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Headnotes:

It is possible under the Constitution for a board within the executive power to determine ethical codes. Once some behavioural codes have been set out in legislation, similar codes may be left to the board to determine. Its competence may be extended to autonomous administrations, local government and other public corporate organisations. Examples of areas where the Board of Ethics has competence include the preparation of bye-laws on ethical codes, the determination of public officials who shall be under the scrutiny of the Board, and the determination of the quality and quantity of gifts which public officials may receive.

Summary:

Several deputies applied to the Constitutional Court for an assessment as to the compliance of various provisions of Law no. 5176 on the Establishment of Public Officials Board of Ethics with the Constitution. The law sets out the aims of this organisation, and the scope of the ethical principles with which public officials must comply.

a. The first paragraph of Article 1

This paragraph provided that "the aim of this law is to determine the establishment of the Public Officials Board of Ethics, its duties and its working procedures and to set out the principles of ethical behaviour such as transparency, impartiality, honesty, accountability, and observance of public benefit to which public officials must adhere".

The deputies argued that the term "such as" gives competence to the Board, an executive body, to determine which acts and actions shall be regarded as unethical. In their view, the Law should have stated clearly the type of behaviour which would be regarded as unethical.

The second paragraph of Article 128 of the Constitution states that "the qualifications of public servants and other public employees, procedures governing their appointment, duties and powers, their rights and responsibilities, salaries and allowances, and other matters relating to their status shall be regulated by law".

Universal values such as respect, honesty, justice, trustworthiness, responsibility and accountability, integrated with the moral values of a society, set a benchmark for the way members of that society behave. The legislator had already included some of those values within the legislation. Other similar behavioural values are clearly indicated by the term "such as". Therefore, the administration could not create new ethical values which were

incompatible with the ethical values enumerated in the law and it could not be argued that the term "such as" constitutes delegation of legislative power to the executive.

The above provision was therefore found to comply with the Constitution.

b. The second paragraph of Article 1

This paragraph stipulated that "this law shall cover all personnel in the departments within the general budget, administrations within the supplementary budget, revolving fund establishments, local government and their organisations, all public administration with independent boards and with public legal personality and funds, presidents and members of administrative and auditing boards and presidents and members of governing bodies."

It was suggested that some of the public institutions mentioned in this paragraph already have autonomy, which would be jeopardised if their observance of ethical rules were to fall within the control of a board of ethics bound to the Prime Minister. They maintained that the institutions were taken under the control of the Board of Ethics while universities were not excepted from it. In Turkey, the term "universities" includes faculties, institutions, professional high schools and similar institutions.

Separation of powers does not only mean separation of competence as between the legislature, executive and judiciary but also separation of powers as between the components of each branch. Autonomous public institutions are definitely not created to be privileged and unaccountable. They must perform their special functions properly within a pluralist society.

Regulations as to ethical principles, which are to be followed by public officials and which are aimed at transparency and the eradication of corruption in public administration, do not impinge upon the autonomous status of some public institutions. Impartiality, transparency, trustworthiness, accountability and other values are the same from one society to another or from one institution to another. Self-regulation and autonomy should not be perceived as bestowing privilege on public institutions.

Justice Fulya Kantarcioglu put forward a dissenting opinion as to this part of the judgment.

On the other hand, the term "institutions" used in the paragraph does not mean institutions under the umbrella of universities. Rather, these are public institutions such as "Turkish Standards Institution" or the "State Statistical Institution".

The second paragraph of Article 1 was accordingly found to comply with the Constitution.

c. The term "the President of the Republic" in the third paragraph of Article 1

The third paragraph of Article 1 states that "the provisions of that law shall not be applied to the President of the Republic, members of the Turkish Grand National Assembly, members of the Council of Ministers, or members of the Turkish Army, judiciary and universities".

The deputies argued that the President of the Republic may not be placed under a status of responsibility. He should not, therefore, be exempted from that responsibility within the meaning of Article 105 of the Constitution (which relates to presidential accountability and non-accountability).

