



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF JAHN AND OTHERS v. GERMANY

(Applications nos. 46720/99, 72203/01 and 72552/01)

JUDGMENT

STRASBOURG

30 June 2005

In the case of Jahn and Others v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr I. CABRAL BARRETO,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA,
Mrs E. STEINER,
Mr S. PAVLOVSKI,
Mr L. GARLICKI,
Mr J. BORRERO BORRERO,
Mr K. HAJIYEV,
Mrs L. MIJOVIĆ, *judges*,

and Mr E. FRIBERGH, *Deputy Registrar*,

Having deliberated in private on 26 January and 25 May 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in three applications (nos. 46720/99, 72203/01 and 72552/01) against the Federal Republic of Germany. Two German nationals, Mrs Heidi Jahn and Mr Albert Thurm (“the applicants”), applied to the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 2 September 1996. Their application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). Three other German nationals, Ms Erika Rissmann, Ms Ilse Höller and Ms Edith Loth (also “the applicants”), lodged applications with the Court under Article 34 of the Convention, Ms Rissmann and Ms Höller on 19 March 2001 and Ms Loth on 23 April 2001.

2. The applicants, who had been granted legal aid, were represented by Ms W. Lange, Ms B. Grün and Mr T. Purps, lawyers, acting for Mrs Jahn and Mr Thurm, Ms Rissman and Ms Höller, and Ms Loth, respectively. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialrätin*.

3. The applicants alleged, in particular, that the obligation imposed on them to transfer their property without compensation had infringed their right to the peaceful enjoyment of their possessions, contrary to Article 1 of Protocol No. 1. They also submitted that they had suffered discrimination within the meaning of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

4. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). These cases were assigned to the newly composed Third Section (Rule 52 § 1).

6. On 25 April 2002 a Chamber of that Section, composed of Mr. I. Cabral Barreto, President, Mr G. Ress, Mr L. Caflisch, Mr P. Kūris, Mr J. Hedigan, Mrs M. Tsatsa-Nikolovska and Mr K. Traja, judges, and Mr V. Berger, Section Registrar, declared application no. 46720/99 (Jahn and Thurm) admissible. In a decision of 15 May 2003, it joined applications nos. 72203/01 (Rissmann and Höller) and 72552/01 (Loth) and declared them partly admissible.

7. On 18 September 2003 the Chamber held a hearing on the merits in the case (Rule 54 § 3) and, on 16 December 2003, it decided that the three applications should be joined (Rule 42 § 1).

8. On 22 January 2004 the Chamber delivered a judgment in which it held unanimously that there had been a violation of Article 1 of Protocol No. 1 and that it was not necessary to examine the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. The Chamber also held, by six votes to one, that the question of the application of Article 41 was not ready for decision. The President of the Chamber, Mr Cabral Barreto, annexed to the judgment a partly concurring and partly dissenting opinion.

9. On 20 April 2004 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted this request on 14 June 2004.

10. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

11. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs	A. WITTLING-VOGEL, <i>Ministerialrätin</i> ,	<i>Agent,</i>
Mr	J. FROWEIN, Professor,	<i>Counsel,</i>
Mr	H. WEISS, <i>Ministerialdirigent</i> ,	
Mr	H.-J. RODENBACH <i>Ministerialrat</i> ,	
Mr	W. MARX, <i>Regierungsdirektor</i> ,	<i>Advisers;</i>

(b) *for the applicants*

Ms	B. GRÜN, lawyer,	
Mr	T. PURPS, lawyer,	<i>Counsel,</i>
Ms	W. LANGE, lawyer,	
Mr	V.-U. HAHN, lawyer,	<i>Advisers.</i>

The Court heard addresses by Ms Grün, Mr Purps and Mr Frowein, and also their replies to questions put by several of its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The first applicant, Ms Heidi Jahn, is the sister of the second applicant, Mr Albert Thurm. They were both born in 1947 and live in Sangerhausen. The third and fourth applicants, Ms Erika Rissmann and Ms Ilse Höller, are sisters. They were born in 1942 and 1944 respectively and live in Erfstadt and Stotzheim. The fifth applicant, Ms Edith Loth, was born in 1940 and lives in Frankfurt an der Oder.

A. Background to the case

1. The land reform implemented from 1945 in the Soviet Occupied Zone of Germany

14. In September 1945, people in the Soviet Occupied Zone of Germany who owned more than 100 hectares of land were expropriated under the land reform (*Bodenreform*). The land became part of a pool of State-owned land (*Staatlicher Bodenfond*) from which parcels of land averaging eight hectares in area were redistributed to farmers who had little or no land of their own.

15. The applicants are the heirs of the new owners (then called “new farmers” – *Neubauern*) of the land redistributed under the land reform

(*Bodenreformgrundstücke*) and situated in the former German Democratic Republic (GDR).

16. The 1945 Land Reform Decrees (*Bodenreformverordnungen* – see paragraphs 55-56 below) constituted the statutory basis of this land reform. They provided that the disposal of land acquired under the land reform was subject to restrictions (*Verfügungsbeschränkungen*). The certificates of allotment (*Zuteilungsurkunden*) stated that the land could pass to the new owner's heirs.

17. The decrees stipulated that certain portions of the land had to be used for agricultural purposes in order to provide sufficient food for the population.

18. The Change of Possession Decrees of 21 June 1951, 7 August 1975 and 7 January 1988 (*Besitzwechselerordnungen* – see paragraphs 57-59 below) dealt with cases where the land was returned to the pool of State-owned land or assigned to third parties, with the proviso that the latter undertook to use it for agricultural purposes.

2. The enactment by the GDR parliament of the Law of 6 March 1990 on the rights of owners of land redistributed under the land reform

19. After the fall of the Berlin Wall on 9 November 1989, negotiations started between the two German States and the four former occupying powers (France, the United Kingdom, the United States and the Soviet Union) and led to the reunification of Germany, which took effect on 3 October 1990.

20. As part of those negotiations, and in order to ensure a transition from a socialist economy to a market economy, the GDR parliament passed the Law of 6 March 1990 on the rights of owners of land redistributed under the land reform (*Gesetz über die Rechte der Eigentümer von Grundstücken aus der Bodenreform* – see paragraph 61 below), also known as the Modrow Law (after the President of the State Council (*Staatsrat*) at the time), which came into force on 16 March 1990.

The Modrow Law lifted all restrictions on the disposal of land acquired under the land reform, whereupon those in possession of the land became owners in the true sense of the word.

21. On 18 March 1990 the first free elections took place in the GDR.

22. On 3 October 1990 the Modrow Law became an integral part of the law of the Federal Republic of Germany (FRG).

3. Enactment by the FRG parliament of the second Property Rights Amendment Act of 14 July 1992

23. On 14 July 1992 the FRG legislature enacted the second Property Rights Amendment Act (*Vermögensrechtsänderungsgesetz*) on the liquidation (*Abwicklung*) of the land reform in the *Länder* of the former GDR. It came into force on 22 July 1992.

24. When passing that Act, the legislature inserted subsections (11) to (16) into section 233 of the Introductory Act to the Civil Code (*Einführungsgesetz in das Bürgerliche Gesetzbuch* – see paragraphs 65-69 below) on the basis of the principles set out at the time in the GDR by the Land Reform Decrees and the Change of Possession Decrees.

B. The proceedings before the courts in the FRG

1. The first two applicants

25. The first two applicants had inherited land in the *Land* of Saxony-Anhalt in 1976. They had been registered in the land register as the owners of that land since 14 July 1992.

26. On 18 January 1994 they attempted to sell it.

27. On 12 July 1994 the Department of Agriculture and Rural Land Consolidation (*Amt für Landwirtschaft und Flurneuordnung*) of the *Land* of Saxony-Anhalt opposed the sale, following which a right of pre-emption in favour of the tax authorities was registered in the land register.

28. On 15 February 1995 the department in question applied to the Sangerhausen District Court (*Amtsgericht*) for an order requiring the applicants to reassign their property to the *Land* of Saxony-Anhalt without compensation.

29. In a judgment of 2 November 1995, the Sangerhausen District Court ordered the applicants to reassign their property in accordance with section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code (see paragraphs 67-69 below). It held that they had had no right to inherit land that had been acquired under the land reform because neither of them had been carrying on an activity in the agriculture, forestry or food-industry sectors on 15 March 1990 or during the previous ten years.

30. The applicants appealed.

31. In a judgment of 22 March 1996, the Halle Regional Court (*Landgericht*) dismissed their appeal on the ground that, on inheriting the property, the applicants had not acquired title to it for the purposes of the Basic Law (*Grundgesetz*), because in 1946 land acquired under the land reform had already been subject to substantial restrictions in the GDR. The Land Reform Decrees of 1945 and the Change of Possession Decree of 1951 prohibited the sale of such land and provided that any decision regarding a change of possession was a matter for the State. That position had not been altered by the Change of Possession Decree of 1975.

32. On 24 April 1996 the applicants appealed to the Federal Constitutional Court on the grounds that they were the legitimate heirs to and owners of the land. In their submission, the GDR Change of Possession Decrees restricting the use of land acquired under the land reform had been

passed after their mother had acquired the land and were therefore inapplicable in their case.

33. On 17 June 1996 the Federal Constitutional Court (*Bundesverfassungsgericht*), sitting as a bench of three judges, dismissed their appeal.

The Constitutional Court held, as it had previously held in its judgment of 4 October 1995 on the same issue (see paragraph 70 below), that the statutory provisions in question did not breach the applicants' right of property, or the principle that laws could not apply retrospectively, or the principle of equality.

The Constitutional Court added that the use of land acquired under the land reform had already been subject to restrictions at the time of the GDR. Those restrictions had been set out in the Change of Possession Decrees and in the case-law of the Supreme Court of the GDR. In its judgment of 12 March 1953, that court had held that such land did not automatically pass to the owner's heirs, but could do so only with the State's consent.

2. The third and fourth applicants

34. The third and fourth applicants had inherited land in the *Land* of Mecklenburg-West Pomerania in 1978. They had been registered in the land register as the owners of that land since 1996.

35. They had leased their land to an agricultural company called Breesen for twelve years, from 1 January 1991 to 31 December 2002.

36. On 3 July 1998 the *Land* of Mecklenburg-West Pomerania requested that the land be transferred into its name on the ground that it had "superior title" (*bessere Berechtigung*) to it under section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code (see paragraphs 67-69 below).

37. In a judgment of 29 October 1998, the Neubrandenburg Regional Court ordered the applicants to transfer their property to the *Land* of Mecklenburg-West Pomerania on the ground that on 15 March 1990 they had neither been members of an agricultural cooperative (*Landwirtschaftliche Produktionsgenossenschaft*) in the GDR nor applied for membership of one.

