



REPUBLIC OF TURKEY COURT OF CASSATION

A REVIEW OF CURRENT ISSUES OF JUDICIAL POWER IN THE FRAMEWORK
OF THE COURT OF CASSATION JUDICIAL CODE OF CONDUCT AND İSTANBUL
DECLARATION ON TRANSPARENCY IN THE JUDICIAL PROCESS

*(EUROPEAN COURT OF HUMAN RIGHTS SEMINAR OPENING OF JUDICIAL YEAR 2018
PRESENTATION BY THE TURKISH COURT OF CASSATION)*



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INTRODUCTION

A well-functioning judiciary is the prerequisite to implement laws in their true sense. Despite advances in the international arena and developments in comparative law, concerns and debates on the exercise of judicial power continue in the European (Regional) Human Rights System as in the rest of the world.

Risks today on the effectiveness and functioning of the judicial power have increased and changed in character. A plethora of political, economic and social changes or shocks such as terror incidents, political crises, riots, wars, migration, domestic disturbance, economic crises, revolutions and counter-revolutions pose serious risks to the high standards of justice afforded by modern legal systems. Challenges in the exercise of the principle of separation of powers persist as a general, long-standing problem. In addition, pressures from the press-media, public reactions and formal or informal civil society organisations have the potential to influence external and internal independence of judges. In a world developing and changing at dizzying speed, the influence by cartels and corporations or other interest groups may sometimes produce circumstances that may lead to ethical issues. In recent years particularly, populist policies that are even observed in advanced democracies not only threaten democracy and human rights, but also adversely impact the fundamental principles of the rule of law.¹ Against such exemplified risks, what measures are necessary to take in order to exercise the judicial power for its proper purpose? This issue, no doubt, involves various dimensions on account of its structural difficulty and complexity.

Law is a system of values and principles. While these values and principles may at times overlap, they are complementary, not alternatives to one another. Some principles and values may stand out in certain periods, but this not detract from the importance of others. This paper will examine the functioning of the legal system and exercise of judicial power in the context of main themes of ethics and transparency.

The review in terms of transparency will be based on İstanbul Declaration on Transparency in the Judicial Process² developed by the Court of Cassation in cooperation with the United Nations Development Programme (UNDP) Turkey Office and adopted by 20 high courts across the world. Account should further be taken of İstanbul Declaration Implementation Measures³ formulated by valuable contributions and support from highly competent and experienced experts representing the five continents and a wide range of legal system. Addressing the matter in the framework of İstanbul Declaration as the first-ever international text on transparency in the judicial process will allow a review of the issues in the European (Regional) Human Rights System through a global perspective and proposing different solutions.

While reviewing in respect of ethics, the Court of Cassation Code of Judicial Conduct will serve as the basis. Formulated in 2017 in the context of the “Court of Cassation Ethics, Transparency and Trust Project” implemented by the Court of Cassation and UNDP Turkey

¹ World Forum For Democracy, Is Populism a Problem, Programme, Strasbourg, November 2017 (Is Populism a Problem), pg.16.

² <https://www.yargitay.gov.tr/sayfa/etik-seffaflik/documents/IstanbulDeclarationBooklet.pdf>

³ <https://www.yargitay.gov.tr/sayfa/etik-seffaflik/documents/NJISTANBULDECLARATION.pdf>

Office, the most important characteristic of the Court of Cassation Code of Judicial Conduct is that it is a product of broad democratic participation and transparent process. Another characteristic is that as a text, it meets the UNODC evaluation criteria. Formulated in a collective philosophy of ethics, the codes are built as three books, namely “Court of Cassation Code of Judicial Conduct”, “Court of Cassation Code of Conduct for Public Prosecutors” and “Court of Cassation Code of Conduct for Staff”.⁴ Laying down detailed provisions, the Court of Cassation Code of Judicial Conduct provides guidelines on how to act individually or collectively against the risks encountered during the exercise of judicial power. The Court of Cassation Code of Judicial Conduct is therefore a guide that proposes modern and effective solutions not only to judges, but also to public prosecutors and judicial staff. Further, the Code is, by design, scope and content, not restricted to the exercise of judicial power, but includes codes of conduct on the general functioning of the judicial system.