Article 105 of the Constitution regulates the way the principle of responsibility should be applied within a parliamentary regime. The President of the Republic does not have political responsibility for acts related to his duties and he has no criminal responsibility other than high treason. The aim of the Law no. 5176 is to determine ethical behavioural principles and to ensure public officials obey them. Ethical values such as transparency, impartiality, trustworthiness, accountability and the observance of public interest are all related to the duties of public officials. The assumption should not be made that the President of the Republic falls under the control of the Board of Ethics as a public official. The provision accordingly complies with the Constitution.

d. The term "to determine the ethical behaviour principles that public officials shall obey while performing their duties by means of bye-law" in Article 3.

Article 3 authorises the Board of Ethics to prepare a bye-law to determine which actions shall be regarded as ethical or non-ethical. The deputies contended that the Board of Ethics should not be given the competence to issue bye-laws. Only the Prime Minister, Ministries and public corporate bodies can issue them.

Bye-laws are issued to ensure the smooth application of laws and regulations. They may not contradict the laws or regulations and they are subject to judicial review. The Board of Ethics is only in fact competent to prepare the bye-laws. Once they have prepared them, the bye-laws will only come into force once the Prime Minister has approved them and it is he who will issue them. Article 3 is therefore compliant with the Constitution.

e. The last sentence of Article 4.1

Article 4.1 of the law provided that "complaints can be made to the Board of Ethics of unethical behaviour at the public institutions and organisations indicated in the Law on the part of public officials having a status higher than general director or the equivalent. The titles which should be deemed as equivalent to general director are to be determined by the Board of Ethics, taking into account the nature of the organisation and the service of public institutions".

The deputies suggested that the competence given to the Board of Ethics by the last sentence of Article 4.1 is the type of competence only the legislature should enjoy, and that it is not something which can be delegated to a board within the executive branch. Furthermore, any obligation imposed on public officials must be designated by law.

Titles such as general director, head of board, head of chamber, and counsellor are used to designate people at similar or at the same hierarchical levels. Their status may only be understood within the context of the relevant law and the organisation in question. Some titles and levels of responsibility are understood to be at "general director level", even though the incumbent is not necessarily given the title of general director.

When Law no. 5176 was enacted, those titles and levels were not listed. However, it is clear that the structure and services carried out by public institutions are to be taken into account when the Board of Ethics decides which titles and levels shall be deemed as equivalent to general director. This argument was therefore rejected.

f. The first sentence of Article 4.2

The first sentence of Article 4.2 of Law no. 5176 stipulated that complaints concerning unethical behaviour on the part of public officials other than general director and the equivalent should be dealt with by the disciplinary authority of the institution in question. That authority would decide whether they had contravened the ethical values set down in the bye-laws issued by the Board of Ethics.

The deputies argued that the Board of Ethics had no competence to issue bye-laws as it is not a public corporate body.

The term "bye-laws issued by the Board of Ethics" in the first sentence of Article 4.2 does not mean that the Board has the competence to regulate by means of by-laws. Rather, it means that the Board will prepare bye-laws and the Prime Minister will issue them. This fact is explained in Article 7 of Law no. 5176 as "The issues regarding the application of that law shall be designated in the bye-laws prepared by the Board. The bye-laws prepared by the Board shall come into force once the Prime Minister has approved them."

Justice Fulya Kantarcioglu put forward a dissenting opinion as to this part of the judgment.

g. The phrase "to determine the scope of the ban on receiving gifts" in Article 9 of Law no. 5176 annexed to the end of Article 29 of Law no. 657 on Public Officials.

Article 9 of Law no. 5176 added a paragraph to the end of Article 29 of Law no. 657, providing that "The Board of Ethics of Public Officials shall have competence as to the determination of the scope of receiving gifts and is empowered to demand, where necessary, a list of the gifts received by public officials above the rank of general director or the equivalent."

The deputies alleged that the scope of the ban on gifts should be designated in the law since it imposes obligations on public officials as provided in Article 128 of the Constitution.

Public officials are restricted in receiving gifts and certain other advantages so that they are not influenced in carrying out their duties. The competence and the duty to determine the acceptable quality and quantity of gifts presents from a humanitarian standpoint are not new obligations imposed on public officials and may not be regarded as the delegation of legislative power. The demand was duly rejected.