H e a d n o t e

to the Judgment of the First Senate of 8 April 1998

– 1 BvR 1680/93, 183/94, 1580/94 –

Article 233 § 2.a.8 sentence 1 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*) as amended by the Property Law Amendment Act (*Sachenrechtsänderungsgsetz*) of 21 September 1994 is incompatible with Article 14.1 sentence 1 of the Basic Law (*Grundgesetz – GG*) to the extent that for the period from 22 July 1992 to the end of 31 December 1994 it does not provide for a statutory claim to payment for use of the landowner against the person using the land with a right to possession.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1680/93 –

– 1 BvR 183/94 –

– 1 BvR 1580/94 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Ms B(…)

– authorised representative: Rechtsanwalt Herbert Korzetzek,
Gessentalstraße 1, Gera –

1. directly against

a) the judgment of the Gera District Court (*Bezirksgericht*) of 26 August 1993 – 1 S 49/93 –,

b) Art. 232 §§ 4, 4a EGBGB as amended by the Public Register Automation Act (*Registerverfahrensbeschleunigungsgesetz* – RegVBG) of 20 December 1993 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2182), Art. 233 § 2a.8 EGBGB as amended by the Property Law Amendment Act (*Sachenrechtsänderungsgesetz* – *SachenRÄndG*) of 21 September 1994 (BGBl I p. 2457) and §§ 1, 2, 8 of the Act to Adjust Contractual Rights of Use (*Schuldrechtsanpassungsgesetz* – *SchuldRAnpG)* of 21 September 1994 (BGBl I p. 2538),

2. indirectly against

Art. 233 § 2a.3 sentence 1 EGBGB as amended by Article 8 of the Second Property Law Amendment Act (*Zweites Vermögensrechtsänderungsgesetz* – 2. VermRÄndG) of 14 July 1992 (BGBl I p. 1257)

– 1 BvR 1680/93 –,

II. of Mr W(…)

– authorised representative: Rechtsanwälte Joachim Heinle und Partner,
Koblenzer Straße 99-103, Bonn –

1. directly against

a) the judgment of partial acknowledgement and the final judgment (*Teilanerkenntnis- und Schlussurteil*) of the Rostock Higher Regional Court (*Oberlandesgericht*) of 21 December 1993 – 4 U 25/93 –,

b) the judgment of the Schwerin Regional Court (*Landgericht*) of 15 December 1992 – 1 O 225/92 –,

2. indirectly against

Art. 233 § 2a.1 EGBGB as amended by Article 8 of the Second Property Law Amendment Act of 14 July 1992 (BGBl I p. 1257)

– 1 BvR 183/94 –,

III.

1. of Mr S(…)

2. of Ms S(…)

– authorised representative: Rechtsanwalt Alfred Steiding,
Präsidentenstraße 85, Neuruppin –

against

1. the judgment of the Neuruppin Regional Court of 29 July 1994 – 4 S 52/93 –,

2. Art. 233 § 2a.8 EGBGB as amended by the Property Law Amendment Act of 21 September 1994 (BGBl I p. 2457) –

– 1 BvR 1580/94 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Grimm,

Kühling,

Seibert,

Jaeger,

Haas,

Hömig,

Steiner

held on 8 April 1998:

1. Article 233 § 2.a.8 sentence 1 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*) as amended by the Property Law Amendment Act (*Sachenrechtsänderungsgesetz – SachenRÄndG*) of 21 September 1994 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I) I p. 2457) is incompatible with Article 14.1 sentence 1 of the Basic Law (*Grundgesetz* – GG) to the extent that for the period from 22 July 1992 to the end of 31 December 1994 it does not provide for a statutory claim to payment for use of the landowner against the person entitled under Article 233 § 2.a.1 of the above statute.

The legislature has a duty to replace the unconstitutional legislation by constitutional legislation by 30 June 2000 at the latest.

2. The remaining constitutional complaints are rejected as unfounded.

3. The Federal Republic of Germany is ordered to reimburse the necessary expenses of the first and third complainants.

REASONS :

A.

The constitutional complaints relate to what is known as the real-property moratorium for land situated in the area of the former German Democratic Republic. This provides that users of land owned by another have by operation of law a right of possession as against the landowners until the adjustment of property law is carried out. Until the end of 31 December 1994, they had to pay for the use of the land only on a contractual basis. 1

I.

1. a) In the German Democratic Republic, private ownership of land had increasingly lost its function as an economic factor over the course of time […] Instead of this, the central institute of the property system was socialist property, and among its man- 2

ifestations, in addition to cooperative common property, above all publicly owned, or People's, property belonging to society as a whole, which […] could neither be transferred nor encumbered. At the same time, the state award of rights of use of publicly owned real property increased in importance as a means of land use. When understood as the transfer of state rights and duties of use, this had its statutory foundation in the last instance in the Civil Code of the German Democratic Republic (*Zivilgesetzbuch – ZGB*) of 19 June 1975 (Law Gazette of the German Democratic Republic, *Gesetzblatt der Deutschen Demokratischen Republik* – GBl I, p. 465). Under this law, the award gave the person entitled the right to build his or her own home or another building for personal use on the publicly owned land and to use it personally (see § 287.1, § 288.1 of the Civil Code). The same applied where rights of use were allocated to build on cooperatively used land, to the citizens to whom they were allocated (see §§ 291, 292.1 of the Civil Code). In both cases, the right of use was the precondition for acquiring independent personal ownership of the building erected, independent of the ownership of the land (see § 288 .4, § 292.3 of the Civil Code).

b) There were special provisions for the agricultural use of land. Since the collectivisation of agriculture was completed in the year 1960, this was largely in the hands of the agricultural cooperatives (*Landwirtschaftliche Produktionsgenossenschaften – LPG*). In addition to the areas brought in by their members, these also farmed areas that were publicly owned, which had been transferred to them as holders of rights of use, and also, on a contractual basis, land belonging to non-members. Under § 19.1 of the Agricultural Cooperatives Act (*Gesetz über die landwirtschaftlichen Produktionsgenossenschaften* – LPG-G) of 2 July 1982 (Law Gazette of the German Democratic Republic I p. 443), the land introduced remained the property of the members. But under § 18 of the Agricultural Cooperatives Act, the agricultural cooperative had the comprehensive and permanent right of use of all the land entrusted to it (see also Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 95, 267 (269)). It also granted the right to erect buildings and facilities, and under § 27 of the Agricultural Cooperatives Act the agricultural cooperative acquired ownership independent of the ownership of the land. 3

c) With the continuation of the transfer of land to public ownership and the largely collective farming of the areas in agricultural use, a system of allocation for use developed; this also created the conditions for building on the land. The buildings largely functioned as encumbrances on the land, like *in rem* rights within the meaning of the Federal German Civil Code. Consequently, those involved were less and less interested in acquiring rights to land and in the property relations. 4

d) The legal reality in the German Democratic Republic did not always coincide with the legal position recorded in writing. Often, with the approval of state or social authorities, buildings were erected, even though the land on which they were built had not been transferred to public ownership and no right of use had been granted. However, the usufructuary relations, often created only de facto, and the subsequent building on land belonging to another were generally regarded as lawful by those in- 5

volved.

