HEADNOTE:

On the question of the constitutionality of the exclusion of claims pursuant to the Act on the Creation of a Foundation “Remembrance, Responsibility and Future” (Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft”).

Order of the First Senate of 7 December 2004

– 1 BvR 1804/03 –

in the proceedings on constitutional complaint

1. of Mr. P.,

2. of Mr. S.,

3. of Mr. H.,

4. of the deceased Mr. S., continued by his heir Mrs. S.,

- authorised representative: lawyer ... –

1. directly against a) the order of the Federal Court of Justice (Bundesgerichtshof) of 27 May 2003 – VI ZR 389/02 –,

b) the judgment of the Higher Regional Court (Oberlandesgericht) Frankfurt am Main of 25 September 2002 – 7 U 155/01 –,

c) the judgment of the Regional Court (Landgericht) Frankfurt am Main of 30 July 2001 – 2/20 O 71/99 –,

2. indirectly against § 16.1 and § 16.3 of the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" of 2 August 2000 (Federal Law Gazette (Bundesgesetzblatt – BGBl) I p. 1263) as well as § 1.3 of the Act on the Notice to Creditors of I.G. Farbenindustrie Aktiengesellschaft in Abwicklung (Gesetz über den Aufruf der Gläubiger der I.G. Farbenindustrie Aktiengesellschaft in Abwicklung) of 27 May 1957 (Federal Law Gazette I p. 569)

RULING:

The constitutional complaint is not admitted for decision.

GROUNDS:

A.

The constitutional complaint is directed against the decisions by civil-law courts which dismissed the complainants' actions for damages and damages for pain and suffering; the complainants had been forced to work for I.G. Farbenindustrie AG during the Second World War. 1

I.

1. During the Second World War, millions of people within the area controlled by the German Reich were deported, sent to different kinds of camps and forced to work in 2

the camps as well as in the private economy in Germany and the occupied countries. These people were called collectively “forced labourers” (*Zwangsarbeiter*) and included in addition to foreign civilian workers (so-called foreign workers (*Fremdarbeiter*)), who were brought to Germany during the War, and foreign prisoners of war (mostly from Poland, the Soviet Union, France and later Italy), prisoners in concentration camps and Jews from the occupied parts of Europe, who were forced to work in ghettos and forced-labour camps (see Herbert, *Zwangsarbeiter im „Dritten Reich“ – ein Überblick*, in: Barwig/Saathoff/Weyde (eds.), *Entschädigung für NS-Zwangsarbeit*, 1998, pp. 17 et seq.). The lot of those interned in the concentration camps was particularly hard; the inhumanity suffered by those who laboured in extermination camps such as Auschwitz was even more extreme (see Wehler, *Deutsche Gesellschaftsgeschichte*, Volume Four, 2003, p. 770). A great many died. The survivors could expect compensation after the end of the Second World War for the injustice done to them.

2. However, there was no such compensation for a long time. In fact a potential compensation scheme was postponed in the Agreement on German External Debts (*Abkommen über deutsche Auslandsschulden*), which was concluded between the Federal Republic of Germany and various Western states in London on 27 February 1953 (Federal Law Gazette II pp. 333 et seq.; hereinafter referred to as the “London Debt Agreement”). Pursuant to Article 5.2 of the London Debt Agreement, “Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich ... shall be deferred until the final settlement of the problem of reparation”. In the period after the agreement, lawsuits brought against German companies by former forced labourers were dismissed by reference to this Article (see Federal Court of Justice (*Bundesgerichtshof – BGH*), *Monatsschrift für deutsches Recht – MDR* 1963, p. 492 (492-493) with a reference to Decisions of the Federal Court of Justice in Civil Cases (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 16, 207; 18, 22; 19, 258; see also Pawlita, *Arbeit und Recht – ArbuR* 1999, p. 426 (430) with further references; Schröder, *Jura* 1994, p. 61 (71) with further references). 3

3. However, the Federal Republic of Germany did make compensation payments to a multitude of victims of the National Socialist system of injustice, mainly to those in Israel, Germany and Western countries. After 1990, the Federal Republic of Germany also made lump-sum payments to several Central and Eastern European countries which established funds for victims of National Socialism. However, special individual compensation payment for the former forced labourers was at first not planned. Consequently, there were numerous lawsuits, but above all a series of class-action lawsuits by former forced labourers against German companies in the United States of America. These cases provided the impulse necessary to begin a search for a solution which would permit payment of compensation and at the same time protect German companies from the risk of being confronted with corresponding claims. After 4

lengthy and controversial negotiations involving the United States of America, Israel, Russia, Poland, the Czech Republic, the Ukraine, Belarus, the Foundation Initiative of German Enterprises (*Stiftungsinitiative deutscher Unternehmen*), the Conference on Jewish Material Claims against Germany (Claims Conference) as well as a number of lawyers who represented victims of National Socialism, the Federal Republic of Germany concluded an intergovernmental agreement with the United States of America regarding the creation of a foundation "Remembrance, Responsibility and Future" (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) 2000 II p. 1373). In addition, all of the negotiating partners made a joint declaration (Federal Law Gazette 2000 II p. 1383). Both the [intergovernmental] agreement and the declaration contained an acceptance of the foundation solution and – as far as possible – obliged the governments to protect the Federal Republic of Germany and German enterprises from compensation suits.

