THIRD SECTION

CASE OF JAHN AND OTHERS v. GERMANY

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

JUDGMENT

This version was rectified in accordance with Rule 81

of the Rules of Court on 28 January 2004

STRASBOURG

22 January 2004

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,

WHICH DELIVERED JUDGMENT IN THE CASE ON

…

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jahn and Others v. Germany,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr I. Cabral Barreto, *President*,
Mr G. Ress,
Mr L. Caflisch,
Mr P. Kuris,
Mr J. Hedigan,
Mrs M. Tsatsa-Nikolovska,
Mr K. Traja, *judges*,
and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 18 September and 16 December 2003,

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 lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two German nationals, Ms Heidi Jahn and Mr Albert Thurm ("the applicants"), 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 and Ms Loth on 23 April 2001.

2. The applicants alleged, in particular, that the obligation imposed on them to reassign 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 been discriminated against within the meaning of Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

3. 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.

4. 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).

5. By a decision of 25 April 2002, the Chamber declared application no. **46720/99** (Jahn and Thurm) admissible. In a decision of 15 May 2003, it joined applications nos. 77203/01 (Rissmann and Höller) and 72552/01 (Loth) and declared them partly admissible.

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

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 September 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr K. Stoltenberg, *Ministerialdirigent*, *Agent*,
Mr H. Weis, *Ministerialdirigent*, *Counsel*,
Mr W. Marx, *Regierungsdirektor*,
Mr T. Laut, judge, seconded to the Federal Ministry of Justice, *Advisers*;

(b) *for the applicants*
Ms B. Grün, lawyer,
Mr T. Purps, lawyer, *Counsel,*

Mr V.-U. Hahn, lawyer, *Adviser.*

(replacing Ms W. Lange, lawyer, at the hearing)

The Court heard addresses by Ms Grün and Mr Purps, and by Mr Stoltenberg and Mr Weis.

8. On 16 December 2003 the Chamber decided to join the applications (Rule 42 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first two applicants, Ms Heidi Jahn and Mr Albert Thurm, are brother and sister. 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

10. 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 (*Bodenfond*) from which parcels of land of an average of eight hectares were redistributed to farmers who had little or no land of their own.

11. The applicants are the heirs of the new owners (then called "the newly settled farmers" – *Neubauern*) of the land redistributed under the land reform (*Bodenreformgrundstücke*) and situated in the former German Democratic Republic (GDR). The land reform decrees (*Bodenreformverordnungen* - see paragraphs 43-46 below) provided 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 authorities agreed. The certificates of allotment (*Zuteilungsurkunden*) stated that the land could pass to the new owner's heirs.

12. The decrees sought to ensure that certain portions of the land were used for agricultural purposes in order to provide sufficient food for the population.

13. The Change of Possession Decrees of 21 June 1951, 7 August 1975 and 7 January 1988 (*Besitzwechselverordnungen* – see paragraphs 43-46 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.

14. 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*), which came into force on 16 March 1990, lifted all restrictions on the disposal (*Verfügungsbeschränkungen*) of land that had been acquired under the land reform, whereupon those in possession of the land became owners in the true sense of the word.

15. On 3 October 1990 the GDR acceded (*ist...beigetreten*) to the Federal Republic of Germany (FRG).

B. The proceedings before the courts in the FRG

1. The first two applicants

16. 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 the land since 14 July 1992.

17. On 18 January 1994 they attempted to sell their land.

18. 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.

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

20. In a judgment of 2 November 1995 the Sangerhausen District Court ordered the applicants to transfer 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 (*Einführungsgesetz in das Bürgerliche Gesetzbuch* – EGBGB – see paragraphs 51-55 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 agricultural, forestry or food-industry sector on 15 March 1990 or during the previous ten years.

21. The applicants appealed.

22. 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 Decree 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.

23. On 24 April 1996 the applicants appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*) 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 to their case.

24. On 17 June 1996 the Federal Constitutional Court, 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, that the statutory provisions in question breached neither the applicants' right of property, nor the principle that laws could not apply retrospectively, nor the principle of equality (see paragraph 56 below).

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 the 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

25. 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 the land since 1996.

26. They had leased their land to an agricultural company (*Agrargesellschaft*) called Breesen for twelve years from 1 January 1991 to 31 December 2002.

27. On 3 July 1998 the *Land* of Mecklenburg-West Pomerania requested that the land be transferred (*Auflassung*) into its name on the ground that it had superior title (*besserberechtigt*) 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 51-55 below).