2. Even before reunification, there was a radical reorganisation of the agricultural law of the German Democratic Republic. The aim, *inter alia*, was to restore to the ownership of the land used by the agricultural cooperatives the status of an asset. For this purpose, first of all § 7 no. 6 of the Act on the Amendment or Repeal of Acts of the German Democratic Republic (*Gesetz über die Änderung oder Aufhebung von Gesetzen der Deutschen Demokratischen Republik*) of 28 June 1990 (Law Gazette of the German Democratic Republic I p. 483) removed the right of the agricultural cooperatives to use land under § 18 of the Agricultural Cooperatives Act. Then, § 1 of the Agriculture Adjustment Act (*Landwirtschaftsanpassungsgesetz – LwAnpG*) of 29 June 1990 (Law Gazette of the German Democratic Republic I p. 642) restored private ownership of land and the farming of land based on this ownership. § 64 of the Agriculture Adjustment Act provided (as does its current version) for a reorganisation of ownership of the areas on which, on the basis of rights of use governed by statutory provisions, buildings had been erected which were in the independent ownership of the agricultural cooperative or third parties. 6

3. On the accession of the German Democratic Republic to the Federal Republic of Germany, the federal legislature had the task of unifying the various forms of ownership and usufructuary relations. This was done in several stages. 7

a) The Act of 23 September 1990 on the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity – Unification Treaty Act – (*Gesetz vom 23. September 1990 zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands – Einigungsvertragsgesetz,* BGBl II p. 885) dispensed with changes in content. Admittedly, it supplemented the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB,* hereinafter: 1990 Introductory Act to the German Civil Code), which also came into force in the area of the former German Democratic Republic, in accordance with Annex I chapter III subject area B part II no. 1 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands*) – Unification Treaty, *Einigungsvertrag* – EV) – by adding special provisions for this area. But under these provisions, building ownership independent of the land and the rights of use created in the German Democratic Republic remained in existence with their previous content until the underlying legal relationships were revised and adjusted (see Article 231 § 5, Article 233 §§ 3, 8 of the 1990 Introductory Act to the German Civil Code). This was intended to guarantee legal certainty and undisturbed administration of the law in the area of the former German Democratic Republic (see *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 12/5992, p. 61 under C). 8

b) The provisions of the Unification Treaty were soon shown to be inadequate to effectively protect the maintained usufructuary relations until they were transferred to federal German property law. The owners of the land often cast doubt on or even took legal action against rights of possession that had previously been relied on on a legal basis or sometimes only de facto, but without challenge (see BTDrucks 12/2480, pp. 32 and 77). In order to prevent a fait accompli being created in this area, the legislature, in order to maintain the status quo until the adjustment of property law, in Article 8 of the Second Property Law Amendment Act (*Zweites Vermögensrechtsänderungsgesetz – 2. VermRÄndG*) of 14 July 1992 (BGBl I p. 1257) with effect from 22 July 1992, introduced what is known as the property-law moratorium into the Introductory Act to the Federal Civil Code (hereinafter: 1992 Introductory Act to the Federal Civil Code). This provided that users of land belonging to another, in cases defined in more detail, received a statutory right of possession in view of the rights of use that had previously accrued to them, legally or de facto (see Article 233 § 2.a.1 sentence 1 of the 1992 Introductory Act to the German Civil Code). It was to be possible to obtain compensation for emoluments obtained or expenses incurred only by mutual agreement (see Article 233 § 2.a.3 sentence 1 of the 1992 Introductory Act to the German Civil Code). The owner was not permitted to encumber his or her land (see Article 233 § 2.a.3 sentence 2 of the 1992 Introductory Act to the German Civil Code). The moratorium was limited in time until 31 December 1994, with permission to extend it once (see Article 233 § 2.a.1 sentence 2 of the 1992 Introductory Act to the German Civil Code). The adjustment of the legal relationships, with regard to fruits and expenses too, was subject to later statutory arrangements (see Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code). 9

The relevant provisions are as follows: 10

Article 233 11

§ 2.a 12

Moratorium 13

(1) The following persons are considered as entitled to the possession of a plot of land situated in the area specified in Article 3 of the Unification Treaty, notwithstanding existing rights of use and more favourable agreements and provisions: 14

a) a person who, before the end of 2 October 1990, on the basis of a final and absolute building permit or in another way in compliance with the legal provisions with the approval of state or social authorities, erected or began to erect buildings or facilities on the land and at the date when this legislation comes into force is using them himself or herself, 15

b) cooperatives (…) to which, before 3 October 1990, on the basis of a final and absolute building permit or in another way in compli- 16-17

ance with the legal provisions with the approval of state or social authorities, buildings erected and associated plots of land and parts of plots of land were transferred for use and independent farming and management and were used by them or by their successors in title,

c) and d) (…) 18

The right under sentence 1 above shall continue until the adjustment of the above legal situation by a special Act and at the longest until the end of 31 December 1994; the period may be extended once by a legal ordinance of the Federal Minister of Justice. The extent and contents of the right shall in other respects be determined by its previous exercise (…) 18

(2) (…)

(3) During the period stated in subsection 1 sentence 2 above, reimbursement for emoluments obtained or expenses incurred may be demanded only by mutual agreement. During the existence of the right of possession under subsection 1, the owner of a plot of land is under an obligation not to encumber the land with rights, unless (…) 20

