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a) Austria / b) Constitutional Court / c) / d) 30.06.2017 / e) G 53/2017 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.18 General Principles – **General interest**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Nazism, pilgrimage-site, prevention / Nazism, fight / Expropriation, by law, challenge in court.

Headnotes:

A legal expropriation may be challenged before the Constitutional Court and is therefore compatible with the fundamental right of access to justice. The expropriation of Adolf Hitler's birthplace in Upper Austria serves a legitimate aim springing from Austria's specific historical context and from the Austrian State Treaty and is proportionate to this aim.

Summary:

I. As per the Federal Act on the expropriation of the property at Salzburger Vorstadt no. 15, *Braunau am Inn* (*Bundesgesetz über die Enteignung der Liegenschaft Salzburg Vorstadt no. 15, Braunau am Inn*) adopted in December 2016, the Republic of Austria, aiming to permanently prevent fostering, promotion or spread of national socialist thought as well as positive commemoration of National Socialism, assumed ownership of Adolf Hitler's birthplace in *Braunau am Inn* (Upper Austria). Under the same Act the Republic expressly undertakes to retain ownership of this property and to arrange for a use compatible with the legal aims of the expropriation. Finally, the Act provides for compensation to be granted to the former owner, the amount of which shall be determined by the Federal Minister of the Interior. If, after the expropriation has become effective, it is established that parts of the property are not required to achieve the aims of this measure, the Republic is obliged to offer them for sale to the former owner.

II. In order to safeguard the Republic's entitlement to property resulting from this Act, the competent district court granted a provisional priority notice to be entered into the land register. The applicant, who is the former owner of the property, appealed against this decision. At the same time, she filed a normative constitutional complaint (*Parteiantrag auf Normenkontrolle*) with the Constitutional Court, claiming that the relevant Federal Act on the expropriation of her property infringed her fundamental rights to a fair trial and to property.

III. The Constitutional Court pointed out that, in principle, the Constitution does not prohibit the legislator from bringing an expropriation directly, i.e., without providing for administrative proceedings to be conducted previously. In particular, such a legal expropriation does not affect the (former) owner's rights more adversely than administrative measures based on a general expropriation act would do: Since any legal expropriation may be challenged before the Constitutional Court, the (former) owner's right of access to justice is fully ensured as the Court, for questions which fall within its specific range of jurisdiction, such as reviewing the constitutionality of general norms, qualifies as a tribunal within the meaning of Article 6.1 ECHR before which a public hearing has to be held if the parties so demand.

As regards the right to property, measures depriving a person of his or her possessions must be considered unconstitutional unless such an expropriation is required by the public interest. This is only the case if there is a specific demand the fulfillment of which is in the public interest, if the property in question is appropriate to satisfy this need and if it is impossible to meet this need in another way than by resorting to expropriation.

The Court, referring to its settled case-law, recalled that the unconditional rejection of National Socialism is a fundamental principle of the Republic restored in 1945. Since 1947, any re-engagement in Nazi activities is prohibited and punishable by constitutional law. What is more, under the State Treaty for the Re-establishment of an Independent and Democratic Austria of 1955, the Republic has expressly undertaken to "continue the efforts to eliminate from Austrian political, economic and cultural life all traces of Nazism, to ensure that (Nazi) organisations are not revived in any form, and to prevent all Nazi [...] activity and propaganda in Austria" (Article 9.1 of the State Treaty) as well as to "give effect" to this principle by adopting appropriate measures (Article 10.1 of the State Treaty). With a view to this specific historical and legal context all public authorities carry a special responsibility for fighting Nazism.

As regards Hitler's birthplace, on account of its uniqueness this place has the potential to become a "pilgrimage site" for neo-nazis. However, under the State Treaty Austria is obliged to take all necessary steps to counter such worshipping. In order to deprive this site of its particular symbolic power, extensive construction measures destroying its recognition value appear to be necessary. Since under civil law only the owner is entitled to use a thing at will, the necessary measures can only be taken if the Republic obtains full power of disposal of the property. In fact, the Republic had repeatedly tried to buy the property in the past, but in the end all these attempts had failed.

The Court therefore found that the expropriation act at issue strikes a fair balance between the outweighing public interests and the applicant's right to property.

Cross-references:

European Court of Human Rights:

- *Kugler v. Austria*, no. 65631/01, 14.10.2010;
- *Perinçek v. Switzerland* (GC), no. 27510/08, 15.10.2015, *Reports of Judgments and Decisions* 2015 (extracts).

Languages:

German.