38. The applicants appealed on the ground, *inter alia*, that, since the leading judgment of the Federal Court of Justice of 17 December 1998 (see paragraph 71 below), it had been established that title to land acquired under the land reform could pass to the owner's heirs.

39. In a judgment of 17 August 1999, the Rostock Court of Appeal (*Oberlandesgericht*) dismissed the appeal, holding that the statutory provisions in question were compatible with the Basic Law. It found, *inter alia*, that the German legislature had thus sought to remedy the loopholes in the Modrow Law, which contained no transitional provisions for cases where changes of ownership had not been recorded in the land register.

40. The applicants appealed to the Federal Constitutional Court, alleging a breach of their property and inheritance rights, of the rule that laws could not apply retrospectively, and of the principle of equality. They submitted that there had been no constitutional justification for interfering with their right of property without compensation and that the interference had been neither proportionate nor necessary.

Furthermore, they were no longer in a position to satisfy the requisite criteria, for example by becoming members of a GDR agricultural cooperative.

41. In a leading decision of 6 October 2000, the Federal Constitutional Court, ruling as a panel of three judges, dismissed the applicants' appeal on the ground that there had not been a breach of their fundamental rights.

42. The relevant extract of that decision reads as follows:

“1. The decisions that are the subject of this appeal are contrary neither to Article 14 of the Basic Law nor to the principles of protection from retrospective laws, which in that provision has an autonomous meaning ...

(a) The rules under section 233(11), paragraph 3, first sentence, taken together with section 233(12), paragraph 2, no. 2, letter (c), and paragraph 3 of the Introductory Act to the Civil Code, which were applied by the civil courts, are compatible with the right of property enshrined in Article 14 of the Basic Law.

(aa) According to the undisputed and not manifestly unconstitutional finding of the Court of Appeal, title to land acquired under the land reform in the Soviet Occupied Zone and the German Democratic Republic could pass to the owner's heirs. That is how, under inheritance law, the appellants acquired title to the land in question. Although their rights were initially subject to the restrictions set out in Article VI, no. 1, of Decree no. 19 of 5 September 1945 on the land reform in the *Land* of Mecklenburg-West Pomerania ... and the various Change of Possession Decrees, those restrictions were subsequently lifted when the Law of 6 March 1990 came into force. It can therefore be assumed, as it was by the Court of Appeal, that from then on title to property acquired under the land reform conferred full ownership and as such fell within the scope of the Basic Law, including in those cases where it had passed to the heirs [*Alterbfälle*], that is, in cases where the owner originally registered in the land register had died before 16 March 1990.

(bb) Section 233(11), paragraph 3, first sentence, taken together with section 233(12), paragraph 2, no. 2, letter (c), and paragraph 3 of the Introductory Act to the Civil Code has the effect of depriving the owners of land acquired under the land reform of their title to the land. That does not mean, however, that the land is expropriated within the meaning of Article 14 § 3 of the Basic Law. Expropriation is the taking by the State of an individual's property. It fully or partially deprives individuals of their personal and actual legal title guaranteed by Article 14 § 1 of the Basic Law, in order to achieve specific public aims ... Section 233(11) to (16) of the Introductory Act to the Civil Code is designed to remedy *ex post facto* the repeal without transitional provisions [*ersatzlose Aufhebung*] of the change of possession provisions [*Besitzwechselfvorschriften*] implemented by the Law of 6 March 1990 and to clarify the position regarding title to land acquired under the land reform ... The provisions of section 233(11), paragraph 3, first sentence, taken in conjunction with section 233(12), paragraph 2, no. 2, letter (c), and paragraph 3 being indirectly challenged here are part of this idea of regularisation [*ist Teil dieses Regelungskonzepts*] and thus amount to rules establishing the substance and limits of

ownership (of land), within the meaning of Article 14 § 1, second sentence, of the Basic Law.

(cc) In order to accomplish the task required of it under the said provision, the legislature has to take account of both the legal position of the owner and the requirements of the system of socially fair ownership under Article 14 § 2 of the Basic Law. It also has to strike a fair balance [*gerechter Ausgleich*] and proportionate relationship [*ausgewogenes Verhältnis*] between the legitimate interests of the persons concerned. Unilateral favourable or unfavourable treatment of some rather than others would not be in keeping with the constitutional foundations of a socially just system of private property ...

In exercising its legislative power under Article 14 § 1, second sentence, of the Basic Law, the legislature can also, in certain circumstances, nullify existing legal positions protected by a property safeguard when undertaking a general reform of a particular legal area ... Moreover, fundamental changes in the economic and social situation can broaden its margin of manoeuvre when creating new legislation. The legislature can also, in enacting provisions on the basis of Article 14 § 1, second sentence, of the Basic Law, take account of the difficulties caused by the transition from the socialist legal order and its property regime, including the legal positions subsequently acquired, to the legal system of the Federal Republic of Germany and to the fact that such a transition cannot be implemented overnight. This will have implications for the interpretation of a particular law. Individual provisions imposing a burden cannot be examined in isolation regardless of their legislative context, or without regard to the fact that the desired legal position can only be put in place step by step ...

(dd) Judged in the light of those criteria, the rules under section 233(11), paragraph 3, first sentence, taken together with section 233(12), paragraph 2, no. 2, letter (c), and paragraph 3 of the Introductory Act to the Civil Code are compatible with Article 14 § 1 of the Basic Law.

(aaa) The provisions complained of pursue a legitimate aim.

According to the legal reasoning of the Federal Court of Justice, which was adopted by the Court of Appeal in the original proceedings, section 233(11), paragraph 3, first sentence, taken together with section 233(12), paragraph 2, no. 2, letter (c), and paragraph 3 of the Introductory Act to the Civil Code remedies a hidden legislative loophole in the Law of 6 March 1990 regarding the inheritance of title to property acquired under the land reform, which is at the heart of the instant case. In theory, this finding binds the Federal Constitutional Court. Like the establishment and assessment of the facts relevant to the decision, the interpretation and application of the law of another State are matters for the jurisdiction of the ordinary courts. Only under certain conditions does the Federal Constitutional Court have corrective power in that regard. Those conditions would only be met here if the assessment of the law of the German Democratic Republic relating to a hidden loophole in the Law of 6 March 1990, which forms the basis of the Court of Appeal's judgment, had breached Article 3 § 1 of the Basic Law ... in so far as it prohibits arbitrariness ... This is not the case, however.

In the light of the relevant statutory provisions, the Federal Court of Justice established that the deliberations in the People's Chamber [*Volkskammer*] on 6 March 1990 were designed to prepare the German Democratic Republic's statutory agricultural regime for adjustment to a social market-economy orientated agriculture.

It noted in that connection that priority had been given to amending the Agricultural Cooperatives Act. At the same time, however, the restrictions on the disposal of land acquired under the land reform were also to be lifted and inheritance rights guaranteed in the future. In doing so, the People's Chamber apparently did not realise that the repeal (deemed necessary for that purpose) of the Change of Possession Decrees without any transitional provisions for those transfers and returns that had not been implemented also extended to cases where title to property acquired under the land reform had passed to the owner's heirs. The Federal Court of Justice found that simply transferring title to land used for agricultural purposes to the heirs of beneficiaries who had died, even where the heirs in question did not live in the German Democratic Republic or did not work in the agricultural sector ... did not contribute to the adjustment of a State agricultural system to a market one.

That reasoning is understandable [*nachvollziehbar*] and does not in any way support the assumption that the assessment of the Federal Court of Justice – and therefore of the Court of Appeal – was based on considerations that were irrelevant to the facts of the case and thus breached the prohibition on arbitrariness contained in the Basic Law. It is not for the Federal Constitutional Court to decide whether the drafting history of the Law of 6 March 1990 and legal development in the territory that subsequently acceded to the Federal Republic up until reunification indicate that it was the legislature's intention to repeal – without any transitional provisions, including for cases where land acquired under the land reform had passed to the owner's heirs – the restrictions on the disposal of title to land acquired under the land reform and the Change of Possession Decrees.

(bbb) Nor is the manner in which the legislative loophole identified by the Federal Court of Justice was remedied by the provisions in question open to criticism from the point of view of compatibility with the Basic Law. It leads, against the background of the former decrees of the German Democratic Republic on changes of possession, to an appropriate system of ownership reflecting the factual situation and one that is, moreover, acceptable to the interested parties and clarifies the position for the future.

1. Article 4 § 1 of the Change of Possession Decree of 7 August 1975, in the version set out in the Decree of 7 January 1988, provided that, on the request of an heir to land acquired under the land reform, the district council was to transfer the rights and obligations relating to the use of the land to the heir or to a member of his family designated by him, with the proviso that the heir or the member of his family concerned use the land for agricultural purposes as a member of a cooperative or as a labourer. Where there were several heirs, they had to inform the district council promptly to which heir or other member of their family the rights and obligations associated with farming the land should be transferred. If the conditions for transfer were not satisfied, the land would return to the pool of State-owned property, in accordance with Article 4 § 5 of the decree.

2. By enacting section 233(11), paragraph 3, first sentence, taken together with section 233(12) of the Introductory Act to the Civil Code, the parliament of reunified Germany transposed these legal principles wholesale. The parties have therefore been placed in the situation that they would have been in if the Change of Possession Decrees had been properly applied and implemented by the authorities of the German Democratic Republic prior to the entry into force of the Law of 6 March 1990 or if, before reunification, the legislature of the German Democratic Republic had enacted transitional provisions akin to the rules previously governing changes of possession. The provisions complained of, as the Court of Appeal rightly held, moreover, did not destroy the legitimate confidence [*schutzwürdiges Vertrauen*] of the heirs of owners of land acquired under the land reform.

It was not generally possible to have confidence in the continued application of the laws of the German Democratic Republic at the time of the change of regime [*Wende*], given the possible reunification of the two German States. Such confidence would have been justified only if there were special reasons for believing that the law of the German Democratic Republic would exceptionally remain in force ... The expectation that property ownership acquired prior to the entry into force of the Basic Law in the territory that had acceded to the Federal Republic would in principle be recognised could not be as extensively protected as the expectation that the rights acquired by virtue of the Basic Law would be maintained. In any event, the only factor to be taken into consideration for the protection of this expectation is the factual and legal position the German federal legislature found to obtain in the German Democratic Republic when it ceased to exist as a State and which, in the course of reunification, was so to speak transposed as a legal element into the sphere of application of the Basic Law ...

