

Expropriation without Compensation – the European Court of Human Rights sanctions German Legislation expropriating the Heirs of “New Farmers”

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Introduction

On 30 June 2005, the Grand Chamber of the European Court of Human Rights (ECHR) issued a judgment concerning the expropriation of the heirs of new farmers in the former German Democratic Republic (GDR).¹ With this decision, the Grand Chamber overturned a unanimous judgment by the Chamber of 22 January 2004.² This article outlines the facts of the case (section A), the German case law (section B) and the Chamber and Grand Chamber judgments (section C) and provides an evaluation of the judgments (section D).

A. Facts of the case and historical background

After the end of World War II, the Soviet Military Administration assumed power in the Soviet Occupied Zone in Germany. Together with the German Communist Party, it designed a concept for a „democratic land reform“. As a statutory basis for the land reform, it enacted the Land Reform Decrees (*Bodenreformverordnungen*) in September 1945. The aim of this reform was not only to expropriate national socialists and war criminals, but also landowners owning more than 100 ha in order to minimize their power and to secure the food supply of the population.³ The land

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¹ Eur. Court H.R., Grand Chamber Judgment, *Jahn and others v. Germany*, Judgment of 30 June 2005, available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3511702&skin=hudoc-en&action=request>.

² Eur. Court H.R., Chamber Judgment, *Jahn and others v. Germany*, Judgment of 22 January 2004, available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3511702&skin=hudoc-en&action=request>.

³ See, Art. 1, para. 1 of the Land Reform Decree in the province of Saxony of 3 September 1945, official gazette (*Verordnungsblatt*) for the province of Saxony, No. 1/45, p. 28.

became part of a pool of state-owned land (*Staatlicher Bodenfonds*) and was then redistributed to farmers owning little or no land at all, the so-called new farmers (*Neubauern*).

The Land Reform Decrees provided that the land acquired under the land reform was subject to restrictions: The new farmers should not be allowed to sell, lease, burden or divide the land. Moreover, a certain portion of the land had to be used for agricultural purposes in order to provide sufficient food for the population, and part of the harvest was intended for the state. However, it was stipulated in the certificates of allotment (*Zuteilungsurkunden*) that the land could pass on to the owners' heirs on condition that they used it for agricultural purposes.

The Change of Possession Decrees (*Besitzwechselerordnungen*) of 1951, 1975 and 1988 dealt with the return of land to the pool of state-owned land and its reassignment to third parties: If the new farmer did not farm the land any more, it fell back into the pool of state-owned land; authorization to reassign the land to a third party could only be obtained if the successor could guarantee the agricultural use of the land. These changes in ownership, however, were often not entered in the land register of the GDR. As a result, in many cases the persons actually farming the land were not identical with the formal owners indicated in the land register.

On 6 March 1990, the GDR legislature enacted the Law on the rights of owners of land acquired under the land reform (*Gesetz über die Rechte der Eigentümer von Grundstücken aus der Bodenreform*), also called the Modrow Law⁴, which came into force on 16 March 1990. This law abrogated all restrictions on the land acquired under the land reform, and thus those in possession of the land became owners to the full extent. With the German Unification on 3 October 1990, the Modrow Law became an integral part of the law of the Federal Republic of Germany (FRG).⁵

⁴ Hans Modrow was the prime minister of the GDR from November 1989 until March 1990.

⁵ Art. 9 I of the Unification Treaty of 31 August 1990, BGBl. II 1990, 885, 892 provides:

Law of the German Democratic Republic valid at the time of the signing of this Treaty which is law of the *Länder* according to the distribution of competence under the Basic Law shall remain in force in so far as it is compatible with the Basic Law, notwithstanding Article 143, with the federal law put into force in the territory specified in Article 3 of this Treaty and with the directly applicable law of the European Communities, and unless otherwise provided in this Treaty. Law of the GDR that is federal law according to the distribution of competence under the Basic Law and concerns legal aspects not regulated by the state remains valid as law of the *Länder* under the conditions of the first sentence until it is regulated by the federal legislature.

Two years later, after the German reunification, the FRG legislature passed the Second Property Rights Amendment Act⁶ on the liquidation of the land reform in the federal states (*Länder*) of the former GDR and inserted Section 233, Subsections 11 to 16 into the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*).