28. In a judgment of 29 October 1998 the Neubrandenburg Regional Court (*Landgericht*) 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* - LPG) in the GDR nor applied for membership of one.

29. The applicants appealed on the ground, *inter alia*, that, since the judgment of the Federal Court of Justice of 17 December 1998 (see paragraph 57 below), it had been established that title to land acquired under the land reform could pass to the owner's heirs.

30. 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 sought to remedy the loopholes in the GDR Law of 6 March 1990, which contained no transitional provisions for cases where changes of ownership had not been recorded in the land register.

31. 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.

32. In a decision of 6 October 2000 the Federal Constitutional Court dismissed the applicants' appeal on the ground that there had not been a breach of their fundamental rights (for the detailed reasoning see paragraph 59

below).

3. *The fifth applicant*

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

34. From 1968 to 1979 she had been a member of an agricultural cooperative in the GDR. Since 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 (*nationale Volksarmee*) until 31 December 1990.

35. 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. Accordingly, the applicant had been paid 60,000 German marks (DEM) in rent paid to the town in error.

36. Since 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.

37. 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 51-55 below).

38. 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 agricultural, forestry or food-industry sector. 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.

39. 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 “newly settled farmer” had paid a certain sum on being allotted his or her land under the land reform.

40. In a decision of 15 July 1999 the Federal Court of Justice (*Bundesgerichtshof*) dismissed an appeal by the applicant against the Federal Constitutional Court's judgment.

41. The applicant lodged a constitutional appeal with the Federal Constitutional Court, relying on a breach of her rights of property; 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.

42. In a decision of 25 October 2000 the Federal Constitutional Court dismissed the applicant's appeal on the ground there had not been a breach of her fundamental rights (for the detailed reasoning see paragraph 58 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

43. The land reform decrees, which constituted the statutory basis of the land reform implemented in the Soviet Occupied Zone of Germany between 1945 and 1949, provided 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 authorities agreed. The certificates of allotment (*Zuteilungsurkunden*) stated that the land could pass to the new owner's heirs.

44. 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.

45. The Change of Possession Decrees of 21 June 1951, 7 August 1975 and 7 January 1988 dealt with cases where the 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.

46. Very often, however, these transfers were not, in practice, registered in the land register, with the result that discrepancies arose between the persons actually farming the land and the persons registered as owners in the land register.

47. The Law of 6 March 1990 on the rights of owners of land acquired under the land reform (*Gesetz über die Rechte der Eigentümer von Grundstücken aus der Bodenreform*), also known as the Modrow Law (after the President of the State Council (*Staatsrat*)), which came into force on 16 March 1990, lifted all restrictions on the disposal of land that had been acquired under the land reform, whereupon those in possession of the land became owners in the true sense of the word.

The Law provided:

Section 1

"In establishing 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 enter into force on the date of publication.
2. On that date the following instruments shall be repealed:

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

- the second Decree of 7 January 1988 on the 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*

48. 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 determination of unresolved property issues*

49. 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 a joint declaration on 15 June 1990 on the determination of unresolved 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.

50. In that 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. *Section 233(11-16) of the Introductory Act to the Civil Code*

51. 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.

52. When passing that Act the legislature inserted subsections 11-16 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.

53. Section 233(11), paragraph 2, of the Introductory Act to the Civil Code provides that land acquired under the land reform passes, in theory, to the heirs of the registered owner 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.

54. Section 233(12) makes a distinction in respect of persons or institutions with superior title to that of the 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 15 March 1990, the persons having superior title are those to whom the land had been formally allotted in accordance with the land reform decree 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 died before 15 March 1990 the tax authorities of the *Land* in which the relevant land was situated have superior title and can request that the land be assigned to them.

55. Section 233(12), paragraph 3, of that Law 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 agricultural, forestry or food-industry sector 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 (LPG) 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 of the Federal Constitutional Court*

56. In a judgment of 4 October 1995 the Federal Constitutional Court held that these provisions were compatible with the Basic Law, seeing that 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.

57. In a judgment of 17 December 1998 (*Rechtspfleger* 1999, pp. 222 et seq.), the Federal Court of Justice

stated that on the death of a person who had acquired land under the land reform, title to the land passed to their heirs. It added, however, that section 233(11-16) of the Introductory Act to the Civil Code was compatible with the Basic Law. The legislature had thus intended to remedy the loopholes in the GDR Law of 6 March 1990, which had failed to take account of the fact that as the GDR authorities had very often not applied their own rules some people were still registered as owners in the land register purely by chance or by oversight.