The present paper consists of an introduction and three sections taking into account the background papers for the ECtHR opening seminar of judicial year. The first section addresses the separation of powers; the second section dwells on the accountability of courts and judges; and the third and final section treats the institutional communication strategy for the judiciary.

A) SEPARATION OF POWERS

A most important safeguard for human rights, democracy and rule of law is the principle of “separation of powers.” This political and legal fact was expressed in Article 16 of the French Declaration of the Rights of Man and of the Citizen that “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

The principle of separation of powers in essence protects the independence of the judiciary against any interference by the legislative and executive. “Judicial independence” is a fundamental principle in all modern constitutions⁵ as well as the top of the list in all codes of conduct, national and international.⁶ The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary.⁷ The adoption of constitutional proclamations of judicial independence do not automatically create or maintain an independent judiciary. Judicial independence must be recognized and respected by all three branches of government. The judiciary, in particular, must recognize that judges are not beholden to the government of the day.⁸

⁴<https://www.yargitay.gov.tr/sayfa/code-of-conducts/1139>

⁵“Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?”, See The Rule of Law Checklist, Venice Commission of the Council of Europe, Strasbourg 2016(The Rule of Law Checklist), pg.33.

⁶See Bangalore Principles of Judicial Conduct, Value 1; European Court of Human Rights Code of Judicial Conduct Article 1, Court of Cassation Code of Judicial Conduct Article 1.

⁷Commentary on the Bangalore Principles of Judicial Conduct, UNODC Publication, Vienna Austria (Commentary), p.33.; Basic Principles on the Independence of the Judiciary, Article 1.

⁸ Commentary pg.40.

Article 1 of the Court of Cassation Code of Judicial Conduct states that “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”

A code of conduct, as a rule, lays down the standards of conduct for judges and require judges to comply with such standards. However, the potential of judges to fulfil some of their ethical obligations may depend on the legislative’s and executive’s taking the necessary care on code of conduct. Therefore, Bangalore Principles of Judicial Conduct and Court of Cassation Code of Judicial Conduct, considering the said fact, states in their preambles that the code of conduct has, among others, a function to “enable the members of the legislature and executive and lawyers and the public to better understand the judiciary and provide support to the judiciary.”

1) Appointments of Judges

A most fundamental requisite for the separation of powers is that the selection, appointment and retention of judges be guaranteed against the interference by the executive. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.⁹ ECtHR treats the matter in the context of right to fair trial in Article 6 of ECHR.¹⁰ In order to establish whether the judiciary can be considered “independent” of the other branches of government, regard is usually had, among other things, to the manner of appointment of its members, to their term of office, to their conditions of service, to the existence of guarantees against outside pressures, and to the question whether the court presents an appearance of independence.¹¹

Article 13 of Istanbul Declaration states that “There should be transparency in the appointment process of judges.” This principle is further elaborated as follows:

“It is generally agreed that transparency is required in the conditions for the selection of candidates for judicial office. In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office. All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment. That will enable procedures for judicial appointment and promotion based on merit to be opened to a pool of candidates as diverse and reflective of society as a whole as possible. Publication of the list of vacant posts and the list of candidates for those posts will also permit public scrutiny of the appointment process.

While there is a diversity of methods by which judges assume office, recent international and regional initiatives are unanimous in their view that it is essential for

⁹Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, Article 40.

¹⁰ ECtHR decided that the tenure of judges could not be left to the discretion of the executive. (See ECtHR, In *Gurov v. Moldova*, no. 36455/02, §§ 34-38, 11 July 2006).

¹¹ Commentary pg.41.

the maintenance of the independence of the judiciary that the appointment and promotion of judges are not made by the legislature or the executive, but by an independent body such as a Council for the Judiciary, with the formal intervention of the Head of State in respect of higher appointments. Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism. A mixed composition avoids the perception of self-interest, self protection and cronyism, and reflects the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy.”

