

83

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Noot Kiiver

**Eigendom. Onteigening zonder compensatie.
Bijzondere historische omstandigheden.
Grand Chamber.**

[EVRM art. 1 Eerste Protocol, 14]

Ten tijde van het bestaan van de voormalige DDR was het land van "nieuwe boeren", dat wil zeggen boeren die van de landhervorming van 1945 hadden geprofiteerd, aan een aantal beschikkingsbeperkingen onderworpen. Zo bestond er bijvoorbeeld een verkoop- en verpachtingsverbod. Vererving kon alleen door middel van een nieuwe toedeling door de staat geschieden, en dan ook alleen als de beoogde erfgenamen als arbeider of lid van een landbouwcoöperatie eveneens in de landbouw werkzaam waren. Als er geen erfgenamen waren die bereid waren om het land verder te bewerken, bleef het land in staatseigendom. Door de onoplettendheid of onverschilligheid van de DDR-autoriteiten werden desondanks vaak erfgenamen in de registers ingeschreven die niet in de landbouw werkzaam waren, en die daarom eigenlijk geen recht op het grondbezit zouden hebben gehad.

Na de val van de Berlijnse Muur trachtte de DDR-wetgever vervolgens de landbouw op de Duitse hereniging en de vrije markteconomie voor te bereiden en heeft, door middel van de wet-Modrow van maart 1990, alle beschikkingsbeperkingen op het land van nieuwe boeren opgeheven. Hierdoor werden echter niet alleen alle nieuwe boeren volledige eigenaren van hun land zonder genotsbeperkingen, maar ook alle personen die daarvoor dat land van de oorspronkelijke nieuwe boeren hadden geërfd, terecht (omdat zij zelf ook boeren waren) of onterecht (omdat zij dat niet waren). In 1992 heeft de wetgever van de Bondsrepubliek deze lacune proberen te sluiten: personen die in 1990 of in de tien jaar daarvoor niet in de land-

bouw werkzaam waren geweest, en die desondanks land hadden geërfd en door de wet-Modrow als eigenaren werden aangemerkt, moesten hun grondbezit zonder vergoeding aan hun deelstaat afstaan.

De klagers in deze zaak stellen dat zij op die wijze disproportioneel in hun eigendomsrecht zijn aangeast: zij hadden in de DDR vóór 1990 geërfd alhoewel zij toen geen boeren waren, zij werden in 1990 krachtens de wet-Modrow volledige eigenaren en werden later, nadat zij zich in de jaren negentig in het landregister hebben laten inschrijven, zonder compensatie onteigend.

Een Kamer van het EHRM heeft in 2004 vastgesteld dat, alhoewel de problemen van het Duitse herenigingsproces als buitengewone omstandigheden konden worden beschouwd, de doorgevoerde maatregel toch als onteigening moest worden gekwalificeerd; deze onteigening legde een disproportioneel zware last op de geraakte individuen, aangezien zij sinds de invoering van de wet-Modrow ervan uit mochten gaan dat zij rechtmatige eigenaren waren en vervolgens, toen zij hun land moesten afstaan, geen enkele vergoeding voor hun verlies hebben ontvangen. De Kamer concludeerde tot schending van art. 1 Eerste Protocol EVRM (eigendom), zonder de klacht apart onder art. 14 (discriminatie) te behandelen.

De Duitse regering is tegen de uitspraak van de Kamer in beroep bij de Grote Kamer gegaan. De Grote Kamer vernietigt nu het arrest van de Kamer, en stelt géén schending van art. 1 Eerste Protocol vast. De Grote Kamer gaat in op het karakter van de bezit rechten van de nieuwe boeren tijdens het DDR-regime, en stelt vast dat zij inderdaad geen rechten hadden genoten die vergelijkbaar zijn met volledig eigendom in een democratische markteconomie; bij goede toepassing van het recht van de DDR hadden klagers, aangezien zij niet in de landbouw werkzaam waren, nooit kunnen erven, en was het land eveneens zonder vergoeding in staatseigendom overgegaan. Aangezien de toepassing van het recht in de DDR niet uniform was, bevatte de wet-Modrow, die alle beschikkingsbeperkingen ophief en in geen enkele overgangsregeling voor erfgefallen voorzag, een verborgen lacune. De Duitse wetgever had deze lacune na de hereniging ook relatief snel, namelijk in 1992, gesloten, en heeft klagers gelijkgesteld met andere voormalige DDR-burgers die (terecht) geen land hadden kunnen erven. De overgangstijd van de Duitse hereniging was inderdaad een zeer bijzondere omstandigheid, en in deze context was de onteigening

zonder vergoeding aanvaardbaar en niet disproportioneel. De wet-Modrow werd immers in 1990 gedurende een periode vol onzekerheden door een niet-democratisch DDR-parlement aangenomen; de wetgever van het herenigde Duitsland heeft redelijk snel gereageerd; en hij heeft zich daarbij door beweegredenen van sociale rechtvaardigheid laten leiden. Geen schending art. 1 Eerste Protocol. Het onderscheid dat de genomen maatregelen tussen klagers en andere categorieën personen maakten, zijn daarenboven objectief en redelijk gerechtvaardigd: geen schending art. 14 EVRM.

Jahn *e.a.*
tegen
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The Law

I. Alleged violation of article 1 of Protocol No. 1

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

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

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

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

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

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

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

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

B. Justification for the interference with the right of property

1. "Provided for by law"

81. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the law upon which the interference is based should be in accordance with the domestic law of the Contracting State, including the

relevant provisions of the Constitution (see *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

82. The applicants submitted that the interference had not been in accordance with the law since, in 1992, the German legislature had wrongly assumed that land acquired under the land reform in the GDR could not pass to the owner's heirs. That was why the second Property Rights Amendment Act of 14 July 1992 had first allocated title to the property to the applicants and subsequently withdrawn it from them in favour of the tax authorities. The applicants had already been the owners of the land, however, having inherited it in the GDR, and while the legislature could not award them a property right which was theirs already, it could not validly withdraw it from them either.