Consequently, the heirs of the owners of land acquired under the land reform could no longer legitimately expect to maintain the title they had acquired by virtue of the failure to implement the Change of Possession Decrees enacted at the time of the German Democratic Republic. Nor did the transition, in terms of both the general and the constitutional law, of the German Democratic Republic to a legal order protecting private property offer particular grounds for expecting that, where land acquired under the land reform passed to the owner's heirs, title to the land – described in the law in question as full ownership – would be maintained. Once transition had been achieved, only ownership of private property knowingly and intentionally conferred on an individual was to be protected. This was not the case regarding the ownership of land that had been acquired under the land reform and subsequently inherited from the owners, since, as observed by the Federal Court of Justice, there was a hidden legislative loophole in the Law of 6 March 1990. It therefore has to be assumed that the legislature of the German Democratic Republic would itself have enacted analogous provisions to those by which the land became State-owned property again if it had been aware of the factual and legal position regarding cases where there were no heirs satisfying the conditions by which the rights and obligations governing use of the land could be transferred to them.

In these circumstances, the legislature of reunified Germany was justified in compensating, comprehensively, for provisions that had been overlooked at the material time. The fact that it did not remedy this loophole when the Unification Treaty was signed does not justify a legitimate expectation that the legal position created by the Law of 6 March 1990 would be maintained. Having regard to the multiplicity and complexity of the tasks that had to be undertaken in connection with reunification, the authors of the Unification Treaty were not in a position to enact in a single stroke of the pen, as it were, and in a definitively satisfactory manner, all the rules necessary to ensure the smooth adjustment of the law of the German Democratic Republic to that of the Federal Republic of Germany ... Thus all persons subject to the jurisdiction of the courts had to expect that legal positions initially transferred as they stood would be modified and clarified by the reunified German legislature once it had ascertained the scope of the laws enacted by the German Democratic Republic.

The same also applies to ownership of land acquired under the land reform, which the legislature of the German Democratic Republic had transformed into full ownership when privatising the agricultural system.”

3. *The fifth applicant*

43. The fifth applicant had inherited land in the *Land* of Brandenburg in 1986.

44. From 1968 to 1979, she had been a member of an agricultural cooperative in the GDR. From 1 January 1980, she had worked as a cleaner at the Ministry of National Security (*Ministerium für Staatssicherheit*) in the GDR. After the dissolution of the GDR, she had been a member of the National People's Army until 31 December 1990.

45. Prior to German reunification, the town of Frankfurt an der Oder had opened a leisure centre called the Helensee on the applicant's land. After reunification, the town had leased the leisure centre to a managing company. The applicant had accordingly been paid 60,000 German marks (DEM) in rent paid to the town in error.

46. From 30 November 1991, the applicant had been registered in the land register as the owner of the land. On 3 September 1996 she signed a lease with the managing company of the leisure park for an annual rent of DEM 12,000.

47. On 28 July 1995 the *Land* of Brandenburg requested that the land be transferred into its name on the ground that it had superior title to it under section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code (see paragraphs 67-69 below).

48. In a judgment of 16 July 1997, the Frankfurt an der Oder Regional Court ordered the applicant to transfer her land on the ground that, on 15 March 1990, she had not been carrying on an activity in the agriculture, forestry or food-industry sectors. It also ordered her to pay the *Land* of Brandenburg DEM 60,000 plus interest at the annual rate of 4% from 24 January 1997.

49. This judgment was upheld on 10 June 1998 by the *Land* of Brandenburg Court of Appeal, which held, among other things, that the mere fact that the applicant had technically always been a member of an agricultural cooperative, even after starting her job at the Ministry of National Security, did not suffice to give her valid title to the land in question. Moreover, referring to the decisions of the Federal Constitutional Court of 17 June 1996 and 4 October 1995, the Court of Appeal held that section 233(11) did not infringe the right of property or the principle that laws could not apply retrospectively even if the “new farmer” had paid a certain sum on being allotted his or her land under the land reform.

50. In a decision of 15 July 1999, the Federal Court of Justice allowed an appeal on points of law by the applicant regarding the amount she had been ordered to pay and dismissed the remainder of the appeal.

51. In a judgment of 4 February 2000, the Federal Court of Justice remitted the case to the Court of Appeal regarding the first point, on the ground that the applicant had been justified in keeping the compensation for loss of enjoyment (*Nutzungsentschädigung*) that she had received from the

town of Frankfurt an der Oder prior to 22 July 1992.

52. In a judgment of 26 July 2000, the Brandenburg Court of Appeal ordered the applicant to repay an aggregate amount of DEM 27,000.

53. The applicant lodged a constitutional appeal with the Federal Constitutional Court, relying on a breach of her rights of property and inheritance, of the principle that laws could not apply retrospectively, and of the principle of equality. In her submission, there had been no constitutional justification for interfering with her right of property without paying her compensation, and the interference had been neither proportionate nor necessary.

54. In a leading decision of 25 October 2000, the Federal Constitutional Court dismissed the applicant's appeal on the ground that there had not been a breach of her fundamental rights (see paragraph 72 below).

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Law and practice in force in the GDR at the material time

1. The Land Reform Decrees of 1945

55. The Land Reform Decrees of 1945 constituted the statutory basis of the land reform and imposed restrictions on the disposal of land acquired under the land reform. They provided, among other things, that land acquired under the land reform could not be divided up, sold, leased or seized and that part of the harvest had to be handed over to the State.

In certain exceptional cases, the land could be divided up and leased, however, if the local administrative authorities agreed. The certificates of allotment described the land as “private property capable of passing to the owner's heirs”.

56. The decrees stipulated that certain portions of the land had to be used for agricultural purposes in order to provide sufficient food for the population.

2. The 1951, 1975 and 1988 Change of Possession Decrees

57. The Change of Possession Decrees of 21 June 1951, 7 August 1975 and 7 January 1988 dealt with cases where land was returned to the pool of State-owned land or authorisation was obtained to assign it to third parties, with the proviso that the latter undertook to use it for agricultural purposes.

58. As the applicants had inherited their property in the GDR in 1976, 1978 and 1986 respectively, it was the decree of 7 August 1975 on changes of possession, in the version of the decree of 7 January 1988, that was applicable.

59. The relevant extracts of this decree read as follows:

Article 1

“Land redistributed under the land reform may be transferred through a change of possession to members of an agricultural cooperative or to persons working in the agriculture, forestry or food-industry sectors ...”

Article 4

“1. Where he falls into the category of persons referred to in Article 1 and is in a position to use the land in accordance with the prescribed purpose [*zweckentsprechend*], an heir shall assume the rights and obligations pertaining to land acquired under the land reform.

...

3. If the conditions for transfer of the right of use of land acquired under the land reform are not satisfied, the land in question shall be returned to the pool of State-owned land.”

60. Often, however, these transfers were not effected and entered in the land register in practice, with the result that discrepancies arose between the persons actually farming the land and the persons registered as owners in the land register.

3. The Law of 6 March 1990 on the rights of owners of land redistributed under the land reform – the “Modrow Law”

61. The Law of 6 March 1990 on the rights of owners of land redistributed under the land reform, which came into force on 16 March 1990, lifted all restrictions on the disposal of that land.

The Law provided:

Section 1

“As regards the right of possession [*Besitz*], use [*Nutzung*] or disposal [*Verfügung*] of land acquired under the land reform, the provisions [*Bestimmungen*] of the Civil Code of 19 June 1975 of the German Democratic Republic ... shall apply. The contrary restrictions on disposal contained in [other] legal provisions [*Rechtsbestimmungen*] are hereby lifted.”

Section 2

“(1) The Decree of 15 December 1977 on land transactions [*Grundstücksverkehrsordnung*] ..., in the version set out in the Decree of 14 December 1988 on the adaptation of the provisions relating to the remedies available to citizens and the determination of jurisdiction to review administrative decisions [*Verordnung zur Anpassung von Regelungen über Rechtsmittel der Bürger und zur Festlegung der gerichtlichen Zuständigkeit für die Nachprüfung von Verwaltungsentscheidungen*], shall apply to transactions concerning the land referred to in section 1.

(2) As regards the protection of the use of agricultural and forestry land [*Nutzung des land- und forstwirtschaftlichen Bodens*], the Decree of 26 February 1981 ... on the use of land [*Bodennutzungsverordnung*] shall apply.

Section 3

“(1) This Law shall come into force on the date of publication.

(2) On that date the following instruments shall be repealed:

(i) the Decree of 7 August 1975 on implementation of the changes in possession of land acquired under the land reform [*Verordnung über die Durchführung des Besitzwechsels bei Bodenreformgrundstücken*] ...; and

(ii) the second Decree of 7 January 1988 on implementation of the changes in possession of land acquired under the land reform.”

B. The treaties and declarations concerning German unity

1. *The State Treaty between the FRG and the GDR on the Creation of an Economic, Currency and Social Union*

62. Article 1 of the State Treaty between the FRG and the GDR on the Creation of an Economic, Currency and Social Union (*Staatsvertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*) of 18 May 1990 refers to a social market economy (*soziale Marktwirtschaft*) and to the protection of the right of property.

2. *The Joint Declaration of the FRG and the GDR on the Resolution of Outstanding Property Issues*

63. During the negotiations on German reunification between the governments of the FRG and the GDR and the four former occupying powers (France, the United Kingdom, the United States and the Soviet Union), the two German governments issued on 15 June 1990 a Joint Declaration on the Resolution of Outstanding Property Issues (*Gemeinsame Erklärung der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen*), which became an integral part of the German Unification Treaty (*Einigungsvertrag*) of 31 August 1990.

64. In the Joint Declaration, the two German governments indicated that, in their attempt to resolve the property issues in question, they had had to establish a socially acceptable balance (*sozial verträglicher Ausgleich*) between competing interests, having regard to the principles of legal certainty and clarity and to the protection of property rights.

C. Law and practice in force in the FRG

1. *The second Property Rights Amendment Act of 14 July 1992*

65. On 14 July 1992 the FRG legislature enacted the second Property Rights Amendment Act on the liquidation of the land reform in the *Länder* of the former GDR. It came into force on 22 July 1992.

66. When passing that Act, the legislature inserted subsections (11) to (16) into section 233 of the Introductory Act to the Civil Code on the basis of the principles formerly set out in the Land Reform Decrees and the Change of Possession Decrees.

67. Section 233(11), paragraph 3, of the Introductory Act to the Civil Code provides that land acquired under the land reform will, in theory, pass to the registered owner's heirs unless there are persons or institutions having “superior title” (*bessere Berechtigung*) to it under section 233(12).

Such persons or institutions with superior title can request that the land be assigned to them without compensation.

68. Section 233(12) makes a distinction in respect of persons or institutions with superior title to that of heirs to the land, according to whether the owner registered in the land register was dead or alive when the GDR Law of 6 March 1990 on owners' rights came into force.

Thus, if the owner registered in the land register was still alive on 16 March 1990, the persons having superior title are those to whom the land had been formally allotted in accordance with the Land Reform Decrees or the Change of Possession Decrees even if the appropriate details were not entered in the land register.