Article 13 of Istanbul Declaration Implementation Measures clarifies the provisions in Istanbul Declaration. Accordingly, “The election procedures of independent and impartial judges is essential to establish and maintain the public’s trust and confidence in the administration of justice. The measures should be taken in this frame are as follows:

1. Establish an independent body with broad professional and civic representation to receive and review applications and/or nominations for judicial office.
2. Require that all judicial vacancies, including for high judicial office, be advertised, with information on the qualities required from candidates for such offices.
3. Require publication of a list of vacant judicial offices, and the list of candidates who have applied or been nominated for such offices.
4. Promulgate procedures that ensure the public and the media have access to candidate interviews by the body responsible for appointing or nominating persons for judicial office.
5. Establish a merit based recruitment and promotion process that reflects the diversity of society.
6. Promulgate procedures governing the transfer of judges for regular rotation or on an emergency basis.”

In case of high or critical posts such as a judge and particularly a bench member at high courts, the society has the right to know who, why, on account of what personal characteristics has been appointed to or selected for that post. Transparent processes will ensure that authorities in charge of making the appointment or selection be accountable to the society.

2) Interference in, Pressures on and Threats against the Judiciary

The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.¹²

¹² The Rule of Law Checklist, pg.35, p.71. (See in particular ECtHR *Campbell and Fell v. the United Kingdom*, 28 June 2014, 7819/77 and 7878/77, § 78).

ECtHR decided that the interference by the executive in the ongoing judicial proceedings or trials might impair the reputation of the judiciary which in turn would undermine the guarantees of fair trial. The statements by high-ranking politicians in the government on the ongoing proceedings, calls on the courts to return a certain decision even if for justified reasons are not compatible with the notion of an “independent and impartial tribunal” in Article 6 of ECHR that guarantees the right to fair trial.¹³

ECtHR decided that even if there were no tangible evidence that the statements by high-ranking politicians influenced the court, the “appearance of impartiality” was of utmost importance and the said statements might violate the right to fair trial.¹⁴ This is also of utmost importance in respect of judicial conduct. Therefore, Article 1.5 of the Court of Cassation Code of Judicial Conduct states that “A judge shall be free from inappropriate connections with, and influence by, the executive and legislative branches of government, and also demonstrate to a reasonable observer to be free there from.” This is very important not only for judges, but also for judicial staff. The preamble of the Court of Cassation Code of Conduct for Staff states that “WHEREAS public confidence in the judicial system is dependent on the perceived integrity of judicial staff who play any role in the administration of justice.”

The Court of Cassation Code of Judicial Conduct includes more elaborate rules on the pressure and threats against the judiciary. Article 1.1 reads “A judge shall reject any attempt to influence his or her decision in any matter before the judge where such attempt arises outside the proper performance of judicial duties.” It may be debatable what procedure a judge who encounters such an act should follow. In certain cases, the fact that the judge has not been influenced by such an attempt cannot by itself be considered sufficient. It is also necessary to dispel the risks that such an interference with the judiciary will create on the appearance of independence and impartiality. It may be useful to communicate the issue to the court administration which in turn will communicate to the relevant representative of the executive (or of the legislative, whoever may be) that the act is improper so that similar acts will not be repeated in the future.

3) Maintaining the Authority of Judicial Proceedings: Comments from the Executive on Pending Procedures

If commenting on judges’ decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges’ decisions, other than stating their intention to appeal.¹⁵

ECtHR considers the violation of the presumption of innocence in the context of the right to fair trial pursuant to Article 6.2 of ECHR. Accordingly, the Court found there had been a violation of the right to fair trial when a suspect was declared guilty by the

¹³ *Sovtransavto Holding v. Ukraine*, no. 48553/99, ECHR 2002 VII; *Kinsky v. the Czech Republic*, no. 42856/06, 9 February 2012.

¹⁴ *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, 21 January 2016,

¹⁵ CM/REC (2010)12, Article 18.

Minister of Interior at a press conference one day before the court trial started.¹⁶ ECtHR indicated that the infringement of the presumption of innocence could arise not just from statements made by a judge but from other public officials and authorities as well, including the President of Parliament, the public prosecutor, the Minister of the Interior, or police officers.

