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Freedom of Expression of Judges within the Boundaries of Private Life: Cultural and Gender Dimensions²

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Abstract

This paper focuses on the issue of whether the boundaries of the private lives of judges are shaped according to cultural conditions and gender. My main assumption is that gender inequality in a culture is reflected in how the boundaries of the private life of judges are interpreted. In this regard, women judges may face more restrictions than their male colleagues in what they wear, what they do and what they say in their lives generally. And ultimately, an interpretation of private life that reinforces gender roles also limits the freedom of expression. I concretise my discussion regarding gender stereotypes that influence what judges do or say in their private lives in different cultures.

Keywords: judges, private life, culture, judicial conduct, ethical principles, gender stereotypes.

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Sędziowska wolność wypowiedzi w granicach życia prywatnego – wymiary kulturowe i związane z płcią³

Streszczenie

Artykuł skupia się na kwestii tego, czy granice życia prywatnego sędziów i sędzi kształtowane są przez warunki kulturowe i płeć. Moje główne założenie jest następujące: brak równości płci odbija się w sposobie interpretacji granic życia prywatnego sędziów i sędzi. Pod tym względem kobiety-sędzi mogą w większym stopniu niż ich koledzy po fachu płci męskiej mierzyć się z ograniczeniami dotyczącymi ubioru oraz tego, co mogą ogólnie w życiu robić i mówić. Ostatecznie interpretacja życia prywatnego, która narzuca role płciowe, ogranicza również swobodę wypowiedzi. W swoim opracowaniu podaję konkretne przykłady dotyczące stereotypów płciowych, które mają wpływ na to, co sędziowie i sędzi robią czy mówią w życiu prywatnym w różnych kulturach.

Słowa kluczowe: sędziowie i sędzi, życie prywatne, kultura, zachowanie sędziego, zasady etyczne, stereotypy płciowe.

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Introduction

When we examine the abstract principles of judicial conduct regarding judges, question mark arises concerning two issues. First question is over whether we could talk about 'judges' generally (regardless of gender in a culture) and the other question is to what extent the scope of the judges' freedom of expression depends on the context or the culture of a given society. The research question of this study is shaped by these two questions. This paper will focus on the problem whether the boundaries of the private lives of judges are drawn according to cultural conditions and gender issues. In this regard the topic of freedom of expression will be discussed in the context of private life – although these are specifically defined in the ECHR as two separate rights and sometimes potentially conflicting rights.⁴ However, occasionally some behaviours exhibited in private life, such as dress code is closely related to the freedom of expression in relation to the way a person expresses herself.⁵ Hereby, judges' freedom of expression in private life will be evaluated from a gender perspective in the context of specific cases.

Private Life of Judges: Is There a Valid Limitation in All Cases?

Carrie Menkel-Meadow in her work, highlights the 'classic issue'⁶ with the question of 'to what extent must legal professionals be judged by different standards than those applied to other professionals?'⁷ In terms of judges, this question points to a 'known' answer: there are some restrictions on the private lives of judges. Whether a judge is Polish or Turkish, she is the subject of these restrictions due to the nature of the profession. These restrictions are stressed in national principles of judicial

⁴ D. Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights: A Handbook for Legal Practitioners*, 2007, p. 11, <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> (access: 10.05.2022).

⁵ S. İnceoğlu, *Yargı Bağımsızlığı ve Yargıya Güven Ekseninde Yargıcın Davranış İlkeleri*, İstanbul 2008, p. 250.

⁶ C. Menkel-Meadow, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, "Pace Law Review" 2001, 21(2), p. 369, footnote 23.

⁷ *Ibidem*, p. 369.

conduct⁸ as well as universal judicial principles.⁹ For instance, the Commentary on The Bangalore Principles of Judicial Conduct highlights that ‘A judge must maintain high standards in private as well as public life.’¹⁰ However, there is an *unknown* aspect of this *known* issue, which is related to how these borders are culturally reshaped especially in the context of gender. Does the expression of ‘judge’ in universal regulations cover all judges in Turkey, the United States or Poland equally? Or do cultural or gender differences allow for different interpretations of behaviour targeted by regulations?

