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Moderator
Prof. Dr. Adem SÖZÜER
Dean of the Faculty of Law, Istanbul University

ETHICAL PRINCIPLES OF JUDGES IN THE OTTOMAN STATE: THE CONVENANCE OF JUDGE

Assistant Prof. Dr. Ahmet KILINÇ
Lecturer of the History of Law, Faculty of Law,
Yıldırım Beyazıt University, Ankara

Introduction

The need for social order originates from the fact that one cannot live alone. The coexistence of people brings together the rules that they must obey. Religion, morals, customs and law rules are accepted as social order rules aiming at ensuring that the community can live together in peace and prosperity without chaos and disorder. Today, we are faced with ethical principles, the popularity of which has increased, that are stated as principles that must be obeyed by the people who live together with the social order rules and/or who are in these rules when they carry out their relations with the society. Within the ethical principles, it can be argued that the concept of occupational ethics is discussed and questioned more.

In this study, we will try to explain the ethical principles that judges had to obey in the Ottoman State. First of all, we must determine what the concept we are going to investigate meant in the Ottoman Empire and determine the limits of this concept. According to this, we will try to give information about concepts such as ethics, the relation between ethics and law, professional ethics.

The continuation of the existence of the Ottoman State for so long that lasted its existence for six centuries has been associated with the notion of justice it provided. Indeed, the Ottoman Empire was fed from the Turkic tradition that regarded justice as the basis of the state on one hand and from Islamic law which frequently makes reference to the justice in its main sources. Because of the facts that there were so many courts to resolve

2 In Kutadgu Bilig, an important source of the pre-Islamic Turkish Law History, the principle that the ruler should be based on justice was stated as follows: “…This blade in my hand is a tool that cuts. I cut the work like a knife; never keep anyone who seeks the right. As for the candy, it is for the person who suffers from prosecution, comes to my door and finds justice. That man leaves my place as if he ate sweet, pleased and smiling. The water of this poisonous bitter Hind herb is drunk by tyrants and those who doesn’t apply justice... They come to me; and when I judge, they look sourly as if they have drunk Hind medicine. My sternness, being beetle-browed and sullen face is for persecutors who are brought in front of me. It does not matter whether they are my son, close friend or relatives, passengers, passer-bys or guests. All of them are the same for me in terms of the law; when Judging, no one finds me different. The foundation of this Beylic is accuracy…” Yusuf Has Hacib, p.66; For the understanding of justice in Old Turkish States, see Adem Tutar, “İslam Öncesi Türk Devlet Gelenekinde Adalet Anlayışı [Understanding of Justice in Pre-Islamic Turkish State Tradition] ”, Türkler, v. 2, Ankara 2002, p. 868-873

3 An-Nisa 58: “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.

4 Divan-ı Humayun (Imperial Court), İkindi Divanı (Court in the afternoon), Çarşamba Divanı (Court on Wednesday), Pasha Courts, Kadi-ul Asker Court, Provincia Treasurer Court, Agha Courts, Captain Pasha Court, congregational courts, Consulate Courts and, of course, kadis can be mentioned as the judicial authorities in the classical period that the Reaya(ordinary people) can apply according to the nature of the legal question. In the aftermath of the Tanzimat, while the new courts such as the Nizamiye Courts, the Commercial Courts and the Parliamentary Attorneys joined the judicial organization, the former judicial authorities were either updated or abolished. Halil Cin, Gül Akyılmaz, Türk Hukuk Tarihi[Turkish Law History], Sayram Yayınları 5th Ed., Konya 2013, p. 168 et seq; Ekrem Buğra Ekinci, Tanzimat ve Sonrası Osmanlı Mahkemeleri [Ottoman Courts during and After Tanzimat Period ], Arı Sanat Yayınevi, İstanbul 2004, p. 22
disputes, that no discrimination was made among the applicants according to religion, sex, age\(^5\), a Western Researcher described XVIth Century Ottoman Empire as a “state of law under the conditions of its age”.\(^6\)

In a state, whether justice is at the forefront is related to how judges practice their profession in terms of their role in the manifestation and implementation of justice. That is, the existence of justice in the state is tightly connected with the powers of the judges who dispense it. In this context, it is important what the rules that the judges had to comply with when practicing their profession in the Ottoman State, which was also famous for its justice, is important.

Information about the process of being a judge in the Ottoman Empire will not be given in this study. Instead, the professional ethics principles that the judges were expected to obey during the hearings and in their daily life will be focused on. The answers to the following questions will be sought: Were there such ethical principles in the Ottoman State? Which concept in the Ottoman State did point to ethical principles? Were there any legal norms governing these principles? In addition, the study will attempt to make comparative analysis of the ethical principles that the judges had to comply with in the Ottoman State and the ethical principles of the Bangalore, which is the first legal document that comes to mind at the moment when the judicial ethics is considered. The aim of the study is to reveal the experience of the Ottoman State on the ethical principles that judges had to obey.

\(^5\) Gül Akyılmaz, “Osmanlı Devleti’nde Reaya Kavramı ve Devlet-Reaya İlişkileri [Concept of Reaya in the Ottoman State and the State- Reaya Relations]”, Osmanlı, v. 6, Ankara 1999, p. 50

Ethics, Ethical Principles, Professional Ethics

Under this heading we will try to set the conceptual boundaries of the phenomena that we will seek in the Ottoman State. For this reason, we find it useful to state what should be understood from ethics, ethical principles and professional ethics concepts.

Ethics is defined diversely in the literature. Ethics is defined as a set of moral principles that a person uses during his or her behavior, as well as personal criteria that a person uses to distinguish between right and wrong. According to another definition, the moral values which should be taken as basis commonly in a specific field of activity or during the realization of transactions and activities in daily life are called as ethics. Ethics is also defined as all moral principles which one thinks that she/he must obey in a behavior.

Ethics could be defined as a science discipline. The discipline of philosophy that investigates the values and rules that constitute the basis of individual and social relations established by people in terms of morals such as right-wrong or good-bad could be called as ethics. As a science, ethics was defined as the discipline of philosophy that investigates what is good and bad in moral terms, how moral consciousness and judgment

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forms in people, concepts of task and responsibility, why individuals and society should behave morally.\textsuperscript{11}

Indeed, as a branch of philosophy, ethics examines values, norms, rules that an individual obey when establishing relations with other people and the community from the point of views such as true-false or good-bad.\textsuperscript{12} In other words, ethics is science of philosophy that examines the values that affect relationships between people, the nature and background of the behaviors considered as good or bad, true or false in moral terms. With its this feature, ethics, also defined as moral philosophy, examines how the judgement that human behavior is good and bad is reached, and what intentions and purposes are involved in its background.\textsuperscript{13}

Based on the definitions we can say that there are three basic features of the ethics. The first of these is the role of ethics in determining the behavior of an individual. Ethics include directives about how people should behave when communicating with other people or with the community. Ethics intervenes in an individual’s attitudes and behaviors by determining which behavior is good or which behavior is bad theoretically, abstractly and/or morally. This characteristic of ethics shows that it has a social order nature. The second characteristic of ethics is that it has a moral dimension. We can say that having a moral dimension is the main factor that differentiates it from other social order rules, especially law rules. Ethics relies on moral values, values, and principles as they lead people to behave in a certain way. In other words, ethics is built on moral

\textsuperscript{11} Lokman Çilingir, Ahlak Felsefesine Giriş [Introduction to Moral Philosophy], Elis Yayınları, İstanbul 2015.

\textsuperscript{12} Tuncay, p. 2; Ibid

\textsuperscript{13} Necat Kırs, Hukuk ve Etik Hukuk Mesleğinin Ahlaki Boyutu [ Law and The Moral Dimension of Ethical Law Profession], Boğaziçi Yayınları, İstanbul 2016, p.56.
values.\textsuperscript{14} The third fundamental characteristic of the ethics is that an individual thinks that he/she should obey the mentioned moral values. In other words, ethical principles must be accepted by the person at his/her sole discretion. In terms of this aspect of the ethics, personal criteria are at the forefront. This characteristic of the ethics leaves the control of the act against the ethical principles again to the person himself. This control is done with the “conscience” of the person. Indeed, an individual criticizes his/her feeling, thought, behavior, attitude and action as right-wrong, good-bad, positive-negative by listening to the voice of “his/her conscience”. Thus, the person ensures balance, order, control and harmony in relations between himself/herself and others.\textsuperscript{15}

Honesty, truthfulness, keeping the promises, loyalty, and justice, helping others, respecting others and fulfilling responsibilities are among the main ethical values.\textsuperscript{16}

The ethical principles that people have to obey in their relationships with each other are also influential in the practice of a profession. These rules, which are defined as vocational ethics or “Code of Professional Ethics”, can be defined as a set of principles and rules based on beliefs about what is true, what is wrong, what is fair and what is unfair about the professional behaviors that are necessary to practice in the

\textsuperscript{14} There are so many points that can be expressed about ethical-moral relations but we will only express one of the views on the relationship between ethics and moral in order not to digress the subject. According to those who see ethics as the science of examining the philosophical foundations of morality and examining the source of human behavior, ethics examines the ideal and abstract, while morality examines human behavior which is tangible. Kiriş, p. 56. For discussion on this issue, Mehmet Yüksel, Etik Kodlar, Ahlak ve Hukuk [Ethical Codes, Morality and Law], Hacettepe HFD, 5(1), 2015, p. 9 et seq. can be reviewed.


\textsuperscript{16} İşgüden, Çabuk, p. 62.
profession. Professional ethics, defined as the general rules accepted and approved by the professionals are also defined as the sum of the ethical principles and standards that direct the behaviors in the Professional life and provide guidance about what can be made and what cannot be made. In another view, Professional ethics refers to the rules for determination what is ideal when performing a particular profession.

There are many benefits that can be achieved by acting in accordance with professional ethics. Adhering to these rules will increase the reputation of those who perform their profession because those with whom contact is made will perceive those who obey the principles of Professional ethics as more respectable and reputable. With the respect of the third persons, we can say that the person who follows the rule will have a clean conscience. Having a clean conscience will increase the confidence of a member of a profession in his/her knowledge and ability. Adhering to these principles raises the quality of work done in a positive manner. Those who conduct their profession according to ethical principles gain the trust of the public more easily and prevent waste of time and...
resources. By observing the principles of professional ethics, personal tendencies are bordered; the professionals are prevented from acting illegally.

Principles of Professional ethics have certain characteristics. It is stated that these principles, like the other ethical principles, have crossed the borders of the country and reached the international dimension. In addition, professional ethics principles consist of rules that cause practical effect, ensures that the profession coincides with the society and has continuity. These principles need to be followed by those who have that profession and are performing it. In other words, they are dealing with these rules because they have the profession they are practicing. Another characteristic of the professional ethics principles is that the principles are directly related to the profession. Those rules exist because that profession is practiced. In other words, although the prohibitions within these principles or the actions which are not recommended are in compliance in the law, they should not done because of the profession that is carried out. For example, while gift-giving is a pleasant kindness in human relations, this behavior cannot be interpreted in this way for public officials and judges. Another characteristic of professional ethics principles is that these principles do not regulate the rights and authorities that the profession has because the rights and authorities of the profession are included in the provisions of their respective legislation.

Based on the definitions and characteristics of professional ethics principles, we can say that these principles have three basic elements. The first of these are that Professional ethics are accepted and adopted


22 Güner, p. 22.

by those who practice the profession. This feature is in parallel with the personal acceptance of ethical principles. The second characteristic of professional ethics principles is that these principles are values that direct the behavior in the professional life. Because these values determine what an individual should do and should not do while carrying out one’s professional activities. The third characteristic is that the attitudes and behaviors that should not be done as a result of these principles arise from the characteristic of the profession. In other words, professionals should not perform some behaviors which are normally in compliance with customs and law because they have that profession and perform it.

As is known, judges are performing public service. In this case, it is also necessary to give information about the ethical behavior of public officials. The ethical behavior of a public official is defined as “always keeping public interest by a public officer in front of her/his own interest while performing the duty, and not getting involved in relations that will make the officer dependent on the others (through financial and other interest relations)”.

According to another definition, ethics in public administration is a set of moral principles and values such as impartiality, honesty, social justice, transparency, accountability and being public-minded that the administrators must obey when taking decisions and performing public services. In the Turkish Positive Law, the first article of Law No. 5176 defines transparency, impartiality, honesty, accountability and being public-minded as exemplary principles of ethical behavior that public official should comply with. Literature describes behaviors such as justice, loyalty to the state, capability and qualification, impartiality, honesty, courtesy, respect, trust, public service consciousness, geniality, helpfulness as ethical behaviors while behaviors such as discrimination, favoritism, bribery, corruption, irregularity, abuse, exploitation, negligence, temporizing, doing


politics, psychological intimidation and pressure (mobbing), insults and profanity, abuse of authority, gossip and embezzlement are described as unethical behaviors.26

The aims of ethical behavior in the public sector can be summarized as follows: To prevent corruption and make the honesty dominant, to prevent personal interests from being held on the frontline, to guide public officials, to specify what is good or bad are some examples of the aims. In addition, ethical behavior in the public sector increases trust in the state and public officials, and improves the legitimacy of the state, thus ensures state-citizen integration. Lowering the cost of public services and improving the service quality are other aims.

In this case, judges who are in charge of performing public service are expected to act in accordance with the ethical principles of their profession. Professional ethics principles that judges must obey are in close relation with “legal ethics”. Because, legal ethics is defined as the set of moral values ensuring the rule of law and justice while the legal rules are maintained, implemented and controlled.27 Judges are expected to practice their profession by targeting ethics of law. For this target, they have to act in accordance with the judgment ethics. Judgement ethics is defined as the obligation of lawyer, prosecutor and judge, who are indispensable parts of the jurisdiction, to act lawfully, fairly, honestly, in short, ethically during proceeding.28

Ethics-Norms Relationship and the Ethical Principles in Positive Law that Judges Must obey.

26 Ömür Elçioğlu; Eryılmaz, p. 330 et seq.
27 Can Tuncay, s. 1; For the opinion that the ethics of law is related to the compliance of the law and the implementation of law to the justice requirements please see Gülriz Uygur, Hukuk Etiğine Giriş [Introduction to Ethics of Law], http://www.bahum.gov.tr/bahumetik/kose_yazileri/makale_bilimsel_yazi/1_makale.htm e.t.: 09.07.2016.
28 Can, Tuncay, p. 164
Under this heading, the information on whether ethical principles are included in the legislation in force will be briefly mentioned, and information about the legalization of the ethical principles that judges should obey today will be conveyed. In this way, an assessment can be made between the present practice and the practice in the Ottoman State.

From the point of view of the jurist, we see the ethics close to the rules of morality which are considered among the rules of social order. As it is stated, although the ethical principles are outside the legal rules, they also have the function of providing social order. Because, as it is tried to be explained above, ethical principles also determine how people should act when getting in contact with other people or society. The fact that the rules of ethics determine the relationship of people with other people and/or society makes these rules social order rules. The presence of guilty conscience, which is considered as the sanction of the rules of morality, for the principles of ethics makes these two phenomena to get closer to each other.