On 2 August 2000, the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" of 2 August 2000 (*Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" – EVZStiftG*, Federal Law Gazette I p. 1263; hereinafter referred to as the "Foundation Act") entered into force; it was amended by the Acts of 4 August 2001 (Federal Law Gazette I p. 2036) and of 21 August 2002 (Federal Law Gazette I p. 3347). In the Preamble, the German *Bundestag* acknowledges political and moral responsibility for the victims of National Socialism; similarly the enterprises which have come together in the German Industry Foundation Initiative (*Stiftungsinitiative der deutschen Wirtschaft*) acknowledge that they bear a historic responsibility for the German enterprises which participated in National Socialist injustice. Pursuant to § 3 of the Foundation Act, the Foundation shall be endowed with a capital fund of ten billion German marks, half of which is to be provided by the German Federal Government and the other half by the German Industry Foundation Initiative. § 9.2 of the Foundation Act makes provision for the payment of 8.1 billion German marks as compensation for forced labour as defined in § 11.1 sentence 1 nos. 1 and 2 and sentence 2 of the Foundation Act. The sum is supposed to be distributed by various partner organisations responsible for different regions. The payments to be made to the victims vary in their amount. The maximum amount for former forced labourers held in concentration camps and similar places of confinement is DM 15,000 pursuant to § 9.1 in conjunction with § 11.1 of the Foundation Act; all other persons who suffered injury are eligible for DM 5,000. The maximum amounts may be reduced if the sum earmarked for a partner organisation is insufficient to cover full payment to all of the eligible persons. Pursuant to § 9.9 of the Foundation Act initially only 50% or 35% of the monies are to be paid out; any balance is to be paid out after all applications have been processed. Pursuant to § 13 of the Foundation Act, the payments are strictly personal and may only be applied for by surviving spouses, descendants or heirs appointed by will if the eligible person died after 15 February 1999. Pursuant to § 15.2 of the Foundation Act, earlier payments by enterprises as compensation for forced labour and other injustices suffered under National Socialism will be deducted from payments pursuant to § 9.1 of the Foundation Act, 5

even where the earlier payments were made by a third party.

§ 16 of the Foundation Act states: 6

Exclusion of Claims 7

(1) Payments from public funds, including social security, and from German enterprises for injustice suffered under National Socialism as defined in § 11 may be claimed only under the terms of this Act. Any further claims in connection with National Socialist injustice shall be excluded. This shall also apply to the extent that any claims have been transferred to third persons by operation of law, transition or a legal transaction. 8

(2) All eligible persons shall provide a statement in their application whereby upon receipt of payment under this Act they irrevocably waive, without prejudice to sentences 3 to 5, any further claims against the public purse for forced labour and for property loss, all claims against German enterprises in connection with National Socialist injustice and all forced labour claims against the Republic of Austria or Austrian enterprises. This waiver shall become effective upon receipt of a payment pursuant to this Act. … 9

(3) Any additional provisions dealing with compensation arrangements and arrangements for the settlement of the consequences of war which are payable out of the public purse shall not be prejudiced by the above. 10

After the German *Bundestag* had enacted the Foundation Act and determined that legal certainty had been guaranteed pursuant to § 17.2 of the Act, the Foundation commenced making payments in June 2001 (see First Report of the Federal Government on the Status of Payments and Cooperation between the Foundation “Remembrance, Responsibility and Future” and the Partner Organisations of 27 November 2001 (*Erster Bericht der Bundesregierung über den Stand der Auszahlungen und die Zusammenarbeit der Stiftung "Erinnerung, Verantwortung und Zukunft" mit den Partnerorganisationen*), *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 14/7728, p. 7). By 31 March 2004, the first instalment had been paid to around 1.5 million of the up to 1.7 million eligible persons and some partner organisations had already begun with the disbursement of the second instalment; it is intended to complete the full disbursement in the summer of 2005 (see Fourth Report of the Federal Government on the Status of Payments and Cooperation between the Foundation “Remembrance, Responsibility and Future” and the Partner Organisations of 25 June 2004 (*Vierter Bericht der Bundesregierung über den Stand der Auszahlungen und die Zusammenarbeit der Stiftung "Erinnerung, Verantwortung und Zukunft" mit den Partnerorganisationen*), *Bundestag* document 15/3440, pp. 3, 7, 16; Press release 06/2004 of the Foundation “Remembrance, Responsibility and Future”). 11

II.

1. In 1941, I.G. Farbenindustrie AG (since 1952, I.G. Farbenindustrie AG in Abwick- 12

lung, the defendant in the original proceedings; hereinafter referred to as the "defendant") resolved to establish an industrial complex named "I.G. Auschwitz" to produce "Buna" (synthetic rubber) and fuel in Monowitz near Auschwitz. Prisoners of war and prisoners from the Auschwitz concentration camp were used to build the extensive facilities. In mid-1942, a concentration camp was established next to the production facilities at the defendant's instigation to house the forced labourers used; this camp was operated by the SS and the defendant together. While the SS was responsible for the fresh supplies of prisoners and for guarding them, the defendant was responsible for their health as well as their board and lodging (see Borkin, *Die unheilige Allianz der I.G. Farben*, 1979, p. 113). At this point, the Auschwitz camp complex consisted of the camps Auschwitz I (the original concentration camp), Auschwitz II-Birkenau (extermination camp) and Auschwitz III-Monowitz (the defendant's concentration camp) (see Piper, *Die Rolle des Lagers Auschwitz bei der Verwirklichung der nationalsozialistischen Ausrottungspolitik*, in: Herbert/Orth/Dieckmann (eds.), *Die nationalsozialistischen Konzentrationslager*, Volume I, 1998, p. 390 (408 et seq.)).