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

59. The relevant extract from the Federal Constitutional Court's decision of 6 October 2000 is worded 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 (*Besitzwechselverordnungen*), 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 (11-16) 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 (*Besitzwechselvorschriften*) 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 together 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, paragraph 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, paragraph 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 preferential 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, paragraph 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 this 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, paragraph 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 in 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 the straightforward transfer of 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 ensuring the smooth 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 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 the legal development of 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 passed to the owner's heirs – the restrictions on the disposal of title to land acquired under the land reform and the change of ownership 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 a proper and fair system of ownership 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 would 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 as to the heir or other member of their family to whom the rights and obligations associated with farming the land should be transferred. If the conditions for transfer were not satisfied, the land would become state-owned property (*staatlicher Bodenfonds*), in accordance with Article 4 § 5 of the decree.

2. Under section 233(11), paragraph 3, first sentence, taken together with section 233(12) of the Introductory Act to the Civil Code, these legal principles were transposed wholesale. The parties have therefore been placed in the situation that they would have been in if the change of ownership 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 pursuant to 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 which 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 conditions 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."

THE LAW

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

60. 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

61. The Court notes that the parties disagreed as to the nature of the interference in question, that is, whether it was the first or second sentence of the first paragraph of Article 1 which applied in the instant case.

62. 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, amongst other things, to control the use of property in accordance with the general interest ... . The 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.).

63. In the Government's submission, the obligation on the applicants to reassign their land to the tax authorities 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 did not amount to a deprivation of property within the meaning of Article 1 of Protocol No. 1. They argued that the new paragraphs inserted into the Act in question were designed to remedy the loopholes and correct the injustices in the GDR Law of 6 March 1990 – the Modrow

Law – and dealt with the distribution of property (*Eigentumszuordnung*) as such. In reality, the applicants' title to the property was a merely formal one (*formale Eigentumsposition*) which was uncertain and entirely illegitimate. The interference complained of, which had been "minimal" here, therefore had to be examined in the light of the first sentence of the first paragraph of Article 1.

64. The applicants submitted that there had been a "deprivation" of property in this case within the meaning of the second sentence of the first paragraph of Article 1.

65. The Court reiterates that, in determining whether there has been a deprivation of possessions, it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a *de facto* expropriation (see *Sporrong and Lönnroth,* cited above, pp. 24-25, § 63; *Brumarescu v. Romania* [GC], no. 28342/95, § 76, ECHR 1999-VII; and *Zwierzynski v. Poland*, no. 34049/96, § 69, ECHR 2001-VI).

66. In its decision of 6 October 2000 (see paragraph 59 above), the Federal Constitutional Court held, referring to the leading judgment of the Federal Court of Justice of 17 December 1998 on the issue (see paragraph 57 above), that land acquired under the land reform in the Soviet Occupation Zone and in the GDR could pass to the new owner's heirs. It added that, as the Modrow Law had lifted all the restrictions on the land, title to property acquired under the land reform had been transformed into full ownership, and as such fell within the scope of the Basic Law, including in those cases where it had been inherited.

67. The effect of this was that the applicants, as the heirs of the owners of land acquired under the land reform, had become owners in the true sense of the word after the Modrow Law – which had come into force on 16 March 1990 – had lifted the restrictions encumbering the land. They had therefore legally acquired full ownership of the land by virtue of a law passed by the GDR's parliament before the first free elections in 1990. Following the reunification of Germany that property title subsequently became an integral part of FRG law, and thus fell within the scope of the Convention. The fact that the Government subsequently considered that title to be illegitimate because the GDR had failed to apply its own rules, since the applicants had not themselves farmed the land, cannot cast doubt on the legality of the full ownership they had thus acquired.

68. After German reunification the applicants had all been registered as owners in the land register and had, initially, been able to dispose of their property as they wished. In 1991 the third and fourth applicants had leased their land to an agricultural company for twelve years and the fifth applicant had received rent from the town of Frankfurt an der Oder, which had leased her land to a leisure centre.

69. Subsequently, the courts of the FRG ordered the applicants to reassign their land to the tax authorities of the *Länder*, pursuant to section 233(11), paragraph 3, and (12), paragraphs 2 and 3 of the Introductory Act to the Civil Code, on the ground that on 15 March 1990 – the day before the Modrow Law came into force – they had neither been carrying on an activity in the agricultural sector nor been members of an agricultural cooperative.