Increased means of communication today, particularly the increased impact of internet and social media, pose serious risks to the right of protection against defamation and presumption of innocence. Therefore, it is now necessary for the relevant persons or organisations to act more carefully and sensitively.

The Court of Cassation Code of Conduct for Public Prosecutors explicitly treats the matter laying down an ethical rule that “the public prosecutors shall respect the presumption of innocence and the right of protection against defamation” (Article 4.2).

Further, Articles 2.4, 2.5 and 2.6 of the Court of Cassation Code of Judicial Conduct lay down certain rules of conduct to reduce potential risks associated with the matter.

4) Security of Tenure of Judges

Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.¹⁷ Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.¹⁸

According to ECtHR, an important element of the judicial guarantee of the judge’s term of office is that it is not arbitrarily terminated by the executive and legislative body before the date prescribed by law. It is against ECHR that a judge’s term of office is terminated by unjustified reasons. ECtHR decided that allegations by the president of a high court that his mandate was terminated for criticism on the reforms must be examined seriously and Articles 6 and 10 be considered infringed if the allegations were true.¹⁹

In modern legal systems, the security of tenure of judges is usually guaranteed in the constitution under the title of independence of the judiciary. ECtHR case-law explicitly indicated that the inclusion of the security of tenure of judges in the constitution and laws would not alone constitute adequate guarantee.²⁰ The terms of office of judges, their independence, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their terms of office, where such exists.²¹

¹⁶ ECtHR, *Toni Kostadinov v. Bulgaria*, no. 37124/10, 27 January 2015.

¹⁷ CM/REC (2010)12, Article 49.

¹⁸ The Rule of Law Checklist, pg.35, p.76.

¹⁹ *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.

²⁰ *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.; Kudeshkina/Rusya.

²¹ Commentary pg.34.

5) Guarantees on Disciplinary Proceedings Brought against Judges Following Public Expression of Views

ECtHR decided that judges, like other people, should enjoy freedom of expression. The exercise by a judge of the freedom of expression particularly on matters of administration of justice or functioning of the judiciary is a necessity to the separation of powers. Imposing sanctions on judges for such cases may have a chilling effect on judges in defending judicial independence and impartiality.

ECtHR found that a letter sent to the applicant, who was the President of the Liechtenstein Administrative Court, by the Prince of Liechtenstein announcing his intention not to reappoint him to a public post constituted an infringement of the right to freedom of expression (ECHR Article 10).²² ECtHR held that a judge's making public statements upon removal from office should be considered in the context of freedom of expression. If disciplinary proceedings were to be brought, there must be certain procedural guarantees. Disproportionate disciplinary penalties lead to judges avoiding from participating in public debate in the effectiveness of the judiciary and make a chilling effect.²³

Istanbul Declaration provides significant procedural guarantees for judges. Article 15 of the Declaration reads "There should be transparency in the disciplinary process of judges." And Article 15 of Istanbul Declaration Implementation Measures include the following provisions:

"Closed or obscure judicial disciplinary proceedings being calculated to undermine public confidence in the integrity of the judicial process, the judiciary should:

1. Define conduct that may give rise to disciplinary sanctions.
2. Institute and publish a procedure for making a complaint against a judge in respect of his or her professional capacity.
3. Establish an independent investigatory body, with lay participation, to receive complaints against a judge in his or her professional capacity; to investigate such complaints; and to determine what action, if any, is warranted, including reference to the independent disciplinary body.
4. Establish an independent disciplinary body, with lay participation, vested with the power of removal of judges. A judge subject to removal shall be entitled to full rights of defence before such body, including legal representation; an inquiry conducted by reference to established standards of judicial conduct; and the expeditious conclusion of such inquiry. In the event of a decision to remove a judge, the judge is entitled to appeal to an appropriate court or tribunal.
5. Establish procedures that ensure a complainant is kept informed of the progress of the investigation.
6. Ensure that the final decision in a disciplinary proceeding against a judge that results in a sanction is published or otherwise made public."

In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement

²² *Wille v. Liechtenstein* [GC], no. 28396/95, § 70, ECHR 1999-VII.