2. After Poland was occupied by the German armed forces (*Wehrmacht*), the complainants, then of Polish nationality, were taken captive because they were Jewish. As prisoners in the Auschwitz-Monowitz concentration camp, they were compelled to serve as forced labourers in the defendant's industrial facilities there. 13

After imprisonment in various other forced labour camps, the first complainant, born in 1925, was a forced labourer working for the defendant in the sewer system and electricity area from June 1943 to January 1945. The second complainant, who was born in 1924, was first interned in the Buchenwald concentration camp, transferred from there to the Auschwitz-Birkenau camp and finally used in various construction units in Auschwitz-Monowitz from October 1942 to January 1945. The third complainant, born in 1923, was taken from the Warsaw Ghetto and moved to various forced-labour camps. After internment in the Majdanek and Auschwitz-Birkenau concentration camps, the third complainant was transferred to Auschwitz-Monowitz where he worked from July 1943 on the construction of the company's [defendant's] own electrical plant. The fourth complainant, who was born in 1915, was first interned in Buchenwald and then Auschwitz-Birkenau, before he was transferred to the defendant's plant where from October 1942 to January 1945, he was forced to carry corpses and work as a male nurse and in road construction; he has died in the meantime and the proceedings are being continued by his wife as his heir. 14

The complainants were forced to perform heavy work without protection for about 84 hours per week under inhumane conditions in the defendant's plant. The food ration consisted of a small serving of bread in the morning and what was known as "Buna soup", an extremely watery soup containing a small amount of potato, for the evening meal. At night they had to sleep on wooden plank beds that they shared with other prisoners. The forced labourers were beaten by both the SS guards and the civil foremen and, once they could no longer work, they were handed over the SS to be murdered in the Auschwitz-Birkenau extermination camp (see for example, Wagner, 15

Häftlingsarbeit für die IG Farbenindustrie in Auschwitz-Monowitz, in: *Dachauer Hefte*, Issue 16, 2000, *Zwangsarbeit*, pp. 136 et seq.; Setkiewicz, *Häftlingsarbeit im KZ Auschwitz III-Monowitz. Die Frage nach der Wirtschaftlichkeit der Arbeit*, in: Herbert/Orth/Dieckmann (eds.), loc. cit., Volume II, 1998, pp. 588 to 600). Of the prisoners who were forced to work on the defendant's construction site in Auschwitz-Monowitz, nearly 25,000 did not survive (see Herbert, *Geschichte der Ausländerpolitik in Deutschland*, 2003, p. 169).

3. On 29 and 30 July 1948, the 6th Military Court of the United States of America in Nuremberg sentenced 13 of the defendant's board members and executives to prison terms ranging from one and a half years to eight years (see *Das Urteil im I.G.-Farben-Prozess. Der vollständige Wortlaut mit Dokumentenanhang*, 1948). The Allies split the consortium into the companies Bayer, Hoechst, BASF as well as others; the legal successor was I.G. Farbenindustrie AG in Abwicklung. 16

4. In February 1957, the defendant for the one part and the Claims Conference and the former forced labourer Norbert Wollheim for the other part signed the so-called "Wollheim Agreement" (*Wollheim-Abkommen*) after the latter had been successful at first instance in an action brought for damages. Mr. Wollheim was not covered by the London Debt Agreement since he was a German. The defendant committed itself to pay a total of 30 million German marks to forced labourers who had been put to work in its enterprise during the war; its payment was made subject to the law granting it immunity from further claims (see Benz, *Der Wollheim-Prozess. Zwangsarbeit für I.G. Farben in Auschwitz*, in: Herbst/Goschler (eds.), *Wiedergutmachung in der Bundesrepublik Deutschland*, 1989, pp. 303 et seq.). Thereupon the *Bundestag* passed the Act on the Notice to Creditors of I.G. Farbenindustrie Aktiengesellschaft in Abwicklung of 27 May 1957 (*Gesetz über den Aufruf der Gläubiger der I.G. Farbenindustrie Aktiengesellschaft in Abwicklung vom 27. Mai 1957, Aufrufgesetz – AufrufG*, Federal Law Gazette I p. 569; hereinafter referred to as the "Notice to Creditors Act"), which obliged the liquidators of the defendant to request creditors to lodge their claims by the end of 1957. § 1.3 of the Notice to Creditors Act states: 17

> Claims which are not lodged on time shall extinguish when the time limit expires. This shall not apply in the case of securitised debts or claims which are or were evident from the company's documents or which are or were otherwise known to the company. 18

Altogether around 6,500 of the defendant's former forced labourers received compensation payments; persons who had worked for up to six months in the defendant's Buna plant in Auschwitz-Monowitz received DM 2,500, those who had had to work there longer received DM 5,000. It was intended that in return the recipients agree to waive any further claims they might have (see Brozik, *Die Entschädigung von nationalsozialistischer Zwangsarbeit durch deutsche Firmen*, in: Barwig/Saathoff/Weyde (eds.), loc. cit., p. 33 (43)). 19

III.

The complainants were seeking damages and compensation for pain and suffering in amounts between DM 40,799.35 and DM 70,399 in the civil-law proceedings brought by them. The defendant sought to rely on the exclusion of claims contained in the Notice to Creditors Act and, in the alternative, it argued that the claims were statute-barred. Whilst the legal dispute was going on, the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" (hereinafter also abbreviated to the "Foundation Act") was enacted. 20

1. The Regional Court (*Landgericht*) dismissed the statement of claim in the challenged decision since § 16.1 sentence 2 of the Foundation Act prevented the complainants from making the claims. Moreover, it found that the claims were statute-barred. 21

2. The Higher Regional Court (*Oberlandesgericht*) rejected the complainants' appeal as unfounded in a judgment that has been challenged [by the constitutional complaint]. The Higher Regional Court opined that the complainants' claims were not completely statute-barred; contrary to the case-law of the Federal Court of Justice a 30-year time limit applied to compensation claims based on unjust enrichment. Nonetheless, the claims that were not statute-barred were excluded by the Foundation Act. In the Higher Regional Court's view, the application of § 1.3 of the Notice to Creditors Act would lead to the same result. The exemption in § 1.3 sentence 2 of the Notice to Creditors Act did not apply because claims for damages for pain and suffering and claims for compensation brought by former forced labourers were neither securitised claims nor claims evident from the company's documents nor claims otherwise known to it. Furthermore, the Higher Regional Court assumed, in application of § 138.4 of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*), that the complainants had received payments on the basis of the Wollheim Agreement. The question of whether they granted waivers in connection with the payments remained open. 22

