

## Foundation Law for the Compensation of Forced Laborers Held to be Constitutional.

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[1] The “foundation initiative” promoted by representatives of German industry as a speedy resolution to high-risk American trials concerning NS-forced labor, was enacted into law by the German Parliament (Bundestag) on August 2, 2000. The foundation is called the fund for “Remembrance, Responsibility and the Future” (“Erinnerung, Verantwortung und Zukunft”). The legal fallout from the creation of the foundation is beginning to show. Recently, the Superior Tax Administration (Oberfinanzdirektion) in Frankfurt am Main declared the corporation payments made to the foundation to be directly deductible under German Income Tax law. The foundation law also recently passed its first review for constitutionality.

[2] The State Appellate Court (Oberlandesgericht) for the state of Northrhine-Westfalia in Hamm, Germany, recently ruled that the foundation law was constitutional. On October 27, 2000, the Court handed down a judgment dismissing a suit brought by a 74 year-old Ukrainian woman and former forced laborer. She had sued the business for which she had been forced to work during the war. The Court found that the suit lacked prospects of success and therefore rejected the plaintiff's claims for financial assistance to conduct the suit as provided by Section 114 of the Code of Civil Procedure. More significantly, the Court dismissed the substantive portion of the plaintiff's suit. In dismissing the suit, the Court relied on the foundation law's claim to be the exclusive basis and source for compensation of World War II forced labor claims. The Court stated that, pursuant to Section 16.1(2) of the foundation law, claims against private parties (including corporations) may not be made outside the scope of the foundation law's provision for compensation in Section 11.

[3] The Court supported its judgment with a number of decisions by lower courts, a judgment rendered by the Federal Constitutional Court (Bundesverfassungsgericht) in 1996 and a recent decision of the Federal Employment Court (Bundesarbeitsgericht). The Court found that in these previous cases the various courts questioned the legal basis for claiming compensation for forced labor. Only a selective reading of the cases, however, could support the State Appellate Court's conclusion that forced labor plaintiffs are without a valid claim outside the provisions of the foundation law. The decision of the Federal Constitutional Court did not (and was not meant to) decide the legitimacy of claims made against private parties, as was the case in the proceedings at issue here. Rather, the FCC limited its ruling to the question whether payments made in the post-war reparation context barred individuals from bringing cases against private parties, including corporations. The FCC answered this question in the affirmative but it did not address the status of suits in competition with a statutorily created compensation foundation. The Federal Employment Court recently dismissed a forced labor suit after concluding that the relationship between industry and the forced laborers did not constitute an employment contract. The Federal Employment Court did not rule on the legitimacy of the forced labor claims, but instead merely rejected jurisdiction over the case in favor of the jurisdiction of the general civil courts. The State Appellate Court also failed to note that the Federal Employment Court's judgment has been criticized for its reliance on outdated jurisprudence. The recent decisions of lower courts, upon which the State Appellate Court also relied, involved the dismissal of forced labor claims. These cases also did not address the supremacy of the foundation law but instead dismissed the forced labor suits on the procedural (statute of limitations) grounds.

[4] The judgment of the State Appellate Court is the first to be handed down since the creation of the foundation and it will receive exaggerated attention. There is reason to doubt that the decision will survive close scrutiny from higher courts. The Court touched upon the plaintiffs allegation that the foundation law is unconstitutional, briefly discussing the laws compatibility with Articles 3 (equality before the law) and Article 14 (right to property) of the German Basic Law (Grundgesetz). The Court affirmed the constitutionality of the foundation law under Article 3, finding that Section 11 enumeration of the different victims of Nazi persecution, particularly forced labor, is not arbitrary. As to Article 14, the plaintiff alleged that the striking gap between the demanded amount of wages and the lump sum provided by the foundation law constituted a denial of her property rights. In rejecting this claim the Court primarily relied on a decision of the Federal Constitutional Court that affirmed the Parliament's authority to settle or fulfill established rights with new terms. In that case the FCC upheld the compensation scheme of a foundation established to compensate victims of faulty pharmaceutical goods (“Contergan”). The State Appellate Court held that Section 11 does not deprive the plaintiff of an established property right, which would be protected by Article 14, but instead establishes (for the first time) a cause of action for forced laborers which otherwise had not found success in the courts.

[5] The State Appellate Court case is a good example of the foundation law's direct impact. The new law, concluded after a long struggle in which representatives of the victims participated, supposedly settles questions about the amounts and modes of the envisioned payments. In setting forth this scheme, the foundation law puts forward clear standards and one can understand the Courts impulse to rely on the legislation to resolve such a law suit rather than

inject itself into a fresh, fundamental reexamination of the issue. Set against this background, the State Appellate Court's decision is as pragmatic as the initiative itself. If the State Appellate Court's decision regarding the constitutionality of the foundation law is only the early rumblings of a legal storm on the horizon, it is for the future to reveal whether, besides "legal closure," legal and social peace are also to be had.

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**For more information:**

English language version of the Basic Law on-line:

<http://www.uni-wuerzburg.de/law/gm00000>">www.uni-wuerzburg.de/law/gm00000

OLG Hamm, Neue Juristische Wochenschrift (NJW) 2000, 3577-3579.

Decision of the Bundesarbeitsgericht (Federal Employment Court) of February 28, 2000, in: Neue Juristische Wochenschrift (NJW) 2000, 1438.

Commentary by: Achim Seifert, in: Arbeit und Recht 2000, 228.

Decision of the Bundesverfassungsgericht (Federal Constitutional Court -- FCC), in: 42 BVerfGE 263 - "Contergan".

Foundation law on the web: <http://www.bundestag.de>">www.bundestag.de

*Hugo J. Hahn*, Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg. Das Entschädigungsgesetz vom 2.8.2000, Neue Juristische Wochenschrift (NJW) 2000, 3521-3526.