However, if the owner registered in the land register had died before 15 March 1990, the persons with superior title are:

(a) those to whom the land had been formally allotted in accordance with the Land Reform Decrees or the Change of Possession Decrees, even where there is no corresponding entry in the land register;

(b) the heir of the last owner registered in the land register, on condition that he or she satisfies the conditions of allocation (*zuteilungsfähig*), that is, carried on an activity in the agricultural, forestry or food-industry sectors (see paragraph 69 below);

(c) the tax authorities of the *Land* in which the property is situated.

69. Section 233(12), paragraph 3, provides that the only persons who can inherit land acquired under the land reform are those who on 15 March 1990 were carrying on an activity in the agriculture, forestry or food-industry sectors in the GDR or had carried on an activity in one of those sectors during the previous ten years. If this is not the case, title to the land in question vests in the tax authorities of the *Land* in which it is situated. The case-law has subsequently extended this obligation to require the person to have also been a member of an agricultural cooperative in the

GDR (Reports of the decisions and judgments of the Federal Court of Justice in civil cases, vol. 136, p. 283).

2. Case-law of the Federal Court of Justice and Federal Constitutional Court

70. In a judgment of 4 October 1995, the Federal Constitutional Court held that these provisions were compatible with the Basic Law, as at the time of the GDR land acquired under the land reform had not passed to the owner's heirs in accordance with the general principles of civil law, but had from the outset been subject to special rules.

71. In a leading judgment of 17 December 1998 (*Rechtspfleger* 1999, pp. 222 et seq.), the Federal Court of Justice indicated for the first time that on the death of a person who had acquired land under the land reform, title to the land could pass to their heirs. It added that section 233(11-16) of the Introductory Act to the Civil Code was nevertheless compatible with the Basic Law. The legislature had thereby intended to remedy the loopholes in the GDR Law of 6 March 1990, which had failed to take account of the fact that very often the GDR authorities had in practice failed to ensure that the land was returned to the pool of State-owned land and to amend the entries in the land register in accordance with the principles set out in the Land Reform Decrees and Change of Possession Decrees.

72. Similarly, in two leading decisions of 6 and 25 October 2000 (1 BvR 1637/99 and 1 BvR 2062/99), the Federal Constitutional Court also held that section 233(11-16) of the Introductory Act to the Civil Code was compatible with the Basic Law even if it had now been established that land acquired under the land reform could pass to the owner's heirs.

D. Statistical information provided by the parties

1. Cases in which land acquired under the land reform was returned to the pool of State-owned land in the GDR

73. According to the figures submitted by the Government for the *Land* of Mecklenburg-West Pomerania, in approximately 80,000 cases land acquired under the land reform had been returned to the pool of State-owned land in the GDR before 1990.

74. The applicants disputed those figures, considering that the land in question had probably been voluntarily returned.

They pointed out that for the whole of the GDR, between 1946 and 1952, approximately 80,000 parcels of land had been voluntarily returned to the pool of State-owned land on account of the difficulties in farming the land after the war (W. Bell, "Expropriations in the GDR farming industry after 1949 and the corresponding political reasons" – *Enteignungen in der Landwirtschaft der DDR nach 1949 und deren politische Gründe*, 1992).

2. *Consequences of the 1992 legislation*

75. According to the figures submitted by the Government – also for the *Land* of Mecklenburg-West Pomerania – in 41,000 cases heirs to land acquired under the land reform had been able to keep their land; in 3,300 cases, in the absence of any heirs, the *Land* had recovered it; and in 4,400 cases the *Land* had requested reassignment of the land of heirs who did not satisfy the conditions of allocation.

76. The applicants disputed those figures, submitting that, in all, between 50,000 and 70,000 persons who had inherited land acquired under the land reform had already been expropriated without compensation in favour of the tax authorities of the *Länder*.

They indicated, by way of example, that the *Land* of Saxony-Anhalt had obtained the reassignment of land from heirs in 17,288 cases extrajudicially and in 677 cases through the courts; the *Land* of Brandenburg, for its part, had requested the reassignment of land from heirs in 14,500 cases extrajudicially and in 3,542 cases through the courts.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

77. In the applicants' submission, the obligation on them to reassign their land to the tax authorities without compensation, in accordance with section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code of the FRG, infringed their right to the peaceful enjoyment of their possessions guaranteed by Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. **Whether there was an interference with the right of property**

78. As it has stated on several occasions, the Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules: “the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second

rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, *inter alia*, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which partly reiterates the terms of the Court's reasoning in *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56; *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II; and *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I).

79. The Court notes that the Government did not contest the opinion of the Chamber, which, in its judgment of 22 January 2004 (at paragraphs 65-70), had found that there had been a deprivation of property in the instant case within the meaning of the second sentence of Article 1 of Protocol No. 1.

80. The Court agrees with the Chamber's analysis on this point. It now has to determine whether the interference complained of was justified under that provision.

B. Justification for the interference with the right of property

1. "Provided for by law"

81. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the law upon which the interference is based should be in accordance with the domestic law of the Contracting State, including the relevant provisions of the Constitution (see *The former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

82. The applicants submitted that the interference had not been in accordance with the law since, in 1992, the German legislature had wrongly assumed that land acquired under the land reform in the GDR could not pass to the owner's heirs. That was why the second Property Rights Amendment Act of 14 July 1992 had first allocated title to the property to the applicants

and subsequently withdrawn it from them in favour of the tax authorities. The applicants had already been the owners of the land, however, having inherited it in the GDR, and while the legislature could not award them a property right which was theirs already, it could not validly withdraw it from them either.

83. In the Government's submission, the interference had been in accordance with the law. They referred to the Chamber's reasoning on this point.

84. The Court notes that in the instant case the measure complained of was based on section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code in the version of the second Property Rights Amendment Act of 14 July 1992 (see paragraphs 65-69 above). That section contains very clear provisions governing the order in which land acquired under the land reform is to be allocated and the conditions that must be satisfied by the heirs in order to keep it. The German legislature sought to remedy the loopholes in the Modrow Law by specifying that, in accordance with the Change of Possession Decrees in the GDR, only persons who had worked in the agricultural sector, among others, and were members of an agricultural cooperative could inherit that land (see paragraphs 57-59 above).

85. The German courts subsequently ordered the applicants to reassign their land to the tax authorities pursuant to those provisions, and the Federal Constitutional Court held, in its decisions of 6 and 25 October 2000, that the provisions were compatible with the Basic Law (see paragraphs 41-42 and 54 above).

86. The Court does not consider this interpretation to have been arbitrary. It reiterates in that connection that it is in the first place for the domestic authorities, notably the courts, to interpret and apply the domestic law and to decide on issues of constitutionality (see, among many other authorities, *Wittek v. Germany*, no. 37290/97, § 49, ECHR 2002-X; *Forrer-Niedenthal v. Germany*, no. 47316/99, § 39, 20 February 2003; and *The former King of Greece and Others*, cited above, § 82).

87. Like the Chamber (at paragraphs 71-76 of its judgment), the Court therefore concludes that the deprivation of property was provided for by law, as required by Article 1 of Protocol No. 1.

2. "In the public interest"

88. The Court must now determine whether this deprivation of property pursued a legitimate aim, that is, whether it was "in the public interest", within the meaning of the second rule under Article 1 of Protocol No. 1.

89. In the applicants' submission, the interference in question did not pursue a legitimate aim, since in 1992 the German legislature had not realised that they already had a property right, and the Federal Court of Justice still acknowledged today that the second Property Rights

Amendment Act was based on the theory that land acquired under the land reform did not pass to the owner's heirs.

The applicants also complained that the legislature had sought to reactivate the former socialist law in force at the time of the GDR, and had made matters worse by preventing the applicants from taking measures that would have enabled them to keep their property. In reality, the State had simply sought to take the land without compensating the heirs affected by the measure.

90. The Government contended that the interference in question pursued an aim in the public interest, which was to clarify the position regarding ownership of land that had been acquired under the land reform. To that end, the German legislature had had to remedy the loopholes and correct the injustices of the Modrow Law, which had failed to take account of the fact that very often the GDR authorities had not applied their own rules correctly. At the time, only persons actually working in the agricultural sector could inherit the land, failing which it was to return to the pool of State-owned land. The failure of the legislature to intervene after German reunification had, they argued, created a blatantly unfair situation in relation to heirs who had had to return their land at the time.

91. The Court is of the opinion that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

Furthermore, the notion of “public interest” is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation (see *James and Others*, cited above, p. 32, § 46; *The former King of Greece and Others*, cited above, § 87; and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67 *in fine*, ECHR 2002-IX). The same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy.

92. Agreeing as it does with the Chamber's opinion on that point (see paragraphs 80-81 of the Chamber's judgment), the Court has no reason to doubt that the German legislature's determination to settle the property matters arising from the land reform and correct the – in its view unfair – effects of the Modrow Law was “in the public interest”.

3. Proportionality of the interference

(a) Recapitulation of the relevant principles

93. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth*, cited above, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38).

In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Zvolský and Zvolská*, cited above, § 69).

94. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *The Holy Monasteries*, cited above, p. 35, § 71; *The former King of Greece and Others*, cited above, § 89; and *Zvolský and Zvolská*, cited above, § 70).

95. In the instant case, the second Property Rights Amendment Act of 14 July 1992 does not provide for any form of compensation for the applicants. As it has already been established that the interference in question satisfied the condition of lawfulness and was not arbitrary, the lack of compensation does not of itself make the State's taking of the applicants' property unlawful (see, *mutatis mutandis*, *The former King of Greece and Others*, cited above, § 90, and *Zvolský and Zvolská*, cited above, § 71). Accordingly, it remains to be determined whether, in the context of a lawful

deprivation of property, the applicants had to bear a disproportionate and excessive burden.

(b) The Chamber's judgment

96. In its judgment of 22 January 2004, the Chamber held as follows:

“91. In the instant case, if the German legislature's intention was to correct *ex post facto* the – in its opinion unjust – effects of the Modrow Law by passing a new law two years later, this did not pose a problem in itself. The problem was the content of the new law. In the Court's view, in order to comply with the principle of proportionality, the German legislature could not deprive the applicants of their property for the benefit of the State without making provision for them to be adequately compensated. In the present case, the applicants evidently did not receive any compensation at all, however.

...

93. Having regard to all these factors, the Court concludes that, even if the circumstances pertaining to German reunification have to be regarded as exceptional, the lack of any compensation for the State's taking of the applicants' property upsets, to the applicants' detriment, the fair balance that has to be struck between the protection of property and the requirements of the general interest.

There has, therefore, been a violation of Article 1 of Protocol No. 1.”

(c) The parties' submissions

97. The applicants asked the Court to confirm the Chamber's judgment, submitting that the deprivation of property they had suffered was manifestly disproportionate since it had been carried out without compensation, for the benefit of the tax authorities, and had been totally unjustified.