(4) to (7) (…) 21

(8) The legal relationship between the landowner or other persons with *in rem* rights and the person entitled to possession, with regard to emoluments and expenses, is reserved to be legislated on by statute. 22

c) aa) The final adaptation of the usufructuary relations that came into existence in the German Democratic Republic to the real property law of the Federal German Civil Code is the subject of the Property Law Adjustment Act (*Sachenrechtsbereinigungsgesetz – SachenRBerG*), which came into force on 1 October 1994 as Article 1 of the Property Law Amendment Act (*Sachenrechtsänderungsgesetz – SachenRÄndG*) of 21 September 1994 (BGBl I p. 2457). In the course of bringing together ownership of land and buildings, this statute is intended to achieve an adjustment of the interests of landowners and such users as, under existing relations with regard to usufructuary rights or independently of these, with the approval of state or social authorities, built on land belonging to another and, in view of their investments in the buildings, should enjoy protection of legal continuity and protection of bona fide acts and declarations (see BTDrucks 12/5992, p. 62). Apart from the possibility of the landowner purchasing the building erected by the user, this purchase being subject to particular conditions, or of the landowner redeeming the user's rights, which are based on investment by way of a building (see § 15.4 sentence 1, § 29.5 sentence 1, § 29.5 sentence 1, § 31.5 sentence 1 in conjunction with §§ 81 *et seq.* of the Property Law Adjustment Act), this adjustment is carried out in such a way that users of the land entitled by law are to have the right to choose between having a heritable building right created on 23

the land on which they have built, and the purchase of the land (see § 15.1 in conjunction with §§ 32 *et seq*., §§ 61 *et seq*. of the Property Law Adjustment Act). The normal ground rent is half the amount of the rent usual for the use in question, and the purchase price is in principle half the value of the land (See § 43.1, § 68.1 of the Property Law Adjustment Act), and therefore this usually results in the half of the land value benefiting the user and half the landowner (see BTDrucks 12/5992, pp. 63-64).

bb) The provisions on the real property moratorium in the Introductory Act to the German Civil Code were adjusted to this legislation scheme by Article 2 § 5 of the Property Law Amendment Act (hereinafter: 1994 Introductory Act to the German Civil Code). This provides that the statutory right of possession of the entitled users shall be extended until the adjustment of property law has been completed (see Article 233 § 2.a.1 sentence 3 of the 1994 Introductory Act to the German Civil Code). In future, the use will be on a payment basis; where it has been free of charge until now, the landowner has been entitled since 1 January 1995 to demand payment for use up to the amount of the ground rent payable under the Property Law Adjustment Act, subject to statutory or contractual provisions to the contrary, as soon as proceedings for property law adjustment are instituted (see Article 233 § 2.a.1 sentences 4 and 5 of the 1994 Introductory Act to the German Civil Code). There are separate provisions, for the period from 1 January 1995 to 31 December 1998, for payment for the use of buildings and facilities that serve public purposes or are intended for common use (see Article 233 § 2.a.9 of the 1994 Introductory Act to the German Civil Code). In contrast, for the period until the end of 31 December 1994, the user has no obligation to surrender the emoluments to the owner unless the parties have agreed otherwise (see Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code). 24

Art. 233 § 2.a of the 1994 Introductory Act to the German Civil Code, so far as it is of interest here, reads as follows:

Article 233 25

§ 2.a 26

Moratorium 27

(1) The following persons are considered as entitled to the possession of a plot of land situated in the area specified in Article 3 of the Unification Treaty, notwithstanding existing rights of use and more favourable agreements and provisions: 28

a) a person who, before the end of 2 October 1990, on the basis of a final and absolute building permit or in another way in compliance with the legal provisions with the approval of state or social authorities, erected or began to erect buildings or facilities on the land and at the date when this legislation comes into force is using them himself or herself, 29

b) cooperatives (…) to which, before 3 October 1990, on the basis of a final and absolute building permit or in another way in compliance with the legal provisions with the approval of state or social authorities buildings erected and associated plots of land and parts of plots of land were transferred for use and independent farming and management and were used by them or by their successors in title, 30-31

c) and d) (…) 32

The right under sentence 1 above shall continue until the adjustment of the above legal situation by a special Act and at the longest until the end of 31 December 1994; the period may be extended once by legal ordinance of the Federal Minister of Justice. In the cases designated in § 3.3 and §§ 4 and 121 of the Property Law Adjustment Act, the right of possession referred to in the first sentence shall continue until the adjustment of these legal relationships under that Act. If the use has previously been free of charge, the landowner, from 1 January 1995 on, may require the user to make a payment up to the amount of the ground rent payable under the Property Law Adjustment Act if proceedings to reorganise the land under the Act on the Separation in Accordance with the Map of Unsurveyed Land and Land with Building Over the Boundary, (*Gesetz über die Sonderung unvermessener und überbauter Grundstücke nach der Karte, Bodensonderungsgesetz,* Land Separation Act) are initiated, the landowner applies for notarial conciliation proceedings under §§ 87 to 102 of the Property Law Adjustment Act or land reorganisation proceedings under the eighth part of the Agricultural Adjustment Act or, in the above proceedings, has become involved in negotiation to create *in rem* rights or a transfer. This shall be without prejudice to contractual or statutory arrangements for a different payment for use or earlier commencement of the obligation to pay. The extent and contents of the right shall in other respects be determined by their previous exercise (…) 33

(2) (…)

(3) During the period stated in subsection 1 sentence 2 above, reimbursement for emoluments obtained or expenses incurred may be demanded only by mutual agreement. During the existence of the right of possession, the owner of a plot of land is, under subsection 1, under an obligation not to encumber the land with rights, unless […] 34

(4) to (7) (…) 35

(8) For the period until the end of 31 December 1994, the person 36

entitled under subsection (1) above shall not be obliged to surrender emoluments to the landowner or to other persons with *in rem* rights, unless the persons involved have agreed otherwise.

(9) For the period from 1 January 1995 to 31 December 1998, the landowner may demand from the public corporation that is using the land to fulfil its public duties, or, if the land has been dedicated to common use, that is responsible for maintaining the building or the facilities, only payment in the amount of 0.8 per cent per annum of the land value of a plot of land not built on and similarly situated and release from the encumbrances on the land (…) This shall be without prejudice to contractual agreements to another effect. 37

II.

