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Transcript (Symposium: Nazis in the Courtroom: Lessons From the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France).

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German civil law system and our own common law system. These are not merely differences in procedure, or even differences internal to the law. Legal systems reflect their countries' larger systems of political authority, and Germany's larger system has historically been bureaucratic and hierarchical rather than decentralized.⁷³ German judges are neither political appointees nor elected officials: they are *Beamters*, civil servants, who do not belong to the bar, who begin their careers directly out of law school, and who are gradually promoted as they gain experience and please their superiors. As with other civil servants, bureaucratic conscientiousness all too readily takes the place of bureaucratic conscience.

I began with this question: does the rule of law immunize and safeguard jurists from evil-doing or from the voice of conscience? My answer, I fear, is "more the latter than the former." And this for three reasons, only one of which is specific to Germany. That is the point I just mentioned, that German judges work in a hierarchical rather than a decentralized system of authority. The other reasons, however, are the psychology of role-identification, and the broad form of legal positivism with which it corresponds entirely too well. Positivists understand quite well that legal validity is no talisman against evil; what they did not anticipate was how little evil might trouble the conscience of a judge.

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I would like to build on what's been said. We have been looking largely at the role of judges during periods of persecution, and I would like to continue the story as to Germany by looking at three judges to see how post-Nazi judges and post-communist judges have interpreted the jurisprudence in the cases from the Nazi period. What do these decisions tell us about how these judges confronted the

⁷³ See generally MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

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dilemma? How do they resolve the question of the conflict between evil laws and their role as judges? Are there any lessons?

Let us begin with the most recent (post-communist) decision, which begins at the Berlin Wall in 1989. Just before reunification, East German border guards shot two East Germans trying to escape across the border. These border guards were prosecuted in 1991, and the question confronted by the Berlin State Court was whether these defendants had a defense in former East German (GDR) law.⁷⁵ One might have thought the Unification Treaty bound these judges, because, in common with the rule of law in all democracies, the treaty stated that the law that applied to these cases should be the scene of the crime law.⁷⁶ Thus, the question for the judges was whether to apply GDR law and validate the defense that they were just following the law prohibiting unlawful border crossings.

The court posed the dilemma exactly as we are considering it here, saying the question was whether the written (i.e., former) law was rightful, and that the issue seemed to be a dilemma of law versus justice.⁷⁷ What is interesting about this decision is that it takes us back close to fifty years, to the post-World War II German judiciary, because the court looks back to other periods of persecution and post-persecution and declares that it is guided by the post-war German judiciary evaluating Nazi law, and so the cases that they look at are (again) cases of collaborators.⁷⁸ One in particular concerned a woman who evidently had a bad marriage, and, using the Nazi laws as an enabling opportunity for judicial murder, denounced her husband, who was incarcerated. She was prosecuted after the war for having done that. Now, her husband was arrested but not killed, and in her defense she relied on Nazi law, and said that this was the law she was following.⁷⁹ In confronting

⁷⁵ See Ruti G. Teitel, *supra* note 24; Kif A. Adams, *What is just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271 (1993).

⁷⁶ Teitel, *supra* note 24, at 243.

⁷⁷ Teitel, *supra* note 24, at 241.

⁷⁸ Teitel, *supra* note 24, at 243. In rejecting the guards' defenses, it appears that the court did not follow the treaty. *Id.*

⁷⁹ See Note, *German Citizen who Pursuant to Nazi Statute Informed on*

those laws in the 1950s, the German judiciary said that there has to be a way of evaluating laws that are unjust; in "extreme cases" there must be a possibility to weigh justice more highly than legal certainty.⁸⁰ So again, we see the dilemma between formal law and justice; between the rule of law as security versus what is just.

To return to the post-communist court: it held itself guided by the postwar cases, and in a potentially controversial analogy said both involve "extreme cases."⁸¹ Like the collaborator cases, the border guard action was an "extreme case," and in these "extreme cases," justice is more important than certainty.⁸² Now, it is worthy to note, that unlike the other cases discussed on the panel that occurred during persecution, here the act of validating the evil law would imply an act of clemency, a defense: the border guards would go free. This then is the reverse of those other cases, where validating the law means a conviction. Coming up in the reverse, these cases invert the usual case, but consider the same problem of to what extent to validate evil laws.