At the time of the GDR, as the heirs of owners of land acquired under the land reform, they had been the lawful owners of that land, regardless of the entries in the land register. Furthermore, objectively speaking, there had been no loopholes in the Modrow Law, which had aimed to re-establish the right of property in the true sense of the term for all owners of land acquired under the land reform, including their heirs, and to repeal once and for all (*Schlussstrichgesetz*) the contrary provisions of the GDR. The applicants produced declarations from former senior officials of the GDR, including that of the former prime minister and author of the Law, Mr Hans Modrow, in support of their submission. Lastly, the creation of a right of property in the GDR such as existed in market economy systems had even been one of the conditions required by the FRG with a view to achieving German reunification. After the first free elections of 18 March 1990, the GDR parliament, under Mr de Maizière's government, had approved the Modrow Law, as had happened after German reunification under Mr Kohl's government. The GDR, for its part, had always stressed the need to preserve the rights of owners of land acquired under the land reform.

In 1992 the German legislature, by arbitrarily depriving the applicants of their inheritance, had sought to establish “equality in injustice” (*Gleichheit*

im Unrecht) by applying a policy that went even further than the one implemented at the time by the GDR authorities and was unworthy of a State governed by the rule of law.

The applicants accordingly maintained that they had been the victims of an unprecedented attack on private property, and pointed out that to date the Court had never found that the circumstances had been exceptional to the point of justifying a deprivation of property without compensation. They referred to *The Holy Monasteries* and *The former King of Greece and Others*, cited above, and *Broniowski v. Poland* ([GC], no. 31443/96, ECHR 2004-V) in support of that submission.

98. The Government, on the other hand, contested the Chamber's conclusion on this point, arguing that in exceptional circumstances resulting from a change of regime it might be justifiable not to pay compensation when devising a comprehensive solution to property issues. They referred, *inter alia*, to *Zvolský and Zvolská*, cited above, in that connection.

They observed that in the GDR the applicants, as heirs of the owners of land redistributed under the land reform, had not acquired a property right in the true sense of the term, but merely a right of usufruct. Under the Change of Possession Decrees, their land should have reverted to the pool of State-owned land without compensation if the heirs were not themselves farming the land. The fact that the GDR authorities had often failed to ensure that the land returned to the pool and to amend the entries in the land register in accordance with the principles laid down in those decrees did not give the applicants a right to keep their land. Even if they had acquired a formal title to the property, the applicants could not expect to maintain their legal position (*Fortbestand ihrer Rechtsposition*) and could not rely on the principle of “protection of legitimate confidence” (*schutzwürdiges Vertrauen*) in that regard. The real purpose of the Modrow Law had been to ensure, as a matter of priority, that the land was used for agricultural purposes and to allow farmers, and not heirs to the land who were not themselves farming it, to become owners in the true sense of the word so that they could be integrated into the free market economy.

The Government referred to *James and Others* (judgment cited above, and opinion of the Commission, p. 71) and submitted that, for reasons of social justice, the legislature had had to correct the Modrow Law, which had been passed in the particular circumstances of the GDR by a parliament that had not been democratically elected, without making provision for the payment of compensation.

(d) The Court's assessment

99. In order to be able to judge, in the light of the principles set out in paragraphs 93 to 95 above, whether the “fair balance” between the protection of the right of property and the public interest has been respected, the Court considers it useful to reiterate certain special features of the present case and, in particular, the historical context in which it arose.

(i) The nature of the right of the “new farmers” and their heirs in the context of the land reform in the GDR

100. The aim of the land reform, which was implemented from 1945 in the Soviet Occupied Zone of Germany and continued after 1949 in the GDR, was not only to distribute the land to farmers, who were then called “new farmers”, but also to ensure that the land thus distributed was farmed under the State's control. It is true that the certificates of allotment described the land as “private property capable of passing to the owner's heirs” (see paragraph 55 above), and that, in its leading judgment of 17 December 1998, the Federal Court of Justice confirmed that it could pass to the owner's heirs (see paragraph 71 above).

101. Nevertheless, the right of the new farmers in the GDR cannot be classified as a property right such as existed at the time under democratic, market economy regimes. Being, as it was, a reflection of the collectivist system of property rights that characterised the former communist countries, land acquired under the land reform was subject to substantial restrictions on disposal under the Land Reform Decrees of 1945 and the Change of Possession Decrees of 1951, 1975 and 1988 (see paragraphs 55-59 above).

102. The initial aim of the land reform, which was the agricultural use of the land in question, also explains why the heirs to the land could not validly keep it unless they themselves were working the land or were members of an agricultural cooperative. If they were not, the land was either allocated to persons with superior title or had to be returned to a pool of State-owned land (see paragraphs 57-59 above).

103. It appears to be established that, although in many cases the land was, in practice, returned to the pool of State-owned land (see paragraphs 73-74 above), the GDR authorities did sometimes, often out of indifference since the land was in any event generally managed by agricultural cooperatives, omit to effect these transfers and enter them in the land register.

104. The result of this is that if the GDR authorities had consistently applied the rules in force at the time, the applicants, who were not farming the land themselves and were not members of an agricultural cooperative, would not have been in a position to keep it.

(ii) The nature of the applicants' right after the entry into force of the Modrow Law

105. During the transitional period and the negotiations between the two German States and the four former occupying powers that began after the fall of the Berlin Wall on 9 November 1989, the GDR parliament enacted the Law of 6 March 1990 on the rights of owners of land redistributed under the land reform – the Modrow Law – which came into force on 16 March 1990, two days before the first free elections of 18 March 1990. That Law lifted all restrictions on the disposal of land that had been acquired under the land reform, thereby transforming the property titles acquired under the reform into “full ownership [that] as such fell within the scope of the Basic

Law, including in those cases where it had passed to the heirs, that is, in cases where the owner originally registered in the land register had died before 16 March 1990” (see the leading decision of the Federal Constitutional Court of 6 October 2000 – paragraph 42 above).

106. However, it should be noted that the Modrow Law itself (see paragraph 61 above) is very succinct: although it states that the restrictions on disposal are lifted and the Change of Possession Decrees repealed, it does not contain any specific provision regarding the position of the heirs to the land concerned and does not contain any transitional provisions regarding the application of that Law.

Given the lack of any uniform practice in the GDR in this area, the position of heirs who were not themselves farming the land and were not members of an agricultural cooperative, as was the applicants' case, can accordingly be regarded as having been uncertain.

Having regard to those factors, the Federal Constitutional Court's finding (see also the leading decision of 6 October 2000 – paragraph 42 above) that the Modrow Law contained a “hidden legislative loophole” does not appear to be unjustified.

(iii) The reasons for the second Property Rights Amendment Act of 14 July 1992

107. On 14 July 1992, less than two years after German reunification took effect on 3 October 1990, the German legislature sought to correct the effects of the Modrow Law for reasons of fairness and social justice.

108. The main purpose of the second Property Rights Amendment Act of 14 July 1992 (see paragraphs 65-69 above), which was based on the principles set out in the GDR by the Land Reform Decrees and the Change of Possession Decrees, was to place all heirs of land acquired under the land reform in the position they would have been in if those principles had been properly applied at the time. This was to prevent heirs who did not fulfil the conditions for allocation of land from obtaining an unfair advantage over those who, at the time, had had to return the land to the pool of State-owned land because they were not themselves farming the land and were not members of an agricultural cooperative.

(iv) Conclusion

109. The Court notes that it has in the past already been required to rule on whether an intervention by the legislature with a view to reforming the economic sector for reasons of social justice (see *James and Others*, cited above, examined under the second sentence of the first paragraph of Article 1, and concerning the reform of the British system of long leasehold tenure), or to correct the flaws in an earlier law in the public interest (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII, examined under the second paragraph of Article 1, and concerning retrospective tax

legislation) respected the “fair balance” between the relevant interests in the light of Article 1 of Protocol No. 1.

110. Admittedly, there are certain similarities between the instant case and the aforementioned cases in that in 1992 the German legislature had sought to correct the flaws in the Modrow Law for reasons of social justice. It differs from *James and Others* in particular, however, as the second Property Rights Amendment Act does not provide for any compensation whatsoever for the applicants.

111. As the Court has stated above (see paragraph 94), a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.

112. It must therefore examine, in the light of the unique context of German reunification, whether the special circumstances of the case can be regarded as exceptional circumstances justifying the lack of any compensation.

113. In that connection, the Court reiterates that the State has a wide margin of appreciation when passing laws in the context of a change of political and economic regime (see, *inter alia*, *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, and *Zvolský and Zvolská*, cited above, §§ 67-68 and 72). It has also reiterated this point regarding the enactment of laws in the unique context of German reunification (see, most recently, *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111-12, ECHR 2005-V).

114. In its judgment of 22 January 2004, the Chamber found that, in order to comply with the principle of proportionality, the German legislature “could not deprive the applicants of their property for the benefit of the State without making provision for them to be adequately compensated” (see paragraph 91 of the Chamber judgment). The Chamber concluded that “even if the circumstances pertaining to German reunification ha[d] to be regarded as exceptional, the lack of any compensation for the State's taking of the applicants' property upset, to the applicants' detriment, the fair balance that ha[d] to be struck between the protection of property and the requirements of the general interest” (see paragraph 93 of the Chamber judgment).

115. The Court does not share the Chamber's opinion on that point however.

116. Three factors seem to it to be decisive in that connection:

(a) Firstly, the circumstances of the enactment of the Modrow Law, which was passed by a parliament that had not been democratically elected, during a transitional period between two regimes that was inevitably marked by upheavals and uncertainties. In those circumstances, even if the applicants had acquired a formal property title, they could not be sure that their legal position would be maintained, particularly as, in the absence of any reference to heirs in the Modrow Law, the position of those among them who were not farming the land themselves and were not members of

an agricultural cooperative remained precarious even after that Law had come into force.

(b) Secondly, the fairly short period of time that elapsed between German reunification becoming effective and the enactment of the second Property Rights Amendment Act. Having regard to the huge task facing the German legislature when dealing with, among other things, all the complex issues relating to property rights during the transition to a democratic, market economy regime, including those relating to the liquidation of the land reform, the German legislature can be deemed to have intervened within a reasonable time to correct the – in its view unjust – effects of the Modrow Law. It cannot be criticised for having failed to realise the full effect of this Law on the very day on which German reunification took effect.

(c) Thirdly, the reasons for the second Property Rights Amendment Act. In that connection, the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice so that the acquisition of full ownership by the heirs of land acquired under the land reform did not depend on the action or non-action of the GDR authorities at the time (see paragraphs 103-04 above). Likewise, the balancing exercise between the relevant interests carried out by the Federal Constitutional Court, particularly in its leading decision of 6 October 2000, in examining the compatibility of that amending Law with the Basic Law, does not appear to have been arbitrary (see paragraphs 41-42 above). Given the “windfall” from which the applicants undeniably benefited as a result of the Modrow Law under the rules applicable in the GDR to the heirs to land acquired under the land reform, the fact that this correction was made without paying any compensation was not disproportionate (see, *mutatis mutandis*, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, pp. 2353-55, §§ 80-83). It should also be noted in that connection that the second Property Rights Amendment Act did not benefit the State only, but in some cases also provided for the redistribution of land to farmers (see paragraphs 67-69 above).