The constitutional complaints are based on the following initial fact situations: 38

1. The first complainant is the owner of a plot of land situated in the area of the former German Democratic Republic; before the accession of the German Democratic Republic to the Federal Republic of Germany, this plot of land, on the basis of a lease, was transferred to the district council (*Rat des Kreises*) and by the district council to an agricultural cooperative to be used free of charge. The agricultural cooperative erected a hall on the land, and under § 27 of the Agricultural Cooperatives Act it acquired ownership of this hall. At the end of 1990, the lease expired, following notice of termination given by the district administrator's office. The successor in title to the agricultural cooperative, the defendant in the original proceedings, then leased out the hall for DM 7,000 per month. It refused to pay rent to the defendant. The defendant's action, directed towards the payment of an instalment of the rent for the month of January 1992, failed. The District Court (*Bezirksgericht*) dismissed the action on the grounds that: (1) under Article 233 § 2.a.1 sentence 1 letter b of the 1992 Introductory Act to the German Civil Code, the defendant was deemed to be entitled to possession; (2) under Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code the legal relationship between the landowner and persons entitled to possession, *inter alia* with regard to emoluments, was reserved for later legislation; and (3) for lack of contractual arrangements there was no right to demand compensation for loss of use during the period of right to possession. 39

2. The second complainant, in 1991, became the owner of a plot of land situated in the area of the former German Democratic Republic; the previous owner, under an agreement for use, had allowed this land to be used by the district council, and the district council had allowed it to be used by an agricultural cooperative. The agricultural cooperative put the land at the disposal of the local authority that was the defendant in the original proceedings; the local authority built a multi-purpose building, part of which it used as an administrative building, on the land. The contract for use was cancelled on 31 October 1990. The complainant, in his action, applied for an order that the local authority should vacate and deliver up possession of the part of the 40

building and associated area of land used for the local authority administration.

The action was unsuccessful at two instances; the reason given by the Higher Regional Court (*Oberlandesgericht*) was because under Article 233 § 2.a.1 sentence 1 letter a of the 1992 Introductory Act to the German Civil Code the local authority had a right to possession. This provision also applied, the court held, if, as in the present case, the defendant did not acquire independent ownership of the building. It was not possible to derive from the legislation a restriction to the effect that the defendant, as a local authority, could not rely on the protection of the moratorium. This contained an admissible determination of the content and limits of ownership in the meaning of Article 14.1 sentence 2 of the Basic Law. 41

3. The third complainants are the owners of a plot of land; in 1984, a publicly owned enterprise took possession of this land in the course of an enlargement of its ponds, and from then on it worked the land. There was no basis for this use under the law of ownership or by way of rights of use. In 1990, the complainants claimed compensation for loss of use for the period from 1984. The successor in title to the enterprise, the defendant in the original proceedings, paid DM 2,500 in a settlement. It refused to make further payments. Thereupon, the complainants sued in the civil courts, asserting claims to payment for use for the period from 1 January to 30 September 1991, and on appeal at the Regional Court *(Landgericht)* also for the years 1992 and 1993. In this, they were unsuccessful. 42

The Regional Court stated as grounds for dismissing the action the fact that, by reason of the moratorium under Article 233 § 2.a.1 sentence 1 letter a of the 1992 Introductory Act to the German Civil Code, the defendant had acquired a right to possession of the plot of land in question, because the expansion of the pond and the use of the land for this purpose had been approved by the state at the time they took place. Under Article 233 § 2.a.3 sentence 1 of the 1992 Introductory Act to the German Civil Code, in the absence of a contractual agreement, the complainants could not claim compensation for loss of use for the whole duration of the defendant's statutory entitlement to possession; claims to payment for use, under Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code, were reserved for separate legislation. 43

III.

1. In the proceedings 1 BvR 1680/93, the complainant firstly challenges the violation of Article 14 of the Basic Law by the decision of the District Court. She submits that Article 233 § 2.a.3 of the 1992 Introductory Act to the German Civil Code, on which this decision was based, is unconstitutional. This provision deprives her of the possibility of claiming payment for use. This constitutes expropriation. The legislation in this respect lacks a provision for compensation as mentioned in Article 14.3 of the Basic Law. […] 44

Secondly, the complainant directly challenges Article 232 § 4 and § 4.a of the Intro- 45

ductory Act to the German Civil Code as amended by the Public Register Automation Act (*Registerverfahrensbeschleunigungsgesetz – RegVBG*) of 20 December 1993 (BGBl I p. 2182; hereinafter referred to as: 1993 Introductory Act to the German Civil Code), Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code and §§ 1, 2 and 8 of the Act to Amend Contractual Rights of Use (*Schuldrechtsänderungsgesetz – SchuldRÄndG*) of 21 September 1994 (BGBl I p. 2538), passed as Article 1 of the Act to Adjust Contractual Rights of Use (*Schuldrechtsanpassungsgesetz – SchuldRAnpG*). These provisions too violated Article 14 of the Basic Law, because they provided that land should be transferred to the owner of a right of use that was fictitiously presented as continuing, without granting the landowner affected a payment for the previous permitted use.

2. The constitutional complaint 1 BvR 183/94 challenges the two court decisions against the complainant and indirectly challenges Article 233 § 2.a.1 of the 1992 Introductory Act to the German Civil Code. The complainant submits that Article 14.1, 2.1 and 3.1 of the Basic Law were violated. 46

It submits that the moratorium solution is not sufficiently definite, in view of the possibility that it might be extended for a period of time that cannot be precisely defined. Admittedly, the moratorium, it states, is subject to a time-limit ending on 31 December 1994. However, it was possible for the moratorium to be extended once by a statutory order, which is subject to no conditions. In effect, in this way, the landowner is deprived of this use of his property for an unlimited period of time. […] This represents a disproportionate encroachment upon the core area of the right of ownership. 47

Irrespective of this, Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code does not apply here. According to the legislators' statement of intention, the moratorium is designed to protect private builder-owners. At the time of the German Democratic Republic, local authorities, as parts of the centralised state, were not able to be subjects of their own rights and duties. They therefore had no right of reliance on the law that merited protection. […] 48

Finally, the application of the moratorium presupposed that there were uncertainties with regard to the ownership of the land and any rights to buildings erected on the land. That is not the case here, according to the complainant. It has been clarified that the complainant is the owner of both the land and the building. […] 49

3. In the proceedings 1 BvR 1580/94, the complainants challenge the judgment of the Regional Court. They submit that there has been a violation of Article 14.1 and 3.1 of the Basic Law. They claim that the Regional Court wrongly applied the moratorium provisions. Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code has no retroactive effect on legal relationships and agreements before it entered into force. […] 50

In addition, Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code is directly challenged. The fact that this Article does not permit the 51

restitution of emoluments for the period until the end of 1994 on a statutory basis is a violation of Article 3.1 and Article 14.1 of the Basic Law and of the prohibition of retroactive law.