²³ *Kudeshkina v. Russia*, no. 29492/05, 26 February 2009.

could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement.²⁴ A judge should not involve himself or herself inappropriately in public controversies. The reason is obvious. The very essence of being a judge is the ability to view the subjects of disputes in an objective and judicial manner. It is equally important for the judge to be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which is the hallmark of a judge. If a judge enters the political arena and participates in public debates - either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government – he or she will not be seen to be acting judicially when presiding as a judge in court.²⁵ However, a judge may speak out about the operation of the justice(court), effectiveness and the independence of the justice²⁶ and criticise the law.²⁷

Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training.²⁸ The Court of Cassation Code of Judicial Conduct does not bar any judge from expressing views on the justice system or the effectiveness of the judiciary. On the contrary, it generally protects the freedom of expression of judges including social media. Any restrictions introduced are the fundamental principles to preserve the impartiality of a judge.

The Court of Cassation Code of Judicial Conduct lays down the following rules on a judge's expression of his or her views to the public:

- “4.6 A judge shall avoid taking part publicly in controversial discussions of a partisan political nature.
- 4.7 A judge shall exercise self-restraint in using the social media to avoid posts that involve political, ethnic, sectarian, sexist or similar language.

It is important to grant and protect the freedom of association for the genuine enjoyment and exercise of the freedom of expression. To that end, the Court of Cassation Code of Judicial Conduct provides the following rules on the freedom of association of judges:

- “4.14.4 Engage in civic activities, if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.
- 4.17 A judge may form or join associations of judges or participate in other organisations representing the interests of judges provided that such act not break the law.”

²⁴ Commentary, pg.95, p.134.

²⁵ Commentary, pg.95, p.136.

²⁶ Commentary, pg.96, p.138.

²⁷ Commentary, pg.96, p.139.

²⁸ Consultative Council of European Judges (CCJE 2010)3, Magna Carta of Judges (Fundamental Principles), Article 18.

B) RESPONSIBILITY AND ACCOUNTABILITY OF JUDGES

1) General

Ensuring the independence²⁹ and security of tenure of judges is a requirement for the rule of law (Article 2 of the Constitution). To that end, modern legal systems have certain legal guarantees as well as special rules. Such privileges accorded to judges are intended for their objective and rational conduct on the job. This serves the public good, rather than the judge's interest. When the judiciary is fair, the state and citizens and all other persons feel secure. The purpose of the security of tenure is to ensure that judges make fair decisions in an environment free of any and all material or moral fears and pressures.³⁰ However, where a judge conducts judicial work arbitrarily or irresponsibly, s/he should be held accountable for his/her misconduct. Otherwise, the legal security of individuals will be jeopardised and the rule of law, human rights and particularly the right to fair trial (ECHR Article 6) that need to be protected will be infringed. Securities accorded to judges are not privileges accorded to their persons, but put in place with a view to protecting the legal security of the public and administering justice.³¹ Further, it would be contradictory to adopt penal and disciplinary accountability of judges who deliberately or grave professional misconduct violate the lives, property, honour and reputation of persons, and not to adopt civil (financial) liability on the other.³²

The public trust in the judicial system and moral authority and integrity of judges is the most important thing in a modern democratic society. In that sense, the members of the judiciary should be open to account and subject themselves to mechanisms of checks and balances as a method of maintaining transparency, integrity and accountability. The bench members of high courts should particularly have the highest standards of ethics and integrity, and ensure institutional transparency and accountability. It is crucial to put into effect the code of judicial conduct and include the training on ethics so that all members of the judiciary be aware of code of conduct and professional standards and consequences of non-compliance.

2) Judge's Relations with Media

In case of criticism of the judicial system and judges, ECtHR interprets the freedom of expression broadly and holds that restrictions on freedom of expression are not necessary in a democratic society. Freedom of expression should not be restricted to protect the authority of the judiciary or limit legitimate criticism of justice.³³

²⁹ In the doctrine, emphasis is placed on "impartiality" along with "independence"; and it is indicated that independence alone is not sufficient to ensure impartiality, and that the principles of rule of law and right to fair trial constitute a constitutional basis for impartiality. See Centel, N.: Hâkimin Tarafsızlığı [Independence of Judges], İstanbul 1996, p.28 et seq.; Fendoğlu, H.T.: Yargının Bağımsızlığı ve Tarafsızlığı [Independence and Impartiality of the Judiciary], Ankara 2010, pg.161 et seq.