Now, I would like to explore the reasoning of these two courts: how they came to these decisions and to see what we might draw from their reconciliation of the competing values that we are considering here. The first effort at reconciliation is the 1950 German judiciary's appeal to principles of natural law. This was previously discussed by David Luban. This appeal is illustrated by Gustav Radbruch's conversion. In his movement from positivism to natural law, Radbruch declared that law has to yield to justice. Following Radbruch, much of the reasoning in these cases relies on natural justice principles. In addition to this reasoning, in other reconciling determinations these principles are codified in international legal norms, adopting a concept which was very vivid at the time in the 1950s. Certainly Nuremberg plays a role here, along with the UN, the Geneva Convention, and the growth of international law in general, with its proposition that international law trumps national law, no matter how evil. So

Husband for Expressing Anti-Nazi Sentiments Convicted under Another German Statute in Effect at Time of Act, 64 HARV. L. REV 1005 (1951).

⁸⁰ Teitel, *supra* note 24, at 243.

⁸¹ Teitel, *supra* note 24, at 243.

⁸² Teitel, *supra* note 24, at 243.

this already suggests an understanding that there is law and there is *law*: there is more than one law.

Let me pursue this thread. The post-communist court, considering the dilemma of the tension between morality versus justice, doesn't leave it at that, but instead introduces a very interesting way to think about the way judges might confront this dilemma. The court suggested reasons why the border guards should not have thought of the border protection law as law, even though it was settled law. In particular, the court discussed the lack of transparency: the fact of a news blackout whenever there were shootings; soldiers were warned not to speak; they were often transferred; the names were erased from the records of whom might have been shot; when foreign dignitaries came, there was an understanding that the shootings had to stop. Lastly and most intriguingly the court added to its decision a fact about one of the four defendants, who had shot one of the people crossing the border. The defendant had never worn his medal of merit for the shooting in public because he knew that there was a strong likelihood of insult and attacks, followed by recriminations by the GDR. The point that the court draws from all of this is that we are all aware of the difference between written law and law. Thus, the court says "Justice and humanity were portrayed as ideals also in the then GDR,"⁸³ and since these ideals as to justice were known, many of the inhabitants of the GDR would have considered these written laws unjust.

Here, there are several points. One is the idea of transparency. Part of the rule of law is the idea that for a law to be valid, it has to be written, it has to be published, and it has to be applied generally.⁸⁴ Certainly that was understood. But beyond that, the court points to the importance of public opinion and perceptions of law and legal culture. The court considers if there was a social consensus at the time and if there was a breakdown in consensus on whether these laws were just. The court suggests that the judges could draw upon these considerations in their interpretation of these laws. The court's reasoning is relevant because it suggests a way out of the positivism-natural law dilemma as it is ordinarily framed

⁸³ Teitel, *supra* note 24, at 241.

⁸⁴ See also LON L. FULLER, *THE MORALITY OF THE LAW* 39 (1964).

because it suggests that the fact that the law is written is only one element of what makes law positive, and that there are others, such as a broader understanding of publication and public perception.

I think this decision helps to explain how law is considered in transitional periods, and relatedly, how we evaluate the uses of law in periods of totalitarian rule. In a totalitarian country, we might very well expect a gap between the law as it is written and the people's understanding of the law. Indeed, when we see the commencing of this divide, where contempt for written law or for lawyers begins, it may signal the onset of a new period. The danger sign is clear: lack of integration between the public perception of law as lawful and the law as written. That these attitudes are on the rise in our country is rather troubling.

I want to conclude by suggesting that we can enrich our debate about judgment on tyranny. The real question I suggest is not the issue of the competing claims of morality versus the duty to follow laws, nor the related question of the way we frame and question these claims, but what law do judges follow? What may well be most important about these decisions is that they remind us of law's multiplicity. In functioning democracies, as well as periods where totalitarian countries are in transition towards more liberal regimes, there begins to be a multiplicity of sources of the rule of law: natural law as well as international law, societal consensus, and constitutional law. These are all constraints on the judge's interpretation of statutory law, the law of the sovereign, the law we are considering here. I think this multiplicity helped to advance the breakdown in the last wave of transitions: In a period of technological change, we live more and more with interconnected legal systems, and there is an inherent multiplicity and coexistence of legal values and norms. This interconnectedness helped usher in the collapse of repressive regimes and the last wave of transition. Finally, recognizing multiple sources of law allows us to see the importance of the public sphere in shaping the understanding of the law, as well as what law judges follow.