As it is known, some of the moral codes can also be legal rules. Well, is it possible to see ethical principles in legal rules? This question brings a few additional questions with it. If an instruction implemented on the community or a segment of the society becomes a legal rule, isn’t it considered that that rule is no longer an ethical principle and has become a legal rule? These questions are in fact related to the legitimacy of the rules

29 Türkbağ examines the norm-moral relationship under three headings. First, the law transforms rules of morality into the norms. As an example, the goodwill rule stated in Article 3 of the Civil Code is shown. Secondly, with the reference made to the morality as a whole, rules of morality can become legal norms. For example, according to Article 27 of the Turkish Code of Obligations, “Contracts that are contrary to the provisions of the law, moral, public order, personal rights or have impossible subjects are absolutely null and void.”. This article states that the contracts that are contrary to morality will not be protected by the law. Finally, morally inappropriate attitudes and behaviors are excluded in a more rigorous manner by the law. As an example, lying is a crime on certain conditions. Ahmet Ulvi Türkbağ, “Hukukun ve Ahlakın Kesişim Noktası Olarak Hukuk Normu [Law Norm at the Intersection of Law and Morality]”, GÜHFD, Ankara 2008-2, p. 35,36.
of law. Where does the rule come from? Can ethics be a source of law? Is it possible to distinguish ethics and law from each other?

The literature has considered the above-mentioned questions from different angles. Putting ethical codes and ethical principles into legal norms has been criticized on the ground that it will not contribute the social development. According to this view, the ethical principles that have become rules of law are based on past events and problems such as other legal rules; these principles are left far from the dynamic and variable character of life. It is thought that the possibility that these principles do not include the unique characteristics of the people and that a conscience-appealing value cannot address to the personal conscience of the members of the community at the same degree may cause the ethical principles that are become rules of law to lose their unique character.30 It has also been stated that it is not possible to think ethics free from rules of law. According to this view, it is much easier to follow written ethics codes and see their applicability because ethics deals with norms, establishes norms, and/or justify the norms.31

30 For the views parallel to this view, see “Etik Kodlar, Ahlak ve Hukuk [Ethical Codes, Morality and Law]”, Hacettepe HFD, 5 (1), 2015, p.24, 25. For the similar views arguing that it is difficult for the norms that have been formed as a result of a procedural process to comprehend the majority, diversity and dissimilarity, and norms are also standardising and exclusionary, see Rıdvan Değirmenci, Hukuk Politikası içinde “Hukuk Politikası Açısından Hukuk Ahlak Etkileşimi” [“Legal-Ethical Interaction in Terms of Law Policy” Within the Law Policy], Edited by Ali Şafak Bali, Astana Yayınları 2016, p. 59. For the view arguing that if the ethics is become rule of law, the principle may become ordinary; it is not possible to erase the traces and influences of the ethical principle in the event of the removal of this rule like other legal rules, see Yusuf Karakoç, “Hukuk-Etik İlişkisi [Law-Ethics Relationship]” Hukuk Felsefesi ve Sosyolojisi Arkivi, 24. Kitap, İstanbul Barosu Yayınları, İstanbul 2012, p. 94.

31 Ömür, Elçioğlu, slide. For the view arguing that ethics can only be related to grounding the norms, however the normative assessments will be rotely, and will not show the “value” of what is being assessed; therefore ethics is not a field that forms norms and recommends assessment based on the norms, See Harun Tepe, Bir Felsefe Dali olarak Etik: ‘etik’ Kavramı, Tarihçesi ve Günümüzde Etik [Ethics as a philosophy: The Concept of ‘Ethics’, Its History and Ethics Today], Doğu Batı, yıl 1, sayı 4, p. 14; İbrahim Okur, “Yargı Etiği ve Davranış Kuralları [Judicial Ethics and Code of Conduct]”, Uluslararası Yargı Reformu Sempozyumu, Adalet Bakanlığı Strateji Geliştirme Başkanlığı, 2-3 Nisan 2012, Strateji Geliştirme Başkanlığı Yayın No: 32, Duman Ofset, Kasım 2013, p. 234.
Ethics-norms relations have been discussed for centuries and detailed studies have been carried out as mentioned briefly above. In our opinion, in the last century, humanity has started to give answers to the questions we mentioned above with practical applications. The ethical principles that must be obeyed especially for certain profession groups, are included in rules of law both in international legal norms and in national legal norms. Decisions of the UN which has advisory nature, both international and national Professional principles drawn up for specific occupational groups show that ethical principles can be incorporated into the rules of law today. The Medical Deontology Statute, Ethical Principles of Public Officers are just a few of the examples that are in force on national basis.

The ethical principles that judges should obey today are present as norms both at national and international areas. 1985 UN Basic Principles of Independence of the Judiciary, Recommendation of The Committee Of Ministers of Council of Europa to Member States on The Independence, Efficiency and Role of Judges, the report adopted by Venice Commission in 2007 on Judicial Appointments, the report adopted by the same Commission in 2010 on the independence of judges, European Charter on the Statute of Judges and finally Bangalore Principles of Ethics are international documents on judicial independence and neutrality.

The Bangalore Principles of Judicial Conduct which are extremely important in terms of the subject of our study, as stated in its preamble, were determined in order to provide a framework for the judgement that would guide the judges to establish professional moral standards for the judges and regulate the judicial ethics. It was accepted as a draft by the UN in February 2001 in the city of Bangalore, India. The Bangalore Principles of Judicial Conduct numbered 2003/43 which was accepted by The United Nations Human Rights Commission on 23.04.2003 contains ethical principles and professional ethics standards that must be followed by judges.

32 For the principles, see www.hsyk.gov.tr/yiub/bangalore-yargi-etigi-ilkeleri-tr.pdf e.t.: 15.04.2016.
The Bangalore Ethical Principles were quickly adopted by many countries that attended or did not attend the meeting and settled in domestic law. Thereupon, new studies have been carried out in order to develop these principles. On March 1-2, 2007, a meeting was held in Vienna to strengthen the Bangalore principles with the participation of 35 countries’ representatives under the coordination of the UN Office on Drugs and Crime (UNODC). Following the meeting, a report titled “Commentary on The Bangalore Principles of Judicial Conduct” was prepared in September 2007. The above-mentioned commentary has given Bangalore principles of depth and strength and aimed at contributing to the adaptation of universal jurisprudence ethical principles to each country’s own legal system. The provisions of every civilization and region related to the ethics have been attached to this commentary as appendix. In the appendix of the commentary, perspective of Islamic law on judicial ethic is also included. Representatives from countries such as Syria, Iran, Egypt, Pakistan, where Islamic law was applied, and/or where the Muslim population was high, also attended the meeting. It is necessary to mention that our country did not attend Bangalore and Vienna meetings. However, these principles have been adopted by the Decision of the High Council of Judges and Prosecutors on 27 June 2006 and numbered 315 (by removing the definitions section).

The provisions within the Bangalore Principles of Judicial Conduct have neither suddenly emerged nor spontaneously manifested; they have been adopted as a result of a certain knowledge and experience. Today, when it comes to judicial ethics in the world, it is the first reference source. As mentioned, it has emerged as the achievement of many civilizations and

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experience. Which local experience was inspired has been mentioned in these principles document as well.  

In general, we can say that Bangalore’s ethical principles, when evaluated in general, tried to determine what activities judges could not do that are considered as reasonable for other members of the community at every stage of the trial. In other words, it contains information about behaviors and attitudes that should not be done by the judges for practicing judge profession and in parallel to this, gives the clues of what the judges can do. The crucial point here is that normally there is no objection to these attitudes and behaviors that judges should not do when they are done by

another person or public officer and they are even welcomed by the society in some cases.

We will not mention here what the Bangalore ethical principles consider as unethical. We will try to explain these behaviors while conveying information about the Ottoman State. The first thing we care about here is that the ethical principles that the judges must obey have been tried to be regulated by legal rules. In addition, what we need to understand from the ethical principles that judges must obey was focused on under this heading. In this case, the behaviors and attitudes that the judges should do or should not do for just being judges for the rule of law and justice, and that arise from moral values can be perceived as the ethical principles that judges must obey. The crucial point here is that these behaviors and attitudes that we expect judges not to do are not contrary to law, rules of morality and customs; people are even encouraged for these behaviors in same cases. The fulfillment of these behaviors are perceived as a violation of ethics only when they are fulfilled by one whose profession is judge.

Ethical Principles of Judges in the Ottoman State: The convenance of judge

In the Ottoman Empire, both in the classical period and in the post-Tanzimat period, the profession of judge was considered important, and people who have passed through various training and stages and have certain qualifications are provided to perform this task. In the classical period, the kadis, who were in the “ilmiye” social class, were first educated in “Hâric” madrasahs in the provinces. Then, following the education in “dâhil” madrasahs and certain internship period and exam, they were able to be appointed with naib (delegated judge) title. However, if one wanted to be appointed as kadi, it was mandatory to attend “Mûsile-i Sahn” and “Sahn-ı Seman” madrasahs. The “mulazims(proxy kadis)” graduating from these madrasahs became eligible to be appointed as kadi of kaza (district); if they wanted to be appointed as a high-degree judge, it was mandatory for them to graduate from “altmisli” madrasahs first and then
from “Dar’ul Hadis”. It is important to emphasize that the kadis also had the obligation to do a kind of internship before starting the profession. When the Tanzimat period is examined, the ranks and grades of the kadis were determined with several bylaws issued on different dates; in 1854, a school was opened in order to train kadis with the name “Muallimhane-i Nüvvab”, then Madrasa’üil- Kûzat (Academy of Kadis) started education; so it was deemed necessary to be trained in a separate school apart from madrasah to be able to be a kadi.

Islamic Jurists agree on some of the qualification that the kadis had to have in the Ottoman State while they have different views on some qualifications. In this context, there is a consensus on the following qualifications of kadis: to be Muslim, have discretion skill, have reached puberty and be a free individual. In addition, some Islamic law jurists also consider to become men in gender is a condition to be kadi. It is also emphasized that the judge should be selected among independent, impartial, honest, eligible for the profession, qualified and


37 Melikşah Aydın, İslam ve Osmanlı Hukukunda Hâkimlik ve Hâkimlerin Nitelikleri [Judge in Islam and Ottoman Law] and the Qualifications of the Judges, Selçuk Üniversitesi SBE, Kamu Hukuku Anabilim Dalı, Yüksek Lisans Tezi, Konya 2015, p. 139.


39 Halil Cin, Gül Akyılmaz argue that there is no provision in the Qur’an and Sunna, which are main sources of Islamic Law, that prevents women from being judge, on the contrary, no sex-based discrimination is made. They base this argument on 58th verse of An-Nisa Surah which states that “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice.”, THT, 5. BASKI, p. 174. See also Aydın, p. 132.
competent persons.\textsuperscript{40} Mecelle\textsuperscript{41 42}(Ottoman Civil Code) stated briefly what qualifications the judge should have. While explaining the qualifications of the judge, Article 1792 of Mecelle used the following expressions: “Judge should be “hakim” (rightful, intelligent, wise, scholar), “fehim” (thoughtful, intelligent), “müstakim” (straightforward, independent, honest) and “emin” (self-confident, have confident in his knowledge, credible), “mekin” (honest, honorable, imperturbable), “metin” (patient, sturdy)”.\textsuperscript{43}

There are many things that can be said about the profession of judge in the Ottoman Empire, the education required to be assigned to this profession, and the qualities that should be in the people who will carry out the profession. But we will focus on the ethical principles that must be obeyed when practicing the judge profession.

We embodied the principles of professional ethics as attitudes and behaviors that would not be considered as inconvenient under normal conditions, but judges must avoid just because they are performing that profession. From this point of view, “the morals of the judge” expression comes out as the ethical principles that the Ottoman judges had to obey.

\textsuperscript{40} Aydın, p. 36 et seq.; Recep Akcan, “Hakimin Vasıfları [Qualifications of the Judge]”, Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi, Mihbir Özel Sayısı, Medeni Usul ve İcra Hukukçuları Toplantısı -XII, Cilt 4, sayı 2, Isparta 2014, p. 278 et seq.

\textsuperscript{41} Mecelle is the first civil law of the history of Islamic law, consisting of a preface, 16 books and 1851 articles, which was gradually prepared by a delegation under the presidency of Ahmet Cevdet Pasha and accepted; Mustafa Reşit Belgesay, Mecellenin Külli Kaideleri ve Yeni Hukuk [Mecelle’s General Provisions and New Law], İÜHMİ, İstanbul, 1946, p. 2-3, XII, 561-562. Mecelle that is written in Kazuistic method, was prepared by referring to Hanafi fiqh; only in controversial matters - on condition remaining within the Hanafi sect - they rarely prefer what is necessary and appropriate for the ages.

\textsuperscript{42} It is the first Civil Code of the Islamic Law History, that had been gradually prepared by a committee headed by Ahmet Cevdet Pasha and accepted and that consists of a “mukaddime (preface), 16 books and 1851 articles; Mustafa Reşit Belgesay, Mecellenin Külli Kaideleri ve Yeni Hukuk [General Provisions of Mecelle and New Law], İÜHMİ, İstanbul, 1946, p. 2-3, XII, 561-562. Mecelle which was prepared with Kazuistic Method was based on Hanefiyyah Fiqh; only for controversial issues it preferred the one which is necessary and appropriate to the requirements of the age on condition being within the Hanefiyyah madhhab.

\textsuperscript{43} Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle in Today’s Turkish(Mecelle-i Ahkâm-ı Adliye)], Yetkin Yayınları, Ankara 2011, p.569
The literature supports this idea as well. For example, Ali Himmet Berki said, “There are certain behaviors that are normally permissible, however judges should avoid because of their disadvantages”; and added that otherwise that behavior would be contrary to the morals and characteristics of judge profession.\(^44\) In the Ottoman Empire, the morals of judge shown itself not only in the literature but also in the legislation. The second section of the First Chapter of the 16th Book of Mecelle which had provisions about the judges and had “Kitab’ül Kaza(Book of Judgement) heading had the following heading: “The Morals of the Judge is reflected by its behaviors”. This chapter contains, in our opinion, the 1795th and 1799th articles containing the rules of the profession and the ethical principles that must be obeyed by the kadis in the Ottoman State.