³⁰ Özer, A.: Türkiye'de ve Çeşitli Ülkelerde Mahkemelerin Bağımsızlığı ve Teminatı [Independence and Security of Tenure of Courts in Turkey and Various Countries], Ankara 2009, pg.22,23.

³¹ Saldırım, M.: Hâkimin Hukuki Sorumluluğuna İlişkin Yargıtay Büyük Genel Kurulu ve Yargıtay Hukuk Genel Kurulu Kararları [Decisions of the Grand General Assembly and General Assembly of Civil Chambers of the Court of Cassation on the Civil Liability of Judges], Ankara 2014, pg.7.

³² Aydınalp, S.: Hâkimlerin Hukuki Sorumluluğu [Civil Liability of Judges], Ankara 1997, pg.98.

³³ *De Haes and Gijssels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions 1997-I and Morice v. France* [GC], no. 29369/10, ECHR 2015). In *Morice v. France* [GC], no. 29369/10, ECHR 2015.

The Court of Cassation Code of Judicial Conduct includes the following rules holding that criticism against judges should be tolerated in the sense of freedom of expression:

- 4.18 A judge shall primarily speak through his or her judgments. A judge shall not criticise own decisions or those of his or her colleagues, unless required by his or her mandate, in a manner to influence decisions, communicate with such critics or make statements on such news and comments in the media unless s/he is so authorised.
- 4.19 A judge shall generally avoid the use of the criminal law and contempt proceedings to restrict legitimate public criticism of judicial performance unless necessary.³⁴

In some cases however, penal and civil sanctions may be imposed to protect the reputation of the judge and the authority of the judiciary. ECtHR decided that there was no infringement of the freedom of expression where an attorney was condemned to fine and compensation because of filing a complaint involving libel against the judge hearing a case.³⁵ In another case, ECtHR decided that even if there were legal errors, the disparaging of all judges and prosecutors should not enjoy tolerance under freedom of expression.³⁶ Questioning the competency of a judge, using disparaging words, making false statements about the judge or wilfully distorting the fact shall not be protected under freedom of expression. Statements not in the nature of assault on the personality or general qualities of a judge, but relating to how a judge conducted a case or his/her performance are in the scope of freedom of expression.³⁷

3) Protecting Judge's Privacy

A judge has a private life as everyone else does which must be respected by all. Therefore, the Court of Cassation Code of Judicial Conduct upholds this basic tenet and lays down the following rules:

- 4.14 Since the complete isolation of a judge from the community in which the judge lives is neither possible nor beneficial. As knowledge of the community is essential to the sound administration of justice, a judge may, subject to the proper performance of judicial duties:
 - 4.14.1 Write, lecture, teach and participate in activities concerning the law.
 - 4.14.2 Meet with public bodies, private organizations on matters relating to the law.
 - 4.14.3 Serve as a member of an official body, commission, committee or other body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.
 - 4.14.4 Engage in civic activities, if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

³⁴ ECtHR made various decisions on this matter. See *De Haes and Gijssels v. Belgium*; *Obukhova v. Russia*, no. 34736/03, 8 January 2009.

³⁵ *Peruzzi v. Italy*, no. 39294/09, 30 June 2015.

³⁶ *Wingter v. Germany (dec.)*, 43718/98, 21/03/2002.

³⁷ *Radobuljac v. Croatia*, no. 51000/11, 28 June 2016.

There may however be certain limitations on a judge's private life due to his/her obligations of professional conduct. Private life should not undermine the image and reputation of the judiciary.

