of the following decades. The *Bundestag*'s presumably final debate on this controversy that has marked the entire history of the Federal Republic therefore neither reinstates the victims to their due legal position nor does it provide a clear closure to the process of coming to terms with these crimes, especially in view of their after-effect after 1945. There remains an ambivalence that leaves much unanswered in the current debate on the limits of the right to life.

37 Christian Pross, *Wiedergutmachung: Der Kleinkrieg gegen die Opfer*, Frankfurt/M.: Athenäum 1988.

38 Deutscher Bundestag, "Stenografischer Bericht, 87. Sitzung, 27 January 2011, 9819 (Plenarprotokoll 17/87)". The BEZ Working Group (successor organization of the BEZ), following up on an enquiry of the parliamentary group of the Left Party, criticized the answer of the federal government to this enquiry in "Stellungnahme der AG BEZ zur Antwort der Bundesregierung vom 22.2.2012 auf die Kleine Anfrage der Linksfraktion (Deutscher Bundestag, *Drucksachen* 17/8589 und 17/8729)"; www.euthanasiegeschaedigte-zwangssterilisierte.de/bez_entschaedigung.html (30 August 2014).