117. Having regard to all the foregoing considerations and taking account, in particular, of the uncertainty of the legal position of heirs and the grounds of social justice relied on by the German authorities, the Court concludes that in the unique context of German reunification, the lack of any compensation does not upset the “fair balance” that has to be struck between the protection of property and the requirements of the general interest.

There has therefore been no violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

118. The applicants alleged that they had been the victims of discrimination contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

119. The applicants submitted, in particular, that they had been discriminated against compared with three categories of persons: firstly, owners of land acquired under the land reform who had acquired their property as new farmers and were still alive on 15 March 1990; secondly, owners of land who had acquired it *inter vivos* (*lebzeitiger Eigentumserwerb*) before 15 March 1990; and, lastly, persons who had inherited the land between 16 March 1990 and 2 October 1990.

Such a difference in treatment was not justified, and the entire legal structure of 1992 was based on a complete misapprehension of the position in the GDR and particularly the fact that land acquired under the land reform could pass to the owner's heirs.

Moreover, the applicants could no longer become members of an agricultural cooperative – the deadline for this being 15 March 1990 – although the German legislature had retrospectively imposed this as a condition on 22 July 1992.

120. The Government submitted that, having regard to the purpose of the 1992 Act, the applicants had not been discriminated against compared with any of the three categories of persons to whom they referred.

Firstly, the applicants had clearly not been discriminated against compared with persons who had inherited the land after 15 March 1990, as the correction of the Modrow Law had been necessary only where the GDR had omitted to ensure that the land was returned to the pool of State-owned land and to amend the entries in the land register in accordance with the principles set out in the Land Reform Decrees and the Change of Possession Decrees, which had been the case up until 15 March 1990. Nor had the applicants been discriminated against compared with retired new farmers, who, even if they were no longer active members of an agricultural cooperative, had officially remained members and often lived in buildings situated on land acquired under the land reform and therefore had a legitimate expectation that their rights would be protected. Lastly, the applicants had not been discriminated against compared with persons who had acquired the land *inter vivos* because the applicable rules were different.

121. The Court points out firstly that, as the case falls within the scope of Article 1 of Protocol No. 1, Article 14 of the Convention is also applicable.

122. It then reiterates that a difference of treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences between otherwise similar situations justify a difference in treatment (see, *inter alia*, *James and Others*, cited above, p. 44, § 75, and *Kuna v. Germany* (dec.), no. 52449/99, ECHR 2001-V).

123. The Court notes that in the present case the purpose of the second Property Rights Amendment Act of 14 July 1992 had been to correct the effects of the Modrow Law in order to ensure equality of treatment between heirs to land acquired under the land reform whose land had been allocated to third parties or returned to the pool of State-owned land in the GDR before the Modrow Law came into force on 16 March 1990 and heirs who did not satisfy the conditions for allocation, but in respect of whom the GDR authorities had at the relevant time omitted to effect the transfers and enter them in the land register.

124. Accordingly, there is clear justification for the difference in treatment between the applicants and the persons who had inherited their land after the key date of 15 March 1990. The difference in treatment between the applicants and the retired new farmers who were still alive on that date can be explained by the fact that they officially remained members of agricultural cooperatives. Lastly, the difference in treatment between the applicants and persons who had acquired the land *inter vivos* prior to that key date is also justified because at the time, in the GDR, the *inter vivos* acquisition or transfer of land acquired under the land reform was subject to different rules from those applicable on an inheritance.

125. Having regard to the legitimate aim being pursued in the public interest and to the State's margin of appreciation in the unique context of German reunification, the correction by the legislature in 1992 of the effects of the Modrow Law cannot be considered to have been unreasonable or to have imposed a disproportionate burden on the applicants (see the Court's reasoning under Article 1 of Protocol No. 1 – paragraphs 112-17 above). The provisions of the 1992 Act must therefore be regarded as being based on an objective and reasonable justification.

126. There has therefore not been a breach of the requirements of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been no breach of Article 1 of Protocol No. 1;

2. *Holds* by fifteen votes to two that there has been no breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 June 2005.

Luzius WILDHABER
President

Erik FRIBERGH
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Cabral Barreto;
- (b) partly dissenting opinion of Mr Pavlovski;
- (c) joint dissenting opinion of Mr Costa and Mr Borrego Borrego joined by Mr Ress and Mrs Botoucharova;
- (d) dissenting opinion of Mr Ress.

L.W.
E.F.

PARTLY DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I agree with the majority's finding that there has not been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, but, much to my regret, I cannot share their opinion that there has not been a violation of Article 1 of Protocol No. 1.

Let me explain.

I

I added a partly concurring and partly dissenting opinion to the Chamber judgment, which I would like to set out again here:

“1. I am of the view that there has been a violation of Article 1 of Protocol No. 1 even if I have difficulty in agreeing with the entire reasoning of the judgment.

1.1. The land in question is land that was expropriated in 1945 under the land reform.

Land acquired under the land reform could not be divided up, sold, leased or seized.

Furthermore, when the land was inherited, the relevant district council had to transfer the farming rights and obligations to the heir, who was required to farm the land as a member of a cooperative or as a labourer. If the conditions for transfer were not satisfied, the land became State-owned property again.

The heirs of owners of land acquired under the land reform who were not farming the land could not, prior to the Law of 6 March 1990, register themselves as the owners in the land register.

The Law of 6 March 1990 lifted all the restrictions on disposal of land acquired under the land reform, whereupon those in possession of the land became owners in the true sense of the word.

That Law did not benefit the applicants, however, for the very simple reason that they were not in possession of the land in question on 16 March 1990 when the Law came into force.

1.2. After the Law of 6 March 1990, the applicants succeeded in registering themselves as owners in the land register.

Registration was possible on account of circumstances owing more to mere chance or oversight than legal justification, as the Federal Court of Justice acknowledged.

I would add that the applicants also benefited from the complex and turbulent conditions following the reunification of Germany and from a certain flexibility in the interpretation of the Law of 6 March 1990, which was duly corrected by the FRG legislature in 1992.

As acknowledged by the Federal Constitutional Court, the new Law put the applicants in the position they would have been in if the legislation that had been in force when the Law of 6 March 1990 came into force had been properly applied.

1.3. Despite their lack of justification and legal title, the applicants succeeded in registering themselves in the land register as the owners.

They were thus recognised as the owners by the German authorities and were able to dispose of their property.

I agree that the 1992 Act amounted to an interference with the applicants' position regarding the land in question in that it impaired their legitimate expectation of continuing to be regarded as owners and, accordingly, that there has been a violation of Article 1 of Protocol No. 1.

However, I cannot agree with the following statement in paragraph 86 of the judgment – 'whatever the restrictions on the applicants' right of property at the time might have been, they were clearly lifted by the Modrow Law' – since, as I have tried to explain above, the applicants could not benefit from the Modrow Law because they were neither the owners of the land nor in possession of it when the Law came into force.

I also have difficulty agreeing with the following part of paragraph 90 – 'there is no doubt that they legally acquired full ownership of their land when th[e] [Modrow] Law came into force' – since, to my mind, the Modrow Law did not confer title on anyone, but was limited to lifting the restrictions on the free disposal of the land by those in possession of it, which the applicants were not.

I share the view of the domestic courts (Federal Court of Justice and Federal Constitutional Court) that the 1992 legislature put the applicants in the position they would have been in if the existing legislation had been correctly applied at the time, thus preventing the applicants from obtaining an unjust enrichment.

1.4. It is therefore with the above indications and qualifications that I find a violation of Article 1 of Protocol No. 1.

2. These qualifications regarding my finding a violation of Article 1 of Protocol No. 1 also make me reluctant to agree with certain assertions contained in paragraphs 91 – 'the Court considers that the German legislature should not have deprived the applicants of their property for the benefit of the State without making provision for them to be adequately compensated' – and 93 – 'the lack of any compensation for the State's taking of the applicants' property upsets, to the applicants' detriment, the fair balance that has to be struck between the protection of property and the requirements of the general interest'.

The 1992 legislature corrected a *de facto* situation that had no legal basis. In those circumstances, I question whether it is appropriate to refer to a taking of property and the need to provide adequate compensation.

Accordingly, and it is for this reason that I disagree with the majority, the applicants were able to benefit from the land in question from the time they registered themselves in the land register until they reassigned it to the tax authorities.

The 1992 Act could require the applicants to reassign not only the land, but also the benefit they had had from it.

If that were the case I would agree that the end of the applicants' expectation of continuing to be regarded as the owners justified awarding them just satisfaction in the form of a sum of money.

However, in the present case, and beyond the reimbursement of costs and expenses, it seems to me that a finding of a violation constitutes in itself sufficient just satisfaction for the purposes of Article 41 of the Convention."

II

On re-reading that opinion, I realise that the Court's judgment deals with the concerns that I have already raised and I can therefore unhesitatingly subscribe to the analysis of the nature of the applicants' right after the entry into force of the Law of 6 March 1990.

Nor do I overlook the situation experienced after German reunification, but, despite everything, the applicants were property owners and have been deprived of their possessions.

It remains to be determined whether the total lack of compensation makes the interference disproportionate.

The majority find that the lack of any compensation, in the unique context of German reunification, does not upset the "fair balance that has to be struck between the protection of property and the requirements of the general interest".

It is the settled case-law of the Court, however, that the taking of property without any compensation will result in a violation of Article 1 of Protocol No. 1 "except in exceptional circumstances".

I find it very difficult to speculate generally about the type of "exceptional circumstances" that may justify a total lack of compensation.

In a situation which I consider very similar because it occurred in exceptional circumstances and in the unique context of a brutal change of political regime, during the transition from a monarchy to a republic, in *The former King of Greece and Others v. Greece* ([GC], no. 25701/94, § 99, ECHR 2000-XII), the Court held that "the lack of any compensation for the deprivation of the applicants' property upset, to the detriment of the applicants, the fair balance between the protection of property and the requirements of the public interest".

I can only transpose that reasoning and conclude, as in that judgment, that there has therefore been a violation of Article 1 of Protocol No. 1.

It should not be forgotten that the 1992 Act was passed by a democratically elected German parliament during the post-reunification period, and thus in a unique context, but one that fell far short of exceptional circumstances as serious as those arising out of a shake-up of political regime such as that examined by the Court in the case of *The former King of Greece and Others*.

III

However, I am not impervious to the arguments advanced by the majority in paragraph 116 of the present judgment.