This matter is treated in Article 2.6 of the Court of Cassation Code of Judicial Conduct as follows: "A judge shall not knowingly and willingly, while a proceeding is before, or could come before, make any public or implicit comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process." Here, public or implicit comment does certainly cover the presumption of innocence and the right of protection against defamation.³⁸ Further, the Code includes special rules in Articles 2.4 and 2.5:

- 2.4 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, members of the judiciary and litigants in the impartiality of the judge and of the judiciary.
- 2.5 A judge shall, so far as is reasonable, so conduct himself or herself, and organize the judge's own and the judge's family's personal and economic activities in such a way as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing, deciding, appeal or otherwise dealing with, cases.

4) Judges' Personal Religious or Political Views Affecting Their Judicial Role

ECtHR holds that a judge's personal religious views shall not get in the way of their impartial judicial role. A judge shall not be allowed to promote the church to the detriment of the state protected by the rule of law. Such a case requires a judge's suitability as a judge and calls into question the authority of the judiciary.³⁹

Judges may, as all other individuals, have freedom of religion and conscience or political views. While the Court of Cassation Code of Judicial Conduct upholds this fundamental principle, it includes the following rules under "Propriety" to maintain the reputation and impartiality of the judiciary:

- 4.5 A judge shall, in exercising freedom of expression, belief, association and assembly, always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.
- 4.6 A judge shall avoid taking part publicly in controversial discussions of a partisan political nature.
- 4.7 A judge shall exercise self-restraint in using the social media to avoid posts that involve political, ethnic, sectarian, sexist or similar language.

This matter is also important in terms of the principle of equality. The Court of Cassation Code of Judicial Conduct includes the following rule under "Equality":

- 5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources and not grounds for the case such as colour, sex, religion, conscience, belief, culture, dress, language, place of birth, ethnic or social origin, disability, age, marital status, sexual orientation, social or economic status or other like causes."

³⁸ *Lavents v. Latvia*, no. 58442/00, § 118 and 119, 28 November 2002.

³⁹ *Pitkevich v Russia (dec.)*, no. 47936/99, 8 February 2001.

C) INSTITUTIONAL COMMUNICATION STRATEGY OF THE JUDICIARY

1) General

For the rule of law to survive, people should be educated and their awareness raised on this matter. As Konrad Adenauer said, “democracies need democrats.”⁴⁰ The rule of law can only be fully exercised in a society with a high awareness of law and justice. Therefore, where the public education is held as a priority, and supported by the judiciary which is also actively involved in social life to that end, the potential risks against judicial independence and rule of law will be alleviated.

İstanbul Declaration includes important guidelines on the communication strategy that should be formulated by the judiciary to raise public awareness on the work of the judiciary and promote public trust in the judiciary.

Article 9 of İstanbul Declaration states that “The judiciary should promote programmes to orientate students on the judicial process.” It is further elaborated as follows in the Declaration:

“The judiciary should promote and participate in school and university programmes aimed at developing an understanding, and thereby contributing to the transparency, of the judicial process. These may include visits to courts, classroom appearances by judges, role playing, the use of audiovisual material, and the active teaching of judicial procedures. Such programmes will serve to avoid or correct ignorance and misapprehension about the judicial system and its operation.”

Article 9 of İstanbul Declaration Implementation Measures emphasises that “Promoting and entrenching respect for the rule of law and the role of the judiciary being dependent upon a multi-generational understanding of important legal principles and individual rights, the judiciary should establish regular programs of student engagement that include organized student visits to courts, classroom appearances by judges, civics education, and the active teaching of judicial procedures in conjunction with the legal profession and tertiary educational institutions.”

Article 10 of İstanbul Declaration states that “The judiciary should initiate and/or support outreach programmes designed to educate the public on the role of the justice system.” The elaboration of the Article includes detailed provision.

Article 10 of İstanbul Declaration Implementation Measures elaborates the matter as follows:

“Public confidence in the judicial system and in the moral authority and integrity of the judiciary being contingent on public understanding of the judicial process, the judiciary should:

1. Establish civic outreach programs, including town hall meetings, that provide an opportunity for court users to interact with the judiciary on the problems they have experienced.

⁴⁰ Is Populism a Problem, pg.46.

2. Appear on radio and television programmes to disseminate information on the functioning of the judiciary, its civic role, and judicial processes.
3. Publish, including on the Internet, short, clearly worded and easily understandable pamphlets and other materials that provide basic information on arrest, detention and bail, criminal and civil procedures, and useful contacts for crime victims, witnesses and other users.”