The Word “adab” in the heading of the part is the plural of the Word “edeb”. This concept, which is described as good decency, good behavior, elegance, kindness in the dictionary\(^45\) was described as “nâs ile mu’âşeret ve mu’âmelede ahlâk-ı cemîle ve hisâl\(^46\)-ı müstahsene\(^47\) ile tahalluktan\(^48\) ibârettir”.\(^49\) According to this definition, “edeb” has been described as the good morality and the liked, well-regarded nature, nature that people have in relation to each other when they live together. As can be seen, this definition of “adab (moral)” includes three basic features of ethics that we have identified above. According to this, âdab also aims at regulating the relations between people like ethics. It is also possible to see the attribute of relying on moral values which is the second feature of ethics in this definition of “adab”. Because the definition attributes “adab” to good morality, good habits and the nature that an individual has. The definition


\(^{46}\) Habits, nature, morals

\(^{47}\) Considered as good, liked

\(^{48}\) Moralism from Hulk, a nature, acquiring goodness

states the personal acceptance of moral values, which is the third feature of ethics, by expressing that individuals have the mentioned moral values. As can be seen, both concepts regulate how people should behave when interacting with other people or society, and when doing this, they ground the moral criteria and values, and show that the people personally accepted these values. Based on this, we can say that we see the concept which is described as ethics today in the Islam-Ottoman Literature as “adab”. When “edeb” and “adab”, which its plural form, is adapted and attributed to a profession and art, state and behavior, it expresses the specific rules of that profession and art, the subtleties, and the religious, moral and professional principles that need to be applied in that respect.50

When we associate “edeb, adab” with profession of judge, we encounter the titles of Edebü’l Kâdî and/or Edebu’l-Kadâ, which have been processed in the Islamic literature for centuries. Although Edeb’ül Kadî expresses, in narrow sense, the rules that judges must obey and the good behaviors expected from the judges, it became in time within Islam Law Literature as a special science discipline that examines the issues related to kadi, procedural law and Judiciary.51 Within Edeb’ül Kadî, the issues related to private life, personal relations and official duties of the judges including personality, his relations with the people, words and behaviors, apparel52 have been handled in a guiding and regulatory manner and a specific tradition has been tried to be developed.53 Because the personality

50 Abdülaziz Bayındır, âdâb, İA, Cilt 1, p. 334, 1998.

51 Salim Öğüt, Edebü’l-Kadi, İA, vol. 10, p.408 et seq. Of course, the formation of this science branch is not different from that of the fiqh; Öğüt, p. 409. For the example of fiqh books in procedural law field see. Ibid; Şahban Yıldırımer, İslam Hukukunda Yargıç Etiği [Judiciary Ethics in Islamic Law], e-Şarkiyat İlim Araştırmalar Dergisi, www.e-sarkiyat.com No VIII, 2012, p. 34.

52 In the Ottoman Empire, kadis were allocated special clothes, Osmanlı Devleti’nin de kadılara has kıyaftı tahsis etmiştir, In the Hatt-ı Hümayun (The Sultan’s Decree) dated 1838 (BA, HH, nr. 24176) the official clothing of kadis were described as “telli imame(imamah)” and “ferace”, İlber Ortaylı, Osmanlı’da Kadi [Kadi in the Ottoman], vol. 24, p. 73, 2001.

53 For example, it is possible to find information about not only the qualifications of the judges but also how their apparel should be; Yıldırımer, p. 34.
and private life of the judge directly affects the success of judgment and the respectability of the judgment given. For this reason, Islamic Law accepted that it was necessary to deal not only with the legal status of the judges but also the religious and moral rules that they should be subject to. Therefore, the heading was expressed with the Word “edeb-adab (morals)” instead of “ahkam (directives).” 54

So, what do we need to understand from the morals of the judge, that is, the ethical principles that Ottoman Judges had to obey in relation to our subject? Referring to Hindiye, Ali haydar Efendi said that the “edeb” of kadi was “bast-ı adl, def’ı-zulum, terk-i meyl ve hudûd-ı şer ’iyi muháfaza ve cerâ alâ-süneni’s-sünne gibi şer ‘i-şerîfin mendûb kıldığı şeyi ıltizamdan ibârettir”. 55 In this case, according to Ottoman jurists the “adab” of kadi is that he deems the good moral acts appropriate for Islamic law to be necessary for himself such as realizing the justice, preventing unjustness and persecution, not acting in favor of one side, being impartial, and ensuring the implementation of the Islamic Law. 56

54 Öğüt, p. 408 et seq. As can be seen, in the Islamic literature norms-ethics relationship, with today’s expression, has been discussed. It has been stated that the ethical principles that can be expressed as “Âdab” should not manifest in the form of legal rules expressed as “ahkam.” In our opinion, it is useful to highlight two important findings here. The first is that although the West’s emphasis on judges’ ethical principles has increased in recent years, in the Islamic literature, this subject has been considered important in the mentioned books for centuries. The second important point is that the Ottoman State put into practice the practical implementations of the West in 21st century in order to turn ethics into legal norms in 19th century with the above-mentioned heading in Mecelle; Nasi Aslan, İslâm Hukukunda Yargılama Etiği ve İlkeleri [Judicial Ethics and Principles in Islamic Law], Karahan Kitabevi Adana 2014, p. 143.

55 Ali Haydar Efendi, p. 431.

56 In Article 4.3. of Bangalore Principles of Ethics, it is stated that; “A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge’s court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.” It is obvious that acting to create or doubt a perception that he is in favour of one side cannot be accepted as an ethical behavior. This example shows us that the attitudes and behaviors that was stated as the “edeb-adab” of kadi are the same attitudes and behaviors that are included in the present principles of ethics that must be obeyed by the judges.
As can be seen, the “adab” of the judges of the Ottoman jurists includes the features and elements of the principles of professional ethics and the legal ethics of the present day. “Being accepted and approved by those who are carrying out the relevant profession”, which is the feature of both ethics and professional ethics is stated in the mentioned definition as well. Because, in the description of the Ottoman jurists, some moral values must be considered by the judge to be necessary for him. In other words, as expected from today’s ethics, the judge must personally accept the values mentioned.57

We have stated that the principles of professional ethics a collection of values that direct the behaviors in the professional life. The definition of Ottoman jurists contains values that indicate what kind of behavior the judge can do or cannot do while performing his profession. According to the definition, these values, which must be deemed by the judges for necessary for themselves, are the principles that will provide the supremacy of law such as realizing the justice, preventing unjustness and persecution, being impartial, ensuring the implementation of Law. This element of definition is in parallel with the definition of legal ethics of the present age. Because, as in the definition, legal ethics58 also contains moral values that are necessary to ensure justice and the supremacy of law in the implementation, maintain control of legal rules.

57 The control of judges’ acceptance of these moral principles is left to their own conscience. This is a good example of the spiritual and earthly character of Islamic law. An injustice to be carried out in this world will face sanctions both in this world and in the hereafter. However, it is stated that for a Muslim, the sanction in the hereafter is more effective than the material sanctions. Based on this principle, Hz. Omer advised judges to consider their conscience as a supervisory authority before the fear of central authority for justice decisions. Muhammed Hamidullah, İslam Anayasa Hukuku [Islamic Constitution Law], (Trans. By Fahrettin Atar) ed: Vecdi Akyüz, Umut Matbaacılık, (y.y) 1995, p. 319-320; Yıldırım, p. 35.

58 Can Tuncay, p. 1; For the view arguing that another definition of ethics of law is related to the compliance and law and the implementation of law with the requirements of justice, See Gülriz Uygur, Hukuk Etiğine Giriş[Introduction to the Ethics of Law].
It should be mentioned that these values were included not only in Ottoman literature but also in practice. For example, as stated in the literature\textsuperscript{59} the “naib” (proxy kadi) of district of Radoviste had been dismissed because of his behaviors against “adab-i ubudiyet” (professional ethics) in 1321 according to Hijri Calendar.\textsuperscript{60} In another archive document dated Hijri 1234, which is another example, the case was explained as follows: Shaykh al-islam Mustafa Asım Efendi wanted to pay the debts to the debtees that Selim Efendizade Mustafa Nafiz Efendi who were the former Kadi of Edirne, had been sentenced to pay in installments of 500 “kuruş” per month. However, it was rejected, for encouraging the judge to act against “menafi-i edeb” (common moral values) and his earning from the allocated lands was allocated for the payment of his debts (400 kurush for his family and 500 kurush for the debtees) and he was relocated to Keşan.\textsuperscript{61} As can be seen, a person who had been serving as a judge had been punished because of his unethical behaviors and his debts had been re-structured.

We have stated that another feature of principles of professional ethics is that these principles determine what kind of behaviors the professionals can do or cannot do just for carrying out their profession. According to this, the mentioned section of Mecelle listed the attitudes and behaviors that judges had to do or could not do just for being judges in order to ensure the supremacy of law and justice. As stated above, the crucial point here that the attitudes and behaviors that the judges are expected not to do are normally not contrary to law, morals and customs, even can be encouraged. In accordance with the casuistic method, Mecelle has set out the ethical principles that judges must obey, based on concrete examples. These articles

\textsuperscript{59} Ali Himmet Berki, states that if a judge that was warned for having acted unethically continued acting the same behaviors, he could be dismissed; Berki, p. 162; Yıldırım, p. 44.

\textsuperscript{60} For the document dated Hijri 26/M/1312 See BOA, Y. PRK. MŞ, Dosya No: 5, Gömlek No: 60.

\textsuperscript{61} For the document dated Hijri, 22/Ş/1234, see. BOA, C..ADL, Dosya No: 25, Gömlek No: 1481.
stating the acts and behaviors that judges must avoid and deem necessary for themselves should be examined in detail.62

Avoiding Acts and Movements That Will Affect the Dignity of the Hearing

If the Article numbers in Mecelle is followed, the first concrete principle of ethics that the judges of the Ottoman State had to obey was “to avoid acts and movements that will affect the dignity of the hearing.” The rule for the judges not to act and behave in a way that will affect the dignity of the hearing was expressed in Article 1795 of Mecelle in Ottoman Turkish as follows: “Hâkim; meclis-i muhâkemede alış veriş ve mulâtafe gibi mehâbet-i meclisi izecek eالف al ve harekât danh içtinâp etmelidir.” Cengiz İlhân translated this rule in into present Turkish language as

62 Commentaries were used to examine the provisions in Mecelle in detail. In this context the commentary called “Dürerü’l-Hükkâm Şerhu Mecelleti’l-Ahkâm” should be particularly mentioned. In this commentary the author of which is Ali Haydar Efendi, who was president of the Ottoman appeal court, Fetva Emini(head of the department responsible for Fatwas), Istanbul Law Faculty Mecelle Teaching Member and Minister of Justice, all articles are explained in the classical legal commentary system, and all fiqh books, fatwa publications and epistles from which the religious rules are taken are stated. Shari’i provisions on the different legal issues that are mentioned in respected religious books are stated in this commentary; controversial issues have been discussed, and it has been stated which opinion should be preferred or is preferred. In rare cases, the author tried to solve the problems himself that he had not found any shari’i information on. Mahmesani, one of the contemporary Islamic jurists, expresses his opinion regarding this work as follows: “In this commentary, there are sources of all rules and their shari’i evidence”. Ali Haydar Efendi, II, 397; Ahmet Akgündüz, “Dürerü’l- Hükkâm”, DİA, İstanbul, 1994, X, 28-29; Mustafa Baktır, “Mecelle’nin Küllî Kaideleri ve Ahmet Cevdet Paşa [General Provisions of Mecelle and Ahmet Cevdet Pasha]”, Ahmet Cevdet Paşa, Türkiye Diyanet Vakfı Yayınları, Ankara, 1997, p. 320; for other commentary studies on Mecelle see Mehmet Malkoç, Ana Hatlarıyla Mecelle ve Mecelle ile İlgili Bibliyografik Çalışma(Basılımamış Yüksek Lisans Tezi) [Mecelle With the Main Lines and a Bibliographic Study on Mecelle(Unpublished Master Thesis) , SAÜSBE, Sakarya, 2001, p. 80-96. Ali Aslan Topçuğlu, “Mecelle Şarihi Ali Haydar Efendinin Hayatı Ve Hukukçuluğu[Life of Mecelle Commentator Ali Haydar Efendi and his Characteristics as a Jurist]”, Türkiye Araştırmaları Dergisi, S. 339. This study is a very valuable source about the implementation of Hanafi Fiqh, Ahmed Akgündüz, Mukayeseli İslam ve Osmanlı Hukuku Külliyyati [Comparative Islam and Ottoman Law Collection] , Dicle Üniversitesi Hukuk Fakültesi, Diyarbakır 1986, p 367; www.ekrembugraekinci.com e.t. 02/04/2016
follows: “Judge should avoid acts and behaviors that may affect the dignity of hearing during the hearing.” Another translation is as follows: “Judge should avoid acts and behaviors in the hearing such as trading and joke that may harm the dignity of the assembly.” Atilla Pınar translated this provisions into present Turkish as follows: “The judge should avoid the acts and movements such as trading and joking during the hearing that will overshadow the greatness of the court.”

This provisions makes reference to the conscientious control that should be had within the ethics and the morals of the judges. In other words, the provision has not been written directly as a prohibitive and imperative manner. It is stated in the article that “he should avoid”. It has not been written in an imperative manner like “He cannot make the……..behaviors”. Thus, the provision determines the acts that the judge should not make, and leaves the control of this to the conscience of the judge. Thus, the provision implies that those who want to carry out judge profession must be the persons that have accepted that they should not make these behaviors.

When the rationale of the provision is considered, it will concluded that the behaviors that the judges should pay attention are tried to be explained. Judging from the rationale of the judiciary, the judges attempted to specify the actions that they should take care of during the hearing. Judges should not disrespect the dignity or reputation (in Ottoman Turkish “mehabet”) of the hearing. Mehabet is described in dictionary as “Greatness, modesty, horror, great looking”. Norm, attributes to the hearing itself a reputation, respectability, modesty, glory, greatness. The judges should act in accordance with this glory and greatness. Norm also gives examples of behaviors that can harm the reputation. In this context giving or receiving an object that is not related to the case, making jokes are stated as examples of the behaviors that harm the reputation.

63 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle(Mecelle-i Ahkam-ı Adliye) in Present Turkish], Yetkin Yayınları, Abkara 2011, p.569

64 Pınar, Hakimin Adabı[Morals of the Judge], p. 340.

65 Devellioğlu, p. 602.
In the Commentary of Al Haydar Efendi, it is stated that the religious ground of Article 1795 is the behaviors that Khalifa Omar determined as the conditions that must be obeyed when appointing Sureyh as kadi. Khalifa Omar stipulated that Sureyh should not engage in trading and not take bribes. It can be said that the source of why trading is prohibited in the Islamic Law is the mentioned event. The members of Hanafi sect adapted this principle, for the salary of the judges was high and therefore they were not in need of earning money by trading. Although it was stated that trading was prohibited during the hearing, Ottoman Jurists stated that this ban was valid not only during the hearing but also the Daily life. In fact, this issue must be treated so sensitively that when a judge need to make trading, he must assign a reliable person as assignee for himself and that assignee should not know that he was the assignee of the judge. Because, if the assignee knows that he is the assignee of the judge, he will have the possibility to buy the thing cheaper than the market price and to sell the thing more expensive than the market price. However, it was not considered incorrect for a judge to conduct trading in a manner that obligates the two parties in a proper manner outside the hearing. Considering this, it can be stated that the ethical principles in Ottoman law vary according to whether

67 According to a study, the salary allocated to Surey by Khalifa Omar was equal to the salary of a member of high court of appeal of Turkey in a certain period; Erk, H. Basri, Adalet Edebiyatı Antolojisi, (m.y.) (t.y.) (y.y.), p. 121 cited in Yıldırım, p. 43.
68 Yıldırım, p. 45.
69 In fact, the rule not behaving in a way that will harm the dignity of the assembly that is expected from the judges is valid for all public officers according to the Ottoman Islamic Law culture. For example, it is stated in the boks of Maverdi that public officers should avoid the behaviors that are not perceived as appropriate to being a public officer; İsa Akalın, Türk-İslâm Düşünce Tarihinde Kamu Etiği Anlayışı [Understanding of Public Ethics in Turkish-Islamic Intellectual History] El-Mâverdî Örneği, Kamu Etiği Sempozyumu, Sempozyum Bildirileri 1, TODAL, Ankara 2009,p. 168.
70 Ali Haydar Efendi, p. 431.
or not the ruler is at the stand of the court. Hence, although trading was considered as an act that should not be carried out while the judge is at the stand, it was stated that it was not against to the law even though it was not approbated.72

Trading (obtaining something or giving something) is prohibited by the rule for the judge “for himself”;73 making trading as a requirement of his profession is in compliance with the law because a judge is authorized to buy goods for orphans or have the possessions of a debtor sold.