In fact, the most correct answer to such a question can be given by examining the cases of disciplinary punishments or ethical judgements of judges from different cultures and making a comparison between them. Although it is rightly stated that such a comparison would be difficult due to ‘the different legal traditions; national characteristics, and different legal concepts and terminology.’¹¹ While I have not come across any empirical research directly based on this question yet, it is possible and important to draw attention to few questions that can form the basis of prospective studies. In this regard, I will concretise my discussion regarding gender stereotypes which has reflections on the legal culture and influences on what judges do or say in their private life in different cultures. Accordingly, it is essential to look at the judicial principles related to the private life of judges.

When we examine the Bangalore Principles of Judicial Conduct and its Commentary, we see that the highlights about the private life can mostly be found under the value of ‘propriety’¹²:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge

4.1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.

⁸ For instance, in Turkey, the Court of Cassation Code of Judicial Conduct was adopted in 2017, where some reflections on private life can be seen within the principles of integrity or propriety. See the Judicial Conduct: https://www.yargitay.gov.tr/documents/CoC_CodesofConduct.pdf (access: 10.05.2022).

⁹ This article will be based on international regulations, especially Bangalore Principles of Judicial Conduct (2002) and its Commentary. See the principles on https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (access: 10.05.2022) and Commentary on The Bangalore Principles of Judicial Conduct: https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf (access: 10.05.2022).

¹⁰ Commentary, paragraph 103.

¹¹ U. Schultz, *Introduction: Women in the World’s Legal Professions: Overview and Synthesis*, [in:] U. Schultz, G. Shaw (eds.), *Women in the World’s Legal Professions*, Hart Publishing 2003, p. xxviii.

¹² Bangalore Principles, Value 4.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

As noted, restrictions on what judges do or say in their private lives are due to the nature of the profession. The Commentary, which was prepared to guide 'the cross-cultural consultation process' of the Bangalore Principles,¹³ covers this issue further. It states that 'community standards should ordinarily be respected in private life.'¹⁴ This reference to community standards raises further questions such as whether these restrictions differ from community to community. The Commentary has an effort to clarify this problem as follows:

There is no uniform community standard. In view of cultural diversity and the constant evolution in moral values, the standards applying to a judge's private life cannot be laid down too precisely. This principle, however, should not be interpreted so broadly as to censure or penalize a judge for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community. Judgments on such matters are closely connected to the society and times in question and few can be applied universally.¹⁵

In other words, the Commentary states that due to the cultural diversity, there is no uniform and definite community standards, for this reason it is not easy to achieve universal criteria regarding the restrictions of judges' private lives. Regarding this issue, the Commentary itself presents interesting examples in respect of sexual activities. In some countries (like the Philippines), extra-marital sexual activities resulted in dismissal from judiciary, whereas in other countries (such as the USA) these activities resulted in lighter disciplinary punishments or even with no disciplinary punishments.¹⁶ However, even in the United States itself, different punish-

¹³ '... such a commentary or guide would enable judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the Bangalore Principles and the rationale for the values and principles incorporated in it, but would also facilitate a wider understanding of the applicability of those values and principles to issues, situations and problems that might arise or emerge' (Commentary, p. 17).

¹⁴ Ibidem, paragraph 104.

¹⁵ Ibidem, paragraph 105.

¹⁶ Ibidem, paragraph 105, footnote 48.

ments were given for similar activities in different states.¹⁷ That is to say, sometimes there is a diversity within the same state as well which can also create uncertainty.

However, the Commentary offers more detailed explanations to clear up some other uncertainties. It presents an 'alternative test' in order to avoid 'arbitrary and capricious imposition of narrow morality.'¹⁸ The test states six factors that should be considered in making a judgment on such a matter:

- (a) The public or private nature of the act and specifically whether it is contrary to a law that is actually enforced;
- (b) The extent to which the conduct is protected as an individual right;
- (c) The degree of discretion and prudence exercised by the judge;
- (d) Whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;
- (e) The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates;
- (f) The degree to which the conduct is indicative of bias, prejudice, or improper influence.

It is alleged that these factors would be of use to find a balance between the expectations of public and the rights of judges.¹⁹ However, considering the breadth of the spectrum regarding the limits of private life in different examples, I think that this 'balance' can be very unbalanced in general, and sometimes unequal in terms of gender. I will elaborate this statement with specific examples. The cases I will focus on will be from different states with diverse cultural and gender contexts.