70. Accordingly, the Court considers that the interference with the applicants' right has to be regarded as a "deprivation" of property within the meaning of the second sentence of Article 1 of Protocol No. 1. It therefore needs to determine whether the interference complained of was justified under that provision.

B. Justification for the interference with the right of property

1. "In accordance with the law"

71. 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 rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 79, ECHR 2000-XII).

72. 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 set out in the second Property Rights Amendment Act of 14 July 1992. This 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.

73. Accordingly, the Court considers that the Act satisfied the criteria of accessibility, precision and foreseeability required by the Convention.

74. 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 58 and 59 above).

75. 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 (see, among many other authorities, *Wittek v. Germany*, no. 37290/97, § 49, ECHR 2000-XI, and *Forrer-Niedenthal v. Germany*, no. 47316/99, § 39, 20 February 2003).

76. The deprivation of property was therefore in accordance with the law, as required by Article 1 of Protocol No. 1.

2. "In the public interest"

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

78. 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 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.

79. In the applicants' submission, the interference in question did not pursue a legitimate aim. They complained that the German legislature had sought to reactivate the former socialist regime 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.

80. The Court considers 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, and *The Former King of Greece,* cited above, § 87). 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 from a socialist economy to a market economy.

81. In that connection the Court has no reason to doubt that the German legislature's determination to liquidate 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". A further question is whether this public-interest aim was sufficiently

weighty when it came to considering whether the interference was proportionate.

3. Proportionality of the interference

82. 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).

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, and *The Former King of Greece,* cited above, § 89).

83. In the instant case the second Property Rights Amendment Act of 14 July 1992 does not provide for any 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 and always make the State's taking of the applicants' property unlawful (contrast *Papamichalopoulos and Others v. Greece* (*Article 50*), judgment of 31 October 1995, Series A no. 330-B, pp. 59-60, § 36). 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.

84. The Government contended that the interference in question had maintained a fair balance between the requirements of the general interest of the community and the requirements of the protection of the fundamental rights of the individual. 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 (*Nutzungsrecht*). 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 those rules had frequently not been applied did not give the applicants a right to keep their land. Accordingly, even though they had acquired a formal title to the property, their title was uncertain and entirely illegitimate. The applicants could not expect to maintain their legal position (*Fortbestand ihrer Rechtsposition*) because 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.

85. The applicants submitted that the deprivation of their property, without compensation and for the benefit of the tax authorities, had been manifestly disproportionate. In 1992 the German legislature had wrongly assumed that land acquired under the land reform did not pass to the owner's heirs. Furthermore, objectively speaking, there were no loopholes in the Modrow Law, which had aimed to re-establish the right of property for all owners of the land, including their heirs. The applicants produced declarations from former senior officials of the GDR in support of their submission. The German legislature should have respected the intention of the GDR parliament in that regard. The applicants maintained that they had been the victims of an unprecedented attack on private property and stated that some 50,000 people who had inherited land that had been acquired under the land reform had already been expropriated, without compensation, for the benefit of the tax authorities of the *Länder*.

86. The Court considers that in the instant case it is not its task to analyse the nature of the right of property that the applicants had had in the GDR as the heirs of owners of land acquired under the land reform. Those events had occurred before the Convention entered into force and in a State which was not a party to it. Moreover, it would be a pointless exercise because, whatever the restrictions on the applicants' right of property at the time might have been, they were clearly lifted by the Modrow Law, as the Federal Constitutional Court

itself acknowledged in its decision of 6 October 2000.

87. However, the Court does need to examine the applicants' situation after German reunification and consider, in the light of the principles set out in paragraphs 82 and 83 above, the arguments put forward by the Government to justify depriving the applicants of their property without compensation. Those arguments are mainly based on the Federal Constitutional Court's reasoning in its decision of 6 October 2000.

88. One of the Government's central arguments was that the purpose of the second Property Rights Amendment Act of 14 July 1992, inspired by the principles laid down in the GDR by the land reform decrees and the change of possession decrees, was to put the applicants in the position they would have been in if those principles had been correctly applied at the time. The German legislature thus effectively turned the clocks back in order to prevent the applicants from obtaining, by virtue of the brevity and imprecision of the Modrow Law, unjust enrichment on account of the GDR authorities' failure to apply their own rules.