Section 233 (11), para. 2 deals with the case where the registered owner has deceased before 15 March 1990, as in the cases at hand. It provides that the land acquired under the land reform will in principle pass on to the registered owners' heirs. However, according to Section 233 (11), para. 3, persons or institutions having "superior title" (*besser Berechtigte*) under the terms of Section 233 (12) can demand assignment of the land to them without offering compensation. Pursuant to Section 233 (12), paras 2 and 3, only persons who were engaged in the agricultural sector on 15 March 1990 or for at least ten years before 15 March 1990 are entitled to keep the land permanently. A further requirement developed by German case law is the affiliation in a collective farm (*Landwirtschaftliche Produktionsgenossenschaft*). If these conditions are not fulfilled, the federal state in which the land is situated is entitled to demand its assignment.

The applicants are all heirs of the new farmers. As they were not active in the agricultural sector, according to the GDR law applicable at the time of inheritance, the land should have become part of the pool of state-owned land and should have been redistributed to other aspirants. However, in the case of the applicants as well as in many other cases, the GDR authorities failed to enter the change of possession in the land register. Consequently, the applicants formally remained the owners of the land.

Relying on the provisions inserted in the Introductory Act to the Civil Code, which gave only those persons who were active in agriculture the right to keep their land, the federal states claimed the assignment of the land.

B. German case law

In a leading judgment of 6 October 2000⁷, the Federal Constitutional Court (*Bundesverfassungsgericht*) examined whether Section 233 (11-16) of the Introductory Act to the Civil Code was compatible with the right to property under the Basic Law (*Grundgesetz*).

⁶ Law amending the Property Rights Act and other provisions (*Zweites Vermögensrechtsänderungsgesetz*), 14 July 1992, BGBl. I 1992, 1257.

⁷ Federal Constitutional Court, Judgment of 6 October 2000, 1 BvR 1637/99, available at: <http://www.bverfg.de/cgi-bin/link.pl?entscheidungen>.

I. Infringement of the right to property

Article 14 of the Basic Law provides:

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

The Court reiterated that the applicants had inherited the land from the new farmers.⁸ In spite of the restrictions first imposed on the land acquired under the land reform, with the entry into force of the Modrow Law, the owners' heirs acquired full ownership of the land. Consequently, the provisions enacted in 1992 infringed their right to property under Article 14 of the Basic Law.⁹

Under German constitutional law, one must distinguish between an expropriation which is governed by Article 14, para. 3 and must always be connected with a compensation, and a rule establishing the content and limits of ownership (*Inhalts- und Schrankenbestimmung*) under the terms of Article 14, para 1, second sentence of the Basic Law.¹⁰ The Federal Constitutional Court has a narrow view with regard to the term of expropriation. It is defined as a deprivation of property rights for the public good which is designed to have an individual and concrete effect.¹¹ The Court decided that the deprivation of property at hand was not an expropriation, but a general and abstract definition of the rights and duties of the owners of land

⁸ Until the judgement by the German Federal Court of Justice of 17 December 1998, BGHZ 140, 223, 226 – 231, German courts had consistently held that land acquired under the land reform was not hereditary. See on this point Beate Grün, *Die Geltung des Erbrechts beim Neubauerneigentum in der SBZ/DDR – verkannte Rechtslage mit schweren Folgen*, 8 *Zeitschrift für Vermögens- und Immobilienrecht* (1998), 537.

⁹ Judgment of the Federal Constitutional Court (note 8), para. 16.

¹⁰ Federal Constitutional Court, *The Groundwater Case*, Judgment of 15 July 1981, 58 BVerfGE 300, 330 – 331, para. C II.

¹¹ Judgment of the Federal Constitutional Court (note 8), para. 17.

acquired under the land reform and thus a rule establishing the content and limits of ownership.

The crucial difference is that such a regulation does not automatically entail the need for compensation. Apart from that, the further examination of the case is similar to the case of an expropriation. The Court is bound to examine whether the rule establishing the content and limits of ownership passes the proportionality test of German public law. The requirements of this test are that the measure has to pursue a legitimate aim, it has to be suitable and necessary to achieve this aim and finally, the measure must be proportional in a narrower sense.

II. Legitimate aim

The Court first examined if the provisions pursued a legitimate aim. In this examination, it was in principle bound by the reasoning of the ordinary courts; only if their reasoning is arbitrary can the Court correct the judgment. In this case, the Court found the interpretation of the GDR laws by the Federal Court of Justice (*Bundesgerichtshof*)¹² understandable (*nachvollziehbar*).¹³

According to the Federal Court of Justice, the first aim of the law was to establish legal clarity with regard to the legal status of the heirs of the new farmers.