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

84. The Court notes that in the instant case the measure complained of was based on section 233(11), paragraph 3, and 233(12), paragraphs 2 and 3, of the Introductory Act to the Civil Code in the version of the second Property Rights Amendment Act of 14 July 1992 (see paragraphs 65–69 above). That section contains very clear provisions governing the order in which land acquired under the land reform is to be allocated and the conditions that must be satisfied by the heirs in order to keep it.

The German legislature sought to remedy the loopholes in the Modrow Law by specifying that, in accordance with the change of possession decrees in the GDR, only persons who had worked in the agricultural sector, among others, and were members of an agricultural cooperative could inherit that land (see paragraphs 57–59 above).

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

86. The Court does not consider this interpretation to have been arbitrary. It reiterates in that connection that it is in the first place for the domestic authorities, notably the courts, to

interpret and apply the domestic law and to decide on issues of constitutionality (see, among many other authorities, *Wittek v. Germany*, no. 37290/97, § 49, ECHR 2000-XI; *Forrer-Niedenthal v. Germany*, no. 47316/99, § 39, 20 February 2003; and *The Former King of Greece*, cited above, § 82).

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

2. "In the public interest"

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

89. In the applicants' submission, the interference in question did not pursue a legitimate aim, since in 1992 the German legislature had not realised that they already had a property right, and the Federal Court of Justice still acknowledged today that the second Property Rights Amendment Act was based on the theory that land acquired under the land reform did not pass to the owner's heirs.

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

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

relation to heirs who had had to return their land at the time.

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

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

92. Agreeing as it does with the Chamber’s opinion on that point (§§ 80–81), 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”.

3. Proportionality of the interference

a. Recapitulation of the relevant principles

93. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see, among other authorities, *Sporrong and Lönnroth*, cited above, p. 26, § 69). The con-

cern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38).

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

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

95. In the instant case the second Property Rights Amendment Act of 14 July 1992 does not provide for any form of compensation for the applicants. As it has already been established that the interference in question satisfied the condition of lawfulness and was not arbitrary, the lack of compensation does not of

itself and always make the State's taking of the applicants' property unlawful (see, *mutatis mutandis*, *The Former King of Greece*, cited above, § 90, and *Zvolský and Zvolská*, cited above, § 71). Accordingly, it remains to be determined whether, in the context of a lawful deprivation of property, the applicants had to bear a disproportionate and excessive burden.

b. The Chamber's judgment

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

b⁹⁷. 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.

...

b⁹⁸. 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."

c. The parties' submissions

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

At the time of the GDR, as the heirs of owners of land acquired under the land reform, they had been the lawful owners of that land, regardless of the entries in the land register. Furthermore, objectively speaking, there had been no loopholes in the Modrow Law, which had aimed to re-establish the right of property in the true sense of the term for all owners of land

acquired under the land reform, including their heirs, and to repeal once and for all (*Schlussstrichgesetz*) the contrary provisions of the GDR. The applicants produced declarations from former senior officials of the GDR, including that of the former prime minister and author of the Law, Mr Hans Modrow, in support of their submission. Lastly, the creation of a right of property in the GDR such as existed in market economy systems had even been one of the conditions required by the FRG with a view to achieving German reunification. After the first free elections of 18 March 1990 the GDR parliament, under Mr de Maizière's government, had approved the Modrow Law, as had happened after German reunification under Mr Kohl's government. The GDR, for its part, had always stressed the need to preserve the rights of owners of land acquired under the land reform.

In 1992 the German legislature, by arbitrarily depriving the applicants of their inheritance, had sought to establish "equality in injustice" (*Gleichheit im Unrecht*) by applying a policy which went even further than the one implemented at the time by the GDR authorities and was unworthy of a State governed by the rule of law.

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

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

They observed that in the GDR the applicants, as heirs of the owners of land redistributed under the land reform, had not acquired a property right in the true sense of the term, but merely a right of usufruct. Under the change of

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

The Government referred to the case of *James and Others v. the United Kingdom* (judgment cited above, and Commission decision of 11 May 1984, DR 98, p. 71), and submitted that, for reasons of social justice, the legislature had had to correct the Modrow Law, which had been passed in the particular circumstances of the GDR by a parliament that had not been democratically elected, without making provision for the payment of compensation.

d. The Court’s assessment

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

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

100. The aim of the land reform, which was implemented as of 1945 in the Soviet Occupied Zone of Germany and continued after 1949 in the GDR, was not only to distribute the land to farmers, who were then called “new farmers”, but also to ensure that the land thus distributed was farmed under the State’s control. It is true that the certificates of allotment described the land as “private property capable of pass-

ing to the owner’s heirs” (see paragraph 55 above), and that, in its leading judgment of 17 December 1998, the Federal Court of Justice confirmed that it could pass to the owner’s heirs (see paragraph 71 above).

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

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

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

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

ii. The nature of the applicants’ right after the entry into force of the Law of 6 March 1990 on the rights of owners of land redistributed under the land reform

105. During the transitional period and the negotiations between the two German States and the four former occupying powers which began after the fall of the Berlin Wall on 9 November 1989 the GDR parliament enacted the Law of 6 March 1990 on the rights of owners of land redistributed under the land reform: the Modrow Law, which came into force on 16 March 1990, two days before the first free elec-

tions of 18 March 1990. That Law lifted all restrictions on the disposal of land that had been acquired under the land reform, thereby transforming the property titles acquired under the reform into “full ownership [which] as such fell within the scope of the Basic Law, including in those cases where it had passed to the heirs, that is, in cases where the owner originally registered in the land register had died before 16 March 1990” (see the leading decision of the Federal Constitutional Court of 6 October 2000 – paragraph 42 above).