Another behavior that is mentioned in the Article which harm the greatness of the court is joking around. Ottoman jurists could not agree on where and when joking around was appropriate. For example, according to Ali Haydar Efendi, joking around is an act that should not be done not only during the hearing but also in daily life. Because joking around was considered as an act that could harm the greatness of the judge that was perceived by the community.74 Halebi, on the other hand, emphasis that joking around is an act that should be avoided only during the hearing, and judge should avoid not only joking around with the parties but also with anybody.75 Judge should be dignified and respectful by avoiding humor and joking around and should not speak to the both side on any subject except the case because behaviors such as joking harms the greatness of the court.76 The important point here is that normally joking around with

75 Halebi, 2/98; Atar, Kadi, p. 69.
76 Zeylai, Ali Haydar Efendi, p. 432.
somebody is a behavior that is allowed by fiqh\textsuperscript{77} however, if the person is a judge, this permission is not valid for him.

Ali Haydar Efendi broadly interprets this article, and states that the judge must make a decision by sitting, and there should be people with legal knowledge when he makes decision.\textsuperscript{78} The underlying reason for this is that judge Show respect his jurisdiction by sitting. There was no objection to the judge’s making decision when standing up to something. It was thought that the judge can make his decisions more comfortable when sitting or standing up to something. However, it was stated that the judge should not make decisions when walking, for it could be more difficult to focus and make healthy decisions.

\textsuperscript{77} There is a hadith in this regard. Mohammad the prophet said that” Peygamber Efendimiz “ O Allah, I take refuge in You from anxiety and sorrow”, and he laughed and made jokes when necessary.

An old woman said to Mohammad the Prophet that “ Please pray God to let me in heaven”. Mohammad the Prophet said “ Old women cannot enter heaven”, and the old woman got sad and started to cry for he supposed that she would never be let in the heaven. Realizing the sadness of the women he said “Old woman will not enter the heaven as an old woman. The god will re-create her and she will enter the heaven as a young virgin” and said the following verse of Koran:” Indeed, We have produced the women of Paradise in a [new] creation. And made them virgins, Devoted [to their husbands] and of equal age, For the companions of the right [who are].”(Al-Waqi’ah: 56/35-38

Khalifa Ali who had known for being humorist and wit among the companions of MOhammad the prophet said :” Relax your soul from time to time because if the soul is forced, it will become blind.”

There are some limits for joke, humor:

Humor should be like salt in the life of a person: he should not spend all his time in this.
b) Nobody should be ridiculed, nobody'will be subject to humor or joke (eal-Hujurat: 49/11).
c) Nobody can let o make someone laugh.

“It is a shame for one who lies to maket he ones aroud him.”33. Ebû-Dâvûd, K. el-Vitr, 32; Buhârî, K. el-Cihâd, 74.
34. Tirmizî ( In Şemâîl)

\textsuperscript{78} Ali Haydar Efendi, p. 432.
Both the contemporary Islamic jurists and the Ottoman jurists have also stated that this article also expresses that the judge should not be alone during the trial.\textsuperscript{79} Because that the judge is alone while making decision may incriminate him. The reasoning that the judge should not be alone is based on the following cases: Based on the historical facts that Khalifa Osman made judgement when there were at least four persons with him and Khalifa Abu Bakr had Khalifa Omar, Khalifa Osman and Khalifa Ali when making judgement, it was stated that the judge should not be alone during the hearing.\textsuperscript{80}

So, who are the persons who should be with the Judge during the hearing? Ali Haydar Efendi expresses that the judge’s clerk, bailiff, doorman, witnesses and Sami should be present during the hearing. The clerks should be familiar with the proceeding procedure, and should record the claims and statements in accordance with the procedure. They must sit where the judge has indicated so that he does not attempt to take gifts. Bailiffs should be present at the trial in order to prevent two sides from speaking unnecessarily, meaninglessly and uselessly and acting contrary to rules of morals; because such behaviors harm the greatness of the judge and the court. However, bailiffs should stay away from the judge, not near him. Because the presence of these officers is for the greatness of the proceeding and their standing away increases.\textsuperscript{81} All this indicates that the judge should decide publicly; Article 1815 expresses this clearly. When the judge decides, it was considered important that the parties and persons other than himself should be present at the hearing. One of the important points is that all of the officers who are mentioned have a duty, and aim of this duty is to ensure reaching a fair and impartial judgement. In order such judgements are made, the officers must perform their duties in a way to strengthen the greatness of the court. When the Ottoman tradition in the classical period is considered, it can be seen that there was always witnesses during hearings. These persons were elected among the prominent people of the district and the number could be five, six or more. However, they could not be involved in the functioning of the court and in any way;

\textsuperscript{79} Aslan, p. 49; Fethul Kadir, Ali Haydar Efendi, p. 432.

\textsuperscript{80} Fethul Kadir, Ali Haydar Efendi, p. 432; Aslan, p. 50.

\textsuperscript{81} Zeylai, Ali Haydar Efendi, p. 432.
they only indirectly influenced the judge to make fair decisions by their presence. They witnessed how the trial was carried out, not the legal dispute brought to trial. These people also protect the judge from being incriminated by not leaving him alone.

This article in the Code is broadly interpreted by Ali Haydar Efendi, and he states that it gives idea about the garment of the judge. According to this, the judge should wear beautiful clothes during the proceedings. It is thought that wearing filthy, tacky dresses will harm his greatness. Contemporary Islamic jurists still support this idea. It is stated in the paragraph 6 under the Islamic Law heading of the Commentary on Bangalore Principles of Ethical Conduct that the judge should present himself in a manner that will attract the respect of others, including the apparel.

As mentioned above, the point protected by Mecelle through the provision is the greatness of the court. It is emphasized that the behaviors that may harm the greatness of both the judge and the court should be avoided by the judge, as well. We can say that there is no direct ruling on the greatness of the court in Bangalore Ethical Principles. However, when explaining the principles on the Professional behaviors some principles call attention to that the correctness and consistency of the judge serve for the visibility. For example, it is stated in Article 3.1 that the judge must be in a manner in terms of professional conduct that does not cause any reprehension in a person who is reasonable capable of thinking. In other


83 It must be said that Nasi Aslan has a different point of view on this issue. According to him, the rationale of having witnesses at the trial is not just not leaving the judge alone but also the necessity to have intellectual people present during the trial in order the judge to consult with, Nasi Aslan, İslam Yargılama Hukukunda Jüri /Şuhudul Hal [Jury / “Şuhudul” State in Islamic Jurisprudence Law], beyan yayınları, İstanbul 1999.)

84 Aslan, p. 50.

85 HANİYE, Ali Haydar Efendi, p. 432.

86 Atar, Kadi[Kadi], p. 69.
words, it is stated that the judge’s state and behaviors should be reasonable. Article 3.2 of the above-mentioned principles states that the manner and conduct of the judge must be reinforcing the belief in the correctness and consistency of the judgment: What is important is not just ensuring that justice is realized in real terms but also ensuring that this realization should be achieved through the appearance. In addition, an indirect reference is made to the greatness of the judiciary by stating that the judge should protect the freedom of expression, belief, association and assembly, the honor of the judge profession, independence and impartiality of judiciary. Similarly, it is stated in Article 4.11.4 that the judge can participate in other activities on condition that this participation does not harm the honor of the judge position and does not prevent him from his judicial task. In addition, Article 6.7 expresses this provision in Mecelle in a general was today by stating that “The judge cannot be involved in behaviors that are incompatible with his judicial duties.” We can say that the example in Mecelle is actually more useful in terms of implementation.

It can be said that the greatness of the court is made reference to under “Islamic Law” heading that is appendix of Commentary on The Bangalore Principles of Judicial Conduct. Article 4 of the Commentary emphasizes the greatness of the court that is also emphasized in Mecelle by stating “A court is a place for seriousness, dignity and reputability and not a place for meaningless behaviors, long-lasting conversations and bad attitudes.” Article 3 of the Commentary states that the judge should avoid making jokes with the people during the trial and make them laugh irrespective of whether they are his close friends or not. Therefore, joking is accepted as a non-ethical behavior by contemporary Islamic jurists. In “Edebü’l Kadi”

87 This book of Abu Bakr al-Hassaf (Death: 875 AC), which was a Hanafi Canonist, on Islamic Judicial procedure is the most popular and oldest book on this issue that have reached to present time. This book which is a collection of the rules and procedures that should be complied with during the proceedings, was organized as 120 parts. These parts can be listed as duties of kadi, oath, bail, complaint, imprisonment, interdiction, follow-up of debtors, pretension, correspondence with kadis, testament, proxy, paternity and proof of debts, termination of the contract due to defective goods or services, preemption, appointment of arbitrator, cognizance, judgment of non-Muslims, inheritance sharing, marriage, alimony and testimony, Abdülvehhab Öztürk, EDEBÜ’L-Kâdi, İA, Cilt 10, p. 410.
which is the book of Abu Bakr Ahmad bin Es-Seybani al-Hassaf (Abu Bakr al-Hassaf) to whom reference is made under the Islamic Law heading in the Commentary on Bangalore Principles of Ethics, it is stated that the judge should not make jokes with and laugh at the parties of the case.

Based on this provision, we can conclude that the Ottoman state attributed a respectability to the judiciary and this respectability should not be damaged by anybody, including the judge. The events that may damage the respectability of the trial was stated as trading and joking, however Ottoman jurists also considered not being alone at the trial, making decisions when sitting and wearing suitable clothes in this context. In addition, we can stated that principles of ethics in the Ottoman Law varied according to whether the judge was at the stand or not.

**Not Accepting Gifts**

Another ethical behavior that the ottoman judges were expected to obey was not accepting gifts. This provision was stated in Article 1796 of Mecelle as follows: “Judge does not accept gifts from any of the rivals”.

This provision is translated into present Turkish as “Judge does not accept gifts from any of the both parties”\(^88\) and as “ Judge does not accepts gifts from any of the parties of the case”.\(^89\) The provision is clear; it is stated that no gifts can be accepted from any of the two parties of the case. In fact, gift giving is a form of relationship that is recommended in Fiqh.\(^90\) Even, it is known that gift giving is a Sunnah. However gift giving is not considered appropriate for the officers, especially for the judges. Because it the judge accepts gifts, he may sympathize with the party giving the gift.

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88 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle(Mecelle-i Ahkâm-ı Adliye) in Present Turkish], Yetkin Yayınları, Ankara 2011, p.569


90 Two hadith on this issue as follow: (Honor an invitation, do not reject the gift!) [Buhari] ((The gift is a beautiful rite sent by Allah. Accept the gift and give a more beautiful gift in return!) [H.Tirmizi]
Gift is described as “an object given gratuitously as a sign of love and friendship or as a result of social rules among the people”.91 Article 834 of Mecelle describes gift as “any good that is taken to or sent to somebody as a treat”92 and as a type of grant. However it should be stated that grant has a wider meaning than gift; because although every gift can be a grant, there are aids and donations with religious purpose which are not considered as gift and can be considered as grant.93

According to the Ottoman jurists, the gift is divided into 4 sections. The first section is the gift that is halal for both sides. The gifts given to each other by individuals that are not judges or civil servants are considered in this scope. It is expressed that the judge cannot even accept this gift because it is considered as a bribe. The second section is the gifts which are forbidden (haram) on both sides. The gift given to the judge to direct him to make an unfair decision is an example of this. The third section is the gifts that are only forbidden for the receiving party. This is exemplified by the gift giving of someone to convince the person that does injustice against him to give up this injustice act. The fourth section is the gift given by someone due to the fear of harm to his life or property. Giving this gift is considered as halal, but receiving this kind of gift is considered as haram. It is stated that the judges cannot accept gifts in any way including the gifts classified under first section.94

There are many examples in the hadiths, the second major source of Islamic law, that the civil servant should not receive gifts. The following hadiths state this: “Receiving gifts by public officer is betrayal”,95 “How can a public officer appointed by me cay that it is given to him as a gift! He must have considered whether it would have been given to him as a

91 Ali Bardakoğlu, Hediye[Gift], DİA, XVII, p. 151 et seq.
92 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle(Mecelle-i Ahkam-ı Adliye) in Present Turkish], Yetkin Yayınları, Ankara 2011, p.256
93 Bardakoğlu, p. 151.
94 Ali Haydar Efendi, p. 433; Mülteka 2/98; SERAHSİ, C. XVI, 82.
If he had lived at his father’s or mother’s house!"96, "Receiving gifts by administrators is equal to stealing the state property.97,98 These provisions were strictly observed in the first period applications of Islamic law. In parallel to this, Khalifa Omar notices that a person appointed by him as a public officer brings many gifts and asks him where he received those gifts from. After learning that the objects were the gifts received by the public officer, Khalifa Omar instructed to transfer the gifts to state treasury.99 According to the definition in Mecelle, the person who has the authority to solve the hostility between people and the case according to the provisions in force, that is the judge, has not such a right.100 Ottoman jurists also agree that the judge will not accept gifts in any way except for a few exceptions.