IV.

The Federal Ministry of Justice on behalf of the Federal Government and the Federal Court of Justice *(Bundesgerichtshof)* expressed opinions on the constitutional complaints; in addition, the Ministry of Justice and of Federal and European Affairs of the *Land* Brandenburg and the defendant in the original proceedings expressed opinions on the constitutional complaint 1 BvR 1680/93. 52

1. The Federal Ministry [regards the constitutional complaints as unfounded]. […] 53-56

2.The Fifth Civil Senate of the Federal Court of Justice [also] proceeds on the assumption that the moratorium provision, [at least] in its essential features, complies with the constitution. […] 57-58

3.In the opinion of the *Land* ministry, it is compatible with Article 14 of the Basic Law that the first complainant was not granted a right to payment for use. The Ministry states that the property-law moratorium, including its provision that, finally, compensation for emoluments obtained in the years 1990 to 1994 shall be paid only by mutual agreement, is a determination of the meaning of ownership that is admissible under Article 14.1 sentence 2 of the Basic Law. 59

4.The defendant in the original proceedings in the matter 1 BvR 1680/93 shares this view. 60

B. – I.

The first complainant's complaint, to the extent that it directly challenges Article 232 §§ 4 and 4.a of the 1993 Introductory Act to the German Civil Code and §§ 1, 2 and 8 of the Act to Adjust Contractual Rights of Use, is inadmissible. 61

1.With regard to Article 232 §§ 4 and 4.a of the 1993 Introductory Act to the German Civil Code, the one-year period of § 93.3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) was not observed; the provision challenged came into force under Article 20 of the Public Register Automation Act on 25 December 1993; the challenge to its constitutionality was not made until 19 September 1995. Apart from this, the complainant is also not affected by the provision herself (on this requirement see BVerfGE 1, 97 (101-102); established case-law). Article 232 §§ 4 and 4.a of the 1993 Introductory Act to the German Civil Code refers to the use of land areas for recreation, to which the property-law moratorium does not apply (see Article 233 § 2.a.7 of the 1992/1994 Introductory Act to the German Civil Code). The present case does not relate to such land areas. 62

2.The first complainant is also not affected in that her constitutional complaint is directed against §§ 1, 2 and 8 of the Act to Adjust Contractual Rights of Use. The provi- 63

sions of the Act to Adjust Contractual Rights of Use are not to be applied to legal relationships the adjustment of which is intended to be provided in the Property Law Adjustment Act (§ 2.1 sentence 1 of the Act to Adjust Contractual Rights of Use). *Inter alia*, this covers legal relationships relating to plots of land of the type in the present case, on which independently owned building ownership has arisen (see § 1.1 no. 1 letter b of the Property Law Adjustment Act).

II.

Apart from this, the constitutional complaints are admissible. 64

[…] 65-69

C.

[They] are, [however], unfounded insofar as they are directed against the judicial decisions challenged and indirectly against provisions of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code. On the other hand, the constitutional complaints of the first and third complainants are successful to the extent that they directly challenge Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code. 70

I.

The primary review standard is the guarantee of property in Article 14.1 of the Basic Law. This constitutionally guarantees ownership, which includes the ownership of land allocated by civil law to the individual legal entity (see BVerfGE 70, 191 (199)); the legal content of this is characterised by private use and the owner's fundamental right of disposition of the property (see BVerfGE 52, 1 (30) with further references). The use of the land is intended to enable the owners to organise the property-law aspects of their lives according to their own ideas. Consequently, the fundamental right of property in principle also protects the owner's decision as to how he or she intends to use the property (see BVerfGE 88, 366 (377)). This legal position is affected to the detriment of the landowner if the landowner's right to exclude third parties from possession and use of the land is removed or reduced by statutory provisions (see BVerfGE 52, 1 (30-31)) or if such provisions restrict the payment for the granting of land use without taking account of the fact that the owner has to bear large public burdens, for example public services development charges or the costs of road cleaning (see BVerfGE 87, 114 (148-149)). The same applies if judicial decisions result in such restrictions. 71

II.

The statutory provisions stand up only in part to these requirements. 72

1. Even the property-law moratorium passed by the legislature restricts the landowner's legal position. This follows firstly from the fact that Article 233 § 2.a.1 sentence 1 of the 1992/1994 Introductory Act to the German Civil Code contains a fic- 73

titious statutory right of possession, for a restricted period of time, in favour of those persons who use a plot of land subject to the moratorium on the conditions set out there; under § 986.1 sentence 1 of the Federal German Civil Code, this right of possession can be used in rebuttal of a claim to restitution by the landowner. The owner's right to use and exploit the land is further restricted by the fact that for the period until the end of 31 December 1994 the owner may require from the person entitled to possession compensation for emoluments obtained only by mutual agreement (Article 233 § 2.a.3 sentence 1 of the 1992/1994 Introductory Act to the German Civil Code, Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code). Finally, the landowner has a duty, for the period of the right of possession, not to encumber the land with rights, unless the owner is obliged by statute or under an official decision to create such rights (Article 233 § 2.a.3 sentence 2 of the 1992/1994 Introductory Act to the German Civil Code).

74 These restrictions do not merely reflect a legal position that existed before the accession of the German Democratic Republic to the Federal Republic of Germany and that was in the first instance maintained by Article 231 § 5 of the 1990 Introductory Act to the German Civil Code. They apply "notwithstanding existing rights of use and more favourable agreements and provisions" (see Article 233 § 2.a.1 sentence 1 of the 1992/1994 Introductory Act to the German Civil Code) and under this provision also and above all have detrimental effects for the landowner in the cases in which either no rights of use of the land of another came into existence or such rights, for example as a result of the repeal of § 18 of the Agricultural Cooperatives Act by the Act of 28 June 1990 (see A I 2 above), later came to an end or the existence of such rights was at all events doubtful […] The ownership of the plots of land subject to the property-law moratorium was therefore not without exception already encumbered with the above restrictions when the moratorium entered into effect.