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

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

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

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

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

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

because they were not themselves farming the land and were not members of an agricultural cooperative.

iv. Conclusion

109. The Court notes that it has in the past already been required to rule on whether an intervention by the legislature with a view to reforming the economic sector for reasons of social justice (see *James and Others*, cited above, examined under the second sentence of the first paragraph of Article 1, and concerning the reform of the British system of long leasehold tenure), or to correct the flaws in an earlier law in the public interest (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII, examined under the second paragraph of Article 1, and concerning retrospective tax legislation) respected the “fair balance” between the relevant interests in the light of Article 1 of Protocol No. 1.

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

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

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

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

71917/01 and 10260/02, §§ 77 and 111–12, ECHR 2005).

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

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

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

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

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

biii. thirdly, the reasons for the second Pro-

perty Rights Amendment Act. In that connection the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice so that the acquisition of full ownership by the heirs of land acquired under the land reform did not depend on the action or non-action of the GDR authorities at the time (see paragraphs 103–104 above). Likewise, the balancing exercise between the relevant interests carried out by the Federal Constitutional Court, particularly in its leading decision of 6 October 2000, in examining the compatibility of that amending Law with the Basic Law, does not appear to have been arbitrary (see paragraphs 41–42 above). Given the “windfall” from which the applicants undeniably benefited as a result of the Modrow Law under the rules applicable in the GDR to the heirs to land acquired under the land reform, the fact that this was done without paying any compensation was not disproportionate (see, *mutatis mutandis*, *National & Provincial Building Society*, cited above, §§ 80–83). It should also be noted in that connection that the second Property Rights Amendment Act did not benefit the State only, but in some cases also provided for the redistribution of land to farmers (see paragraphs 67–69 above).

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

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

II. Alleged violation of article 14 of the Convention taken together with article 1 of Protocol No. 1

118. The applicants alleged that they had been the victims of discrimination contrary to Article 14 of the Convention taken together 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 oth-

er opinion, national or social origin, association with a national minority, property, birth or other status.”

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

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

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

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

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

inter vivos because the applicable rules were different.

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

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

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

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

125. Having regard to the legitimate aim being pursued in the public interest and having regard to the State’s margin of appreciation in

the unique context of German reunification, the correction by the legislature in 1992 of the effects of the Modrow Law cannot be considered to have been unreasonable or to have imposed a disproportionate burden on the applicants (see the Court's reasoning under Article 1 of Protocol No. 1 – paragraphs 112–117 above). The provisions of the Law of 1992 must therefore be regarded as being based on an objective and reasonable justification.

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

For these reasons, the Court

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

Partly dissenting opinion of Judge Cabral Barreto

(Translation)

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

Let me explain.

I

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

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

1.1. – The land in question is land that was expropriated in 1945 under the land reform. Land acquired under the land reform could not be divided up, sold, leased or seized.

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

The heirs of owners of land acquired under the land reform who were not farming the land

could not, prior to the Law of 6 March 1990, register themselves as the owners in the land register.

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

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

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

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

I would add that the applicants also benefited from the complex and turbulent conditions following the reunification of Germany and from a certain flexibility in the interpretation of the 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 1992 Act amounted to an interference with the applicants' position regarding the land in question in that it impaired their legitimate expectation of continuing to be regarded as owners and, accordingly, that there has been a violation of Article 1 of Protocol No. 1.

However, I cannot agree with the following statement in paragraph 86 of the judgment – "whatever the restrictions on the applicants' right of property at the time might have been, they were clearly lifted by the Modrow Law" – since, as I have tried to explain above, the applicants could not benefit from the Modrow Law because they were neither the owners of

the land nor in possession of it when the law came into force.

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

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

1.4. 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 1992 Act could require the applicants to reassign not only the land, but also the benefit they had had from it.

If that were the case I would agree that the end of the applicants’ expectation of continuing to be regarded as the owners justified awarding

them just satisfaction in the form of a sum of money.

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

II

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

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

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

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

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

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

In a situation which I consider very similar because it occurred in exceptional circumstances and in the unique context of a brutal change of political regime, during the transition from a monarchy to a republic, in the above-mentioned *Former King of Greece and Others* judgment the Court held that “the lack of any compensation for the deprivation of the applicants’ property upset, to the detriment of the applicants, the fair balance between the protection of property and the requirements of the public interest” (see § 99).

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

It should not be forgotten that the 1992 Act was passed by a democratically elected German

parliament during the post-reunification period, and thus in a unique context but one that fell far short of exceptional circumstances as serious as those arising out of a shake-up of political regime such as that examined by the Court in the case of *The Former King of Greece and Others*.

III

However, I am not impervious to the arguments advanced by the majority in paragraph 116. While I am unable to bring myself to find that there has not been a violation, I do consider, for the reasons already expressed in my opinion annexed to the Chamber judgment and reiterated above, that the finding of a violation was sufficient to meet the requirements of Article 41 of the Convention.

Partly dissenting opinion of Judge Pavlovski

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

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

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

"In the public interest" criterion

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

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

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

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

For **two of those years** they had been recognised as the legal owners of the land even by the respondent State.

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

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

I entirely agree with the Chamber's finding that, after German reunification, the applicants had all been registered in the land register and

had, initially, been able to dispose of their property as they wished (see the Chamber's judgment of 22 January 2004, paragraph 68).

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

Like the applicants, some 50,000 other persons are in the same situation in practical terms (see Chamber's judgment of 22 January 2000, paragraph 85). I really fail to see any "public interest" in depriving such a large number of German citizens of their property rights.