3. In an order which the complainants also challenged, the Federal Court of Justice rejected as unfounded their appeal against the refusal to grant leave to appeal (*Neue Juristische Wochenschrift – NJW* 2003, p. 2912) since there was no reason to admit the case pursuant to § 543.2 sentence 1 of the Code of Civil Procedure. The questions of the constitutionality of § 16.1 of the Foundation Act and § 1.3 of the Notice to Creditors Act were not of fundamental significance. With regard to § 16.1 of the Foundation Act, the Federal Court of Justice stated that it had already set out in its order of 30 November 2000 (NJW 2001, p. 1069) that the legislature had considered whether the exclusion in § 16.1 was in conformity with Article 14 of the Basic Law (*Grundgesetz – GG*) (*Bundestag* document 14/3206, pp. 17-18). In its view, § 16.1 was not unconstitutional since it did not result in the waiver of enforceable claims that had been acquired; instead it gave forced labourers an easily enforceable claim against a foundation with adequate funds in lieu of what was generally a statute-barred claim against a debtor who in many cases no longer existed. The Federal Court of Justice found that this was not constitutionally objectionable and supported its view by refer- 23

ence to the judgment of the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) in the *Thalidomide* (*Contergan*) case (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 42, 263).

Nor was the complainants' allegation (which they did not further substantiate) in their appeal against the refusal to grant leave to appeal that § 1.3 of the Notice to Creditors Act was unconstitutional of fundamental significance. Furthermore, the Federal Court of Justice held that the Higher Regional Court had been correct in assuming that the complainants' claims did not fall within the exemption in § 1.3 sentence 2 of the Notice to Creditors Act anyway, since according to the wording of the section as well as the spirit and intent of the statute, negligent ignorance (imputed knowledge) [on the part of the defendant] of the complainants' claims did not prevent the claims from being extinguished. 24

The question of whether the claims were statute-barred was also not of fundamental significance because it was not of importance for the appellate court's decision. At most it could become significant in connection with an examination of the constitutionality of § 16.1 of the Foundation Act and § 1.3 of the Notice to Creditors Act. However, insofar the Senate found that there was no reason for diverging from the previous case-law of the Federal Court of Justice (with reference to BGHZ 48, 125 (127)). 25

IV.

The complainants allege that their fundamental rights under Article 2.1, Article 3.1, Articles 14.1 and 14.2 as well as Article 19.4 and Article 20.3 of the Basic Law have been violated by the challenged decisions; in particular, they allege that the exclusion of compensation claims which results from § 16.1 sentence 2 of the Foundation Act is a violation of the fundamental right contained in Article 14.1 of the Basic Law. 26

1. They argue that since the Basic Law's protection of property also extends to private-law rights and claims, the damages they claim for the compensation of the severe injustices they suffered and the inhuman sacrifices they made with regard to their quality of life are covered by the protection of Article 14 of the Basic Law. 27

In addition, the complainants are of the opinion that the Federal Constitutional Court established a list of principles in the *Thalidomide* case (BVerfGE 42, 263) for the replacement of private-law claims through public-law claims. The change [from private to public] must be undertaken in the interests of the holder of the rights; the change must not be designed to satisfy the needs of the general public or one beneficiary, but rather to realise the party concerned's property rights through improving and strengthening the legal position of the individual. In doing this, it is necessary to preserve the value of property through provision of something else which is of comparable value (essence of preservation of value). In the view of the complainants the Foundation Act did not satisfy these standards. 28

a) The complainants allege that the transformation of the damages claims of those entitled to them was not carried out in such persons' interests, but rather in the inter- 29

ests of German industry. The purpose of the Foundation Act was primarily to provide German enterprises with immunity from claims by the victims of forced labour who live in the United States of America and Israel, but not to provide the victims with reasonable compensation.

No provision was made for compensation payments to forced labourers who were put to work in agriculture or who had to work for the church or as domestic help. As a result, the Foundation Act could not fulfil its aim of providing all forced labourers with final compensation. The distinction made between forced labourers in industry and other forced labourers was arbitrary and a violation of Article 3.1 of the Basic Law. 30

b) To the extent that the Foundation Act applies to the complainants and other applicants who could assert legal claims against enterprises which still exist, it results in the "employers" of forced labourers receiving extremely preferential treatment; this does not strengthen or improve the legal position of the individual, but instead seriously weaken it. Furthermore, the deadline for applications provided for in § 14 of the Foundation Act would impose a time limit on claims not subject to the statute of limitations and on claims which were in any case not statute-barred. 31

The complainants further allege that it was not true that many of the forced labourers had found for the very first time a solvent debtor in the Foundation; with a little research it would have been possible to find legal successors for almost all of the enterprises. The enterprises which had used forced labourers were mostly international consortia that had almost without exception survived the war. 32

c) Moreover, the complainants claim that the Foundation Act failed to preserve the value of property. Since the complainants belonged to the group of persons referred to in § 11.1 sentence 1 nos. 1 to 2 or sentence 5 of the Foundation Act, they were only entitled to claim payment of "up to DM 15,000" pursuant to § 9.1 of the Foundation Act. However, individual forced labourers could not be certain of obtaining this amount since initially only 50 % of the maximum amounts could be distributed and it was not until after all applications pending before partner organisations had been processed that the remaining payment of up to 50 % would be paid to the extent possible on the basis of the funds available. These small amounts stood in contrast to the claims made by the complainants ranging from at least DM 40,000 to at least DM 70,000, which could be seen as typical for the amounts claimed by forced labourers. 33

2. Furthermore, it is argued by the complainants that the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" violates the principle of proportionality. It fails in its aim to achieve legal certainty for German enterprises and to protect German industry from possible further claims and, taking into account the relationship between the perpetrators and their victims, it fails to provide a humanitarian service through the funds made available. The Foundation Act is one-sided. The rights of the forced labourers were impaired in an intolerable manner for the benefit of the enterprises which used them and the forced labourers' damages claims for aggravated tortious injury were reduced to a humanitarian gesture. The Foundation Act en- 34

croaches upon the essence of ownership rights that derive from the extreme personal suffering of the victims.