75 2. With this content, Article 233 § 2.a of the 1992/1994 Introductory Act to the German Civil Code is a provision that determines the content and limits of ownership of land that is used by third parties for building purposes, as provided in Article 14.1 sentence 2 of the Basic Law […] The moratorium does not have the effect of an expropriation, because it does not lead to the landowner being deprived, in whole or in part, of specific legal positions protected by Article 14.1 sentence 1 of the Basic Law; instead, it defines in general and abstract terms the content of ownership of the land in questions (see BVerfGE 52, 1 (27); 79, 174 (191) with further references). As a determination of content and limits, Article 233 § 2.a of the 1992/1994 Introductory Act to the German Civil Code must comply with the requirements of the constitutional principle of proportionality: this principle obliges the legislature to achieve a fair balance and an appropriate relation between the interests warranting protection of the persons involved (see BVerfGE 87, 114 (138); 95, 48 (58)).

76 3. The moratorium solution of 1992, as far as it is to be assessed in this context, satisfies these requirements.

a) It was the aim of the provision challenged in Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code to temporarily safeguard usufructuary relations taken over from the time of the German Democratic Republic, whether they existed on a legal basis, or whether they had come into being de facto, until the final new organisation of the legal relations between the landowner and the user, and thus at the same time to guarantee peace under the law between the persons involved […] In particular, the statutory right of possession of the user was intended to protect the investments in the land made by the user in reliance on the lawfulness of his or her acts and to prevent the creation of a fait accompli (for example if actions in the civil courts led to the enforced surrender of individual plots of land) which might have made the adjustment of property law more difficult or impossible (see BTDrucks 12/2480, p. 1, 77). 77

b) This objective justifies the restrictions of rights of landowners associated with the property-law moratorium of 1992. 78

aa) The legislature of the Federal Republic of Germany could not ignore the usufructuary relations that had come into being in the German Democratic Republic in compliance with the legal system or at least with the approval of state or social authorities. Instead, it was likely to regard those rights as continuing to deserve protection, because on their basis valuable investments were made in building, and if the German Democratic Republic had continued in existence, they would most probably have permanently benefited the user. For this reason, the legislature attempted to transfer the situation with regard to rights and possession that existed at the time of the accession to the property-law system of the Federal German Civil Code. This was not possible in the short term. The real-world fact situations were varied, and they only gradually became known to the legislature in their variety and complexity. They required a thorough examination and difficult decisions. There can therefore be no objection if the legislature, in part in the interest of legal certainty between the parties, at first limited itself to essentially maintaining the status quo, but organising it in such a way that the legislature retained scope to legislate on the future property-law adjustment of the usufructuary relations. 79

The restrictions entailed by this are reasonable from the point of view of the landowners. It was only reunification that put them in a position to enforce claims with regard to the land they owned. But in fact, the relationships had not changed, or had changed only insignificantly, unless the plot of land in question had in any case been acquired by legal transaction only after accession (see also Article 233 § 2.a.1 sentence 3 of the 1992 Introductory Act to the German Civil Code). The legislature was therefore permitted for an interim period to give lower priority to the interest of the landowners in a private use of their land, and only this interim period is the subject of these proceedings, than to the concerns of the users of the land […] 80

bb) In view of the weight and complexity of the problems to be mastered by the adjustment of property law, this also applies if the length of the interim period is taken in- 81

to account and at the same time account is taken of the fact that the property-law moratorium in Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code, by the case-law of the Federal Court of Justice (see *Deutsch-deutsche Rechts-Zeitschrift – DtZ* 1995, p. 360 (364)), extends to the time before it came into force, that is, is retroactive. On the other hand, there are no constitutional objections, even if the Federal Court of Justice (*loc. cit.*) is followed in assuming that this is a genuine retroactive effect (on the distinction between false and genuine retroactivity, see for example BVerfGE 95, 64 (86)). Admittedly, genuine retroactivity, unlike false retroactivity, is in principle constitutionally inadmissible. But here too, the prohibition of retroactive law, which is based on the protection of public confidence, has lower priority if, exceptionally, it was impossible to rely on the continuation of previous law (see BVerfGE 95, 64 (86-87)). This is the case, *inter alia*, if the legal position is so unclear and confused that it was necessary to wait for clarification from the legislature, and if paramount concerns of the public interest, which take precedence over the principle of legal certainty, call for a retroactive provision (see BVerfGE 13, 261 (272); 30, 367 (388, 390-391); 88, 384 (404)).

82 These requirements are satisfied in the present case. The legal position that the legislature that passed the Unification Treaty Act maintained in Article 231 § 5 of the 1990 Introductory Act to the German Civil Code (see A I 3 a above) immediately revealed itself to be unclear and uncertain, recognisably to those affected. It was therefore necessary, for a transitional period, to create the conditions so that an adjustment of property-law relationships, doing justice to the interests involved, was still possible and so that until then a state of peace under the law between the parties was preserved. These public-interest aims, pursued in the 1992 property-law moratorium, are of such weight that they are also capable of justifying putting this moratorium into effect retroactively.

83 The duration of the statutory right of possession granted to the user in sentence 1 of Article 233 § 2.a.1 of the 1992 Introductory Act to the German Civil Code, may by sentence 2 of the provision be extended by legal ordinance beyond 31 December 1994; this need not be examined here […], because the [authorised] federal minister did not make use of this authorisation.

84 cc) Finally, the fact that subsection 3 sentence 1 thereof provides for a claim for compensation for emoluments obtained for the period until the end of 1994 at the latest only by mutual agreement does not mean that the provision in Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code is disproportionate.

85 As can be seen from the opinion of the Federal Court of Justice, this has the result that until that date the landowner cannot pass on public charges affecting him or her to the user of the land against the latter's will, but may even, in certain circumstances, have to accept a financial loss. But in this connection too it must be taken into account that the legislature, when it realised that the transitional arrangements in the Unification Treaty would not be sufficient to safeguard the maintained usufructuary relations,

was obliged to amend the transitional law despite continuing uncertainties. At the time, as the Federal Government has submitted in its opinion, there were neither precise ideas as to the amount of any compensation for loss of use, nor was it foreseeable in what way – possibly prejudicial to the question of payment – the property-law adjustment itself would be realised.