Second, the Federal Court of Justice had argued that the provisions were a measure to remedy the loopholes in the Modrow Law, which had not regulated the position of the heirs of new farmers. The GDR legislature had failed to take into account that although the Land Reform Decrees required that only persons who used the land agriculturally could be its owners, the GDR authorities had in many cases not amended the entries in the land register. Thus, some people were still registered as owners purely by chance or by oversight. However, it could not have been the will of the GDR legislature that it should depend on the diligence of the GDR authorities as to whether the heirs could keep the land or not. The 1992 Second Property Rights Amendment Act was passed to ensure equal treatment of those heirs whose land had been redistributed in the agricultural fund or reassigned to third persons and those who did not fulfill the conditions for allocation either but who were still the formal owners due to the failure of the GDR authorities to change the entries in the land register. The owners should be put in the position they would have been in if the GDR laws had been applied properly. As the transfer of title to these heirs did not contribute in any way to the development of a

¹² Federal Court of Justice, Judgment of 17 December 1998, BGHZ 140, 223, 232-236.

¹³ Judgment of the Federal Constitutional Court (note 8), para. 24.

free market economy, which had been the aim of the Modrow Law, the Court assumed that the legislature of the GDR would itself have enacted analogous provisions if it had been aware of the consequences of this law.¹⁴

III. Proportionality

The Court recognizes that the deprivation of property at hand has a retrospective effect as the new farmers had first acquired unburdened property through the Modrow Law. However, it would only constitute a violation of the principle of non-retroactivity if the new farmers had had legitimate confidence (*schutzwürdiges Vertrauen*) in the continued application of GDR laws. In the present case, the Modrow Law was enacted in a period of transition from the socialist GDR regime to a free market economy. Thus, according to the Court, the applicants could not rely on the continuity of their legal title. The period of two years which had elapsed between the enactment of the Modrow Law and the Second Property Rights Amendment Act did not change the outcome of these considerations. Taking into account the enormous difficulties in transforming a socialist property regime into the legal system of the FRG market economy, the length of this period could be regarded as adequate.¹⁵

Hence, the Court comes to the conclusion that the provisions in question did not violate the Basic Law.

C. Grand Chamber Decision of 30 June 2005

I. Art. 1 of Prot. No. 1 of the European Convention on Human Rights

Whereas the Chamber in its decision of 22 January 2004 unanimously found a violation of Art. 1 of Prot. No. 1 of the European Convention on Human Rights, the Grand Chamber decided by eleven votes to six that there was no breach of the right to property. As the Grand Chamber judgment only deviates from the Chamber judgment when it comes to the proportionality of the measure, this article will refer to the Chamber judgment only insofar as it differs from the Grand Chamber judgment.

¹⁴ *Id.*, para. 29.

¹⁵ *Id.*, para. 30.

1. Deprivation of property

Art. 1 of Prot. No. 1 of the European Convention on Human Rights 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.

The Court reiterates its case law that Art. 1 of Prot. No. 1 comprises three distinct rules: first the principle of peaceful enjoyment of property (para. 1, first sentence), second the subjection of the deprivation of property under certain conditions (para. 1, second sentence) and third the right of Contracting States to control the use of property in accordance with the general interest (para. 2).¹⁶

The Court does not find it necessary to examine the quality of the title to land before the entry into force of the Modrow Law.¹⁷ It agrees with the Chamber that land acquired under the land reform could pass on to the owners' heirs. Thus, as the Modrow Law had lifted all restrictions on the land, the right to property acquired under the land reform had been transformed into full ownership. Moreover, the applicants were registered as owners in the land register. It was irrelevant whether the Government regarded the property as illegitimate because the GDR authorities had failed to apply their own rules. It was rather crucial that with the enactment of the Modrow Law, the applicants had become true owners of the land and then had to reassign their property to the tax authorities of the federal states. This amounted to a deprivation of property within the meaning of the second sentence of Art. 1 of Prot. No. 1 of the Convention.¹⁸

¹⁶ Eur.Court H.R., *Jahn and others v. Germany* (note 2), para. 78.

¹⁷ The nature of the title to land acquired under the land reform during GDR era was controversial due to its subjection to restrictions and conditions. For a detailed elaboration, see KRISTINA GRAF, *Das Vermögensgesetz und das Neubauerneigentum* (2004), 220 - 224; SEBASTIAN PRIES, *Das Neubauerneigentum in der ehemaligen DDR* (1993), 117-142.

¹⁸ Eur. Court H.R., *Jahn and others v. Germany* (note 2), para. 79, which refers to the Chamber Judgment (note 3), paras 65 - 70.