99 There are also other hadiths about the transfer of the gifts received by the public officers to the state. Adiyy b. Amiîre el-Kindî’ states that Mohammad the Prophet had said: "People! If one of you is appointed to deal with the works of the state and hide even a needle or smaller thing, what he hides will be a fetter for him. This person will come to the presence of God with this fetter. (Ravi continues speaking): Someone from Ansar stood and said: I can now see that man. You the messenger of the God, please take back the task you gave me. Modahhad the Prophet said to him: Why did you say this? He said he had heard what the prophet was saying. Mohammad the Prophet said: I repeat what I have said. Those who are appointed by us should bring the things they receive from the people to the state, irrespective of whether they are a few or a lot. They just receive what we give them for their duty. They do not receive the things that are forbidden to be received". Ahmed b. Hanbel IV, 192. Sünen-i Ebu Davud Terceme ve Şerhi [Sunen-i Ebu Davud Translation and Commentary], Şamil Yayınevi: 13/160-161, www.enfal.de/ebudavud e.t.: 10.04.2016
100 If the judge takes a gift, there is two options be implemented. If the person who has given the gift is known, according to Articles 890 and 891 of Mecelle the implementation will be made as follows: The gift will be considered as an extorted good. If the good is at the same condition, it will be returned to the owner. If it is not, its monetary value will be paid to the owner. If the owner is unknown or it is not possible to return it to the owner, it should be recorded as state property. Feth ve İnaye[Feth and Inaye], Ali Haydar Efendi, p. 434; Nasi Aslan, İslam Hukukunda Yargılama Etiği ve İlkeleri [Ethics of Judiciary in Islamic Law and its principles], Karahan Kitabevi, Adana 2014, p. 52.
The exceptional circumstances in which the judge may receive a gift are expressed as follows. The first exception is that a judge accepts a gift only from someone who is senior in rank and who has appointed him as the judge. For example, when a kadi appoints proxy kadis in districts within his territory, the proxy kadi can accept gifts from the kadi. The second exception is when the judge has received a gift from his relatives on condition that they do not have an ongoing case at the court. The evidence of this in the fiqh is that it he rejects the gift, it may be perceived by the relatives that the judges would like to severe his relationship with them. The third exemption is that the judge can accept the reasonable gifts from those who were friends of the judge before he became a judge and with whom the judge gave and receive gifts on condition that they do not have an ongoing case at the court. The reason for allowing the acceptance of this gift or not considering is as a bribe is that this gift giving is a traditional habit. Here, it is obvious that this gift is not related to the judge’s profession. However, the gift must be an ordinary object. If it is not considered as an ordinary gift, it must be returned. If the part of the gift exceeding the ordinary cannot be returned, then the gift must be returned as a whole. For example, if it was usual to give a linen dress


102 Article 1805 of Mecelle states that it is possible to commission it in this way. Article 1805-If it is allowed, the judge can authorize someone (“naip”) to represent him and dismiss him. If the judge is not allowed to do it, he cannot authorize anybody. If the judge is dismissed or dies, the duty of the person who is authorized by the judge does not end. If the judge of a district dies, the person who is authorized by the judge can rule the cases until a new judge comes there.

“Article 1805.- Hâkim eğer nasp ve azl-i naibe mezun ise diğer kimseyi kendisine naip nasb ve anu azl edebilir; değilse edemez; ve kendisinin ma’zul ya fevt olması ile naibi naibi mün’azil olmaz. (See Article 1460). Binaenaleyh bir kazanın hâkimini vefat ettik de yerine diğer hâkim gelinceye dek ol kazada vuku’ bulan dá’vayı hâkimi mütveeffanın naibi istima’ ve hüküm verebilir.”

to the judge before he became a judge and if a silk dress is given to him as a gift, then the judge should return the silk dress as a whole. As it can be seen, the situations in which judges can accept gifts are subject to very strict conditions. The first condition is that everyone cannot give a gift. The second condition is the continuity in this matter. The beginning of this continuity should correspond to the period before the judge was appointed as a judge. Another condition is that the gift given should be similar to the gifts that was given earlier. Finally, the people that gave the gift should not have an ongoing case at the court.

The term “hasmeyn” that is “the parties” is broadly interpreted by Ali Haydar Efendi. According to the author, this term should be interpreted as “those who do not have ongoing cases at the court” not the persons that are parties of the case. Because, according to him, it is forbidden for the judge to receive a gift no matter who gives.104 In our opinion, Ali Haydar Efendi interprets the provision of the law too broadly. In our opinion, if the aim had been not to allow judges to receive gifts in any way, it could have been expressed in this way in the law.

The term “gift” in the article can also be interpreted widely. Since the word “gift” is used in the sentence, it should not be interpreted that the judge can borrow or lend the goods or Money, or buy or sell the goods. This subject has already been explained when Article 1795 was being examined; it was emphasized that the judge can perform these activities only in certain conditions. In our opinion, the amount of the gift and its economic value are not criteria. Because an object that is very unworthy in economic terms can be very valuable to the judge spiritually, and it can affect the judge when making decision.

The relationship between bribery and gift is one of the fundamental problems that have been dwelled on since the early days of Islamic law. Some of the Islamic lawyers have considered the gift given to the public officer the same as bribery. Omar bin Abdulaziz emphasized that there

104 Ali Haydar Efendi, p. 433; Indeed, it is narrated that Khalifa Omar b. Abdulaziz didn’t accept the apple presented to him as a gift and he only ate the apple only after one of his relatives bought that apple and gave him as a gift; Köse, Rüşvet[Bribery], p. 158-159.
was no difference between the gift a public officer received and bribery by stating that “Gift used to be a “gift” in Mohammad the prophet’s age, now it is bribe”.105 In the time of the Prophet, giving a gift to someone was not for an expectation of any unauthorized legitimacy, and the intention was only to reinforce love and fondness. Then this situation changed and the one giving the gift started to give the gifts with the aim to obtain an illegitimate interest from the other side; this means bribery.106 By making reference to Cilâ’üıl-Kulûb, li’l-Birgivî, Ali Haydar Efendi states that “Esdika ve mu ‘ârifin başkasından hediyye câiz değildir. Zîrâ hediyye-i mezkûre rüşvet-i mesturedir”.107 In present Turkish, it argues that gift is a secret, covered bribery. In fact, camouflaging the bribe as if it was a gift is an example of “fraus legi facta” that means trying to obtain the results or interests that are not legally allowed by hiding the real aim under a legal provision.108

Although bribe is not mentioned in the article, it is stated that the bribe should be evaluated within the scope of this article. The main factor that distinguishes gift and bribe from each other is the presence of interest expectancy.109 It can be stated that the main element that separates the bribe from the gift is the aim. Bribe was described as an object given with an expectation, gift was described as an object given without any expectation.110 Bribery is forbidden by both the Qur’an and Hadith that are among the primary sources of Islamic law.111 In our opinion, bribery is

106 Köse, Rüşvet[Bribery], p. 157.
108 Köse, Rüşvet[Bribery], p. 156.
109 Köse, Rüşvet[Bribery], p. 158.
111 With the verse “And do not eat up your property among yourselves for vanities (Al-Bakarah 188)” it is forbidden to obtain property unjustly through the ways other than Allah has legitimated. With the statement “do not send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].”, the bribery is emphasized ; Köse, Rüşvet [Bribery], p. 145.
beyond the ethical breach, and is subject to the criminal law. Thus, it took its place in the Islam-Ottoman criminal law.\textsuperscript{112}

When the implementation during the Ottoman Period is examined, it is possible to see that it was not allowed to receive gifts from the rajah. In 1207 in Hijri calendar, a document was sent to Vidin and Silisre guards and kadis stating that it was not allowed to receive gift from the rajah.

\textsuperscript{112} It is possible to see that the bribery is a crime in the Penal Code of Tarik-i İlimiyye dated 1838. According to this, if a person gives bribes after being appointed to the prominent people in the region such as governor, voivode, mütesellim and demarch under the name “gift” expecting to receive their help in the future, and then tries to receive the price of the gifts from the rajah that apply to the court, the judge will be punished. Musa Çadırcı, “Tanzimat’ın İlanı Sıralarında Osmanlı İmparatorluğunda Kadılık Kurumu [Kadi Institution during the proclamation of the Tanzimat in the Ottoman Empire and the Penal Code of Tarik-i İlimiyye dated 1838],” AÜDTCF Tarih Araştırmaları Dergisi, C. XIV, Ankara, 1983, p. 145, 146. According to the mentioned law, there is no obstacle to the receipt of small gifts and gratuities that do not constitute harm to the public order. Erdoğan Keleş, “Tanzimat Döneminde Rüşvetin Önlenmesi İçin Yapılan Düzenlemeler [Regulations for the prevention of bribery in the Tanzimat Period]” (1839-1858), p. 261. There are also reports of bribery in the classical period. Anatolian second lieutenants made complaint to the Sultan about “Kadiasker” Damad Muhyiddin Efendi” claiming that he took bribe, looked down on the poor ulema, sold the kadi positions for big amount of Money and they were changed many times in a year. They also asked the Sultana to provide help for Ahizade Abdulhalim Efendi to be appointed as kadiasker, and also came to “divan” (council of ministers), explained their complaints and had Damad Efendi dismissed; Tarih-i Selânikî, C.II, p. 826-827 cited in Yasemin Beyazıt, Osmanlı İlimiyye Tarkîkinde İstihdam ve Hareket: Rumeli Kadiaskerliği Ruznâmçeleri Üzerine Bir Tahlil Denemesi(XVI. Yüzyıl[ Employment and Movement in the Ottoman Ilmiyye Tarîk: An Analysis on “Ruzname”s of Rumeli Kadiasker(XVI. Century)], Ankara Üniversitesi,, SBE, Doktora tezi, Ankara 2009, p. 159; Melikşah Aydın, “İslam Ve Osmanlı Hukukunda Hâkimlerin Hediye Almaları Ve Davetlere Katılmaları Hususu Ve Günümüz Modern Hukukla Karşılama[Consideration of Judges’ Participation in Invitations and Receiving Gifts in Islam and Ottoman Law and Comparison with the Modern Law]” Uluslararası Türk Hukuk Tarihi Kongresi, İstanbul 2016, Yayınlanmamış Tebliğ, p. 10. According to some jurists, judges should be deemed as having taken bribe because of the objects received by the officers that controls the entrance and exit to/from the court; Ömer Düzbakır, İslâ-Osmanlı Ceza Hukukunda Rüşvet ve Bursa Şer’iyye Sicillerine Yansıyan Örnekler [Bribery in Islamic-Ottoman Criminal Law and the Examples in Bursa Criminal Court Records], e-Journal of New World Sciences Academy 2008, Volume: 3, Number: 3, 2007, s. 535.
by public officers. In addition, in 1274 in Hijri calendar, it was decided to prosecute a complaint in the Assembly that was claiming that Erzurum Naib (Proxy kadi) make an unfair decision against a woman, whose name was penbe, by receiving bribe.

With the provision “A judge and members of the judge’s family, shall neither ask for, nor accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.” In article 4.14 of Bangalore Principle of Ethics on Judicial Conduct is similar to this article. Gift giving was explained in more detailed under Islamic Law heading in Commentary of the mentioned principle. According to this, “A judge cannot be allowed to accept a gift. All kinds of benefits that a judge can accept from another person within the jurisdiction of authority should to be regarded as gifts in the same way.” It should be noticed that what is to be regarded as a gift has been explained in more detail in this provision. In this context, not only an object or article should be considered as a gift; all aspects of the benefits should be considered within this scope.

Both Islamic law and the Bangalore principles have allowed the judge to receive gifts in certain circumstances. Bangalore principles states that subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality. In this case, there is a difference between the limitations brought by Islamic law and the restrictions there. Firstly, it is emphasized in Bangalore Principles that the gift to be given should be something that is considered as a token. In Islamic law, gifts that are customary may not be token. The point that Islamic law is paying attention to here is that the gift has been given before and it is a custom. The second difference is that

113 For the document dated 17/Za/1207 hijri see BOA, C.ML, Dosya No: 18, Gömlek No: 850.

114 For he document dated 17/S/1274 hijri see BOA, A.MKT.UM, Dosya No: 294, Gömlek No: 11.
there is no limit in Bangalore Principles related to the person who gives the gift. Islamic law has set a limit in this regard as explained above. It should be pointed out that both thoughts are aim judgement of the judge not to be affected with the gift. However, as a result of the fact that Islam Law developed based on the kazuistic method, this issue is addressed with specific examples in Islamic Law.

In the title of Islamic Law, which is included in the annex of the Commentary on Bangalore ethical principles, the exceptions to receiving gifts mentioned above are not included. It is stated in the commentary that “A judge is not permitted to accept gifts. All forms of benefit that a judge may receive from another person within his jurisdiction should be treated in the same way as gifts.” Similarly, In the Edebü’l-Kadi written by Abu Bakr Ahmad bin Es-Seybani el-Hassaf (Abu Bakr el-Hassaf) to which reference is made by the above-mentioned commentary that the judge can accept gifts from his relatives on condition that they do not have an ongoing case at the court, he can accept the gifts that he accepted before being a judge, however he should not accept the gifts that is more valuable than those accepted by the judge before being a judge. As can be seen, as the only exemption, the permission that the judge can accept gifts from his senior who has appointed him as the judge is not mentioned here.

In our positive national law, It was stated in Article 68/2-f of Law of Judges and Prosecutors that if the judge demand gifts directly or through agents or if he/she accepts gifts given with the aim of obtaining interests irrespective of whether when he/she is on duty or not, or if he/she demand or accept credit from job holders, he will be subject to a disciplinary punishment which is “change of position”.

Consequently, judge’s gift giving is shaped by the detailed provisions of Islamic law in this regard and has taken place in Mecelle. The concept of gift that is explained by being associated with bribery is normally a welcomed, even recommended, tradition. However, it has been seen as a

behavior that should not be done by the judges. Although Mecelle has not ruled in which cases the judges are allowed to accept gifts, both Ottoman jurists and contemporary Islamic jurists state that judges may receive gifts in the presence of certain conditions. Another thing that draws attention in this issue is that the rule has been expressed as independent from time. In this way, it is emphasized that accepting a gift will never suit the dignity of the profession. In addition, this feature of the rule also gives an idea about when the gift will not be taken. According to this, the judge can accept gifts neither before nor after the decision. In other words, judge cannot accept gifts after the case has been concluded and the decision has become definite.

Not Participating in Banquets

The participation of Ottoman judges in banquets was also considered as an ethical violation. Article 1797 of Mecelle have expressed this rule briefly and concisely: “Judge cannot participate in the banquets organized by any of the parties of the case.”\(^\text{116}\) It was thought that this could leave the judge under suspicion.\(^\text{117}\)

The phenomenon that needs to be emphasized in the provision of “Judge cannot participate in the banquets organized by any of the parties of the case” is “banquet”. The banquet is defined in the dictionary as accepting guests, providing them with eating and drinking.\(^\text{118}\) The concept of “banquet” is used for the events that are organized for occasions such as wedding and birth, or sometimes occasionally inviting people without such a reason to give meal.\(^\text{119}\) Participation in banquet is a Sunnah and

\(^{116}\) Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle (Mecelle-i Ahkam-ı Adliye) in Present Turkish], Yetkin Yayınları, Ankara 2011, p.569

\(^{117}\) Aslan, p. 55.

\(^{118}\) Devellioğlu, p. 1190.