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

"...the German legislature had had to remedy the injustices of the Modrow Law, which had failed to take account of the fact that very often the GDR authorities had not applied their own rules correctly. The result had been that many farmers actually farming the land were not registered as the owners in the land register and, conversely, that many heirs who were not themselves farming the land were registered as the owners..." (see Chamber judgment of 22 January 2004, paragraph 78)

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

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

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

The Government failed to show that their intentions were genuine. For instance, they did not show that they really needed the land for agricultural needs or that the expropriated land was distributed to other persons actually farming or that the FRG authorities, as a result of

the modification of the legislation, had really granted ownership rights to those who were "... farmers actually farming the land [but] were not registered as the owners in the land register..." or that the land in question was returned to the original owners dispossessed of the land under the communist regime. Neither am I ready to accept that the "...situation in relation to heirs who had had to return their land ..." could serve as a legal ground for expropriating those whose property rights had been legally recognised by the respondent State.

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

As to the "proportionality of the interference"

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

Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and whether it imposes a disproportionate burden on the applicants. In order to comply with the principle of proportionality, the German legislature could not deprive the applicants of their property for the benefit of the State without making provision for them to be adequately compensated. In the present case the applicants did not receive any compensation at all (see Chamber's judgment of 22 January 2004, paragraphs 82–93).

At the same time, with the deepest respect to my fellow judges, it is difficult for me to share the majority's finding in the present case that "...in the light of the unique context of German reunification, the lack of any compensation does not upset the "fair balance" which has to

be struck between the protection of property and the requirements of the general interest” (see paragraph 117).

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

Well, the interests of the German State have been perfectly respected by transferring the land in question into state ownership. But my question is how have the landowners’ interests been respected? The answer is crystal clear: in no way. If one party gets everything and the other party gets nothing, what kind of balance are we talking about? What does the “fairness” of this “balance” consist of in the case before us? The answer to this question is in my view quite clear again: no elements of “fairness” or “balance” have been respected in this case. I would rather call the approach applied to those dispossessed of their property “an unfair mis-balance”.

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

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

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

At the beginning of the 1990s many post-

communist countries underwent various transformations of their political and economic systems, but no one (at least, to the best of my knowledge) used all these rather painful transformations as justification for the expropriation of their citizens. On the contrary, they denationalised and privatised former state property. Many people who, under what were then communist totalitarian regimes, could not even dream about private property became actual owners. In the light of all this experience the attempts to explain the expropriation of thousands of German citizens by a need “...to transform the communist property situation into a market-economy system...” look really odd (see the Government’s memorial, paragraph 32).

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

In my opinion, the principle of a “fair balance” has not been respected by the respondent State in this case. This becomes even clearer if one takes into consideration the applicants’ argument voiced during the hearing that they had not even been allowed to buy their own land.

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

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

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

Joint dissenting opinion of Judges Costa and Borrego Borrego joined by Judge Ress and Judge Botoucharova¹

(Translation)

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

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

3. In paragraph 116 of the judgment the Modrow Law is stigmatised as having been “passed by a parliament that was not democratically elected”.

It is true that the parliament which passed it, on 6 March 1990, had not been formed following democratic elections. However, it will be appreciated that this Law was enacted “as part of the negotiations” between the two German States (and the four former occupying powers) and that its aim was “to ensure a transition from a socialist economy to a market economy”. That is what is indicated in paragraphs 19 and 20 of the judgment.

One could add that the legislative departments

of the federal ministries were involved in drafting it. The Modrow Law is indeed the result of political negotiation. The “non-democratic parliament” of the former GDR is therefore not the sole father of the Modrow Law. What is more, that Law became an integral part of the law of reunified Germany on the very day of reunification, that is, 3 October 1990 (see paragraphs 19 and 22 of the judgment).

4. The Act of 14 July 1992 therefore modified a law which had been an integral part of the legislation of the Federal Republic of Germany for nearly two years. Admittedly, as stated in paragraph 116, that period of time, given the enormity of the task, did amount to a “reasonable time to correct the effects” of the Modrow Law, even if nearly two years is not a short time.

5. However, we do not agree with the statement made later on in this paragraph, at point iii, that the owners benefited from a “windfall” and that the fact that “this was done without paying any compensation was not disproportionate”. The word “windfall” was used for the first time, it would appear, in *James and Others v. the United Kingdom* (judgment of 21 February 1986, Series A no. 98), but at the same time the *James* judgment laid down the principle of compensation – albeit of “less than reimbursement of the full market value” – for persons deprived of their property (*ibid.*, § 54). A total lack of compensation is justifiable only in exceptional circumstances (see *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 49, ECHR 2000-XII). It is significant that the former king, who lost his throne following a referendum after the fall of a military dictatorship, was awarded substantial compensation by our Court whereas the modest applicants here are not entitled to anything. Might there be two categories of exceptional circumstances? The concept of exceptional circumstances is itself a dangerous one, moreover, which, in our view, should be handled with great care.

6. We should add that the 1992 Act was of retrospective effect and was unforeseeable. The applicants had become legal owners. They had been legally registered in that capacity in the land register, the fifth applicant since 1991 and the other four on or after the date of the 1992 Act. That they had inherited property originally destined for agricultural purposes whereas they themselves were not or were no longer

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

farmers or members of an agricultural cooperative might justify depriving them of their property (although they had acted in good faith and had had confidence in the law). But without any compensation?

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

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

8. We also voted that there had been a breach of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1. The total lack of compensation cannot be justified, in our view, by a real difference between the position of the applicants and that of the three categories of persons referred to in paragraph 119 of the judgment. That said, it was not an aberration on the part of the Chamber either to hold, at § 97 of its judgment, that, having regard to its finding of a violation of the applicants' right to the peaceful enjoyment of their possessions, it did not consider it necessary to examine the allegation of a breach of Article 14. However, we prefer the position we have expressed by our vote. To our mind, it expresses our conviction more explicitly.

Dissenting opinion of Judge Ress

(Translation)

1. I share the dissenting opinion of Judges Costa and Borrego Borrego, joined by Judge Botoucharova, except regarding a violation of Article 14.

I still find the reasoning of the Chamber, which

had adopted a judgment on 22 January 2004 in the present case holding unanimously that there had been a violation of Article 1 of Protocol No. 1 on the ground that the State had compelled the applicants to assign their property to the State without any compensation, more convincing than the Grand Chamber's judgment.