The Commentary on the Bangalore Principles of Judicial Conduct highlights judge’s involvement in public education and legal education.⁴¹

2) Relations of Judiciary and Media

Article 11 of Istanbul Declaration lays down the following rules on the relations of the judiciary and media:

“The judiciary should afford access and appropriate assistance to the media to enable it to perform its legitimate function of informing the public about judicial proceedings, including decisions.

It is the function and the duty of the media to gather and convey information to the public, and to report and comment, on the administration of justice, including cases, before, during and after trial, without violating the *sub judice* rule, the presumption of innocence, and the rights of parties to a dispute. This principle, which includes the freedom to decide which cases are to be brought to the attention of the public and how they are to be treated, and the right to criticize the organization and functioning of the justice system, should only be departed from to the extent set out in the International Covenant on Civil and Political Rights.

Media access to judicial proceedings is not a matter of simply opening doors to the courtroom and providing seats to journalists. Courts are not well served by inaccurate and sensationalist coverage of court proceedings. In fact, poor or biased media coverage can undermine public confidence in the judiciary and raise concerns with regard to judicial independence, impartiality and integrity. The training of journalists organized by, or in cooperation with, the courts can help reduce ineffective reporting. Such training should be designed to provide them with basic knowledge about court procedures and legal issues, and thus contribute to improving journalistic skills and ethics, and building trust between judges and journalists.

Engaging the media may also require that courts actively reach out to journalists by establishing press offices within each court, to facilitate media coverage of judicial proceedings. These offices could liaise with media representatives, respond to and manage requests from journalists, issue press releases and generally provide accurate information about judicial decisions and legal issues. These offices could also provide schedules of upcoming cases, monitor the media for accurate reporting, and design media campaigns that promote public understanding of the judiciary.”

⁴¹ Commentary, pg.105, p.156,157.

Article 11 of İstanbul Declaration Implementation Measures states that “Since the media has the responsibility of gathering and conveying information, and reporting and commenting, on the administration of justice, the judiciary should:

1. Establish a press or public affairs office to facilitate media coverage of judicial proceedings by liaising with media representatives, responding to and managing requests from journalists, issuing press releases, and generally providing accurate information about judicial decisions and legal issues. This office should provide schedules of upcoming cases, assist the media in accurate reporting, and design media campaigns that promote public understanding about the judiciary.
2. Establish a program that builds trust between the media and the court by providing training of journalists that includes basic education on court structure, court procedures, methods of accessing court information, and legal issues.”

CONCLUSION

When ECtHR decisions are examined in the framework of the Court of Cassation Code of Judicial Conduct and İstanbul Declaration on Transparency in the Judicial Process, we see that the fundamental principles and values of justice are common.

Dr. Nihal Jayawickrama, the General Coordinator of the United Nations Group on Integrity in the Judiciary which drafted the Bangalore Principles of Judicial Conduct wisely summarises the matter as follows:

“...The second is to say what a humbling experience it was for me, when preparing the draft Principles, and thereafter the draft Commentary, to learn that these core judicial values and principles and even detailed statements of their applicability were already to be found in the texts of ancient Egypt and in Hindu Law in or around 1500 BC.; in Buddhist philosophy in 500 BC; in the Twelve Tables of Rome in 450 BC (which contains the injunction that “The setting of the sun shall be the extreme limit of time within which a judge must render his decision”); in Chinese law around 312 BC; in the legal systems that flourished in Africa at the same time as they did in Greece and Rome; in the writings of Jewish scholars in or about the 12 th century AD; in the teachings in the Old Testament; and, in very specific and comprehensive terms, in Islamic Law. **The judicial values are not only global; they are also eternal. They are part of our common heritage.**”⁴²

⁴² See Nihal Jayawickrama: *Yargı Bağımsızlığından Yargının Hesap Verebilirliğine* [From Judicial Independence to Judicial Accountability], (Opening Symposium of the Court of Cassation Ethics, Transparency and Trust Project 13-14 April 2017, pg.23-32), pg.31-32.