Standards of Judicial Conduct – Ethical Aspects[*]

(Seminar Ankara September 24, 2004)

A cornerstone of a constitutional state and a society governed by the rule of law is the separation of powers as postulated by the philosophers Charles de Montesquieu and Immanuel Kant. The assignment of the three main duties of the state authority – i.e. legislature, executive and judiciary – to three different independent from each other organs of the state is an essential in democratic societies.

This principle especially regarding the judiciary is also enshrined in Article 6 of the European Convention on Human Rights in which you can read that everyone in the determination of his civil rights and obligations or of any criminal charge against him is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This means that the Convention demands for judges independence and impartiality in the exercise of their judicial functions. With the item independence we will deal in the afternoon in the context of public confidence, for the moment let us concentrate on impartiality.

The main duty of a judge is to hear and decide matters assigned to him free of bias and not being swayed by partisan interests. This includes also that he should not let himself be influenced by fear of criticism or public clamour. His attitude to all parties should be the same and he should require that all persons acting in the process show similar conduct consistent with their role, may it be lawyers, prosecutors, litigants and others.

For criminal cases there exists in Article 6 para 3, subpara d, an expressly formulated provision that everyone charged with a criminal offence has inter alia the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The fact that this special provision can only be read in the context of criminal proceedings may not lead to the misunderstanding that it does not exist in civil proceedings. This is included in the wording “fair hearing” in para 1 of Article 6 of the Convention as the European Court of Human Rights in its constant case law has decided several times.

To confer separately with the parties and their counsel – for example in an effort to mediate or to settle pending matters – should only be done with the consent of the other parties. Adequate time and facilities for the preparation of the case in civil matters and of the defence in criminal matters for both parties has to be foreseen.
Last but not least a judge has to avoid public comment on the merits of a pending case which would not only be a violation of the presumption of innocence in criminal cases (which by the way also applies to public comments of prosecutors about guilt

---

[*] ***Dr.Willi Fuhrmann****, Avukat ve Avrupa Konseyi Uzmanı, AİHM Eski Hakimi*

of an accused according to the case law of the Court in Strasbourg) but also in civil cases a breach of impartiality.

In case a judge comes to the opinion that his impartiality in a proceeding might reasonably be questioned shall step down from the case.

At any rate this has to be so if the following facts apply:

If the judge has previously served as a lawyer in the disputed matter or has given a legal advise to a party. I
If the judge knows that he or someone of his family has a financial or any other interest in the subject matter which could be affected by the outcome of the proceeding.
If someone of the judges family is a party or a trustee or a lawyer to a party of the proceeding or is to the judges knowledge likely to be a material witness in the case.
If the judge at an earlier occasion publicly has expressed an opinion concerning the merits of the particular case.
And of course if the judge has a personal bias or prejudice concerning a party and if he has a personal knowledge of disputed evidentiary which could lead to making him to a witness in the proceeding.

The above examples are not exhaustive and the general rule is that a judge shall anyway disqualify himself if he hesitates that the parties or the public have reasons to question his impartiality although that might not be the case. The European Court of Human Rights has circumscribed this with the following sentence: “Justice has not only to be done – it must also be seen to be done!”

As regards extra judicial conduct and/or other professional activities it is self-explaining that this is a very broad field in which not each situation or fact can be addressed bearing in mind that we are faced today with a full agenda and a tight time schedule. Therefore I’ll restrict myself to more general remarks and be at your disposal in the discussion if there are questions about special topics.

It seems to be wise for a judge to be very careful in considering all his extra-judicial activities in the light of compatibility with his profession to minimize the risk of conflict with his judicial duties and the dignity of his office.

Therefore there will be no problem to speak and write or teach and lecture on legal or non legal subjects as well as to engage in sports, in the arts or other social activities as long as this does not interfere with the performance of the judge’s judicial duties.
In this context there arises the question about engagement in politics and if judges should take over political functions or mandates and if they wish so if they should be allowed to by the legislation.

This very sensitive question which also may raise hesitations in the direction of separation of powers and on the contrary in the direction of the right to free elections enshrined in Article 3 of Protocol No.1 to the European Convention on Human Rights is not solved in an uniform way amongst the European member states. For example in my home country Austria there exists no exclusion and I know several judges who are acting there as deputies in different legislative bodies.

In Hungary on the other hand judges and members of the police are by constitutional law not allowed to stand for elections to the parliament. I think that both ways of approximation to this problem have their pros and contras. My personal opinion, which of course not at all is relevant, may be made out by the fact that I immediately after my election as a judge at the European Court of Human Rights stepped down from my mandate in Austria's National Council.

Again and once more it has to be stated that also in that field nothing is "absolutely white" or "absolutely black" and that it seems to be impossible to regulate all details of extra judicial conduct of judges. In each judiciary of a functioning democratic society governed by the rule of law there here has to be developed a special sensibility of the members of the judiciary and a certain feeling about what is acceptable and what not.

This is not only an important matter of education and training of judges, there is also need of supervision and liability for members of the judiciary in case they do not obey the rule of law or the ethical aspects of their profession.

Let us start with the disciplinary liability, which in some respect has to be very carefully balanced with the principle of independence. The latter forbids that a judge is – also in disciplinary matters – subordinated to authorities of the executive because this could lead to improper influence of the state to the judge in the performance of his judicial work.

Therefore there is a need that another independent body protects discipline and ethic of the profession as well as the improvement of judges work. This at the best can be done by chambers of judges either installed at the different courts or in the framework of an association of judges or as it be the case in several European member states by a Supreme Judicial Council. Anyway clear legal provisions have to be enacted to on the one hand provide a satisfactory supervision of the discipline and conduct of judges and on the other hand to avoid interferences in their independence.

The same applies to civil liability of judges – well understood in matters of their work as a judge – because this cannot be understood in all other matters of the life as member of the society. If there is envisaged to make a judge liable for grave faults in his professional performance this also has to be circumscribed very carefully by law and in that event to be foreseen a sufficient insurance, which is also a matter of independence.

Let me finish with the aspect of criminal liability. It seems to be clear that a judge must be secured by criminal immunity in respect to his judicial work – save to intentional violations of law – as one aspect of his independence. In several former communist countries after the fall of the old regimes there has also been enacted an absolute immunity for judges for all offences which are punished to say five or ten years. The sense of this was to protect judges against improper prosecution by the state authority having in mind what happened during the years of dictatorship.

It came out that this has been a mistake and all this laws have been amended or are on the way to be amended. What is at stake and what is needed are again clear and

foreseeable regulations. If the legislator decides to secure judges independence in such a way there has at the same moment to be implemented a procedure before an independent body to abolish the immunity of a judge who is suspected to have committed an offence or a crime. It has to be stated that both possibilities – no immunity or if yes procedure as described before – are an acceptable way to deal with this problem.

Closing my presentation for the moment I am looking forward to an interesting discussion before the lunch break.