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

3. My biggest reservation concerns the reference to the “unique” context of the unification of Germany and the “exceptional circumstances” of this case. As my colleagues Judges Costa and Borrego Borrego have rightly pointed out,

this expression should not be misused. The unification of Germany is no more “unique” than the dissolution of the USSR or of Yugoslavia or the change of political regime that occurred in many countries after the fall of the Berlin Wall. If a State like the FRG is bound by the Convention such events cannot in general justify a vague interpretation or less strict application of the Convention. The *Ilascu and Others v. Moldova and Russia* ([GC], no. 48787/99, EHRC 2004/85) judgment, the context of which could also have been described as “unique” following the dissolution of the USSR, is a good example of this firm approach on the part of the Court. With the notion of “exceptional circumstances” the Court could have arrived at different results in that case as well. It seems to me that the Court has been less firm in its decision in the case of *Von Maltzan and Others v. Germany* ((dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111–12, EHRC 2005), in which it did not acknowledge the applicants’ legitimate expectation of compensation (as a property right) even though the Federal Constitutional Court had in principle recognised that right of property, and in the present case.

4. The introduction of the concept of “exceptional circumstances” as a *ratio decidendi* justifying an exception under Article 1 of Protocol No. 1 is a very dangerous step in the development of the interpretation of the Convention. The Court has used it very rarely, for example in the *Former King of Greece and Others v. Greece* ([GC], no. 25701/94, § 49, ECHR 2000-XII) case, where it did nonetheless award just satisfaction. If the Court accepts that exceptional circumstances may justify interferences by the State with the individual’s rights, this is a state-orientated concept that is a far cry from the concept of human-rights protection. In the case of *James and Others*, which has been mentioned as a case in which a parallel can be drawn (*James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98), the rights of private individuals were weighed against each other. In that case it could be said that there was not a fair balance between the persons concerned because the tenants had already invested so heavily in the buildings that the right of the formal owner could justifiably be overridden. In that case as well, however, the Court did not rule out just satisfaction even if it was

less than the market value. That particular case concerned a situation in which the State could be considered as the just arbitrator between competing private interests. In the present case the State itself engineered the interference on the ground that the Modrow Law had created inequalities in society.

The situation is far from being comparable to the *James and Others* case and I do not understand how the Court could have overlooked that profound difference.

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

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

6. What is exceptional in a transitional period? There may be greater possibilities of mistakes

by the legislature, which future legislatures would be inclined to correct, but does this give carte blanche to commit violations of human rights or to regard violations as non-violations? The Court has also referred to the nature of the right or rather to its unclear nature and character and introduced a classification of weak and normal or strong rights. That distinction makes things even less clear. One of the big mistakes of the Court was to turn to the law of the GDR, which of course was not bound by the Convention. The starting point for the Court should have been the Treaty of Unification, when the Convention also came into force on the territory of the former GDR.

The Treaty of Unification included the Modrow Law as part of the federal legislation and, as the Government have confirmed, established the full property rights of the applicants. It was not only futile to refer to the legal situation in the GDR but also unjustified to go back further than the entry into force of the Convention on the territory of the GDR.

7. The Court also regarded as an exceptional circumstance the fact that the Modrow Law was passed by a regime that did not have democratic legitimacy and no one could therefore have confidence in the legal stability of such a Law. The decisive moment, however, was the Treaty of Unification and the incorporation of the Modrow Law into FRG law by the fully democratically elected German parliament, which makes that argument futile. The fact that the German legislature reacted promptly, within less than two years, to correct the so-called unacceptable consequences of the Modrow Law does not justify referring to “exceptional circumstances”.

On the contrary, a parliament which promptly corrects errors that have become evident is not in an “exceptional situation” and this does not justify concluding that interferences may not be violations of human rights. To sum up, the whole argumentation is rather circular. The situation has nothing in common with the case of *Rekvenyi v. Hungary* ([GC], no. 25390/94, ECHR 1996-III) where the restriction of the right to vote was justified by the argument that otherwise the whole election process could be jeopardized. In the present case the Government did not advance the idea that it had to protect individual property rights but, on the contrary, the State thought of a solution from

which it could derive the greatest advantage from the taking of property.

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

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

NOOT

1. Klagers hebben tijdens het bestaan van de DDR kortweg op onwettige wijze land geërfd, en kregen daardoor onverdiend – omdat zij zelf geen boeren waren – een beperkte gebruikstitel ten opzichte van grondbezit; zij werden vervolgens in de omwentelingsperiode van 1990 samen met alle anderen tot volledige eigenaren van hun land verklaard; na de hereniging hebben zij zich ook daadwerkelijk in de registers laten inschrijven, maar moesten uiteindelijk hun land weer afstaan, omdat ze het oorspronkelijk nooit hadden mogen verkrijgen. Daarmee moest een lacune in een wet uit de turbulente laatste maanden van de DDR worden gestopt. Vraag is alleen of deze maatregel, de (her)ontneming van privé-eigendom, werkelijk zonder enigerlei schadevergoeding mocht geschieden. De Kamer van het EHRM vond in 2004 van niet: hoe onwettig hun situatie voorheen wel of niet was, klagers golden in elk geval sinds 1990 als eigenaren, en bij hun onteigening, hoe redelijk die ook was in het algemeen belang, had er compensa-