Legal Culture and Gender Roles in Terms of Judges' Private Lives

The relationship of culture and law can be explained in various ways depending on the different definitions of both concepts. I will target what Roger Cotterrell describes as 'law's dependence on culture' when he addresses the notion of legal culture and its use in comparative law.²⁰ My main assumption is that it is not realistic to consider the discriminatory attitudes that permeate any legal culture

¹⁷ Ibidem.

¹⁸ Ibidem, paragraph 106.

¹⁹ Ibidem, p. 82.

²⁰ R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Aldershot 2006, p. 98.

independently of the dominant culture in which the law in question takes place. In this direction, lay people and legal actors themselves get their share from the unequal norms in the dominant culture. In this sense, both external and internal legal cultures²¹ are affected from the gender norms found in one culture.

Accordingly, discrimination against gender in the dominant culture influences the restrictions on what judges do or how they express themselves in their private lives as well. Under the title of 'judges', it is impossible to make generalisations on this issue. Because we know that there are judges, who reveal information about their homosexuality or surrogacy or being HIV positive²² without any threat to their jobs, but there are also judges who lose their seats because of their short skirts or make-up.²³ I want to present several examples to support this remark. The examples I will use are concerning how the boundaries of judges' private life in different countries are interpreted broadly or narrowly according to the perception of gender.

For instance, in the USA,²⁴ the UK²⁵ or Germany²⁶ there are judges who has changed their gender medically and legally and continued their professions without any practical problems. In Germany, the former judge of the Federal Court of Justice Johanna Schmidt-Räntsch after she had undergone gender reassignment, she sent a letter to her colleagues explaining her transition.²⁷ She expresses her feelings regarding her experience as follows:

It was a terrible feeling the first time I went in dressed as a woman. I went by train to my court... I was very anxious. I didn't sleep the night before. But nothing happened. Absolutely nothing. People... didn't react in any way.²⁸

²¹ Lawrence Friedman uses these terms to describe the concept of legal culture. He claims that 'the external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks' (L.M. Friedman, *The Legal System: A Social Science Perspective*, New York 1975, p. 223).

²² M. Thornton, H. Roberts, *Women Judges, Private Lives: (In)Visibilities in Fact and Fiction*, "University of New South Wales Law Journal" 2017, 40(2), p. 764.

²³ See: Özpinar v. Turkey, Appl. No. 20999/04.

²⁴ *Judge Victoria Kolakowski*, <https://www.cppr.in/wp-content/uploads/2017/06/Judge-Victoria-Kolakowski-Bio.pdf> (access: 20.05.2022).

²⁵ *Victoria McCloud, a transgender judge, wants a more diverse judiciary*, <https://www.thetimes.co.uk/article/victoria-mccloud-a-transgender-judge-wants-a-more-diverse-judiciary-jc7rqhbc9> (access: 20.05.2022).

²⁶ *Lessons to be learnt from German experience with gender recognition*, <https://www.irishtimes.com/news/crime-and-law/lessons-to-be-learnt-from-german-experience-with-gender-recognition-1.2103022> (access: 20.05.2022).

²⁷ There are claims that men's homosexuality is welcomed, while lesbian judges feel that they should leave the bench (M. Thornton, H. Roberts, op. cit., p. 765.)

²⁸ *Lessons to be learnt from German experience...*

People did not react because – as far as we read from her story – they thought that changing gender was a private matter like changing the family surname. Is gender reassignment of a judge really ‘a private matter’ or does it affect the judge’s professional life negatively? If we evaluate it in the light of ‘alternative test’ stated in the Commentary, the first issues we will consider are ‘the public or private nature of the act and whether it is contrary to a law’ and ‘the extent to which the conduct is protected as an individual right.’ Gender reassignment is a lawful act under German law,²⁹ and it is a protected individual right which apparently has a private nature. When the act accords with the first two steps, I suppose the answers for the rest of the alternative test is predictable.

However, the same provisions of the test could have been interpreted differently if hypothetically similar event took place in Turkey. I predict such a statement with *a fortiori* analysis, by looking at the attitudes towards ordinary transgender people in Turkish society,³⁰ although gender reassignment is a protected individual right under Turkish law.³¹ While there are violations of the private lives of lay people, the issue is even more troubling for the judges, whose private life should be even more limited. Two popular examples addressing judges’ private life and gender in Turkey can be used to support these assumptions. The first case is about a woman judge trainee, the second case, which is a well-known case that also came in front of the ECHR, is about a woman judge.