\(^{119}\) Mustafa Çağrıç, Ziyafet[Banquet], DİA, 2013, Vol. 44, p. 495 et seq.
recommended behavior.\textsuperscript{120} However, the participation of the judges in banquets are considered as non-ethical. Even, it is stated in fatwas that if a judge eats the meal presented by any of the parties to the case, he cannot make decision the case. As an example we can give Ebusuud Efendi’s fatwa: “The Question: If the kadi eats the meal presented by the claimant, will the decision taken by him be valid? Answer: The decision will not be valid.”\textsuperscript{121}

Islamic Ottoman jurists assesses whether the judge can go to banquets that does not belong to one of the parties of the case according to whether it was a banquet open to public or a private invitation. Whether or not the banquet is public is understood from invitation; a banquet to which everybody is invited is considered as a general banquet while the banquets

\textsuperscript{120} The person organizing a banquet should not discriminate people according to whether they are rich or poor. Because, it was stated in a hadith that “The worst of the meal is the banquet to which only rich people are invited and the poor are not invited” (Buhârî, “Nikâh [Wedding]”, 42; Müslim, “Nikâh [Wedding]”, 107; Ebû Dâvûd, “EtÔime”, 1). For banquets, priority should be given to the relatives and then the friends and acquaintances should be invited. The person organizing the banquet should not seek praise and respect and should aim to please his friends, to live the Sunnah of the Prophet and to keep people’s heart pleasing; hw should not invite people who may have difficulties to participate in the banquet. The invited should accept the invitation as much as possible without making a rich poor distinction. Mohammad the Prophet accepted the invitations of the poor and slaves (İbn Mâce, “Ticârât”, 66, “Zühd”, 16; Tirmîzî, “Cenâöz”, 32). The importance of the participation to the wedding is especially emphasized; this was stated to be fard al-ayn, fard al-kifayah or sunnah-ı kifaye or sunnah; the participation to other banquets was considered as mustahabb (Gazzâlî, II, 42; Akfêhsî, p. 36; İbn Tolun, p. 41-42). Mohammad the Prophet advised the persons who are invited to a banquet to accept the invitation (Müslîm, “Nikâh [Wedding]”, 97, 98, 100-106; Ebû Dâvûd, “EtÔime”, 1); it was stated that those who do not accept the invitations without an excuse would be sinners (Müslîm, “Nikâh [Wedding]”, 110; Ebû Dâvûd, “EtÔime”, 1; İbn Mâce, “Nikâh [Wedding]”, 25). When he was invited, the prophet went to places even far from Medina (Müsned, II, 424, 479, 481, 512; Buhârî, “Hibe [Grant]”, 2, “Nikâh [Wedding]”, 73; Müslim, “Nikâh [Wedding]”, 104); Çağrıcı, Ziyafet [Banquet], p. 496. Mohammad the Prophet said “ one who does not accept the invitation contravene Abu’l Kasim (the Prophet), Ahmed b. Hanbel, Müsned, 1/88; İbn Mâce, Cenâiz 1; Tirmîzî, Edeb 1; Berki, p. 162.

\textsuperscript{121} DÜZDAĞ, M. Ertuğrul, Şeyhülislam Ebussuud Efendi Fetvaları Işığında 16. Asr Türk Hayatı[Life in Turkish Community under the light of fetwas of Ebussuud Efendi the sheikh ul-islam], İstanbul, 1983, p. 133.
to which only certain persons are invited is considered as a private banquet. According to this, it is stated that the judges should not go to the invitations prepared for him, which would not be prepared if he did not exist in another expression, with two exceptions. The underlying factor of this thinking is that the judge is forbidden from benefiting the members of the society free of charge. The judge’s attendance at the banquet is perceived as benefiting free of charge from other people. This situation will frighten the other side, put him/her in trouble, and the judge will be put under suspicion.

One of the exceptions is the invitations of intimate relatives for private banquets. This invitation is considered as “sila-i rahim”. The rejection of this invitation was not welcomed. However, the invitee must not have a case at the court. The second exception is the following: The judge may take part in the habitual invitations which he used to participate before becoming a judge. Of course, the invitee must not have a case at the court in this situation as well. In addition, the judge should not accept the invitations that are not habitual. For example, if banquet had been organized once a month before he became the judge and the frequency was turned into once a week, then the judge should not participate any of them.

122 Halebi, p. 98; Ebû Bekir Ahmet bin eş-Şeybanî el-Hassâf (Ebû Bekir el-Hassâf), Edebü’l-Kâdi cited in Bangalore Şerhi [Bangalore Commentary], Serahsi. Atar, Kâdi, p. 69. In this regard, we can see that the mujtahids have different ideas. According to Abu Hanifa and Abu Yusuf the judge cannot participate in private banquet, even it is organized by his intimate relatives.; according to Imam Mohammad, he can. Fetâvâyi Hindiyye, C. VI, 270. Fetâvâyi Hindiyye, translated by Mustafa Efe, Huzur Yayınevi, İstanbul, 2004; Aslan, p. 55.


124 Redd-i Muhtar [Rejection of Muhtar], Ali Haydar Efendi, p. 437; Halebi, 2/98, Zuhayli Vehbe. İslâm Fikhi Ansiklopedisi [Encyclopedia of Islamic Fiqh], p. 8/255 İstanbul, 1994; Ebubekir Yağmur, İslâm Hukukuna Göre Hakimin Ahlaki Yöntem [The moral qualifications of the judge according to Islamic law], Yeni Ümit Dergisi, Nisan-Mayıs Haziran 2000, Yıl 12, sayı 48, http://www.yeniumit.com.tr/konular/detay/islam-hukukuna-gore-hakiminahlaki-yonu e.t.: 15/04/2016, Aslan, Yargılama Etiği [The ethics of Jurisdiction], p.55. If the invitee who is arelative og the judge had not invited the judge before he was appointed as a judge, and started to invite him after he had become a judge, then the judge should not participate of this relative’s banquet. Fetâvâyi Hindiyye, C. VI, 270
There is no objection to the participation of the judge to public banquets of the persons that are not a party to a case at the court. The public banquets are not considered as a matter of suspicion even only one side of the case attends.\textsuperscript{125} Accordingly, this means that the prohibition is limited to the invitations made by the parties of the case.

There is no objection to the judge’s participation to the funeral and visit the patient, for visiting the patient and participating the funeral are Sunnah of the prophet.\textsuperscript{126} Indeed, participating to the banquets is considered as non-ethical in principal. However, the judge cannot spend much time during these kind of visits and should not speak too much.\textsuperscript{127} In addition, if one of the parties to the case is ill, it is advised that the judge should not visit that person.\textsuperscript{128}

When we look at the Ottoman application, we see that the treasury meets the expenses of the banquets in which the judges are present. For example, accounting records were made in the books for the amount of meat, bread, cheese, butter and honey and similar food consumed and the money spent for the banquet that was organized by Gelibolu Kadi Mustafa Celebi and to which Kasim and Hamza, Kadi of Midilli and some other kadis, head architect, preachers, madrasa teachers, soldiers from the palace, members of Hacı Bektaş Community were invited.\textsuperscript{129} In our opinion, it was aimed at preventing the situation of being put under suspicion mentioned above.

\textsuperscript{125} Yağmur, same place, p. 196; Aslan, p. 55.

\textsuperscript{126} Serahsi, C. XVI, 81; Some authors suggest that visiting a patient should not last too long. This is what suits the sunnah. İbn Abidin, Muhammed Emin (d. 1836), Reddûl-Muhtar Ale’d-Dürri’l-Muhtar, translated by Mehmet Savaş, İstanbul, 1985, C. XII, p. 164; Ali Haydar, C. IV, p. 437, Mahmut Şen, İslam Hukuk Geleneği Perspektifinden Yargı Etik İkileri [Ethical Principles of Judiciary from the Perspective of Islamic Law Tradition], Uyuşmazlık Mahkemesi Dergisi, sayı 6, Ankara 2015, p. 519.

\textsuperscript{127} Ebû Bekir Ahmet bin eş-Şeybanî el-Hassât’in (Ebû Bekir el-Hassâtî), Edebü’l-Kâdî cited in Bangalore İlkeleri Şerhi [Commentary on Bangalore Principles of Ethics]. In addition, the judge should not speak about the case he is dealing with; Şen, p. 519.

\textsuperscript{128} Mecme ‘u’l-enhurst, Ali Haydar Efendi, p. 437. Fetâvâyi Hindiyye, VI, 265.

\textsuperscript{129} BOA, MAD.D, File no of this undated document is: 7987.
There is no direct regulation in Bangalore principles that judges cannot go to banquets of the parties to the case as guests and that they cannot eat stunning food there. However, in Article 68/b of Judges and Prosecutors Law, it is stated that the judge should be punished with disciplinary action due to his behaviors and actions that give an idea that he/she cannot perform his/her duties correctly and impartially.

In the literature, some authors have argued that the banquet could be considered as a gift under Article 4.14 of Bangalore Principles of Judiciary Ethics. However, in our opinion, gifts and banquets, in other words to be a guest to one of the parties, should not be considered as the same way. Because no treat or objective benefits may be obtained in a visit. However, the visits establish a relation between the invitee and the visiting person, and brings the parties closer together and establishes a friendly relationship. Mecelle considers such a relationship will direct the judge to make a subjective evaluation, and forbids this act.

It is possible to find a similar provision under Islamic Law title in the appendix of Commentary on Bangalore Principles of Ethics. Article 3 of the Commentary emphasizes that he/she should not socialize extensively with others by referring to the fact that the judge should not engage in any behavior that is not socially acceptable. The article also referred to the fact that the judge should not participate in the general meetings organized for him/her.

In summary, it is aimed at preventing any suspicion by determining that the Ottoman judges should not go to the banquets of the parties. Even, it is stated by the Ottoman jurists that judges should not participate in the banquets specially organized for themselves. The fact that the expenses of the banquets attended by the judges in practice are covered by the Treasury can be considered as a measure taken to prevent such suspicion. This provision is also important, for it shows us an example of the actions that the judge cannot do outside the trial.

130 Sancak, Kiyak, p. 59.
Not Leading Misunderstanding and Imputation (Not showing Special Interest)

Article 1798 of Mecelle states the obligation of the Ottoman Judges not act and behave in a manner that may put them under suspicion and imputation as follows: “Esnâ-yı muhakemede hâkim tarafeynden yalnız birisini hanesi kabul etmek ve meclisi hükümde biriyle halvet veya ikişinden birine el ya göz veya baş ile işaret eylemek veya anlardan birisine gizli lâkırdı yahut diğerinin bilmediği lisan ile söz söylemek gibi töhmet ve su-i zanna sebep olabilecek hal ve hareket de bulunmamalıdır”

This article can be translated into present Turkish as either “Judge; when the case is being proceeded, should not be in attitudes and behaviors that can lead to misunderstandings and accusations such as hosting only one of the parties to the case at his home, being alone with a person when making the decision, pointing with either hand, eye, or head to one of the parties, telling something secretly one of the parties or in a language that the other party does not know.” or “While the case is being proceeded, the Judge should not act or behave that can lead to accusation or suspicion such as accepting one of the parties to his home alone and be alone at the court with one of the parties or pointing out one of the two parties with a hand or eye or head or speaking to one of the parties secretly or in a language that the other party does not understand”. Atilla Pınar translated this provision into present Turkish as follows: “While the case is being proceeded, the Judge should not act or behave that can lead to accusation or suspicion such as accepting one of the parties to his home alone and be alone at the court with one of the parties or pointing out one of the two parties with a hand or eye or head or speaking to one of the parties secretly or in a language that the other party does not understand”.

131 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-i Adliye) [Mecelle in Today’s Turkish(Mecelle-i Ahkâm-i Adliye)], Yetkin Yayınları, Ankara 2011, p.569
132 Sancak, Kıyak, 60.
133 Pınar, Hâkimin Adabı[Convenance of the Judge], 341.
Here, as in other ethical principles, the state and behaviors of the judge are emphasized. It is expressed what a judge can or cannot do. The intent is that these actions can lead to misunderstanding and imputation. In fact, thinking badly about someone and imputation are forbidden. Therefore, the behaviors that can cause these results are prohibited.

The article exemplifies what may lead to misunderstanding (suizan) and imputation:

It is not possible for the judge to host only one of the parties in his house. In this case, both parties can be hosted at the same time. However, one of the party cannot be hosted alone.

The judge is not allowed to be alone with someone when making decision

It is not appropriate to point to one of the parties with hand, eye, head and eyebrow.

Speaking secretly to one of the parties is not considered as ethical.

Telling something to one of the parties in a language that the other party does not know is not considered appropriate.

The Islamic jurists considered the judge’s unilateral smile, laughing, or pointing in any way to one of the parties in this category.134

Because of the fact that these acts and behaviors can be interpreted as if the Judge is supporting one of the parties and doing an injustice to the other party, and as a result, the judge can be put under suspicion, the judges should avoid these acts. Because, this situation can lead to doubt in the other party, encourage one party against the other, and cause the other party to think that the judge is supporting the opposite and this party may recuse.135

134 Mergınânî, el-Hidâye, c. III, p.103 cited in Aslan, p. 56.
135 Şerh-i Mece ‘ and Velvâliciyeye, Ali Haydar Efendi, p. 437; Bilmen 8/220; Yıldırım, p. 46; Aslan, p. 56.
However, the judge may visit persons who does not have a case at the court, and may host them.  

The judge must not accept the parties in case they arrive uninvited and he should not invite them to his own home. However, it is stated that there is no objection if the judge invites both sides and give a feast. Based on this provision, it has also been mentioned that the judge should not shout at one of the parties. The only exception to this is to speak to the parties due to their contravening behaviors.

The provision of this article is also interpreted to mean that the judge should not indoctrinate one of the parties. It is forbidden for the judge only to indoctrinate the parties, and it is stated that he can indoctrinate the witnesses unless he leads to suspicion in the witnesses.

For example, if the claimant declares that he sues 2500 mites and the witness is testifies for 2000 mites, the case must be rejected pursuant to Article 1708. However, if the judge tells the witness that “it is possible that the claimant acquits the defendant from 2000 mites” and consequently if the witness says “Yes, the claimant has 500 mite debt receivable , for acquits the defendant from 2000 mites”, it should be considered that this is a result of indoctrination. As is in this example, the witness should

136 Berki, p. 162.

137 Feth ul Kadir[Rejecting the Muhtar], Ali Haydar Efendi, p. 438.


139 Redd-i muhtar[Rejecting the Muhtar], Feth, Ali Haydar Efendi, p. 438

140 There is also lawyers who do not consider it unappropriate if the judge helps the person who cannot speak because of excessive excitement and fear to calm down and explain his/her demands; DEMİR Abdullah, Medeni Yargılama Hukuku Osmanlı Mahkemesi[ Civil Judgment Law Ottoman Court], Yitik Hazine Yayınları, 2010, p.26; Şen, p. 519. The said opinion belongs to Abu Yusuf and Imam Shafii; according to Abu Yusuf it is permissible(istihsanen caiz). Because the goal of making the judiciary legitimate is to preserve the rights of people. Witnesses are a mean for unveiling the truth; Aslan, p. 57.

141 Redd-i muhtar[Rejecting the Muhtar], Ali Haydar Efendi, p. 438; Ibrahim Halebi states the example of the questions that may put the judge under suspicion as follows:” Can you testify in the case such as ...”, Halebi, p. 98.
not be indoctrinated to put him under suspicion. At this point, it is also worth mentioning that Abu Yusuf is a different approach from the other mujtahids. According to Yusuf, indoctrinating the witness is considered “good” on condition that there is no suspicion. That is, if the question to be asked is not to put one side under suspicion, it is a good way for solving the case to ask a relatively guiding question to understand the subject better.

The sentence “not to give a secret word” in the provision does not apply only to judges. Other officials who are present in the hearing, for example, the janitor, clerk, bailiff should not speak secretly with the parties. Judge should also check the officers in this respect. In addition, the judge should not talk to the parties about the case outside the court.

Based on this provision, Ali Haydar Efendi states that the judge cannot accept a petition during the hearing but only after the hearing.

These issues can be associated with Article 36 of Judges and Prosecutors Law.

The provisions of Article 2.2 of Bangalore Principles on Judicial Ethics which is “A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.,” Article 3.1 which is “A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.” And Article 3.2 which is “The behavior and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.” Are similar to Article 1798.