tie moeten worden betaald (zie EHRM 22 januari 2004, *Jahn e.a. t. Duitsland*, EHRC 2004/22 m.nt. Kiiver). De Duitse regering heeft toen meteen aangekondigd in beroep bij de Grote Kamer te willen gaan, en het beroep werd inderdaad in behandeling genomen. Voor Duitsland ging het immers om financiële schadevergoeding in wellicht wel 50.000 gevallen waarin personen op een vergelijkbare manier zonder compensatie werden onteigend. Voor het Straatsburgse Hof gaat het hier daarentegen om meer, namelijk vooral om de proportionaliteitstoets, en daarmee de mate van eigendomsbescherming, onder art. 1 Eerste Protocol EVRM. Onteigening geheel zonder compensatie is immers, volgens vaste Straatsburgse rechtspraak, normaliter disproportioneel, en kan alleen in zeer buitengewone omstandigheden (“exceptional circumstances”) worden gerechtvaardigd (Kamer par. 82; Grote Kamer par. 94, telkens met verwijzing naar jurisprudentie). De Kamer oordeelde in 2004 unaniem dat de hereniging inderdaad buitengewoon moeilijk was, maar dat onteigening geheel zonder vergoeding ook in dat geval te ver ging: schending art. 1 Eerste Protocol. De Grote Kamer oordeelt nu daarentegen, elf tegen zes, dat er géén schending was van art. 1 Eerste Protocol. De buitengewone omstandigheden van het geval rechtvaardigden juist wél het ontbreken van compensatie bij de voorgenomen onteigening, de maatregel is derhalve niet disproportioneel. Goed nieuws voor de Duitse regering, zij hoeft geen vergoeding te betalen. Klagers zijn nu, enerzijds, definitief hun land kwijt. Anderzijds zou men kunnen stellen dat zij precies daar zijn waar ze in de DDR, bij goede toepassing van de regels, ook al zouden zijn geweest: namelijk zonder recht op erfenis, en dus zonder land, en ook zonder vergoeding. Ze zijn in hun rechtmatige situatie hersteld, en dat was juist de bedoeling van de onteigening. Maar zo makkelijk komt het Hof er natuurlijk niet van af. Er blijft namelijk een aantal vragen over: hoe zit het met het intussen gewekte vertrouwen? Wat betekent deze uitspraak voor de reikwijdte van art. 1 Eerste Protocol? En wat bracht de Grote Kamer precies ertoe om tot niet-schending te concluderen en daarmee het arrest van de Kamer te vernietigen?

2. Het feitencomplex is bij de uitspraak van de

Kamer en bij het bovenstaande arrest van de Grote Kamer uiteraard hetzelfde. Ook de argumenten van de partijen zijn hier bijna onveranderd ten opzichte van de procedure voor de Kamer. Heeft er een ontneming van eigendom plaatsgevonden? Klagers stelden al voor de Kamer dat de wet-Modrow, waarmee de DDR alle genotsbeperkingen op het relevante grondbezit ophief, hen tot volledige eigenaren van hun geërfd land had gemaakt. De maatregel van de wetgever van de Bondsrepubliek van 1992 ontnam hen dit land weer. De regering stelde voor de Kamer dat er geen eigendom was ontnomen, omdat klagers onder het DDR-regime geen eigenaren van het land waren, maar slechts een soort vruchtgebruik hadden; de wet-Modrow verleende hen vervolgens evenmin eigendom, maar alleen een soort onwettige, puur formele en vooral onzekere rechtspositie, die later volledig terecht werd teruggedraaid. De Kamer vond wél dat er eigendom werd ontnomen, zoals bedoeld in art. 1 Eerste Protocol; de Grote Kamer bevestigt deze conclusie, en de regering betwist dat nu ook niet meer. Zelfs rechter Cabral Barreto die, als voorzitter van de Kamer, had opgemerkt dat klagers pas ná 1990 feitelijk in het landregister werden ingeschreven, en dus pas vanaf dat tijdstip eigenaren waren, legt zich op dat punt bij de analyse van de Grote Kamer neer. Was de onteigening vervolgens voorzien bij wet? Ja, zeggen zowel de Kamer als ook de Grote Kamer. Was de onteigening in het algemeen belang? Klagers stelden in beide instanties dat de overheid simpelweg hun land heeft weggenomen zonder daarvoor compensatie te willen betalen, en dat de overheid daarbij, door de oorspronkelijke voorwaarden voor vererving toe te passen, tevens met terugwerkende kracht de socialistische wetgeving van de voormalige DDR had gereactiveerd. De regering stelde dat de onteigening was ingegeven door sociale rechtvaardigheidsoverwegingen, en de noodzaak om een wetgevingslacune die onredelijke gevolgen had, te sluiten. Zowel de Kamer als ook de Grote Kamer aanvaardden het argument van de regering, mede gelet op de nationale beleidsvrijheid bij de vaststelling van het algemeen belang. Was de onteigening – zonder compensatie – tenslotte proportioneel? Dit is het punt waar de Kamer en een meerderheid van de Grote Kamer van mening

verschillen, en dit is ook meteen het cruciale punt voor de eindconclusie. Hier raakt het debat tussen de partijen voor de Grote Kamer zelfs aanzienlijk verhit, en zelfs sommige rechters zijn in hun afwijkende opinies tamelijk fel.

3. Klagers benadrukken voor de Grote Kamer dat zij, met of zonder inschrijving in het register, zonder twijfel eigenaren van het land in kwestie waren. Zij ontkennen dat de wet-Modrow een verstopte lacune bevatte: volgens hen werden de vragen van oude twijfelachtige erfgevallen wel degelijk in het DDR-parlement behandeld, maar ten gunste van een wet die een streep onder oude geschillen zou zetten, bewust genegeerd. Dat had de Duitse wetgever in 1992 moeten respecteren. Ook *dissenter* Ress, die al samen met Cabral Barreto in de Kamer zat, stelt dat de DDR-wetgever wel degelijk wist wat hij deed. De latere onteigening bereikte volgens klagers dan ook niets anders dan "gelijkheid in onrechtvaardigheid" (par. 97), en een onteigening geheel zonder vergoeding heeft het Straatsburgse Hof volgens klagers nog nooit als proportioneel aanvaardt. Hier dus wel. De Grote Kamer wijkt namelijk niet alleen bij de conclusie, maar reeds bij de analytische benadering van de Kamer af. De Kamer weigerde in 2004 na te gaan of klagers in de DDR daadwerkelijk eigendom of, zoals de regering had gesteld, alleen maar vruchtgebruik konden genieten. Volgens de Kamer was deze vraag irrelevant, alleen de eigendomsverlening door de wet-Modrow was bepalend. De Grote Kamer kijkt wél naar het DDR-eigendomsregime van vóór 1990 en is het met de regering eens dat klagers, die nu eenmaal geen boeren waren, inderdaad nooit hadden mogen erven, en dat de wet-Modrow een lacune bevatte. Rechter Ress vindt deze analyse nog steeds zowel futiel als ook ongerechtvaardigd, aangezien de DDR zelf nooit partij bij het EVRM was. Maar de Grote Kamer gaat verder in haar analyse van de situatie in de DDR vóór de hereniging: de wet-Modrow werd aangenomen vóór de eerste democratische parlementsverkiezingen aldaar. Zij is dus op besluit van een ondemocratische wetgever tot stand gekomen, hetgeen in de sfeer van omwentelingen alom sowieso al tot verminderde rechtszekerheid had moeten

