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Expropriation, Possession, right to claim, time-limit.

Headnotes:

It is contrary to the right to property for the limitation period to start running from the date of the beginning of de facto expropriation. The illegal deprivation of property by way of de facto expropriation infringes Articles 36 and 46 of the Constitution.

The provision infringing the essence of the right of possession is contrary to the Constitution. The right of possession may not expire even in a case where no claim has been raised during the twenty-year period after the de facto expropriation of real property.

Summary:

Four lower courts made a reference to the Constitutional Court as to constitutionality of Article 38 of the Law on Expropriation.

Under Article 38, where real property has been expropriated but the legal procedures are not yet completed and where that property is allocated to public service or construction has started on that real property, the owner or possessor of that real property or his/her heirs may not raise any claims after the twenty-year limitation period. That period starts running on the day the public authorities take possession of the real property in question.

According to Article 35 of the Constitution: "Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest." The right of possession gives the individual the right to use and enjoy his possessions provided that he/she does not infringe the rights of others and complies with the legal rules.

The concept "possession" as regulated in Article 38 of the Law on Expropriation envisages the exercise of control over real property for twenty years without interruption or challenge.

Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law, in accordance with the reasons set out in the relevant , and without infringement of their essence.

Contemporary democracies are regimes within which fundamental rights and freedoms are secured within their broadest meaning. Restrictions severely limiting fundamental rights and freedoms breach the essence of those rights and freedoms, which may only be restricted to the extent that is necessary for the continuity of the social order and for the reasons set out in the Constitution.

The fundamental element of expropriation is the public interest, and it means that the right of possession is transferred to the administration provided that compensation is paid. Another definition of expropriation is the confiscation of real property in the public interest against the will of the possessor provided that compensation is paid in advance.

Expropriation is regulated in Article 46 of the Constitution, which entitles the State and public corporations, where required by the public interest, to expropriate privately-owned real property wholly or in part and to impose public servitude on it in accordance with the principles and procedures prescribed by law, provided that actual compensation is paid in advance.

The competence to determine the limits and content of the right of possession is given to the legislator; however, this competence is not absolute. The administration may not take action contrary to the expropriation principles unless those actions are in accordance with the essentials of the Constitution.

De facto possession by the administration has the same results as ordinary expropriation where twenty years have passed since the taking of *de facto* possession. At the end of the twenty-year period, the real property is registered in the registry in the name of the administration, even though no compensation has been paid to the former possessor. After the expiry of the twenty-year period, all rights of the former possessor lapse. In such cases, the provision in question is more than a restriction of the right of possession; it is an infringement of the essence of the right of possession. Consequently, the impugned provision is contrary to Articles 13, 35 and 46 of the Constitution.

Moreover, the Court found that Article 38 of the Law on Expropriation was also contrary to Article 2 of the Constitution. In its judgement, the Court referred to some judgements taken by the European Court of Human Rights under Article 1 Protocol 1 ECHR.

For these reasons, the Court struck down Article 38 of Law on Expropriation.

Supplementary information:

The Constitutional Court was called upon to decide whether the twenty-year limitation period terminating the right of access to the courts, laid down by Article 38 of the Expropriation Law, was compatible with the Constitution. The applicants who had brought the matter before the lower courts complained that because of the twenty-year limitation period, it had become impossible to recover their lands or to receive compensation.

The plaintiffs argued in the lower courts that the interference with their rights to peaceful enjoyment of their possessions was not compatible with, *inter alia*, Article 36 of the Constitution, which lays down the right to a fair trial and Article 46 of the Constitution, which sets out the procedure for expropriation.

In three out of four cases, the military authorities became the owners of the land through unlawful conduct, namely, by taking possession without title. Since there was no formal expropriation, the landowners did not know that they would one day lose their title to the land. The Expropriation Law (Law no. 2942) was enacted during the Military Coup period, which lasted from 12 September 1980 to 6 December 1983. The last paragraph of Provisional Article 15 of the Constitution previously provided that the constitutionality of the laws enacted during that period could not be challenged. However, that provision was repealed on 17 October 2001 for the purpose of enhancing civil and political rights. After that amendment to the Constitution, the applicants succeeded in having the Constitutional Court strike down that provision.