142 Halebi, p. 98. For example, the judge can indoctrinate the witness by saying “do you confirm that the event occurred as said?” in order to help to unveil the truth. According to Abu Yusuf, this is permissible (istihsanen caiz); Aslan, p. 57.
143 Redd-i muhtar[Rejecting the Muhtar], Velvaliciyye, Ali Haydar Efendi, p. 438.
144 Ali Haydar Efendi, p. 438.
145 Sancak, Kıyak, p. 60.
Article 7 of Commentary the contemporary Islamic jurist’s state that the judge must treat the parties equally at every stage of the case. According to this, the judge must treat equally the parties of the case in every stage irrespective of whether they are father and son or Khalifa and vassal or Muslim and non-Muslim. The judge’s evaluation, speaking to and communicate with them are included in this. He should not laugh on one side while frowning on the other. He should not show more interest to one side more than the other. If there is a common language known by both sides of the case and if they can speak this language, the judge should not speak to one of the parties in a language that the other party does not know. Again, in Edebü’l-Kâdî, book of Ebû Bekir Ahmet bin eș-Şeybanî el-Hassâf’în (Ebû Bekir el-Hassâf), to which reference is made by mentioned Commentary, it is stated that the judge should not allow the parties to come his home and/or he should not host one of the parties at his home.

We understand from this provision that the state and behaviors of the judge should not be in a way to lead to misunderstanding and imputation. It is seen as a positive attitude in terms of judicial ethics that the Ottoman Jurists considers the acts such as speaking secretly that can put the persons under suspicion are valid not only for the judge but also for all public officers who are present at the hearing. Comparing to Bangalore Principles of Ethics, its providing concrete examples is another considerable feature that is based on its kazuistic feature.

Treating Parties Fairly

It is possible to see in article 1798 of Mecelle the provision that the Ottoman judges should treat the parties fairly: “Hâkim,beyn-el-hasmeyn adl ile me’murdur. Bianaenaleyh tarafeynden biri her nekadar eşraftan ve diğerı ahad-ı nasdan olsa bile hîn-i muhakemedede tarafeyni oturtmak ve kendilerine imal-i nazar ve tevcih-i hitap etmek gibi muhakemeye müteallik muamelâtda tamamiyle adl ve müsavata riayet etmesi lâzımdır.”

146 Obligation to treat fairly is an issue not only for judges but also for all public officers in the Islamic Ottoman Law culture. It can be observed in the books of Maverdi; Isa Akalın, Türk-Islâm Düşünce Tarihinde Kamu Etiği Anlayışı El-Mâverdi Örneği [Understanding of Public Ethics in the History of Turkish-Islamic Thought Al-Mâverdi Example], Kamu Etiği Sempozyumu, Sempozyum Bildirileri 1, TODAİ, Ankara 2009, p. 168
Cengiz İlhan translated this provision as “It is the duty of the judge to treat both sides fairly. Therefore, even if one of the parties is one of the prominent persons of the district and the other party is someone from the public, the judge should have the both parties seated and should behave fairly and equally in full when he should look at or speak to the parties as a requirement of the hearing.” While Atilla Pınar translated as “It is the duty of the judge to treat both sides fairly. Therefore, even if one of the parties is one of the prominent persons of the district and the other party is someone from the public, the judge should have the both parties seated and should behave fairly and equally in full when he should look at or speak to the parties as a requirement of the hearing.” The provision has also been translated into present Turkish as follows: “The judge is obliged to be fair between the parties to the dispute. Therefore, although one of the sides is one of the prominent people and the other is an ordinary person, the judge should adhere to justice and equality completely during the proceeding by having the parties seated, looking at them and speaking to them”.

The obligation to act fairly mentioned in the article can be understood in two ways. The first is that the judge should act equally to the parties in the proceedings during the trial. The second is to deciding in favor of the party that is right without victimizing.

The first responsibility that the rule imposes on judges is to treat the parties equally in matters concerning the trial. This obligation is imposed on the judges based on the main sources of Islamic law. There is a hadith of Mohammad the Prophet stating that “When one of you takes on the judicial duty, he should treat the parties equally in terms of having them seated, pointing to them and looking at them. He should not raise his voice against just one of two opponents”.

147 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle in Today’s Turkish(Mecelle-i Ahkâm-ı Adliye)], Yetkin Yayınları, Ankara 2011, p.568

148 Pınar, Hakimin Adabı [Convenance of Judge], p. 341

149 Sancak, Kıyak, p. 60.

Khalifa Omar\textsuperscript{151}, the equal treatment to the parties has been expressed as follows: “Treat the parties in a way so that those who are weak do not lose the hope for justice, and those who are strong do not be in anticipation for being favored”\textsuperscript{152}. Based on the word “people” in the expression of “Keep people equal in the judicial council” in the letter of Khalifa Omar, Serahsi emphasized that people from all walks of life can come to court, and all of them must be treated equally regardless of race, color, language, religion, social, economic, political status. This issue is stated in Mülteka as following: “Kadi should treat equally to the parties in terms of having them seat, looking at them and heading toward them, should not speak secretly to them, should not point to one of them, should not go to the banquet organized by one of them, should not smile at one of the opponents while making a wry face to the other, should not make jokes to one of the opponents and should not give advice to one of the opponents on how to defend himself/herself”\textsuperscript{153}.

Islamic Ottoman jurists states that the possibility that the judge may refrain from acting equally to the parties can be related to the judges’ fear of the strong side. The judge should not be afraid of the powers of one of the opponents and should not make decisions for his/her sake and to make up to him\textsuperscript{154}. Because there is the evidence of the obligation to act equally in the Qur’an: “do not fear the people but fear me …”\textsuperscript{155}

The above-mentioned provision, like other articles, exemplifies the factors that make the judge not to treat the parties equally. The fact that one of the opponents is from the prominent persons and the other is an ordinary

\begin{itemize}
\item \textsuperscript{151} This letter contains the basic rules that constitute the core of Islamic jurisprudence law or Edebü’il-Kadi(Ethics of the Judge). For the entire letter see Aslan, p. 143 et seq; Serhasi, Mebsut, c. XVI, p. 60 et seq.
\item \textsuperscript{152} Muhammed Hamidullah, İslam Anayasa Hukuku] Islamic Constitutional Law], (Translated by Fahrettin Atar) ed: Vecdi Akyüz, Umut Matbaacılık, (y.y.) 1995, p. 289; Yıldırımer, yargıç etiği [Ethics of the Judge], p. 43; aslan, p. 144.
\item \textsuperscript{153} Mülteka, p. 98.
\item \textsuperscript{154} Kadi[Kadi], Ali Haydar Efendi, p. 439.
\item \textsuperscript{155} Al-Ma’idah, 5/44.
\end{itemize}
citizen has the potential to lead to judge to treat unequally to the parties. The provision emphasizes that this should be paid attention to. The judge should pay attention to his attitudes and behaviors when the opponents of a case have the above-mentioned features. For example, according to Ottoman Jurists, the judge cannot have one of the opponents who is one of the prominent persons for his/her this feature while having the other party standing. The judge cannot look at only one side while not looking at the other; cannot let only one side while not letting the other to speak.

Likewise, this article also points out that the judge should not guide one of the opponents about how he/she should express his/her claim and with which words. In other words, the judge cannot guide one of the parties by using expressions such as “express your claim by ....”

The Islamic Ottoman jurists assess the equality of the parties so carefully that they state that the judge should not perform the proceeding while having one of the opponent on his left side and the other on his right side. Ali Haydar Efendi explained the reason for this is by stating that right side is superior to the left side and more honorable and that Mohammad the Prophet allocated his right side to Abu Bakr.

The Islamic jurists have expressed opinions expressing how far and where the judge should be located so that the judge can provide equality between the parties. In this case, the parties will be in front of the judge and will be in the distance where the judge can easily hear their normal voices. In other words, the parties should be placed in a distance that the judge does not require to pay attention to hear them. This distance was stated to

156 It should be noted that the judge can keep both of them standing, Dürr-i Münteka, Ali Haydar Efendi, p. 439. Berki states that the parties must be seated; Berki, p. 163. When the Islamic Law History is examined, the following example has been found: During a trial to which Khalifa Omer was one of the parties, Zeyit bin Sabit, the Kadi of Madina, wanted to offer him a different place to sit based on the hadith stating that “If a prominent person visits you, offer him treat”. Khalif Omar did not accept this offer stating that it was the first sign of tendentiousness, and sat next to Ubey ibni Kaab who is his opponent in the case; Berki, p. 164.


158 Ali Haydar Efendi, p. 439; Berki, p. 163.
be two “zira” distance. Based on this, the judge should forbid the parties to raise their voices. Because one opponent’s raising his/her voice is seen as a practice that will damage equality.

That the judge treats equally to one who is strong in economic, sociological or political aspects and the one who are not as strong as the other side will lead the strong side to think that the judge will not make decision in favor of you due to his/her power and will make a fair decision, and lead to weak side to think that his/her weakness will not affect the decision to be taken and strengthen his trust in the judge and the court. Otherwise, that is, the acts and behaviors of the judge such as paying more attention to what the one of the parties says and treating more gently than the other party may cause the other party to give up endeavoring to prove his case and accordingly to abandon his right.

Another thing to understand from the fact that the judge behaves fairly is making decisions in favor of the party who is right. The judge is obliged to judge in favor of the party who is right. The judge should not make decisions by being afraid of one party or taking into account the relative closeness of one side (for example a person from the same town). The judge should not be influenced by his being told badly about himself in his absence, and should not deviate from justice in any case. The judge should not discriminate the parties according to Muslim-non-Muslim, male-female, young-old, and must make decision in favor of the party who is right.

159 A distance between 150 and 180 cm; Devellioğlu, p. 1188; Berki states that this distance is equal to 2 m; Berki, p. 163.


161 This opinion was stated in the letter sent to Abu Musal es’ariye by Khalifa Omar as follows: “Treat so equally to the parties that the stronger side does not have an expectation and the weak side does not lose trust in your justice”; Berki, s. 163; additionally see. Mecme ‘u’l-enhur ve Zeyla ‘î; Ali Haydar Efendi, p. 439; Şen, p. 520. Atar, p.49,50, Yıldırım, p. 47

162 The obligation to treat fairly is also mentioned in detail in the main sources of the Islamic Law. The verse 4/58 of Al-Nisa that is “…when you judge between people to judge with justice…” is the most known verse.
When we look at the Ottoman practice, we see that even if one of the parties is a sultan, the judge must treat the parties fairly. An example of this is the case one of the parties of which was Mehmet the Conqueror who had got a Greek architect’s hands down claiming that he had shortened two marble pillars of a Mosque that he had been building contrary to the instruction of the Sultan. A similar case was experienced during the reign of Abdülhamid II. Before a case filed against someone who are blamed to rebel against the Sultan, Damad Mahmud Celaleddin Pasha visits Abdullatif Suphi Pasha, head of the Court, and after communicating the greetings of the Sultan, says ‘We are expecting a decision from you that will be appropriate to the greatness of the Sultan’. The case is proceeded and the accused is acquitted. The daughter of Suphi Pasha, who knows the message sent by the Sultan, asks ‘Have you not been afraid of the Sultan who is waiting an appropriate decision from you when making decision?’ The answer of the Pasha is meaningful: ‘Daughter, there is such a judge a Sultan who I and the Sultan will be in front of him together. I am only afraid of that Sultan.’

It is stated in the 5th value of Bangalore Principles of Judicial Conduct that ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office. This provision is parallel to the principle indicated in this article of Mecelle. Because it is stated in the paragraphs about the application of this values that a judge should be aware of, and understand, diversity in society and differences (including but not limited to race, religion, nationality, marital status). The judge must decide consciously on the basis of his conscience on differences. Especially the provision of Paragraph 5.2 which is “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards

163 For the exemplary cases in the Islamic Law History, especially related to halifa Omar, see Ahmet Lütfi Kazancı, Adil Halife Emirü’l Mümünin Hz. Ömer, Ensar Yayınları, 2014, p. 247-248; Şen, p. 525, 526.


any person or group on irrelevant grounds” It emphasizes, in parallel to this provision in Mecelle, that the judge should not act in favor of any party in matters concerning the trial.

This provision in Mecelle can be associated with impartiality which is the 2nd value in Bangalore Principle of Judicial Conduct. The principle which is “Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made” points out that impartiality should be applied not only when making decision but also during the proceeding. The provision in Mecelle also states that the judge should act fairly to the parties during the trial. In this case, we can say that the norm in the Mecelle is a more detailed version of this thought in Bangalore Principles.

Under the Islamic Law title of the Commentary on Bangalore ethical principles, there are statements that are almost identical to the provision in Mecelle. According to Article 7 of the Commentary, A judge must treat the litigants equally in every possible way, whether they be father and son, the Caliph and one of his subjects, or a Muslim and a disbeliever. This includes the way he looks at them, addresses them, and deals with them. He should not smile at one and frown at the other. He should not show more concern for one than he does for the other. He should not address one of them in a language that the other cannot understand if he is able to speak in a language known to both litigants.

This provision in Mecelle can be associated with the right to fair trial which is used frequently nowadays. Because right to fair trial is defined as the fair settlement of rights and responsibilities which are subject to dispute and a criminal offence directed to a person, and it is emphasized that the purpose of this right is to ensure a healthy judicial process.166 The most

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166 Right to fair trial contains rights such as “‘Right to sue”, “The right to be equal before the law and the judiciary”, “The right to be tried by an authorized, independent and impartial jurisdiction established by law”, “The right to a fair trial (without undue delay)”, “The right to public hearing, the right to reasoned decision”, “The right to fair trial” (fair hearing)” and “The right to be present at the hearing”, and it is stated that all these rights must be provided in order to be able to talk about a fair trial, provided that the characteristics of the trial are also taken into consideration, Başar Başaran, Adil Yargılanma Hakki [Right to Fair Trial], AÜ SBE, Kamu Hukuku ABD, Yayınlanmamış Yüksek Lisans Tezi, Ankara 2007, p. 2, 3.
basic requirement of a healthy judicial process is that the judge should treat the parties equally during trial.

This provision in the Mecelle indicates the ethical principles that the judge should comply with during the proceedings. The judge should pay more attention to attitudes and behaviors during the trial such as having a smiley face or a sullen face, speaking with high or low voice. Because fair and equal behavior of the judge will ensure the legitimacy of the court, and consequently, of the state in the eyes of the strong and weak opponents. We can also point out that the Bangalore ethical principles has provisions in this direction, however the provision in Mecelle is different, for giving concrete examples. It is noteworthy that the information contained in the Commentary on Bangalore ethical principles is very close to the provisions of the Mecelle.

Not Making Decision While not Being Able to Think Clearly

We have stated that the ethical principles that the Ottoman judges must obey are expressed as the convenance of the judge and that the provisions under this heading in Mecelle are principles of ethics. The ethical principles are not regulated only under the heading “The Morals of the Judge is reflected by its behaviors” in Mecelle. In our opinion, a provision in the “About the Tasks of the Judge” section of Proceeding Book of Mecelle states another principle of ethics.