The complainants argue that their claims are not statute-barred. Time-limits may only be applied in civilised legal systems; they are not suitable for claims based on crimes against humanity. Even if the provisions containing statutory limitation periods did apply in principle, relying on them would be an impermissible exercise of a right. 35

3. According to the complainants, § 13.1 of the Foundation Act, which only permits compensation claims for forced labourers to be inherited by way of exception, violates the protection afforded to the right of inheritance by Article 14.1 of the Basic Law. The goals of providing compensation and recognition of a moral obligation towards the forced labourers could be achieved in the same way by making payments to descendants and not just by payments to survivors. 36

4. Furthermore, in the complainants' view the qualifying date in § 13.1 sentence 2 of the Foundation Act results in arbitrary and unequal treatment of the relatives of eligible persons who died before 15 February 1999 as compared to the relatives of those eligible persons who died after 15 February 1999. There is no recognisable reason which would justify choosing the date on which the Foundation Initiative was made public as the qualifying date. 37

5. To the extent that it leaves the grant and disbursement of payments to so-called partner organisations, the Foundation Act lacks the necessary clarity and definiteness. Since the procedural rules that the organisations will use to distribute the funds are unknown and since it is uncertain whether the procedure adopted will comply with the rules applicable in a state governed by the rule of law, the Foundation Act violates the principle of a state governed by the rule of law in Article 20.3 and Article 1.3 of the Basic Law. The right of recourse to a court is violated by the fact that provision is made for the setting up of an internal complaints body without any further details as to the complaints procedure. 38

6. Finally, the complainants allege that the Notice to Creditors Act did not apply to their claims since their claims fell within the exemption in § 1.3 sentence 2 of the Act. Furthermore, the Notice to Creditors Act was unconstitutional. Since the Act destroys existing claims without providing any replacement for them, it does not determine the content and limits of property, but results in legal expropriation. However, the constitutional prerequisites for legal expropriation were missing. 39

B.

The constitutional complaint is not to be admitted for decision. The prerequisites for the application of § 93.a.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) are not fulfilled. The complaints raised in the constitutional complaint are for the most part inadmissible and otherwise unfounded. 40

I.

The allegation that the challenged decisions as well as the statutory provisions that they are based on, which the constitutional complaint indirectly challenges, violate the protection of property in Article 14.1 of the Basic Law is admissible. Insofar the complainants are personally, presently and directly affected by the challenged provisions. 41

The allegations that there have been violations of Article 1.3, Article 2.1, Article 3.1, Article 14.1 (right of inheritance), Article 14.2, Article 19.4 and Article 20.3 of the Basic Law are inadmissible. 42

Article 20.3 of the Basic Law is not on its own a right within the definition of Article 93.1 no. 4.a of the Basic Law with reference to which a constitutional complaint can be lodged. To the extent that the complainants assert a violation of other fundamental rights in addition to their property right, they are not entitled to lodge a complaint since they were not personally affected by the challenged provisions. As persons clearly eligible to make a claim, the complainants cannot allege, in particular, that other groups of forced labourers were excluded from the [compensation] scheme. Similarly, the restrictions placed on the inheritability of the compensation claims by § 13.1 sentence 1 of the Foundation Act do not give rise to complaint in these proceedings since complainants 1 to 3 are alive and complainant 4 did not die until after the qualifying date (15 February 1999) with the result that his heir is able to assert claims. The allegation that the provision for the setting up of an internal complaints body violates Article 19.4 of the Basic Law is also inadmissible because the complainants do not have a personal complaint. 43

II.

The challenged decisions and the underlying [statutory] provisions do not violate the complainants' fundamental right under Article 14.1 of the Basic Law. 44

1. Nevertheless, the complainants' claims are covered by the guarantee of property in Article 14.1 sentence 1 of the Basic Law. 45

a) In the private-law field, the protection of property basically extends to all rights having the value of an asset which the legal system allocates to the party entitled so that he or she may exercise the attached powers, however he or she wishes, for his or her own private use (see BVerfGE 83, 201 (209); 101, 239 (258); BVerfG, 1st Chamber of the First Senate, Order of 25 April 2001 – 1 BvR 132/01 –, *NJW* 2001, p. 2159 (2159)). Thus the property guarantee does not just protect a person's rights *in rem* or his or her rights against all other persons claiming an interest in the property; it also protects an individual's rights under the law of obligations (see BVerfGE 42, 263 (293); 45, 142 (179); 83, 201 (208)). Rights under the law of obligations which seek to compensate a person for reductions in his or her quality of life enjoy to a particularly high degree the security and protection afforded by the property guarantee (see BVerfGE 42, 263 (293)). 46

b) The complainants' claims, which they derived from being forced labourers for the defendant, are claims under the law of obligations based on tort law and the law of unjust enrichment. 47

