

Impartiality of the Judiciary

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It can be said that impartiality of the judiciary is undermined by the practice - which is similar to teacher-student relationship - of assessment/grading of local court judges' performance by Supreme Court judges.

At the opening ceremony of the Turkish Justice Academy's 2007-2008 academic year, the Chief Justice of the Court of Cassation (Yargıtay) challenged the prospective judges:

"The main component of judgeship is impartiality. However, you will be partial in your decisions to protect and sustain the Republic of Turkey. If we are here today, it is because of the rights secured by our Republic. You should, and have to, know that the Republic form of government is the most appropriate regime suitable for human dignity and honor. You will be partial to claiming ownership of a democratic and secular system and the rule of law; you will be partial to owning our crescent and star flag, and to raising the flag even higher. You do not have the luxury of being impartial to these issues".

While emphasizing the principle of impartiality, the Chief Justice was pointing to the boundaries of this principle. When the problems of the judiciary are at issue, the independence of the judiciary and ethical principles are the two values mentioned most frequently; however, treated like an orphan child, the principle of impartiality is rarely mentioned. What does the principle of impartiality mean? Are there any limits to the principle of ethical impartiality?

Universal Standards

Legality and the *Independence of Judiciary* themselves are not enough to meet the requirements for "the right to a fair and just trial" guaranteed in Article 6 of the European Human Rights Convention (EHRC). In addition to the principles of *Legality* and *Independence of Judiciary*, the impartiality of the judiciary is also necessary. In *Morris v. UK* – Case Number 38784/97, dated 02/26/2002- the European Court of Human Rights (ECHR) explained in the following words what the concept of impartiality meant:

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“... there are two dimensions in the concept of judicial impartiality. The first, the Court should distance itself from personal bias and influence. The second, the Court should also be impartial objectively; meaning that there should be sufficient guarantees for the Court to dismiss any legitimate misgivings regarding impartiality”.

In accordance with the United Nations’ Bangalore Principles of Judicial Conduct (2003/43), which was ratified in 2006, the Supreme Council of Judges and Public Prosecutors stated that the following conduct is necessary to achieve judicial impartiality: *“Judges should perform their duties impartially, without any bias or favoring anybody; during and outside of trials, judges should act in ways that would increase the parties’ and public’s trust in the judiciary and jurists; during a trial, until the decision, judges should act in ways to minimize the possibility of a rejection of the judge’s decision on appeal.”* Both the UN’s Bangalore Principles of Judicial Conduct and the ECHR’s decision, impartiality is subjected to a distinction between subjective impartiality and objective impartiality.

Subjective impartiality is a judge’s personal impartiality as an individual. A judge is presumed to be subjectively impartial until proven otherwise. However, subjective impartiality requires a very delicate effort in judging; judges should endeavor not to have any bias, prejudice, or precondition, and should avoid the appearance of favoring or hindering any party to a case. Objective impartiality is the parties’ and public’s belief that the Court as an institution is impartial. Achieving objective impartiality requires conferral of some guarantees by judges to eliminate any suspicions regarding their impartiality.

The Legislative Trap

The assessment of judicial conduct by justice inspectors at the Ministry of Justice causes pressure on judges; it can be said that any suspicions regarding the impartiality of judges cannot be eliminated with this assessment since the practice of assessment could not be considered to be “guarantees of judges.” Consequently, impartiality of judges is open to discussion. The public’s feeling that judges do not provide enough guarantees to secure their own impartiality could be said to be the result of the fact that decisions of the Supreme Council of Judges and Public Prosecutors are final decisions and cannot not be challenged. It can also be said that the impartiality of judges is undermined by the assessment/grading of the conduct and performance of local court judges by the Supreme Court judges, which is similar to a teacher-student relationship. We could emphasize that objective impartiality has yet to be absorbed by judges personally – including the author of this article himself-, simply because we still overuse and do not question enough expert reports, which are often prepared in a way they resemble a court judgment, on which to base our judgments. It is possible to give more examples of this kind. If only the lawmakers could make laws parallel to universal

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standards, and if only our judges could give up the luxury of annihilating the universal principles of law, then it is not very difficult to give some guarantees that would strengthen the perception of the objective impartiality of judges.

“The Mind of the State” Trap

The best evidence to prove the subjective impartiality of a judge’s decision is its justification section. It should be known that a judge makes judgments and does not serve anybody in particular. When making his/her decisions, a judge looks only for justice. The only mission s/he should have is to bring about justice. A judge should not feel pressure to protect and shield the state from harm or should not act as an officer of the state or government.

A judge should not feel pressure to give priority to the official theories of the state, nor should s/he feel pressure to protect the “high interests” of the state or government. The sentimental and nonsensical talk of the public should not affect a judge’s decision making. If public discussion does have an effect on a judge’s decision making process, then it is not possible to talk about the impartiality of judging but it is possible to talk about “political judging.” In order to talk about “political judging” – mentioned in ‘*Supremacy of Laws in the Mind of the State Trap*’ by Mithat Sancar – courts do not have to act

in accordance with the political will. When making its decision, if a court, instead of making a reference to laws and justice, makes a reference to the dominant and official ideology, or ‘the mind of the state’, then, ‘political judging’ is at play.

Could we say that the decisions of the ECHR, whose jurisdiction we have long accepted, and the UN’s Bangalore Principles of Judicial Conduct, which are recognized by the Supreme Council of Judges and Public Prosecutors, have brought an exception to the rule of impartial judging? Do we have a responsibility to create whimsical exceptions to impartial judging in our decisions regarding Article 301 (of Turkish Criminal Code), whose fame has gone beyond our borders and which made people say “*maşallah for 301 times!*”^{*} because of our ingenuity in these decisions?

Do we have a responsibility to create whimsical exceptions to impartial judging in our decisions regarding Article 301 (of Turkish Criminal Code), whose fame has gone beyond our borders and which made people say “*maşallah for 301 times!*”^{*} because of our ingenuity in these decisions? Judges do not have the luxury to give up the principle of impartiality, which is the basis for bringing about justice and which helps bring the public’s belief in the justice system to the highest level. Judges do not have the luxury to say “impartiality is a detail if the delicate national values are at stake.” Judging cannot be the rising star of the democratic governance if judges cannot achieve impartiality under all conditions.

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^{*} **Editorial footnote:** It is herewith referred to the old Turkish saying “*maşallah for 41 times*”, meaning the wish for God’s blessing.