

## **14.03.2005, E.2003/70, K.2005/14**

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Headnotes:

If a legal provision is applied to all persons (either legal or natural) having the same legal status, the principle of equality is not violated. The procedures and the rules of possessing real estate by aliens should be regulated by law and the competence on that issue cannot be delegated to the Council of Ministers. In the determination of the competence on possessing real estate by aliens, territorial unity, State security, geological conditions, strategic location of the country and its priorities must be taken into account.

The uncertainties in the article regarding the procedures and rules for acquiring real estate by foreigners, and with respect to the aim, duration, kind and similar features of land lease constitutes a delegation of legislative power to the executive.

Summary:

The main opposition party brought an action before the Constitutional Court alleging that some articles of the Law concerning Changes to Various Laws and the Statutory Decree Concerning the Organisation and Duties of the Ministry of Finance ("Law 4916") were contrary to the Constitution.

### **A. Article 9 of the Law 4916**

Article 9 was added to the Law 4706 as the provisional Article 5/1. In a government decree dated 1969, Tuzla (a district in Istanbul) was assigned as "Dockyard construction industry area" and some plots of land in Tuzla belonging to the Treasury were allocated to dockyard construction entrepreneurs under certain conditions. According to the provisional Article 5/1, the public claims against the dockyard entrepreneurs would be dropped, provided they pay an amount equal to 1% of the property tax value of the properties which have been allocated to them, as well as the expenditures of cases opened. Moreover, in order to benefit from the provisional Article 5/1, the entrepreneurs had to fulfil their contractual obligations, abandon their claims and renew their contracts. If the above conditions were met, no law suit would be filed against them and the land allocations would continue.

The principle of equality mentioned in Article 10 of the Constitution is only valid among individuals that have the same legal status. The aim of the principle of equality is to ensure that the individuals having the same legal status are placed under the same legal processes and to ensure that they are not treated unequally.

Facilities provided in the provisional Article 5/1 shall be applied to all entrepreneurs having the same legal status. Therefore, there is no contradiction between provisional Article 5/1 and the principle of equality mentioned in Article 10 of the Constitution.

On the other hand, in Article 48/2 of the Constitution, it is provided that "everyone has the freedom to work and conclude contracts in the field of his choice". A contract is a bilateral legal process and it is concluded when the parties express their will. The condition in the objected Article "... provided that they conclude a contract with the related ministries ..." recognises the possibility to renew the contracts for the entrepreneurs who have breached their initial contracts. Since there is no obligation to renew the initial contracts, the objected provision is not contrary to the freedom to conclude contracts.

#### B. Article 19 of Law 4916 amending Article 35 of the Law on Title Deed 2644

This Article stipulates that the natural persons having foreign nationality and the companies having legal personality established under the rules of foreign countries may possess real estate within the boundaries of the Turkish Republic provided that this right is reciprocal and legal limitations are observed. If they want to possess real estate encompassing more than 30 hectares, a permission from the Council of Ministers must be obtained. On the other hand, the reciprocity principle shall not be applied in cases of right of way. The Council of Ministers has the responsibility to determine the places where those rules may not apply from the point of territorial security and public interest.

According to the Constitutional Court, the developments in science and technology, emerging possibilities in transportation and communication, as well as the requirements of reorganisation appearing in social and political relations have all brought new dimensions and intensity in international relations. As a result, the necessity to recognise the right to possess real estate for aliens has emerged and equally the requirement to limit those rights had to be determined according to conditions of the country.

A State governed by the rule of law, mentioned in the Preamble and Articles 2 and 5 of the Constitution, is a State whose acts and actions are in conformity with human rights, preserving and strengthening those rights, establishing a just rule of law in all areas, a State bound by the Constitution and general principles of law and which is aware that there are basic principles of the Constitution that the lawmaker may not violate. On the other hand, it is not possible to delegate the competence of the legislative to the executive save the exceptions mentioned in the Constitution. This issue is regulated in Article 7 of the Constitution, which states "Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated." Under this principle, general, unlimited, uncertain regulatory competence may not be given to the executive power. Delegating competence to the executive by law does not mean that it is regulated by law. Therefore, the framework of the competence given to the executive must be drawn. However, only issues related to expertise and technique may be given to the executive.

In the impugned provisions of Article 35, the possession of real estate by aliens was bound to the condition "provided that reciprocity and the statutory limitations are observed", but the procedures and rules of possessing real estate by aliens were not indicated. In order to achieve a State governed by the rule of law, as explained above, it is necessary to indicate the location of real estate to be possessed, the differences between possessing land or building, purchasing aim, its conditions, the procedures to be observed in the registration. Territorial unity, State

security, geological conditions, strategic location of the country and its priorities must also be taken into account. Since those issues were not regulated in the objected law, this amounted to a delegation of the power of the legislative to the executive. The rule of law calls for legal regulations to be clear and understandable.

Meanwhile, there is constitutional inconvenience in the provision require that limited lease may be set on real estate on behalf of the aliens without reciprocal rules. If the duration of limited lease is too long, then it is possible that some results similar to usage of possession rights may emerge.

In the last paragraph of Article 35 it is stated that "the Council of Ministers has the competence to determine locations where the article may not be applied from the point of public interest and territorial security." Thus, a large discretion was given to the Council of Ministers depending on vague concepts, i.e. public interest and territorial security. In Article 16 of the Constitution, the status of aliens was regulated separately. Moreover, under Article 16, "The fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with the international law." The restrictions in the last paragraph of the article regarding aliens must only be made by law. Consequently, the contested provision is indeed contrary to Article 16 of the Constitution.