2. *Justification of the infringement*

According to the case law of the ECHR, an interference with the right to property must be lawful, pursue a legitimate aim and be proportionate.

a) Legal Foundation

The first requirement of Art. 1 of Prot. No. 1 is that any deprivation of property must be based on law. In this case the measure complained of was based on the provisions inserted in the Introductory Act to the Civil Code. The Court states that the decision on issues of constitutionality is primarily the task of the domestic authorities. Only if there is a sign of arbitrariness does the Court interfere. Since the Federal Constitutional Court has deemed the contested provisions compatible with the Basic Law, the deprivation of property was lawful.¹⁹

b) Legitimate Aim

The Court must examine whether the aim of the provisions was in the public interest. According to the German Government, the aim of the laws was to establish legal clarity with regard to the ownership of land acquired under the land reform and to do away with the unjust consequences of the Modrow Law, which had not taken into account that the GDR authorities had not run the land register properly. The Government argued that had they duly applied the law, the applicants would already have lost their land to the pool of state-owned land before the German reunification.

The applicants claimed that by enacting the provisions in question, the German legislature had sought to reactivate the former socialist law in force at the time of the GDR and had sought to expropriate the applicants for the benefit of the state.

According to the Court, due to the closer link between the domestic authorities and society, it is in principle for them to assess what measures are in the public interest. Having to take into account political, economic and social issues, the national authorities enjoy a wide margin of appreciation. Only if the Court does not find any reasonable foundation will it not respect the legislature's evaluation. The Court finds that it has no reason to doubt that the legislature's determination to correct the effects of the Modrow Law was in the public interest, especially taking into

¹⁹ *Id.*, para. 87.

account the radical changes connected with the transformation from a socialist to a market economy.²⁰

c) Proportionality

Only when examining the proportionality of the law does the Grand Chamber come to a different conclusion than the Chamber. Both reiterate 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”.²¹ This means that there must be a reasonable relationship of proportionality between the aim of a measure depriving a person of his possessions and the means employed to achieve this aim. Article 1 of Prot. No. 1 does not establish the payment of compensation as compulsory. Thus, an expropriation without compensation does not *per se* violate the law. However, the measure must not impose an excessive burden on the applicants. Therefore the Court has already found in former cases that a deprivation of property without compensation can only be justifiable under exceptional circumstances.²²

The 1992 Second Property Rights Amendment Act does not provide for any compensation of the applicants. The Government argued that had the GDR authorities applied the GDR laws correctly, the applicants, who did not use the land for agricultural purposes, would already have lost their property during the existence of the GDR. For reasons of social justice, the German legislature had to correct the consequences of the Modrow Law, which had been enacted by a parliament that had not been democratically elected.

aa) Reasoning of the Chamber

The Chamber found that indeed the German reunification was an exceptional situation involving enormous tasks for the German legislature regarding the right of property at the time of transition from a socialist property regime to a market

²⁰ *Id.*, para. 92.

²¹ *Id.*, para. 93. The court first formulated this fair balance-test in the case of *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A No. 52, para. 69, where it held that the idea of proportionality was inherent in the Convention.

²² See, e.g., Eur. Court H.R., *James and others v. The United Kingdom*, Judgment of 21 February 1986, Series A No. 98, para. 54; Eur.Court H.R., *The Former King of Greece v. Greece*, Judgment of 23 November 2000, Reports of Judgments and Decisions 2000-XII, 119, para. 89.

economy.²³ However, the Chamber rejected the contention of the government that the applicants had only acquired a right to usufruct or illegitimate property. It stressed that when the Modrow Law came into force, the applicants doubtlessly acquired full ownership of the land. It was not the correction of the Modrow Law in itself that constituted a violation of the right to property but the fact that no compensation had been provided. In spite of the exceptional circumstances connected with German reunification, the deprivation of property for the benefit of the State without adequate compensation constituted a disproportionate burden on the applicants.²⁴ Thus, the Court held that there was a breach of Article 1 of Prot. No. 1 of the Convention.

bb) Reasoning of the Grand Chamber

The Grand Chamber found no violation of the principle of fair balance. It considered three factors as decisive in its repeal of the Chamber decision: first the lack of legitimate confidence due to the uncertainty of the position of the heirs, second the huge tasks of the German legislature, and third the reasons of social justice relied on by the Government:²⁵

First it refers to the fact that the Modrow Law had been enacted to reform the economic sector in a period of transition between two different political regimes by a non-democratically elected parliament. Thus, the applicants could not have legitimate confidence in the continuity of their title, particularly as the Modrow Law did not contain any provision regarding the position of heirs.