In these circumstances it is understandable that the legislature at first left open the question of a statutory claim to payment for use in Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code and reserved it to be legislated on at a later date. Here, as is shown by the parliamentary background material, the legislators understood this provision together with Article 233 § 2.a.3 sentence 1 of the 1992 Introductory Act to the German Civil Code as a clarification that as a general rule payment was to be made for the emoluments. However, landowners and land users, in the interest of peace under the law, were if possible to agree between themselves on the question of payment, without recourse to the courts. If the parties could not agree, the legislature was even to be free to introduce payment for use even *ex post facto* (see BTDrucks 12/2695, p. 23, under no. 47). 86

From the perspective of the year 1992, therefore, the failure to make statutory provisions for a claim for payment for use for the period until 31 December 1994 was not final. It was rather to be expected, but at any event not to be excluded, that in the provision reserved under Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code the legislature would subsequently grant such a claim, if the owner and user should not be able to come to an agreement on a basis by mutual consent for appropriate compensation for loss of use. The landowner could also reasonably be expected to defer until such legislation was available claims to payment for use for the period until the end of the year 1994 on which no agreement could be reached. 87

4. In contrast, the provision in Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code is not compatible with Article 14.1 sentence 1 of the Basic Law, to the extent that it relates to claims for payment for the emoluments of land in the period from the entry into force of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code on 22 July 1992 […] until the end of 1994. Under this provision, the person entitled to possession under the property-law moratorium is not obliged to restore emoluments to the landowner (and other persons with *in rem* rights) for the period until the end of 31 December 1994 unless the parties have agreed otherwise. It provides that the landowner cannot, even subsequently, assert statutory claims for payment for use for all periods of time before 1 January 1995. This cannot be constitutionally justified in such a volume. 88

a) Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code discriminates one-sidedly in favour of the users of the plots of land affected by the property-law moratorium. Not least, it also favours those of them as a result of whose resistance agreements on reasonable voluntary payment for use have to date failed. Landowners without a contractual right, in contrast, are one-sidedly burdened. 89

Under the provision challenged, they are not only without exception not permitted to demand any payment for granting use of their land; in addition, as the opinion of the Federal Court of Justice shows, they are also prevented from passing on to the user public charges for the period until the end of 1994 that they have to bear in relation to the land. This cannot in principle be seen as a fair provision that puts the interests of landowners and land users, as is required under the constitutional principle of proportionality […], in a fair and reasonable relation.

b) The reasons that are said to justify the provision in Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code lead to a different conclusion only for the period before 22 July 1992. 90

aa) As is shown by the remarks in the report of the *Bundestag* Committee on Legal Affairs on the draft of a Property Law Amendment Act of 27 April 1994 (BTDrucks 12/7425, p. 91), this provision is oriented towards § 993.1, half-sentence 2 of the Federal German Civil Code and is intended to treat the user of a plot of land subject to property-law adjustment in the same way as the possessor in good faith against whom no legal action has been taken is treated under that provision. The possessor must surrender emoluments obtained to the owner only to the extent that they are not to be seen as the proceedings of the thing; in other cases, the possessor is under no obligation to surrender the emoluments. 91

The assessment on which this provision is based, which is determined by considerations of protection of public confidence, may be transferred to the person entitled under Article 233 § 2.a.1 of the 1994 Introductory Act to the German Civil Code only for emoluments that were obtained up to the date when Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code entered into force on 22 July 1992. Until this date, as the legislation stood, there were as yet no indications that the user of a plot of land later subject to property-law adjustment might be obliged by law to pay the landowner compensation for loss of use of the land. Rather, users of land, unless contractual arrangements entered into after the accession ran counter to this and claims to payment for use had not been judicially recognised, could in general assume that the previous conditions of the use of the land would in the first instance continue unchanged. It can therefore be constitutionally justified, if the matter is considered from a perspective that groups the individual cases according to a standardising approach, to attach more weight to the user's reliance on use being free of charge in this transitional period than to the owner's interest in receiving payment for use. For the period after Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code entered into force this no longer applies. From this date, with regard to Article 233 § 2.a.8 of the 1992 Introductory Act to the German Civil Code and to the considerations on which this provision was based (on these, see C II 3 b cc above), the user could no longer assume that the emoluments obtained would remain free of charge. 92

bb) Nor do other reasons justify extending the exclusion of statutory claims to payment for use to the period from 22 July 1992 to the end of 31 December 1994. 93

(1) In the report of the *Bundestag* Committee on Legal Affairs, this exclusion is also justified by the argument that comparable provisions such as the Payment for Use Ordinance (*Nutzungsentgeltverordnung*) of 22 July 1993 (BGBl I p. 1339) provided payments for the first part of the period of transition to land use based on market-economy principles that did not cover the public charges. A retroactive provision with the same content as part of the property-law moratorium had therefore been regarded as problematical (see BTDrucks 12/7425, p. 91). But this consideration explains only why the legislature regarded law of the above kind as unsuitable to serve as a model for legislation on the question of payment in connection with safeguarding the adjustment of property law. On the other hand, no justification can be seen in it for depriving the landowner of a statutory claim to compensation for loss of use on the merits already. 94

(2) The provisions laid down for the adjustment between the landowner and the land user in the Property Law Adjustment Act similarly do not justify the landowner not having statutory claims to payment for use for the period of the property-law moratorium. The view expressed in the Federal Government's opinion, that under the scheme of the Property Law Adjustment Act the land value of the plot of land subject to adjustment is to be allocated in equal parts to the user and the landowner, and the owner's claim to equalisation contains a claim to compensation for loss of use, which is satisfied at the same time, finds no support in the Act. 95

The purchase price that the owner can claim from the user if the user decides to choose an adjustment by way of purchase of the land (see § 15.1 in conjunction with §§ 61 *et seq.* of the Property Law Adjustment Act) is determined solely by the land value of the plot of land in question (see §§ 68 *et seq.* of the Property Law Adjustment Act). It is not relevant whether this land was previously used by the user on a payment basis or free of charge. If a plot of land has been used on a payment basis, a lower purchase price will not necessarily be payable than in the case of use free of charge, for example to make allowance for the payment for use made for periods in the past. Nor is it significant whether, during the property-law moratorium, the owner bore the encumbrances on the land or whether the user took these over. The same applies, if the user of the land, instead of purchase, decides to create a heritable building right on the land (see § 15.1 in conjunction with §§ 32 *et seq*. of the Property Law Adjustment Act), to the calculation of the ground rent payable by the user (see §§ 43 *et seq.* of the Property Law Adjustment Act). 96