In August 2013, a woman Turkish judge trainee, Didem Yaylalı, has committed suicide. Yaylalı was a successful candidate for a judge but faced disciplinary investigation for not fully participating in the internship despite her medical report. Although she finished her internship and had the right to be accepted to the profession, she was rejected. The rumours about what she did or how she behaved in her private life were behind the rejection. The most prominent of these were that she wore tight trousers and she drank alcohol. The Council of Judges and Prose-

²⁹ For more information about the legal recognition of sex categories and transgender in Germany see: J. Schmidt-Rantsch, *Transgender Recognition in Germany: The Role of the German Courts*, “University College Dublin Law Review” 2015, 15, pp. 1–16; P. Dunne, J. Mulder, *Beyond the Binary: Towards the Third Sex Category in Germany*, “German Law Journal” 2018, 19(3), pp. 627–648.

³⁰ Although there are many studies in the literature on the subject, the following articles can be viewed in order to have an overview: R. Turmen, *LGBT Rights: A Struggle for Democracy and Freedom*, “Ankara Bar Review” 2014, 7(1), pp. 11–20; M. McClain, O. Waite-Wright, *The LGBT Community in Turkey: Discrimination, Violence, and the Struggle for Equality*, “Creighton International and Comparative Law Journal” 2016, 7(1), pp. 152–181; E. Taşcıoğlu, *States of Exception: Legal Governance of Trans Women in Urban Turkey*, “Social & Legal Studies” 2021, 30(3), pp. 384–404.

³¹ Article 40 of the Turkish Civil Law (No. 4721, 2001) recognises gender identity reassignment and sets the rules for the procedure. For an evaluation of the current situation in the light of recent court decisions, see: U. Sunata, A. Makaraci Basak, S. Oktem Cevik, *Legal Gender Recognition in Turkey*, “International Journal of Discrimination and the Law” 2022, 22(1), pp. 56–73.

cutors in Turkey has rejected her entrance to profession by justification of the Bangalore Principles.³² She could not handle the result and committed suicide. This case perfectly reflects the unequal interpretation of the issue of private life, which is equally regulated in abstract principles. Some authors call attention to the gendered compulsory training system where candidates are already stressed by 'moral pressures as they are expected to live in a way that is appropriate for being a judge.'³³ Therefore, the pressure on judges' private lives in the context of gender inequality is just beginning before they officially started the profession. Women judges highlight similar points in empirical research on judges in Turkey. A judge, who claims that they rely on masculine codes when entering the profession and throughout their professional life states as follows:

Female candidates became judges or public prosecutors, but they became judges and prosecutors in line with the male point of view. In other words, all the rules – how long her skirt length should be, how she should make her hair or what her make-up should look like (when taking the professional oral exam) were determined according to what men wanted.³⁴

The second example is about a Turkish woman judge, Arzu Özpınar, who brought her dismissal decision in front of the ECHR.³⁵ Özpınar was a judge in a small town of Turkey where one day an investigation was initiated against her with a complaint petition given by 'a group of patriotic police.' While the alleged accusations were varied, the prominent ones included her social relations with married lawyers (while she was not married), wearing short skirts and wearing make-up that was allegedly not suitable for judges.³⁶ Most of the allegations were not based on concrete evidence and they obviously target what she did in her private life. Even more embarrassing, Özpınar maintained that the investigator was not impartial, with a newly dated virginity report she received following the notification of the dismissal decision.³⁷ Therefore, even an issue such as virginity, which was obviously related to private life, was brought before the court. However, the same pressure is in question for male judges. It is claimed that the Council of

³² L. Köksal, *Didem Yaylalı Neden Öldü?*, "Ankara Barosu Dergisi" 2015, 73(4), pp. 21–26.

³³ S. Kalem, *Being a Woman Judge in Turkish Judicial Culture*, "International Journal of the Legal Profession" 2019, p. 7.

³⁴ E. Balcı, *Hukuk Mesleklerinde Kadımlar*, Ankara 2018, p. 141.

³⁵ Özpınar v. Turkey, Appl. No. 20999/04.

³⁶ N. Kuyucu, *Muhafazakarlığın Hedefinde Bir Kadın Yargıç: AİHM'nin Özpınar Kararı*, "Ankara Barosu Dergisi" 2015, 4, pp. 294–295.

³⁷ *Ibidem*, p. 296.