leiden. Ress vindt ook dat volstrekt irrelevant, omdat het een gebeurtenis van vóór de hereniging en de inwerkingtreding van het EVRM in Oost-Duitsland betreft; rechters Costa en Borrego Borrego merken op dat de wet-Modrow niet alleen op initiatief van het DDR-parlement, maar als onderdeel van de herenigingsonderhandelingen tot stand is gekomen; rechter Pavlovski vraagt zich af of nu alle wetten uit die periode ongeldig zijn. Toch is het ondemocratische karakter van het DDR-parlement, dat toen op basis van een enkele eenheidslijst werd "verkozen", samen met het ontbreken van overgangsbepalingen in de wet-Modrow, één van de drie factoren die de regeling van begin af aan onbetrouwbaar, en de latere onteigening zonder compensatie aanvaardbaar maken (alle drie factoren in par. 116). De tweede factor is dat de wetgever van de BRD vrij snel, binnen twee jaar, op de lacune in de wet-Modrow had gereageerd, terwijl de hereniging met al haar sociaal-economische gevolgen al een enorme belasting voor de wetgever was geweest. Als derde factor voert de Grote Kamer aan dat de beweegredenen voor de maatregel op sociale rechtvaardigheid mikten: de klagers kwamen onwettig aan hun eigendom, terwijl andere erfgenamen, die evenmin boeren waren, niet in het genot van eigendom kwamen. Het eigendom van klagers was een "windfall" (*ibid.*), een onverdiend geluk, dat toch nooit lang kon duren.

4. Uiteindelijk komt het er op neer dat de buitengewone omstandigheden van de historische omwenteling in Duitsland een onteigening zonder enigerlei compensatie rechtvaardigen. Ook de klacht dat klagers in strijd met art. 14 jo. art. 1 Eerste Protocol werden gediscrimineerd, wijst de Grote Kamer expliciet af. Dat klagers ongelijk werden behandeld ten opzichte van oorspronkelijke, nog levende nieuwe boeren van 1945 is gerechtvaardigd: bejaarde nieuwe boeren bleven formeel lid van de landbouwcoöperatie, en dat waren klagers nooit geweest; dat zij ongelijk werden behandeld ten opzichte van personen die bij leven van nieuwe boeren land hadden verworven, is gerechtvaardigd omdat overdracht *inter vivos* door andere regelgeving werd beheerst; dat zij anders werden behandeld dan personen die tussen de inwerkingtre-

ding van de wet-Modrow en de hereniging hadden geërfd, is ook gerechtvaardigd: de bedoeling van de onteigening was om gelijkheid te waarborgen van erfgenamen uit de periode van vóór de wet-Modrow. Art. 14 EVRM is dus evenmin geschonden.

5. De Duitse hereniging stelde dus bijzondere omstandigheden voor. Ongelooflijk, oordelen *dissenters* Costa en Borrego Borrego: de recente Europese geschiedenis zit vol omwentelingen en “bijzondere omstandigheden” – denk aan de val van het socialisme, en het uiteenvallen van de Sovjet-Unie en Joegoslavië. En hoe buitengewoon de historische context ook was, telkens heeft het Hof tenminste op een gedeeltelijke schadevergoeding voor onteigeningen geïnsisteerd. Zelfs de ten val gebrachte Griekse koning (EHRM 23 november 2000, *The Former King of Greece e.a. t. Griekenland*, EHRC 2001/9 m.nt. Heringa) had daar recht op! En de overgang naar een republikeinse orde in Griekenland was veel radicaler dan de Duitse hereniging, die, zo merkt Cabral Barreto op, immers door een zacht democratisch parlementair proces werd begeleid. Het corrigeren van wetgevingslacunes is volgens Ress ook niets “buitengewoons”, maar een heel normaal fenomeen dat de overheid niet van de verplichting tot het betalen van schadevergoeding voor onteigeningen kan bevrijden. Daarbij heeft de staat in zijn eigen voordeel gehandeld: hij profiteerde van de onteigeningen. Het gaat dus, volgens Ress, niet om een minnelijke redistributie van eigendom tussen particulieren met de staat als arbiter, zoals bij de teruggaaf van eigendom aan oorspronkelijk onteigende oud-eigenaren, maar om het nationaliseren van particulier grondbezit – teruggaaf aan de eigenaren van vóór 1945 vond wel soms, maar niet altijd plaats. Een boze rechter Pavlovski kan verder geen precedents aanwijzen waar de staat in de naam van de overgang tot een markteconomie tot nationalisering zou zijn overgegaan: de bedoeling is toch juist privatisering, niet onteigening.