The complainants were enslaved at the defendant's plant and forced to work under conditions which would undoubtedly have resulted in their death if they had not been freed. In this way – as was determined by the Higher Regional Court – they became the victims of tortious acts for which the defendant was responsible and which result in their being entitled to claims for damages and damages for pain and suffering. Furthermore, the defendant was unjustly enriched as a result of the forced work; accordingly the Higher Regional Court also confirmed [that the complainants had] claims based on unjust enrichment. 48

c) In any case the claims based on unjust enrichment do not fail because they are statute-barred. 49

With regard to the interpretation and application of nonconstitutional legal norms – in this case those containing limitation periods – the Federal Constitutional Court is bound to follow the decisions of the nonconstitutional courts unless there are errors on the face of the decisions which – apart from the prohibition of arbitrariness – are based on a fundamentally erroneous view of the meaning and scope of a fundamental right (see generally BVerfGE 18, 85 (93, 96); established case-law). The Higher Regional Court found that the claims based on unjust enrichment were not statute-barred; the Federal Court of Justice expressed doubt about this interpretation of the law, but did not pursue the issue since it was not of importance for its decision. Thus the decision that is relevant for constitutional review is the decision by the Higher Regional Court, which is itself not constitutionally objectionable. According to the decision of the Higher Regional Court the claims based on unjust enrichment are in any case not statute-barred. Thus the exclusion of them by the Foundation Act is an impairment of property. 50

The question of whether the Higher Regional Court's assumption that the damages claims had become statute-barred is in conformity with constitutional law may in view of the special circumstances in which they arose, the delay in regulating compensation in the post-war period as well as the practical difficulties associated with asserting the claims be left open since the defendant cannot plead that the claims based on unjust enrichment are statute-barred. Nonetheless, as a result of the provisions of the Foundation Act the complainants are also no longer able to assert their claims which are not statute-barred. 51

2. In legislating on property rights pursuant to Article 14.1 sentence 2 of the Basic Law and enacting the (challenged) provisions of the Foundation Act, the legislature has achieved an overall settlement whose objective it is to deal with conflicting interests fairly. This is not constitutionally objectionable. 52

a) The provisions in the Foundation Act on the eligibility of the claims of forced 53

labourers must not be measured according to the standards set for expropriation in Article 14.3 of the Basic Law. Expropriation presupposes that an individual is deprived of his or her specific legal positions; however not every deprivation is expropriation within the meaning of the Article. The purpose of expropriation is to fulfil certain public tasks. However, if by depriving an individual of his or her legal position the legislature intends to settle private interests, then its legislative enactment will be a determination of the content and limits of property (see BVerfGE 101, 239 (259); 104, 1 (10)).

According to Article 14.1 sentence 2 of the Basic Law, the legislature is responsible for determining the content and limits of property (see BVerfGE 95, 48 (58)); however, the legislature does not enjoy unlimited freedom in performing this task. In particular, it is obliged to ensure that the interests of the parties concerned are settled fairly and evenly balanced. One-sided preferential treatment or discrimination is not in accordance with the constitutional concept of social obligations attached to private ownership (see BVerfGE 101, 239 (259); 104, 1 (10-11); established case-law). 54

b) The Federal Constitutional Court has stated repeatedly that the question of how far the legislature is entitled to go in determining the content and limits of a person's legal position if it falls within the property guarantee cannot be answered without looking at the reasons that led to the person being in that legal position and looking at whether there is a personal or social connection (see BVerfGE 53, 257 (292); 102, 1 (17); established case-law). The complainants' claims are based on injustice suffered, which is described as slave labour in the German-American Intergovernmental Agreement on the Foundation "Remembrance, Responsibility and Future". The complainants were forced to work under conditions which even in comparison to the terrible working conditions of other groups of forced labourers were particularly cruel and unimaginably inhumane. If those advantaged by such work are required to pay compensation for the benefits derived or are required to pay damages, then the claim is based on the work of the exploited victim and the torture endured. It is hard to imagine property claims with a stronger personal connection than the settlement claims of persons who literally had to work for dear life. 55

c) The limits on parliament's legislative powers are not the same, however, for all areas. The legislature's discretion is influenced in particular by the social and political circumstances that determine the content and limits on property (see BVerfGE 101, 54 (76)). In the present case, it is significant that the challenged settlement was part of a compromise reached after lengthy negotiations involving the representatives of the victims of National Socialist injustice and the governments of various foreign countries and that the compromise was an attempt by those involved to achieve a reasonable settlement of interests. The legislature was entitled to accept the assessment of those involved that in total the attempt had been successful. 56

aa) In connection with reparations and how to deal with damage and consequential damage caused by the war, the Federal Constitutional Court has repeatedly empha- 57

sised the breadth of the legislature's discretion to make its own assessments and to legislate (see BVerfGE 13, 31 (36); 13, 39 (42-43); 27, 253 (284-285); 102, 254 (298)). This case-law related primarily to provisions which were in the public interest whereas in the present case the court is dealing at least technically with claims by private parties against another private party. However, it was necessary in this case to solve a problem of considerable public interest. This follows not just from the fact that the exploitation of forced labourers by enterprises such as the defendant enterprise was made possible and was organised by the state, but also from the emphasis in the Preamble to the Foundation Act on the political and moral responsibility for the victims of National Socialism and for their compensation.

58 The Federal Government and the legislature in 2000 had to come to grips with the problem of the unresolved question of the compensation for forced labourers – a question which previous Federal Governments had constantly postponed. Fifty-five years had passed since the end of the Second World War, and due to the reunification and the associated political changes in Europe, there was an urgent need to finally achieve, if possible for once and for all, a financial settlement of the consequences of the National Socialist injustice.