Taking into account the enormous complexity of the tasks the legislature was facing with regard to especially property questions, the legislature enacted the Second Property Rights Amendment Act in a relatively short time after the Modrow Law. Finally, the reason for the enactment of the Second Property Rights Amendment Act was not clearly irrational. The Law was enacted to achieve social justice in order that the acquisition of full ownership by the heirs did not depend on the action or non-action of the GDR authorities. The Court stresses that had the GDR authorities consistently applied the law, the applicants would already have lost their land. It was crucial that the applicants had benefited from a “windfall” due to the Modrow Law. Thus, the lack of compensation was not disproportionate.

²³ Eur. Court H.R., *Jahn and others v. Germany* (note 3), para. 89.

²⁴ *Id.*, para. 93.

²⁵ Eur. Court H.R., *Jahn and others v. Germany* (note 2), para. 116.

Therefore the Court found that there was no violation of Art. 1 of Prot. No. 1 of the European Convention on Human Rights.

II. Art. 14 in Conjunction with Art. 1 of Prot. No. 1 of the European Convention on Human Rights

The applicants also asserted a violation of the prohibition of discrimination. Art. 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.

Having found a violation of the right to property, the Chamber did not find it necessary to examine the case under Art. 14. The Grand Chamber decided by fifteen votes to two that there was no violation of the prohibition of discrimination. It identified a different treatment of the applicants with regard to three groups of persons: first with regard to the original new farmers who were still alive on 15 March 1990. This different treatment was justified as those farmers were officially still members of a collective farm. Secondly, the different treatment of those who had inherited the land only after 15 March 1990 was justified because the aim of the Second Property Rights Amendment Act was to correct the consequences arising out of the omissions of the GDR authorities before 15 March 1990. The third group consists of those owners who acquired their land through acquisition *inter vivos* before 15 March 1990. The different treatment with regard to these owners was justified because the law of inheritance of the GDR was regulated in a totally different way from the acquisition *inter vivos*. Thus, there was no violation of Art. 14 in conjunction with Art. 1 of Prot. No. 1 of the Convention.²⁶

D. Evaluation

The German legislature considered two alternatives with regard to the heirs of new farmers.²⁷ One option would have been to generally assign the property to the heirs of those new farmers last registered in the land register. However, many heirs were registered as owners in the land register rather due to chance or oversight than to

²⁶ *Id.*, para. 126.

²⁷ See, the Official Gazette of the German *Bundestag* (federal parliament) 1992, 12/2480, 83-84.

legal justification. Choosing this model, the legislature would not have taken into account that the GDR authorities applied the law concerning the land acquired under the land reform at different levels of strictness.

Therefore it decided for the second option. Under GDR law, inheritance should only take place if the heir used the land for agricultural purposes. Under the terms of Section 233 (11), para. 3, taken together with Section 233 (12) of the Introductory Act to the Civil Code, these legal principles were realized in the law of the FRG. The core idea of this option was to place the parties in the situation 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.²⁸ The land should only stay with the owners if they had been allowed to keep it in accordance with GDR law.

It is true that if the legislature had not deprived the heirs of their land, they would have had an advantage compared to those whose position of ownership had been deleted in the land register. Thus, the legislature argued that in order to prevent unjust enrichment and promote social justice, it was preferable to expropriate them without compensation. It doing so, it could rely on the Common Declaration²⁹, which stipulates that a socially acceptable balance must be found with regard to property questions. Indeed, the aim of the legislature to treat as equal all heirs of land acquired under the land reform seems perfectly reasonable. Moreover, with regard to proportionality, the domestic legislature has a wide margin of appreciation. The question is therefore whether its assessment is manifestly without reasonable foundation. Here, the judgment of the ECHR adopts several at least questionable assumptions.

What is striking is that this is probably the first judgment in which the Court accepts a deprivation of property without compensation as not violating the Convention. While it has stated several times that in theory, exceptional circumstances may justify a lack of compensation, it has never before regarded these circumstances as given.

Thus, it can be argued that the notion of exceptional circumstances, in which an expropriation without compensation is lawful, should be used extremely restric-

²⁸ PRIES (note 18), 175.