6. Al met al hebben de *dissenters* een geldig punt: zeker als onteigeningen ten voordele van de staat zélf geschieden, is het gevaarlijk om het de staat mogelijk te maken om een vage notie van “bijzondere omstandigheden” in te

roepen en daarmee een vaststelling van een schending van art. 1 Eerste Protocol te vermijden. De financiële kant van het verhaal, namelijk de hoogte van het vergoedingsbedrag, staat mijn inziens evenwel los daarvan. Ook al wordt er een schending van het eigendomsrecht vastgesteld, dan is het nog maar de vraag in hoeverre klagers daadwerkelijk geld kunnen claimen. Het verschil, zoals Ress dat formuleert, tussen onderlinge redistributie van eigendom tussen individuen enerzijds, en nationalisering anderzijds, is niet noodzakelijkerwijs overtuigend. De overheidsmiddelen voor eventuele schadevergoeding bij nationalisering komen namelijk niet uit de lucht vallen: het zijn publieke middelen. En het is nog maar zeer de vraag of de Duitse belastingbetalers zouden moeten opdraaien voor de compensatie van personen die tegen alle regels in, en in het vaarwater van moeilijke hervormingen, aan een twijfelachtige eigendomstitel zijn gekomen. Wat deze uitspraak van de Grote Kamer zo problematisch maakt, is dan ook niet dat klagers geen geld te zien krijgen, maar dat de rechtvaardiging vanuit het overheidsperspectief, en niet vanuit een subjectief standpunt, wordt geconstrueerd. De Kamer had het gewekte vertrouwen van klagers voorop gesteld, zonder al te diep op de historische context in te gaan, en overigens de compensatievraag onder art. 41 EVRM (billijke genoegdoening) open gelaten. De Grote Kamer maakt het Duitsland daarentegen makkelijk om zich vanaf nu tegen alle soortgelijke gevallen te verweren, omdat de historische context nog steeds dezelfde is: de wet-Modrow was kort door de bocht en de DDR-wetgever was ondemocratisch; het stoppen van de lacune geschiedde ondanks de grote werklust na de hereniging vrij vlot; en de beweegreden daarvoor was het nastreven van sociale rechtvaardigheid. Er is daarmee veel minder aandacht voor de persoonlijke omstandigheden van potentiële klagers, bijvoorbeeld het moment waarop zij in de registers terechtkwamen, de omstandigheden van hun inschrijving, het aantal jaren dat zij het eigendom hadden genoten, etc. Daarbij kan, nogmaals, de conclusie nog steeds luiden dat een slechts gedeeltelijke vergoeding, of een vaststelling van een verdragschending, op zichzelf al voldoende billijke genoegdoening voorstelt, en dat klagers maar blij moeten zijn

dat zij niet ook nog hun exploitatieprofijs wegens ongerechtvaardigde verrijking terug moesten betalen.

7. Wellicht zou een door de Grote Kamer bevestigde verdragschending en een financiële compensatie in dit geval voor Duitsland duur zijn geweest. Anderzijds waren moeilijkheden bij de begroting nog nooit een argument om schendingen van het EVRM te rechtvaardigen: schadevergoeding, en op nationaal niveau toegekende bedragen, bijvoorbeeld sociale-zekerheidspremies, moeten gewoon worden betaald, net zoals gevangenen, hoe arm het land ook is, gewoon in een fatsoenlijke toestand moeten zijn. Hoe dan ook, van *Jahn*-achtige kloonzaken komt Duitsland in de toekomst in ieder geval zeker makkelijker af, omdat het feitenkader reeds objectief als “buitengewone omstandigheid” is gekwalificeerd. Maar nu wordt het spannend: wat zal de volgende verweerder als rechtvaardiging voor onteigeningen invoeren? Zeker in Oost-Europa zijn er een hoop landhervormingen, nationaliserings- en omwentelingen geweest, en zij zijn ook allemaal vrij buitengewoon. Oost-Europese landen hebben trouwens niet alleen bijzondere historische omstandigheden te bieden, maar hebben doorgaans ook beperktere financiële middelen dan Duitsland. Nóg spannender dan de vraag wat de volgende staat zal invoeren, is echter de vraag hoe het Straatsburgse Hof zelf weer van de *Jahn*-zaak als precedent afkomt. Als dat namelijk niet lukt, dan zal het zijn cadeautje aan de Duitse overheid aan iedereen moeten verstrekken, ten voordele van statelijke beleidsvrijheid en zeer ten nadele van individuele rechtsbescherming.

Ph. Kiver

84

Europees Hof voor de Rechten van de Mens
30 juni 2005, nr. 5379/02

(Zupančič (President), Caflisch, Birsan,
Tsatsa-Nikolovska, Jaeger, Myjer, David Thór
Björgvinsson)

Noot De Jonge

**Detentie. Vrijheidsbeneming voorzien bij wet.
Proces-verbaal van hoorzitting inzake
verlenging tbs.**

[EVRM art. 5 lid 1, 41]

Klager zat na afloop van zijn gevangenisstraf in tbs. Zijn beroep tegen verlenging van de tbs werd door het hof in Arnhem afgewezen. Toen zijn raadsman om het proces-verbaal van de zitting vroeg, werd hem medegedeeld dat het niet gebruikelijk was om processen-verbaal op te maken bij beroepsprocedures inzake verlening van tbs. Het Straatsburgse Hof stelt een schending vast van art. 5 lid 1 EVRM. De procedure inzake de vrijheidsbeneming was niet voorzien bij wet, aangezien de nationale wet, het Nederlandse Wetboek van Strafvordering, het opmaken van een proces-verbaal voorschreef. Het Hof merkt op dat de praktijk om het opmaken van processen-verbaal achterwege te laten, al uitdrukkelijk door de Hoge Raad als strijdig met de wet werd beschouwd, en dat de Hoge Raad in casu tot hetzelfde oordeel zou zijn gekomen.

Nakach
tegen
Nederland

The Law

I. Alleged violation of article 5 § 1 of the Convention

28. Article 5 § 1 of the Convention, in relevant part, provides as follows:

b“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

be. the lawful detention ... of persons of unsound mind ...”

The applicant complained under this provision