89. The Court reiterates in the first place that it has already had occasion to take account of the exceptional context of German reunification in examining cases brought before it (see, *inter alia*, *Forrer-Niedenthal,* cited above, § 48; *Wittek* cited above, § 61; *Kuna v. Germany* (dec.), no. 52449/99, ECHR 2001-V; and *Goretzki v. Germany*, no. 52477/99, 24 January 2002). It is also aware of the enormous task which befell the German legislature in dealing with all the complex issues relating to the right of property at the time of transition from a socialist property regime to a market economy system. This is particularly true of all the matters connected with liquidating the land reform, a symbol *par excellence* of the collectivist idea of ownership rights.

90. The Court cannot, however, agree with the Government's reasoning in the instant case regarding the concept of "illegitimate" ownership, which is an eminently political concept. As the Court has already stated above, regardless of the applicants' situation before the entry into force of the Modrow Law, there is no doubt that they legally acquired full ownership of their land when that Law came into force. It was voted by the GDR parliament before the first free elections in 1990 in negotiations between the two German States during the period between the fall of the Berlin wall and the implementation of German reunification. The aim of the law was to open up the GDR to a market economy, as provided for in the State Treaty of 18 May 1990 between the FRG and the GDR on the Creation of an Economic, Currency and Social Union (see paragraph 48 above), by lifting all the restrictions encumbering land acquired under the land reform. Moreover, if one were to reason in terms of legitimacy, account would also have to be taken of the initial injustice suffered – as the Government themselves acknowledged in their pleadings – by the former owners of the land who were expropriated after 1945 as a result of the land reform. This factor may be relevant in assessing the compensation payable to the applicants.

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.

92. Admittedly, the second Property Rights Amendment Act did not only benefit the State, but also in some cases provided for the redistribution of land for the benefit of farmers and to the detriment of heirs to the land who had not themselves farmed it. However, the Court is required to deal only with the cases actually brought before it. In the present case the applicants, as the heirs of owners of land that had been acquired under the land reform, had had to reassign their land to the tax authorities without any compensation whatsoever.

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 which 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.

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

94. The applicants also submitted that they had been discriminated against compared to other owners of land acquired under the land reform, contrary to Article 14 of the Convention read 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."

95. The Government submitted that the applicants had not been discriminated against compared to owners who had inherited their land after 15 March 1990. The difference in treatment was, in their view, justified by the legislature's aim to provide a comprehensive solution for the distribution of land that had been acquired in accordance with the principles of the land reform. It had been necessary to intervene only in those cases where the GDR authorities had omitted 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, as had been the case prior to 6 March 1990.

96. The applicants replied that the tax authorities' right to assignment of the land amounted to discrimination against them compared to the owners of land distributed under the land reform who had acquired their land *inter vivos* (*lebzeitigen Eigentumserwerb*) before 15 March 1990 or had inherited it between 15 March 1990 and 2 October 1990. This difference in treatment was not justified, they argued, they themselves having acquired their land solely by inheritance, which was governed by different rules from those applicable to the *inter vivos* disposal of land acquired under the land reform. Moreover, the applicants could no longer become members of an agricultural cooperative, the deadline for this being 15 March 1990, as decided retrospectively by the German legislature on 22 July 1992.

97. Having regard to the finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions (see paragraph 93 above), the Court does not consider it necessary to examine the allegation of a breach of Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

99. The applicants sought, in the first place, restitution of the land in question or, failing that, compensation of an equivalent amount to the current value of their property. They also claimed reimbursement of the costs and expenses.

100. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it reserves that question and, in determining the further procedure, will have regard to the possibility of an agreement between the Government and the applicants.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

2. *Holds* unanimously that it is not necessary to examine the applicants' complaint under Article 14 of the Convention taken together with Article 1 of Protocol No. 1;

3. *Holds* by six votes to one that the question of the application of Article 41 is not ready for decision; and

accordingly,

(a) *reserves* it in whole;

(b) *invites* the Government and the applicants to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in French, and notified in writing on 22 January 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Ireneu Cabral Barreto
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Mr Cabral Barreto is annexed to this judgment.

I.C.B.
V.B.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

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

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 6 March 1990 Law, 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 law 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 Law of 1992 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.

4. My finding of a violation of Article 1 of Protocol No. 1 therefore carries the above corollaries and qualifications.

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 which has to be struck between the protection of property and the requirements of the general interest”.

The 1992 legislature corrected a *de facto* situation which 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 Law of 1992 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 just satisfaction for the purposes of Article 41 of the Convention.

JAHN AND OTHERS v. GERMANY JUDGMENT

JAHN AND OTHERS v. GERMANY JUDGMENT– PARTLY CONCURRING

AND PARTLY DISSENTING OPINION OF JUDGE CABRAL BARRETO