Article 1812 of Mecelle states that “Hâkim, gam ve gussa ve ağlık ve galeb-i nevm gibi sıhhat-1 tefekküre mani olabilecek bir âriza ile zihni müsevveş olduğu halde hüküm tasaddi etmemelidir.” This provision is translated into present Turkish by Atilla Pınar as follows: “Article 1812- The Judge should not try to make decision if his mind become uncertain or unstable due to reasons that may prevent healthy thinking such as grief, hunger or feeling drowsy.” Cengiz İlhan translated this provision into present Turkish as follows: “Article 1812- The Judge should not try to make decision when he is bemused due to a disability that may prevent the judge from think clearly such as sadness, anxiety, hunger and feeling drowsy”.

167 Cengiz İlhan, Günümüz Türkçesiyle Mecelle (Mecelle-i Ahkâm-ı Adliye) [Mecelle in Today’s Turkish(Mecelle-i Ahkâm-ı Adliye) ], Yetkin Yayınları, Ankara 2011, p. 575.
The following hadiths are mentioned as the religious evidence of the provision of the article: “While the judge is angry, he must not give judgment between the parties” or “Judge cannot make decisions when he is angry”. In addition, the following instruction of Omar b. Abdulaziz, Umayyad Khalifa, to Meymun b. Mihran that he appointed as kadi is related to this issue: “When you are nervous and distressed, do not conclude the case, be gentle with the parties.” As it is known, anger prevents people from being prudent, thus prevents a person from thinking moderately and balanced.

Although the importance of the reason that leads to the judge to get angry is discussed among the Islamic jurists, it is generally accepted that the judge should not make decision when he is angry for whatever reason. We can say that the Islamic jurists broadly interpret the anger in these hadiths. Because anger is seen as the focal point that prevents healthy thinking and healthy assessment. According to this, no decision should be taken in cases where the crucial points of the judge profession, such as assessment, are weakened.

168 For example, according to the statement made by Abdurrahman b. Ebi Bekre based on the statement of his father (Ebu Bekre), Ebu Bekire sent a letter to his son (whose name was Ubeydullallah and who is kadi in Sicistan) and stated that the Prophet said as follows: “Judge cannot make decision when he is angry”, Buhari, ahhkám 13; Muslim, akdiye 16; Tirmizî, ahhkám 7; Nesâî, kudât 18, 32; Ibn Mâce, ahhkâm 4; Ahmed h. Hanbel, V, 36, 38, 46, 52.


170 For example, Bagavi and Imam’ul Haramey states that a judge should not make decision when he is in anger that is not for the sake of the God, for the anger fort he sake of the God will prevent oppression while a personal aner cannot prevent the oppression www.enfal.de/ebudavud

171 Abu Davud, www.enfal.de.... In the book “Edebi’l-Kadi” of Ebû Bekir Ahmet bin eş-Şeybani el-Hassâf(Ebû Bekir el-Hassâf) it is emphasized that the decision should be made neither under anger nor under emotional pressure; Bangalore Commentary.
While it has been stated that judges should not make decision when they are angry, it seems that its scope is expanded a bit further in Islamic Law History.\textsuperscript{172} In the provision in Mecelle, it is stated that the judge should not make decision when he is in a situation that may prevent him from thinking clearly, and the conditions that prevent healthy thinking are expanded. In this case, judge’s being sad, anxious, hungry and sleepless are mentioned as the examples of the conditions that may prevent the judge from think clearly. Islamic jurists also mentioned the situations such as being happy, thirsty, overly full, even warmth and chill, sleepy, extremely tired, even being under the effect of feelings or severe sexual desires, feeling suffocated due to excessive cold or hot.\textsuperscript{173} In fact, the judge here is expected to decide when he is calm and moderate. Such sentiments and situations may cause the judge to be distracted or act emotionally which may lead the judge to make unfair decisions.

Ali Haydar Efendi stated that the judge should not be in these situations not only during the decision phase, but also during the trial. In fact, he is recommended to stop the proceeding if the trial lasts too long and he feels tired.\textsuperscript{174} The only exception to this is the fact that the case is

\textsuperscript{172} For example, Satibi considers all psychological states that may affect the decision of the judge within the scope of this hadith and states that the judge should not continue proceeding in these states; Ebû İshak eş- Şâtbbî, el- Muvâfakât (Translated by Mehmet Erdoğan) İz Yayncılık, İstanbul 1990, c. I, p. 197, cited in Yıldırım, p. 47.

\textsuperscript{173} Fethül-Kadir ve Haniye, Ali Haydar Efendi, p. 458. Islamic jurists have stated that there are reports concerning these cases, even if they are weak. Dârekutnî and Beyhâki stated the following hadith based on Ebû Saïd el-Hudrî: “Mohammad the Prophet said that the judge can only make decision when he is satiated” However, there is a weakness of this statement; Davudoğlu Ahmed, Selâmet Yolları, IV, 257-258; www.enfal.de/ebudavud. Ebû Bekir Ahmet bin eş-Şeybanî el-Hassâf(Ebû Bekir el-Hassâf)’s Edebü'l-Kâdi; Bangalore Commentary.;Bilmen, Kâmus, c. VIII, S. 224, Mahfuz b. Ahmed (d.510 H.) Kelvezani, el-Hidaye şî Furû’îl-Fikhi’l-Hanbelî, Dâr’l-Küttübi’l Ílmiyye, Byerut 2002, c. Il, S. 173, Muvaffakuddin Ahmed b. Muhammed İbn Kudame, el-Muğni (with eş-Şerhü’l-Kebir), Daru’l-Hadis, Kahire 1995, c. XIII, S. 439 cited in Aslan, p. 57. Hukuk-i İslamiyye Kamusu, VIII, 224. Sünen-i Ebü Davud Terceme ve Şerhi[Sünen-i Abu Davud Translation and Commentary], Şamil Yaynevi: 13/171-172, www.enfal.de/ebudavud e.t: 14.04.2016.

\textsuperscript{174} Fethül-Kadir and Haniye, Ali Haydar Efendi, p. 458.
very close to decision phase such as the defendant’s acceptance the claims of the claimant. It should be noted that there are also Islamic lawyers who have the opposite idea. Halebi states that the judge should not make decision without exception when he is in such conditions. In our opinion, the Word “tasaddi” used in Mecelle supports the view of Ali Haydar Efendi. Because, the article states that the judge should not attempt to make decision under the said conditions. This shows that, the judge should neither make decision under the said conditions nor perform activities that will be the basis for the decision.

The reason why the judge should not decide when he cannot think clearly is that these situations will make him to deviate from justice. However, the judge is obliged to judge fairly according to Article 1799 of Mecelle. A judge who cannot think well cannot act fairly. It should be noted that Islamic Jurists considers this ban as “kerahat” and states that if the Judge make decision under these negative conditions and if he made a correct decision, this decision will be valid.

Some of the contemporary lawyers state that it is not possible to come across such an arrangement as to be binding in positive law and state that such conditions should be sought without having to be made legal in written law. Because, as the Islamic jurists emphasize, it is not easy to determine the condition that will prevent healthy thinking and it can vary from person to person. Indeed, apart from the psychological disturbances that can be detected from outside, only the judge can determine whether the temporary psychological conditions such as sadness and anxiety and physiological conditions such as hunger will prevent him from making healthy decisions. However, in our opinion, it can be argued that it is not necessary to make a rule the necessity that the judge should not make decision when he cannot think clearly. Because, as stated at the beginning

175 Halebi, p. 98.
176 For similar views see Hondu, p. 15.
178 Sancak, Kıyak, p. 71.
of the study, especially professional ethical principles have already been begun to be included in the rules of law in our age. Considering the issue from the point of view that ethical principles should not be included in the legal rules, we should not put any ethical principle into the norms. However, as mentioned earlier, ethical principles have been put into the legal rules in this era of humanity. It can be considered that this provision can be put into the professional ethics principles of the judge in this frame.

Some of the contemporary jurists state that this regulation, which is set out in Article 1812, is a universal ethical principle, and may serve a model for our age. Indeed, there is no such a rule in Bangalore Principles on Judicial Conduct, which is the latest point of humanity for the ethical principles that judges must comply with today. However, we don’t think that no one will object to the view, which is mentioned in Mecelle, that no decision should be made under the conditions that may prevent to think clearly. Because, it is possible today to catch up with news in which it is stated that the Judge has have the minute written that no healthy decision was able to be made because the court room was too cold.

As mentioned above, there are no such articles in Bangalore Principles of Ethics. However the 3rd and 6th values of the said Principles are associated with the issue. According to “Integrity” which is the 3rd value; “Integrity is essential to the proper discharge of the judicial office.” and


180 In a news dated 26 January 2006, it is stated that during a trial at 3rd Criminal Court of Major Cases Sadık Gözükara, the Judge, said they could not make healty decision due to the coldness of the court hall and asked the clerk to include this statement into the minute. http://www.radikal.com.tr/turkiye/yargi-tutanagi-hayyet-donuyor-769945/ e.t.: 17/06/2016. For the views arguing that the rules of the positive Turkish Law asking the vacation judge while he/she is sleepy to arrest or release peoples is in conflict with the provision of Mecelle, and damages our judicial culture, see Ömer Köroğlu, “Ülkemizde Adliye Kültürü ve Etik [The Judicial Culture and Ethics in Our Country]”, Uluslararası Yargı Reformu Sempozyumu, Adalet Bakanlığı Strateji Geliştirme Başkanlığı, 2-3 Nisan 2012, Strateji Geliştirme Başkanlığı Yayın No: 32, Duman Ofset, Kasım 2013, p. 435.
“A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.” Additionally, it can be considered within the context of competence and diligence which is the 6th value stating that “Competence and diligence are prerequisites to the due performance of judicial office” and application article 6.5 which states “A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.” However, the information included in these values does not explain the rule as clear as Mecelle that the Judge should not make decision under the conditions that prevent the judge from thinking clearly.

Under the Islamic Law title that is appendix of the Commentary on Bangalore Principles of Judicial Conduct, physiological factors are mentioned which may damage the mental state and reasoning ability of the judge. According to this, the judge should not be angry, thirsty, overjoyed or overly upset, should not feel too tired, in other words, and should not feel that he is in need of rest. Because, all of this may prevent the judge from using his reasoning abilities. The presence of such a provision in the commentary is important, for it shows that the point of view in Mecelle is still accepted by Islamic Jurists.

It may be possible to associate this provision with the concept of “judicial independence”, which is frequently used today. As it is known, judicial independence is defined as the fulfillment of the judicial profession by the judge only in accordance with the law and his/her conscience free from the effects that may arise from legislative, executive and even judicial organs. It has been stated that the judge should not be influenced by “foreign elements” when making decisions so that the judiciary can be

181 Pınar, Hakimin Adabı [The Convenance of Judge], p.343.
made independently. The subject matter we examine is more closely related to the independence of the judiciary from the effects of the judiciary itself. As it is known, both the upper judicial bodies during the supervision and other judicial units at the same level should not influence the judge. The judge must be independent from himself/herself—that is in terms of his proximity or distance to a certain group or a location-. This provision in Mecelle points that the Judge should also be independent physiologically and psychologically from himself. The judge must be psychologically independent from himself; his own mood should not prevent him from making fair decisions. The judge must also be independent of himself physiologically. The conditions such as hunger, thirstiness should not prevent him from making fair decisions. Therefore, decisions should not be made under such conditions.

For the judge to be able to make a fair decision, he should be able to think clearly; that’s why he/she should be free from any factors that may influence him both physiologically and psychologically. The provisions in the Mecelle explained the conditions that may affect the judge’s mental state with the examples as follows.

**Conclusion**

Whether ethical principles may or may not be included in the legal rules has been evaluated from different perspectives. In the last century, mankind has included particularly principles of professional ethics both in international law and in national law. Bangalore Principles of Judicial Conduct and the Commentary on these principles that are universally accepted that contains the ethical principles that the judges must obey today. We can say that both these principles and the Commentary on these principles have been formed based on the experience and knowledge.

The determination of the ethical principles that judges should obey in the Ottoman Empire, which is famous for its justice, will provide an opportunity to benefit from an important experience. During the study, the attitudes and behaviors that judges should obey are understood as the attitudes and behaviors that the judges should or should not do just because
they are judges. The important point here is that the attitudes and behaviors that we expect the judges to do or not to do are the attitudes and behaviors that are not contrary to the traditions under the normal conditions, and even encouraged.

When the ethical principles that the judges were expected to obey in the Ottoman State are evaluated from this perspective, we can say that the concept of “convenance of the judge” states this phenomena. In fact, we see that the concept which the contemporary literature defines as “ethics” was defined by the Ottoman doctrine as “adap (convenance)”. According to Ottoman Jurists, the convenance of the Kadi is to consider the good moral acts and behaviors necessary for himself such as realizing the justice, preventing unjustness and persecution, not acting in favor of one side, being impartial, and ensuring the implementation of the Islamic Law. We can say that this definition made in theory is taken into account in Ottoman practice.

We can see the convenance of the judge under a separate chapter in Mecelle, which is known as the Ottoman Civil Law. When these provisions are generally evaluated, we can say that the provisions are proved by Islamic law, and the norms in the articles are based on Islamic legal sources as a rule. Moreover, it is possible to see the characteristic of Islamic law as being the kazuistic in the provisions on the convenance of the judge. Indeed, attitudes and behaviors which are expected not to be done in theory are explained in the articles by giving examples. When the commentaries are examined, we see that the Ottoman jurists express the ethical principles that the judge must comply with more examples.

We think that it is not a correct point of view that the regulations regarding the professional ethics of the judge in Mecelle are seen only as the norm of the Tanzimat period. Because it is possible to see these principles also in Mülteka, which is described as the bedside book of the kadis in the classical period Ottoman state.

The Ottoman Judges were expected to act and behave in a certain way both during and outside the trial. According to this, judges should not be act in a way that may damage the respectability of the court. Making
jokes, giving or receiving objects, making decisions while alone, wearing tacky clothes are described as the states that damage the respectability of the court. Accepting gifts was not seen as an ethical behavior; very strict conditions were determined for the judge to receive gifts. The judge should not go to the banquets organized by any of the parties to the case, and he should not go to the banquets specifically organized for him, either. It is worth considering that, in practice the expenses of the banquets in which the judge is present is covered by the treasury. The judge is expected not to lead misunderstanding and suspicion by leading the creation of an impression with his gestures that he is in favor of one of the parties. Likewise, the judge should conduct the proceedings fairly, without considering the political and economic sociological power of one of the parties.

Although it is not mentioned under “the Convenance of the Judge” heading, another principle of ethics mentioned in Mecelle is that the judge should not make decisions when he is under a condition that prevent him from thinking clearly. In the provision sadness, anxiety, hunger and sleeplessness are mentioned as examples of these conditions; the Ottoman Jurists add the situations such as being happy, thirsty, and overly full, even warmth and chill, extremely tired. It is emphasized that this should be paid attention not only when making decision but also every stages of the proceeding. The idea supported by some of the contemporary jurists that this provision is a universal Principe of ethics and that it should be included in the today’s universal ethic of judiciary is a consistent view that should be supported. Finally, when compared with the Bangalore principles of ethics, it is noted that the principles of ethics in Mecelle are different, for it creates theoretical principles based on concrete examples.
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