While I am unable to bring myself to find that there has not been a violation, I do consider, for the reasons already expressed in my opinion annexed to the Chamber judgment and reiterated above, that the finding of a violation was sufficient to meet the requirements of Article 41 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE PAVLOVSKI

To my great regret, I am not able to share the majority's view that in the instant case there has been no violation of the applicants' rights protected by Article 1 of Protocol No. 1.

In my opinion, it is quite evident from the material before us that there has been a violation of that provision.

I find it difficult to accept the argumentation relied on both by the Government and the majority in their attempts to show that there has not been a violation of property rights in this case.

“In the public interest”

Both the Government and the majority recognise that before the applicants were expropriated the property in question belonged to them (see paragraphs 79-80 of the judgment).

In their memorial, the Government mention that it is clear from the case-law of the German courts in the applicants' cases that the latter had acquired property. The Chamber came to the conclusion that a deprivation of property within the meaning of the second sentence of Article 1 of Protocol No. 1 had taken place. The federal government does not dispute the view of the Chamber in that respect (see paragraphs 20-21 of the Government's memorial).

German reunification took effect on 3 October 1990 (see paragraph 19 of the judgment), so all legal acts committed by the national authorities of the FRG on the territory of the former GDR after that date are attributable to them.

The first two applicants had inherited land in the *Land* of Saxony-Anhalt in 1976 during the existence of the GDR and had been registered in the land register as the owners of that land since 14 July 1992 (see paragraph 25 of the judgment) by the authorities of the FRG, that is, after reunification had taken place. Only in 1994 was a right of pre-emption in favour of the tax authorities registered in the land register. It follows that the applicants had been the legally recognised owners of the land in question for about eighteen years. For *two of those years* they had been recognised as the legal owners of the land even by the respondent State.

The third and fourth applicants had inherited land in the *Land* of Mecklenburg-West Pomerania in 1978 and had been registered in the land register as the owners of that land since 1996 (see paragraph 34 of the judgment), that is, five years after reunification took place. They had been the legally recognised owners of the land for approximately twenty years, that is to say until the judgment of 29 October 1998 of the Neubrandenburg Regional Court ordered the applicants to transfer their property to the *Land* of Mecklenburg-West Pomerania. For about *four of those years*, like the previous two applicants, they had been recognised as the legal owners by

the authorities of the FRG, which, in confirmation of this recognition, had registered them as landowners in the land register.

The fifth applicant had inherited land in the *Land* of Brandenburg in 1986 and had been registered by the authorities of the FRG in the land register as the owner of the land since 30 November 1991 (see paragraphs 43 and 46 of the judgment). By this act of registration, the authorities of the respondent State had recognised the legal character of the applicant's ownership of the land. The applicant had owned the land until 16 July 1997, when the Frankfurt an der Oder Regional Court ordered the applicant to transfer her land supposedly into the name of the *Land* of Brandenburg. So it is clear to me that the applicant had been a legally recognised landowner for about eleven years, and that for about *six of those years* her ownership had been recognised even by the FRG authorities.

I entirely agree with the Chamber's finding that, after German reunification, the applicants had all been registered in the land register and had, initially, been able to dispose of their property as they wished (see paragraph 68 of the Chamber's judgment of 22 January 2004).

The applicants had been legally recognised landowners for a general period lasting between eleven and twenty years. If account is taken of the period that elapsed after reunification had taken place, they had been recognised as owners for between two and six years, even by the authorities of reunified Germany. After that they were deprived of their property.

Some 50,000 people are in the same situation as the applicants in practical terms (see paragraph 85 of the Chamber judgment). I really fail to see any “public interest” in depriving such a large number of German citizens of their property rights.

Giving their justification for depriving the applicants of their property, the Government, at the stage of the Chamber examination, relied on the following argument:

“... the German legislature had had to remedy the injustices of the Modrow Law, which had failed to take account of the fact that very often the GDR authorities had not applied their own rules correctly. The result had been that many farmers actually farming the land were not registered as the owners in the land register and, conversely, that many heirs who were not themselves farming the land were registered as the owners ...” (paragraph 78 of the Chamber judgment)

In their pleadings before the Grand Chamber, the Government added the following argument:

“... The failure of the legislature to intervene after German reunification had, they argued, created a blatantly unfair situation in relation to heirs who had had to return their land at the time.” (paragraph 90 of the present judgment)

I find it difficult to accept that line of reasoning. It would have been valid had the FRG authorities not recognised the applicants' ownership, but they had. For between two and six years, the applicants had been enjoying the same property rights as every other German citizen, without any restriction.

The Government failed to show that their intentions were genuine. For instance, they did not show that they really needed the land for agricultural purposes or that the expropriated land was distributed to other persons actually farming or that the FRG authorities, as a result of the modification of the legislation, had really granted ownership rights to those who were “farmers actually farming the land [but] were not registered as the owners in the land register” or that the land in question was returned to the original owners dispossessed of the land under the communist regime. Neither am I ready to accept that the “situation in relation to heirs who had had to return their land” could serve as a legal ground for expropriating those whose property rights had been legally recognised by the respondent State.

To sum up, I find the Government's arguments a little bit artificial and adduced with the aim of creating appearances of some sort of justification for massively depriving many German citizens of their property rights, which – in my view – by definition cannot be “in the public interest”. No public interest can justify the deprivation of property rights of those who had been peacefully enjoying their possessions for a great many years – rights which had previously been legally recognised by the expropriator itself.

The “proportionality of the interference”

I entirely agree with the Chamber's findings that an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and whether it imposes a disproportionate burden on the applicants. In order to comply with the principle of proportionality, the German legislature could not deprive the applicants of their property for the benefit of the State without making provision for them to be adequately compensated. In the present case, the applicants did not receive any compensation at all (see paragraphs 82-93 of the Chamber judgment).

At the same time, with the deepest respect to my fellow judges, it is difficult for me to share the majority's finding in the present case that “... in the unique context of German reunification, the lack of any compensation does not upset the 'fair balance' that has to be struck between the protection of property and the requirements of the general interest” (see paragraph 117 of the present judgment).

In my view the word “balance” implies taking into consideration the particular interests of both the parties involved – in this case the interests of the German State and the interests of the legal landowners.

Well, the interests of the German State have been perfectly respected by transferring the land in question into State ownership. But my question is how have the landowners' interests been respected? The answer is crystal

clear: not at all. If one party gets everything and the other party gets nothing, what kind of balance are we talking about? What does the “fairness” of this “balance” consist of in the case before us? The answer to this question is in my view quite clear again: no elements of “fairness” or “balance” have been respected in this case. I would rather call the approach applied to those dispossessed of their property “an unfair imbalance”.

I am not able to accept the argument that the Modrow Law “was passed by a parliament that had not been democratically elected” (see paragraphs 98 and 116 of the judgment).

Everybody will agree that none of the compositions of the GDR parliament between 1945 and 1990 had been democratically elected. Does this mean that all the Acts passed by this parliament for forty-six years, including those regulating other property issues, should be questioned or revised? In my opinion, that would lead us too far and create total chaos.

Treating the reunification of Germany as a kind of exceptional circumstance which, in the view of the majority, has released the German authorities from the duty to compensate somehow for damage caused by expropriation is not justified. I would have readily accepted this argument had the damage been caused as a result of *force majeure*, that is to say, as a result of events independent of the will of the government and which this government was not able either to foresee or prevent, but this was not the case. It is very difficult to condone a situation where national authorities wilfully change the legislation in favour of the State and to the detriment of their own citizens and then call their own intentional law-making activity a kind of “exceptional circumstance”.

At the beginning of the 1990s, many post-communist countries underwent various transformations of their political and economic systems, but none of them (at least, to the best of my knowledge) used all these rather painful transformations as justification for the expropriation of their citizens. On the contrary, they denationalised and privatised former State property. Many people who, under what were then communist totalitarian regimes, could not even dream about private property became actual owners. In the light of all this experience, the attempts to explain the expropriation of thousands of German citizens by a need “to transform the communist property situation into a market economy system” seem really odd (see paragraph 32 of the Government's memorial).

In the case before us, people lost their property not because of reunification, but because of the modification of the legislation by the national authorities to the landowners' detriment. To my mind, such “exceptional circumstances” cannot and must not release the German authorities from their obligation to strike a fair balance between the two competing interests: the interest of the State in gaining land and the legitimate interests of the bona fide landowners in being compensated.

In my opinion, the principle of a “fair balance” has not been respected by the respondent State in this case. This becomes even clearer if one takes

into consideration the applicants' argument voiced during the hearing that they were not even allowed to buy their own land.

The deprivation of property in the case before us was clearly of a confiscatory nature, but confiscation is a form of punishment, the application of which, by definition, implies the existence of guilt. It goes without saying that the respondent Government did not show and did not even allege the existence of guilt on the part of the applicants.

As a result, in my opinion, the interference with the applicants' property rights in the present case was not proportionate.

All the above considerations lead me to the conclusion that there has been a violation of Article 1 of Protocol No. 1.

JOINT DISSENTING OPINION OF JUDGES COSTA
AND BORREGO BORREGO JOINED BY
JUDGES RESS AND BOTOCHAROVA¹

(Translation)

1. In this case a Chamber of the Third Section held unanimously that there had been a breach of Article 1 of Protocol No. 1. Much to our regret, however, we are unable to share the opinion of the majority of the Grand Chamber. After the case was referred to it under Article 43 of the Convention, a majority of the Grand Chamber found that the obligation on the applicants to reassign to the tax authorities for no compensation land to which two of them had acquired title as heirs in 1976, two others in 1978 and the last one in 1986, had not amounted to a breach of Article 1 of Protocol No. 1. It is precisely this total lack of any compensation that we find problematic.

2. We do of course agree with paragraph 112 of the judgment, where the approach adopted is “in the light of the *unique context* of German reunification” (which the Chamber judgment had already noted). We feel that this expression should not be misused, however, as the tumultuous history of Europe, from the end of the Second World War to the conflicts in the Balkans – taking in the collapse of the communist regimes in the east European countries – has experienced many “unique contexts”. That is not what we dispute in the judgment though.

3. In paragraph 116 of the judgment, the Modrow Law is stigmatised as having been “passed by a parliament that was not democratically elected”. It is true that the parliament that passed it, on 6 March 1990, had not been formed following democratic elections. However, it should be appreciated that this Law was enacted “as part of the negotiations” between the two German States (and the four former occupying powers) and that its aim was “to ensure a transition from a socialist economy to a market economy”. That is what is indicated in paragraphs 19 and 20 of the judgment. One could add that the legislative departments of the federal ministries were involved in drafting it. The Modrow Law is indeed the result of political *negotiation*. The “non-democratic parliament” of the former GDR is therefore not the sole father of the Modrow Law. What is more, that Law became an integral part of the law of reunified Germany on the very day of reunification, that is, 3 October 1990 (see paragraphs 19 and 22 of the judgment).