(3) Other reasons that might justify not granting the owner statutory rights to payment for use for the period from 22 July 1992 to the end of 31 December 1994 have not been asserted in the present proceedings. Nor are they apparent. In particular, it cannot be assumed that in view of the financial situation of the people in the former German Democratic Republic (on this, see BVerfGE 91, 294 (310)) there could be a general requirement to release the user of another's land from every financial demand by the owner of the land in the period in question here too. The idea of a socially acceptable adjustment does require account to be taken of the particular circum- 97

stances of the users of land, including consideration for the amount of payment for use they can be reasonably expected to make. However, in view of the constitutional guarantee in Article 14.1 sentence 1 of the Basic Law, it does not permit the landowner to be deprived of every statutory claim to a payment for use while the property-law moratorium is in effect. This claim must not necessarily be directed towards obtaining the prevailing market value of the use for the owner. Public charges that the owner must pay are to be reasonably taken into account when the payment for use is calculated (see BVerfGE 87, 114 (150)).

c) A claim corresponding to this cannot be derived from the provision challenged by way of interpretation in conformity with the Basic Law. The possibility of relying on such an interpretation to maintain the maximum of what the legislature intended (see BVerfGE 86, 288 (320)) does not exist if the interpretation would contradict the wording of the provision and the plainly recognisable intention of the legislature (see BVerfGE 90, 263 (275) with further references). An interpretation in conformity with the Basic Law is therefore out of the question here, because the wording of Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code and the intention of the legislature it reveals clearly show that the legislature did not intend to grant the owner of a plot of land affected by the moratorium a statutory claim to payment for use for the period of the moratorium until the end of 1994. 98

5. The fact that Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code violates Article 14.1 sentence 1 of the Basic Law does not affect the constitutionality of the property-law moratorium of 1992. It merely reserved the provisions for the payment for use for a later decision by the legislature […] The legislature made that decision in the form of Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code, without retroactively repealing the interim legislation that had been passed earlier (see Article 3 of the Property Law Amendment Act) or otherwise calling it into question. Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code and Article 233 § 2.a.3 sentence 1 in conjunction with subsection 8 of the 1992 Introductory Act to the German Civil Code are therefore not related to each other in such a way that the unconstitutionality of the former entails the unconstitutionality of the latter too. 99

6. Nor does the incompatibility of Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code with Article 14.1 sentence 1 of the Basic Law result in the provision being null and void. The amount in which the landowner is to be able to claim compensation on a statutory basis for emoluments from his or her land in the period after 21 July 1992 must be reserved to be decided by the legislature. A period until 30 June 2000 appears appropriate for this decision. If within this period there is no new legislation, the courts may decide disputes on the amount of the payment for use in accordance with the points of view set out in the grounds of this order and in doing so, if necessary, supplement this by having resort to the legal concept in §§ 315-316 of the Federal German Civil Code, for example. 100

III.

1. The judicial decisions challenged are constitutionally unobjectionable. 101

a) They are only based on the provision in Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code, which, as far as it is significant in the present case, is constitutional. Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code had not yet come into force when the civil courts made a final decision on the proceedings of the first and third complainants. Its incompatibility with Article 14.1 sentence 1 of the Basic Law therefore has no effect on the continuation of the decisions challenged by these complainants. 102

b) There are no constitutional objections to the interpretation and application of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code by the civil courts. 103

aa) It is an infringement neither of Article 14.1 sentence 1 of the Basic Law nor of Article 3.1 of the Basic Law in the sense of a prohibition of arbitrary decision-making that the Regional Court and the Higher Regional Court in the case of the second complainant granted the right of possession of Article 233 § 2.a.1 sentence 1 letter a of the 1992 Introductory Act to the German Civil Code to local authorities too. In view of the objective of the property-law moratorium (on this, see C II 3 a above), which does not distinguish between natural persons and juristic persons, this cannot be seen as a misapprehension of the meaning and scope of protection of the fundamental right of property. […] The application of Article 233 § 2.a.1 sentence 1 letter a of the 1992 Introductory Act to the German Civil Code to local authorities is also covered by the wording of the provision. In these circumstances, no indications can be seen that the decisions challenged are based on irrelevant considerations in this respect, that is, that they might be arbitrary (see BVerfGE 89, 1 (13-14)). 104

The same applies to the extent that the Higher Regional Court applied the provision mentioned in favour of the defendant local authority, although the latter did not obtain ownership of the building it used for public duties. The Higher Regional Court justified this by the argument that it is the meaning and purpose of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code to subject the legal relations with regard to plots of land on which buildings have with permission been erected to a moratorium until the adjustment of property law, and that this moratorium is linked to bases that can be relied on, that justify the grant of a right of possession to the rightful user. This is unobjectionable under constitutional law (see BTDrucks 12/2480, p. 77). 105

bb) The Regional Court judgment challenged by the third complainants also displays no acts of infringement of the constitution that could lead to its being overturned, irrespective of the validity of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code. 106

[…] 107-108-108

2. The fact that the unconstitutionality of Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code does not call into question the continuing 109

validity of the judicial decisions pronounced on the basis of Article 233 § 2.a of the 1992 Introductory Act to the German Civil Code […] does not, for the third complainants, whose claims to payment for use failed even for the period after 21 July 1992, mean that the third complainants may not again assert these claims on the basis of the new provision to be passed by the legislature. The action of the third complainants was regarded in the judgment challenged as unfounded only with regard […] to the legal situation that existed at the date when the judgment was pronounced (1992 moratorium); according to this, landowners could not demand payment for use on a statutory basis, subject to later legislation to the contrary. This does not exclude the possibility of the defendant being ordered to pay compensation for loss of use on another legal basis, which is to be newly created because Article 233 § 2.a.8 sentence 1 of the 1994 Introductory Act to the German Civil Code is unconstitutional.

[…] 110

Papier Grimm Kühling

Seibert Jaeger Haas

Hömig Steiner

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 8. April 1998 - 1 BvR 1680/93, 1 BvR 1580/94, 1 BvR 183/94

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 8. April 1998 - 1 BvR 1680/93, 1 BvR 1580/94, 1 BvR 183/94 - Rn. (1 - 110), http://www.bverfg.de/e/rs19980408_1bvr168093en.html

ECLI ECLI:DE:BVerfG:1998:rs19980408.1bvr168093