²⁹ Common Declaration of the Governments of the FRG and the GDR for the regulation of open questions concerning property, 15 June 1990, BGBl. II 1990, 1237.

tively.³⁰ For example, in the case of *The Former King of Greece v. Greece*³¹, the Court rated the expropriation of the king without compensation unlawful, although it also took place in the course of a transition of the political regime from a monarchy to a republic.³² One could also argue that the dissolution of the communist states in Eastern Europe always took place in a unique context. It is not clear why the circumstances in the case at hand should be so much more exceptional.

First of all, the assumption that the Modrow Law contained a loophole³³ and that the applicants benefited from a windfall profit is doubtful.³⁴ It is hard to imagine that the GDR legislature simply failed to take notice that the heirs of new farmers acquired private property through the enactment of the Modrow Law. It can just as well be presumed that the GDR legislature knew best of all the legal system of the GDR and how defectively it was implemented with regard to registration in the land register.³⁵ Thus, the assumption of the Federal Constitutional Court that the GDR legislature would have enacted provisions corresponding to the 1992 legislation if it had been more attentive seems highly speculative.

Moreover, the judgments of the Federal Constitutional Court and the Grand Chamber both claim that the applicants had no legitimate expectation to remain owners of the land. They stress that the Modrow Law was enacted in a period of transition and that even under this Law, there was no certainty concerning the position of the new farmers' heirs.

This reasoning is also problematic. The applicants had been landowners for considerable periods of time, legally recognized by GDR and then also by FRG authorities through registration in the FRG land register after reunification. The applicants had inherited the land in 1976, 1978 and 1986. Given that they were registered in the land register in 1992, 1996 and 1991 respectively and were confronted with claims of the tax authorities only in 1994, 1998 and 1995,³⁶ it is doubtful whether a legitimate expectation to keep the land can be denied.

³⁰ See, *Jahn and others v. Germany* (note 2), dissenting opinions of Judges Costa and Borrego Borrego, para. 5, and Ress, para. 3.

³¹ Eur. Court H.R., *Former King of Greece v. Greece* (note 23).

³² See, Eur. Court H.R., *Jahn and others v. Germany* (note 2), dissenting opinion of Judge Cabral Barreto, Section 2.

³³ Judgment of the Federal Constitutional Court (note 8), para. 29.

³⁴ See, Eur. Court. H.R., *Jahn and others v. Germany* (note 2), dissenting opinion of Judge Ress, para. 2.

³⁵ GRÜN (note 9), 539.

³⁶ See, Eur. Court. H.R., *Jahn and others v. Germany* (note 2), paras 25, 27, 34, 36, 43, 46, 47.

In this respect it is irrelevant that the Modrow Law was not enacted by a democratically elected parliament. In the Unification Treaty, it was decided that GDR law should in principle be incorporated in the FRG law.³⁷ Moreover, the democratic legitimization cannot be a cogent criterion. Even the German Basic Law was not enacted by a democratically elected parliament, and no one would cast doubt on its validity.

Rather it must be asked whether one can expect of an ordinary sensible citizen that he assesses the impact of historically important events and accordingly measures his trust in the legal acts of different regimes. This would lead to the undesirable situation that in times of political changes, nationals should in principle mistrust their governments and only develop legitimate confidence in their legal acts in exceptional cases. Concerning German reunification, this result is acceptable with regard to laws that were incompatible with the new economic regime as one aim of reunification was precisely the adoption of the economic regime of the FRG.³⁸ However, there was no indication that the Modrow Law should not be continually applied. On the contrary, this law was specifically designed to facilitate the transition to a market economy and smooth the way to reunification. The foreseeability of the 1992 legislation is therefore highly questionable.

As a result, it must be asked whether the establishment of social justice really outweighs the legitimate expectations of the applicants in this case. One must at least be very restrictive in the justification of a retrospective expropriation with the argument of social justice. The concept of social justice is a very vague one and may, according to the political climate, be filled with very different contents. It would thus be possible that laws are changed by following political regimes or even majorities under the disguise of social justice. This would be contrary to legal security.

No doubt the legislature was confronted with immense difficulties with regard to reunification. However, it is precisely the state's duty to provide means to solve complex issues. It cannot depend on the burden and the organisational efforts of the state whether an expropriation is lawful or not.

Summing up, it must be admitted that there was no ideal solution to the problem at hand. However, I have serious doubts whether sufficient attention has been paid to the interests of the applicants. In my view, it would have been more convincing if the Court had ruled in favor of a violation of Art. 1 of Prot. 1 of the Convention.

³⁷ Art. 9 I of the Unification Treaty (note 6).

³⁸ This is stated in a Judgment by the Federal Constitutional Court of 25 May 1993, BVerfGE 88, 384, 404.