4. The Act of 14 July 1992 therefore modified a law that had been an integral part of the legislation of the FRG for nearly two years. Admittedly, as stated in paragraph 116 (b), that period of time, given the enormity of the

1. Judges Ress and Botoucharova do not share the conclusions in the opinion as regards Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 as they voted with the majority on that issue.

task, did amount to a “reasonable time to correct the ... effects” of the Modrow Law, even if nearly two years is not a short time.

5. However, we do not agree with the statement made in point (c) of this paragraph that the owners benefited from a “windfall” and that the fact that “this was done without paying any compensation was not disproportionate”. The word “windfall” was used for the first time, it would appear, in *James and Others v. the United Kingdom* (judgment of 21 February 1986, Series A no. 98), but at the same time that judgment laid down the principle of compensation – albeit of “less than reimbursement of the full market value” – for persons deprived of their property (ibid., p. 36, § 54). A total lack of compensation is justifiable only in exceptional circumstances (see *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII). It is significant that the former king, who lost his throne following a referendum after the fall of a military dictatorship, was awarded substantial compensation by our Court whereas the more modest applicants here are not entitled to anything. Might there be two categories of exceptional circumstances? The concept of exceptional circumstances is itself a dangerous one, moreover, which in our view should be handled with great care.

6. We should add that the 1992 Act was of *retrospective* effect and was unforeseeable. The applicants had become legal owners. They had been legally registered in that capacity in the land register, the fifth applicant since 1991 and the other four on or *after* the date of the 1992 Act. That they had inherited property originally destined for agricultural purposes whereas they themselves were not or were no longer farmers or members of an agricultural cooperative might justify depriving them of their property (although they had acted in good faith and had had confidence in the law). But without any compensation?

The case-law does of course recognise, in certain cases, that the State has a right of legal pre-emption (see, on pre-emption over a work of art, *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I, or over property, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A). However, it has never, to our knowledge, recognised a *retrospective* right of pre-emption. Mr Beyeler and Mrs Hentrich were, moreover, found to have been victims of a breach of Article 1 of Protocol No. 1 and obtained substantial sums (or even very substantial in the case of Mr Beyeler) under Article 41. Might there be two types of pre-emption?

7. In short, we consider that the applicants were deprived of their possessions without any compensation. They were the victims of a breach of the rules of a State governed by the rule of law whereas the reunification of Germany, in its unique context, was aimed precisely at re-establishing the rule of law. This is what explains our vote on Article 1 of Protocol No. 1.

8. We also voted that there had been a breach of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1. The total lack of compensation cannot be justified, in our view, by a real difference between the position of the applicants and that of the three categories of

persons referred to in paragraph 119 of the judgment. That said, neither was it an aberration on the part of the Chamber to hold, at paragraph 97 of its judgment, that, having regard to its finding of a violation of the applicants' right to the peaceful enjoyment of their possessions, it did not consider it necessary to examine the allegation of a breach of Article 14. However, we prefer the position we have expressed by our vote. To our mind, it expresses our conviction more explicitly.

DISSENTING OPINION OF JUDGE RESS

(Translation)

1. I share the dissenting opinion of Judges Costa and Borrego Borrego joined by Judge Botoucharova, except regarding a violation of Article 14. I still find the reasoning of the Chamber, which adopted a judgment on 22 January 2004 in the present case holding unanimously that there had been a violation of Article 1 of Protocol No. 1 on the ground that the State had compelled the applicants to assign their property to the State without any compensation, more convincing than the Grand Chamber's judgment.

2. The applicants had not acquired property rights illegally, but entirely legally under the Law of 6 March 1990. It would be possible to speak of an illegal acquisition or – as the Grand Chamber has done – a “windfall” if the former laws and regulations of the GDR were taken as a decisive criterion. Such was not the intention of the legislature or the purpose of the Law of 6 March 1990, however. The legislature had to create true ownership in the sense of a free market economy to prepare the GDR for the signing of economic, currency and social union with the FRG, which was finally done on 18 May 1990. It is far-fetched to consider that there is a loophole in that Law concerning the question of ownership of heirs to that land and to see in that a whole series of uncertainties regarding their legal position. Although the Law of 6 March 1990 is very short, or even succinct, all the issues were discussed by the parliamentary commission and were therefore known to the legislature. There is no evidence of a loophole in the structure of that Law. Otherwise, it would be possible to find all sorts of loopholes in short laws if the results of the law appear unsatisfactory. Naturally the legislature can correct those results in such a case, but in doing so it must respect the individual rights it has created. Furthermore, from the Law of 6 March 1990 until the 1992 Act, the applicants were able to exercise their property rights in good faith for two years. Considering that the period during which the Italian authorities left Mr Beyeler in the dark as to whether he had become the lawful owner (see *Beyeler v. Italy* [GC], no. 33202/96, § 119, ECHR 2000-I) was just over four years, I think that in the present case the applicants, whose property rights were not called into question, were also entitled to compensation for the legitimate expectation created by the State.

3. My biggest reservation concerns the reference to the “unique” context of the unification of Germany and the “exceptional circumstances” of this case. As my colleagues Judges Costa and Borrego Borrego have rightly pointed out, this expression should not be misused. The unification of Germany is no more “unique” than the dissolution of the USSR or of Yugoslavia or the change of political regime that occurred in many countries after the fall of the Berlin Wall.

If a State like the FRG is bound by the Convention, such events cannot in general justify a vague interpretation or less strict application of the Convention. *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99,

ECHR 2004-VII), the context of which could also have been described as “unique” following the dissolution of the USSR, is a good example of this firm approach on the part of the Court. With the notion of “exceptional circumstances”, the Court could have arrived at different results in that case as well. It seems to me that the Court has been less firm in its decision in *Von Maltzan and Others v. Germany* ((dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111-12, ECHR 2005-V), in which it did not acknowledge the applicants' legitimate expectation of compensation (as a property right), even though the Federal Constitutional Court had in principle recognised that right of property, and in the present case.

4. The introduction of the concept of “exceptional circumstances” as a *ratio decidendi* justifying an exception under Article 1 of Protocol No. 1 is a very dangerous step in the development of the interpretation of the Convention. The Court has used it very rarely, for example in *The former King of Greece and Others v. Greece* ([GC], no. 25701/94, § 89, ECHR 2000-XII), where it did nonetheless award just satisfaction. If the Court accepts that exceptional circumstances may justify interferences by the State with the individual's rights, this is a State-orientated concept that is a far cry from the concept of human rights protection. In *James and Others*, which has been mentioned as a case in which a parallel can be drawn (*James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98), the rights of private individuals were weighed against each other. In that case it could be said that there was not a fair balance between the persons concerned because the tenants had already invested so heavily in the buildings that the right of the formal owner could justifiably be overridden. In that case as well, however, the Court did not rule out just satisfaction even if it was less than the market value. That particular case concerned a situation in which the State could be considered as the just arbitrator between competing private interests. In the present case, the State itself engineered the interference on the ground that the Modrow Law had created inequalities in society. The situation is far from being comparable to *James and Others* and I do not understand how the Court could have overlooked that profound difference.

The concept of “exceptional circumstances” is one that does not lend itself to generalisations. Moreover, if an attempt is made to generalise the notion of “exceptional circumstances” as a *ratio decidendi*, the Court will lose its status as an organ of justice. It will no longer be possible to determine when and in what circumstances the Court will accept that there were “exceptional circumstances”. Is the fight against terrorism an exceptional situation? Does such an exceptional situation justify interferences with human rights with the result that there is no longer a violation? From what I can see of past rulings, the Court has never justified such an interference with human rights *to the State's benefit* on account of “exceptional circumstances”. On the contrary, the Court has justified, in for example *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III), an extension of the protection of

individuals in “exceptional circumstances”, which is more in keeping with the protection of human rights, even if the justification can hardly be generalised.

5. That a law creates inequalities is not an exceptional situation. There are many such laws and the legislature can be required to correct the inequality. However, the correction must be done while respecting human rights. Such a correction is not an “exceptional situation”. It is in itself an entirely normal situation in which the legislature – under political pressure or because of constitutional objections – corrects an error by the legislature that has led to unacceptable consequences for society. But all that is done at a political level and such considerations should not be brought into play through the notion of an “exceptional situation” when interpreting the Convention.

6. What is exceptional in a transitional period? There may be greater possibilities of mistakes by the legislature, which future legislatures would be inclined to correct, but does this give *carte blanche* to commit violations of human rights or to regard violations as non-violations? The Court has also referred to the nature of the right or rather to its unclear nature and character and introduced a classification of weak and normal or strong rights. That distinction makes things even less clear. One of the big mistakes of the Court was to turn to the law of the GDR, which of course was not bound by the Convention. The starting-point for the Court should have been the Unification Treaty, when the Convention also came into force on the territory of the former GDR. The Unification Treaty included the Modrow Law as part of the federal legislation and, as the Government have confirmed, established the full property rights of the applicants. It was not only futile to refer to the legal situation in the GDR but also unjustified to go back further than the entry into force of the Convention on the territory of the GDR.

7. The Court also regarded as an exceptional circumstance the fact that the Modrow Law was passed by a regime that did not have democratic legitimacy and no one could therefore have confidence in the legal stability of such a law. The decisive moment, however, was the Unification Treaty and the incorporation of the Modrow Law into FRG law by the fully democratically elected German parliament, which makes that argument futile. The fact that the German legislature reacted promptly, within less than two years, to correct the so-called unacceptable consequences of the Modrow Law does not justify referring to “exceptional circumstances”. On the contrary, a parliament which promptly corrects errors that have become evident is not in an “exceptional situation” and this does not justify concluding that interferences may not be violations of human rights. To sum up, the whole argumentation is rather circular. The situation has nothing in common with *Rekvényi v. Hungary* ([GC], no. 25390/94, ECHR 1999-III) where the restriction of the right to vote was justified by the argument that otherwise the whole election process could be jeopardised. In the present case, the Government did not advance the idea that they had to protect

individual property rights but, on the contrary, the State thought of a solution from which it could derive the greatest advantage from the taking of property.

8. The Chamber did not rule on the question of the amount of just satisfaction, but confirmed the principle that a disproportionate interference with the right of property would in principle entitle the victim to redress. All the considerations relating to the nature of the applicants' rights and their legitimate expectations might play a role in the application of Article 41, as the Chamber pointed out, but not in the interpretation and application of Article 1 of Protocol No. 1.

If the Court is now going to say that a kind of expropriation is proportionate because the State has an interest in correcting errors, that is not very far from the defence plea rejected in *Streletz, Kessler and Krenz v. Germany* ([GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II), in which the applicants relied on the *raison d'état* (the State concerned was the GDR) to justify the interferences. If the Court is going to accept that there may be reasons for the State to disregard human rights (whether it calls them exceptional or whatever), who then will protect the individual against interferences with these rights?