Judges and Prosecutors gave a prosecutor only reprimand in the investigation launched after the revelation of hidden camera showing that he had an affair with a divorced woman.³⁸ In this regard, the double standard in moral norms was also evident in matters pertaining to the private lives of judges.

The ECHR found that most of the behaviours examined were not related to her professional life, that the allegations regarding her professional activities could not be proven, that the witness statements presented as the only evidence and that damaged her dignity and decided that Article 8 had been violated.³⁹ Although she won the case and returned the profession, this case itself shows how a single woman judge have felt the pressure to meet the 'community's average value judgements' in her private life.

Consequently, considering the alternative test regarding these two cases, we apparently see that wearing tight trousers, short skirts, or make-ups, were somehow related to the professional life and the 'arbitrary and changeable burden of narrow morality' (stated in the Commentary) could not be avoided. In this regard, the sexist element in the culture is reflected to the legal culture, which caused a narrower interpretation of the private life of female judges.

Studies show that women judge around the world have the same worry: they feel uneasy about how to dress, and they prefer a style of dressing that hides their femininity as much as possible.⁴⁰ Similar remarks have been made in the context of different countries. For instance, in Brazil, especially in small towns, it is stated that moral and behavioural norms for judges differ according to their sexes:

While it is accepted that men, even married men, have lovers, which is regarded as 'natural', women are required to lead a celibate life. So women judges are expected to become "asexual beings" by dressing austerely.⁴¹

This example also underlines a similar point: the double standard in a culture can draw the boundaries of the private life of judges differently according to gender.

³⁸ Ibidem, p. 297.

³⁹ Özpınar v. Turkey.

⁴⁰ A. Shen, *Women Judges in Contemporary China Gender, Judging and Living*, Palgrave MacMillan 2017, p. 196.

⁴¹ E. Botelho Junqueira, *Women in the Judiciary: A Perspective from Brazil*, [in:] U. Schultz, G. Shaw (eds.), *Women in the World's Legal Professions*, Hart Publishing 2003, p. 443, p. 450.

Conclusion

Based on the examples above regarding the private life of judges, it seems possible to make some assumptions in the context of gender and cultural differences. On the one hand, there is a high court judge who changed her gender, went to her court in a dress and continued her profession without any trouble; on the other hand, there is a judge intern who was not even accepted to the profession because she wore tights, or a single woman judge who was dismissed because of her dress, make-up or social relations with male colleagues. In the context of these examples that underline the important points, I will put forward the determinations regarding my research question that I mentioned at the beginning.

First of all, it is *known* that regardless of geography and nationality, *all judges* should be mindful of what they do or how they behave in their private lives. Abstract ethical principles (national or universal) also highlight this issue. Yet, as the Commentary also remarks, these limitations may sometimes differ from culture to culture. However, the problem remains when the cultural values are unequally reflected on these limitations. In particular, if the wider cultural context is much more restrictive for women, gender-based societal norms and expectations will also be reflected in their professional lives.⁴² Regarding this, some authors state that public-private spheres ideology plays for the judges' private lives again:

For women judges, there is always a danger that advertence to their private lives may reinforce their 'otherness' in legal spaces where they are expected to suppress all characteristics associated with the feminine.⁴³

The way they express their femininity through clothing or make-up (as seen in Turkish examples) is in a sense suppressed. Not only matters related to their bodies, but also their social relations and attitudes in these relations are interpreted more restrictive than male judges. Confirming this statement, Seda Kalem highlights that 'when it comes to women judges, the required isolation of the profession cannot solely be understood in reference to impartiality; but the context of gendered cultural codes and values that supersede professional authority.'⁴⁴

Finally, if we consider again the question of whether the boundaries of private life of judges are shaped according to cultural conditions: yes, it does. And some examples of women in Turkish judicial culture show that starting with their training,

⁴² S. Kalem, op. cit., pp. 7, 15.

⁴³ M. Thornton, H. Roberts, op. cit., p. 769.

⁴⁴ S. Kalem, op. cit., p. 14.

gender appears as a pattern maker in their private and professional life.⁴⁵ Actually, the line of private and professional life itself is very imperceptible for female judges, and accordingly, they may face more restrictions than their male colleagues in what they wear, what they do and what they say in their lives generally. And ultimately, an interpretation of private life that reinforces gender roles also limits the freedom of expression. In this sense, judges' freedom of expression and its relevance to private life should be interpreted without ignoring the gender inequality in a culture.

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⁴⁵ Ibidem, p. 20.

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