59 The establishment of the Foundation "Remembrance, Responsibility and Future" represented a late recognition that compensation was due to forced labourers for the injustice done to them. The planned payments were intended to have a financial and a symbolic value. The compensation was also supposed to benefit all of those persons who because of their advanced age or bad health or the trauma experienced as a result of having been exploited as forced labourers would be deterred from getting involved in expensive and complicated litigation with an uncertain outcome. Furthermore, it was intended [through the establishment of the Foundation] to spare all those injured persons who were willing to take legal action to enforce their claims, but who could not be sure that their claims could be enforced either at all or at least during their lifetime, the possibility of protracted litigation. In addition, there is the fact that the majority of forced labourers who had survived [this experience] had died in the meantime. Those still alive were mostly very old. If compensation was to reach them all or at least as many of them as possible, disbursement needed to occur as quickly as possible.

60 That is why it was legitimate for the legislature to decide initially not to seek to resolve all of the outstanding legal issues in dispute, but to instead set up a general settlement scheme which would not look at the specific circumstances in an individual case or examine the fundamental objections raised against the existence of an enforceable claim and find there was entitlement [to compensation] by accepting a lower standard of proof. In particular, it should be unimportant whether the claims of former forced labourers against the enterprises for which they worked were – as was assumed by the case-law – statute-barred or whether at least some of the claims could still be asserted (regarding case-law see (besides the decision of the Federal Court of Justice in the original proceedings) – *NJW* 2003, p. 2912 (2913) – also

Koblenz Higher Regional Court *of*, *OLGReport Koblenz* 2001, p. 30; Hamm Higher Regional Court, *NJW* 2000, p. 3577 (3579); Stuttgart Higher Regional Court, *NJW* 2000, p. 2680 (2681-2682); Berlin Court of Appeal (*Kammergericht*), *KGR* (*Kammergerichtsreport*) *Berlin* 2000, p. 257; Berlin Regional Court , *NJW* 2000, pp. 1958-1959; Hamburg Regional Court , *NJW* 1999, p. 2825).

bb) In its efforts to provide compensation for the injustice suffered which was anyway long overdue, the legislature was entitled to strive for an overall solution of this kind. In particular, it was entitled to take into account that the content of the legislation which it had to enact had been to the greatest possible extent laid down in the agreement made between the Federal Government, the governments of the United States of America, Israel and several Central European and Eastern European countries, the German Industry Foundation Initiative, the Claims Conference as well as the lawyers acting on behalf of a large number of former forced labourers. The agreement that was made would not have been reached if the parties involved had not been convinced that the arrangement ultimately made was in view of the many uncertainties also a reasonable solution for the former forced labourers. Accordingly, the legislature was entitled to approach the matter by entering into negotiations and embarking on a joint search for a compromise and ensuring in this way as well as through the chosen procedure that a solution was found that would settle the interests of those involved in an acceptable way. 61

The agreement that was reached is implemented in Annex A of the German-American Intergovernmental Agreement. The Intergovernmental Agreement contains a detailed description of the principles that it wished to have incorporated in the Foundation's work and in the Foundation Act which would settle interests. The legislature was also entitled to view the individual provisions included as part and parcel of the solution negotiated to provide a final answer to the legal problems involved. 62

3. The specific arrangements provided for in the Foundation Act also satisfy the constitutional requirements placed on the achievement of a fair settlement of interests pursuant to Article 14.1 of the Basic Law. 63

a) The purposes of the Foundation Act are according to § 2.1 on the one hand "to make financial compensation available to former forced labourers and to those affected by other injustices from the National Socialist period" and according to the Preamble on the other hand "to provide adequate legal certainty for German enterprises and the Federal Republic of Germany in particular in the United States of America". Neither of these goals is constitutionally objectionable. Even the goal of protecting the enterprises from lawsuits which might pose a risk to their continued existence is legitimate under constitutional law, particularly as the current owners and employees of the enterprises are not as a rule likely to have been personally responsible for the exploitation of the forced labourers during the Second World War. 64

The Act seeks to settle the interests of the former forced labourers on the one hand and the enterprises on the other hand through an arrangement whereby any claims 65

against German enterprises are transformed into claims against the Foundation. In this connection, the Thalidomide Foundation Act (*Contergan-Stiftungsgesetz*), which had been approved by the Federal Constitutional Court, served as a model (see BVerfGE 42, 263). Numerous, if by no means all, German enterprises that had employed forced labourers committed themselves to making voluntary payments to the Foundation.

b) The provision in the Foundation Act which the complainants most object to, namely § 16.1 sentence 2 of the Foundation Act, does indeed impair their property rights; it is, however, not unreasonable within the context of the overall settlement. 66

§ 16.1 sentence 1 of the Foundation Act provides that payments from public funds for injustice suffered under National Socialism as defined in § 11 of the Act may only be claimed under the terms of this Act. § 16.1 sentence 2 of the Foundation Act excludes any further claims, i.e. also claims based on unjust enrichment or damages claims in connection with National Socialist injustices against the defendant. 67

aa) To the extent that former forced labourers are entitled to claims against the enterprises, they are deprived of these claims by the Act; however, at the same time the claims are transformed into claims against the Foundation – albeit in lesser amounts. Eligible persons under § 11 of the Foundation Act receive claims against the Foundation in an amount up to DM 15,000, while claims against the Federal Republic of Germany as well as German enterprises in connection with National Socialist injustices are excluded (§ 16.1 of the Foundation Act). In addition, eligible persons are only entitled to payments if they grant a waiver (§ 16.2 of the Foundation Act). This provision also applies if the amounts they are entitled to under § 11 of the Foundation Act are considerably lower than those that might be obtained in an action for compensation or damages for unjust enrichment. 68

bb) Such an impairment of the legal position of the forced labourer, which is protected by the property guarantee, can only be justified in the context of the mutually agreed overall settlement and having regard to the fact that the settlement has advantages for those concerned in addition to the clear disadvantages that it entails. The settlement improves the legal position of the bulk of the approximately 1.7 million former forced labourers who are still alive and takes into account the considerable uncertainty associated with the enforcement of their claims. In particular, it avoids lengthy legal disputes and thus improves the chances of the injured receiving payments within their own lifetime. It also ensures that the realisation of payment claims is not left to chance. Thus forced labourers who were compelled to work for enterprises that no longer exist today or which are insolvent receive the same payments as those who worked for enterprises which still exist today. 69

As was already stressed by the Federal Constitutional Court in its decision on the Act on the Establishment of a Foundation “Help for Disabled Children” (*Gesetz über die Errichtung einer Stiftung „Hilfswerk für behinderte Kinder“* (BVerfGE 42, 263 – Thalidomide case)), where an individual’s claim only becomes realisable due to mem- 70

bership of a community of injured persons, such individual will share as claimant the common destiny of the other injured persons and cannot escape this by alleging that he or she has acquired an independent claim. He or she is subject to a duty, albeit a limited one, to accept a new order of entitlement aimed at strengthening the legal position of all (see BVerfGE 42, 263 (301-302)). Contrary to what the complainants think, the strengthening of the legal position of all does not call for the improvement of the legal position of each individual. In fact insofar as individuals are now and again disadvantaged, these disadvantages must be weighed against the advantages achieved in total (see BVerfGE 42, 263 (302)).

71 The complainants shared their fate with the other slave labourers and forced labourers. Attempts by individual victims in the decades after the Second World War to obtain compensation for forced labour before the German courts were unsuccessful; there is only one known case of a former forced labourer being awarded the small amount of DM 177.80 by a court (see Ferencz, *Lohn des Grauens*, 1981, pp. 214 to 216). It was not until class-action lawsuits were brought in the United States of America and many lawsuits were pending in the Federal Republic of Germany that the willingness of German industry to make substantial payments within the framework of the German Industry Foundation Initiative developed. In particular, the pressure of the community of injured persons led to negotiations which resulted ultimately in a much larger amount being made available than what had originally been planned on the part of the Germans. Initially, industry had only considered paying DM 1.7 billion into the Foundation (see Eizenstat, *Unvollkommene Gerechtigkeit*, 2003, p. 279). It was not until the “foundation solution” had been agreed upon after difficult and protracted negotiations that it became possible to provide all of the former forced labourers with compensation (even if it was not called this) within a short space of time.

72 cc) Without the establishment of the Foundation, if any, only a very small fraction of the former forced labourers would have actually been able to enforce their inherently existent claims. Measured against the total number of victims still alive, only a small minority had sued for damages in Germany, America or other countries. The likelihood of success of such lawsuits was dubious. Case-law in Germany, in particular that of the Federal Court of Justice on claims of the former forced labourers being statute-barred posed an obstacle to their success. There is no telling whether or not it might have been possible to achieve a change in the case-law. In view of the advanced age of many of the injured persons, they probably would not have lived to experience the successful conclusion of years of litigation.

73 dd) Nonetheless, the burden placed on German industry by the Foundation is slight when compared with the injustice done to the forced labourers and the advantages received by the enterprises. Enterprises which have refused to make a payment to the Foundation also benefit from the arrangement, even though they too formerly used forced labourers. They receive immunity from the compensation claims of the forced labourers they exploited without a making a contribution of their own to the Foundation’s capital. Instead a considerable share of the load from the Foundation

has been borne by the Federal Republic of Germany through its payment of DM 5 billion as well as through the reduction in its income from taxes by approximately DM 2.5 billion which resulted from its allowing industry a tax deduction for the funds provided; this was done in order to ensure that a final and quick settlement could be achieved which did not involve litigation with the enterprises that did not contribute. Since what was important were the payments to the injured forced labourers and not the punishment of the enterprises, the solution chosen does not become unreasonable under constitutional law just because the state assumed the largest share of the load.

74 It also has to be noted in this context that the solution chosen also serves another purpose of the Foundation Act, namely to provide legal certainty for German industry as a whole. This was – insofar as it could be achieved at all through agreements at governmental level – only possible by also granting immunity to the enterprises which did not contribute to the Foundation. The Federal Republic of Germany wished to avoid the continuation, in particular, in the United States of America, of the public discussion about forced labour for German enterprises – and this also to the disadvantage of those enterprises which had come together in the German Industry Foundation Initiative.

75 The strong involvement of the Federal Republic of Germany in providing capital for the Foundation can be justified incidentally also by the fact that in addition to the respective enterprise and the Nazi regime, the German population as a whole also profited from the forced labour. Through the use of the forced labourers it was possible to maintain the supply situation for the population until the last phase of the war at a comparatively high level (see, for example, Herbert, *Geschichte der Ausländerpolitik in Deutschland*, 2003, p. 147).

76 ee) Notwithstanding the numerous deficiencies necessarily associated with the difficulty of dealing with the injustice at such a late date, the arrangement made still falls within the boundaries of what the legislature is entitled to consider a reasonable settlement of the conflicting interests involved within the terms of Article 14.1 sentence 2 of the Basic Law.

77 4. The application of the Foundation Act to the complainants by the courts is also not constitutionally objectionable. In this respect, the constitutionality of § 1.3 of the Notice to Creditors Act is just as irrelevant as the question of whether the claims by the complainants on the basis of that Act had expired. As a result of the Foundation Act, all of the claims, even those not covered by the Notice to Creditors Act, can no longer be asserted.

Judges: Papier, Haas, Hömig, Steiner, Hohmann-Dennhardt,
Hoffmann-Riem, Bryde, Gaier

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 7. Dezember 2004 - 1 BvR 1804/03

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