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**Same-Sex Adultery as a Ground for Divorce**

Bir Boşanma Nedeni Olarak Aynı Cinsiyetten Kişilerin Zinası

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**ABSTRACT**

Discrimination against individuals with different orientations occurs when courts adopt a perspective that implies that those who do not identify as heterosexual are abnormal. Since marriage is viewed as a heterosexual legal relationship by the Turkish courts, heteronormative dynamics dominate divorce proceedings. Protecting or supporting same-sex relationships has never been the goal of Turkish courts. Nonetheless, court rulings constitute a form of rights violation, given that discrimination is forbidden under Turkish law and can lead to compensation claims. Adultery is only one of the few contexts in which same-sex unions in Turkish jurisprudence. Turkish courts recognize that reformist rulings on adultery do not necessarily permit or endorse same-sex unions. Despite Türkiye being a secular state, the religious values held by a significant percentage of the population cannot be disregarded when it comes to the judicial system. Courts, however,

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believe that they would be acknowledging the possibility of same-sex relationships if they recognized same-sex adultery. On the other hand, due to concerns about compensation claims, courts are beginning to adopt supposedly equal positions even in cases where they are sincerely unable to approve same-sex unions. This has led to inconsistent rulings, as some courts shift their approach case by case to avoid the accusation of discrimination, causing legal ambiguities.

**Key Words:** Discrimination, Family Law, Divorce, Gender Equality, Adultery.

## ÖZ

Farklı yönelimlere sahip bireylere karşı ayrımcılık, mahkemelerin kendilerini heteroseksüel olarak tanımlamayanların normal olmadığı yönünde bir bakış açısını benimsemişle ortaya çıkar. Türk mahkemeleri için evlilik, heteroseksüel bir hukuki ilişkidir. Bu nedenle boşanma sürecini de heteronormatif dinamikler yönetir. Eşcinsel ilişkileri korumak veya bu tür ilişkileri desteklemek hiçbir zaman Türk mahkemelerinin ya da hakimlerinin hedefi olmamıştır; ancak cinsiyet ayrımcılığının hukuki mevzuat tarafından aleni bir biçimde yasaklanması mevcut mahkeme kararlarının bireysel tazminat taleplerine neden olmasına yol açmıştır. Bir boşanma nedeni olarak zina, aynı cinsiyetten birlikteliklerin Türk yargısındaki yansımalarından yalnızca bir tanesidir. Türk mahkemeleri, zina kavramının geniş yorumlanmasının doğrudan eşcinsel birlikteliklere izin verilmesi anlamına gelmediğini bilir. Zira Türkiye laik bir devlet olmasına rağmen yargı sisteminin idaresi söz konusu olduğunda, nüfusun önemli bir kısmının benimsediği dini kurallar göz ardı edilmez. Bununla birlikte günümüzde mahkemeler, eşcinsel zinaya izin verdikleri takdirde hukuki düzlemde eşcinsel ilişki olasılığını kabul etmiş olmaksızın rahatsızlık duymalarına rağmen, tazminat yaptırımları nedeniyle sözde eşit pozisyonlar benimsemeye ve bakış açılarını değiştirmeye zorlanırlar.

**Anahtar Kelimeler:** Ayrımcılık, Aile Hukuku, Boşanma, Cinsiyet Eşitliği, Zina.

## INTRODUCTION

Nowadays, two fundamental questions seem unsolvable in the legal system. The first question is whether the homosexual relationship between a married person and another constitutes adultery within the scope of the Turkish Civil Code nr. 4721. The second question is what the definition of sexual intercourse is. There isn't much complexity to why these questions have been classified as unsolvable. The ground is that the Turkish courts are unwilling to acknowledge same-sex partnerships as having a legal status. So then, where does the dilemma mentioned in the title of this study arise from, and what is the solution?

The Court of Cassation's historical decision of "Giving custody of a daughter to a woman who has a habit of homosexuality disease may jeopardize her future." is an indicator of understanding the point of view of the courts.<sup>1</sup> On the other hand, the sociological, non-religious, and cultural character of the new and young Turkish society, the international treaties to which it is a party, and the desire to have a modern legal system all work against the Turkish courts' willingness to deny homosexual relationships on a legal basis.<sup>2</sup> In other words, Turkish courts are unable to forbid homosexual relationships explicitly, but they also cannot publicly endorse them.

In this light, Part II of this article presents the general understanding of adultery under Turkish law. This part summarizes the act's criminal and civil aspects by analyzing the historical ground. Part III discusses the definition of adultery by looking at its fundamental elements in the 4721 nr. Civil Code. Part IV analyzes the dilemmas that the courts and doctrine create. Finally, the conclusion offers suggestions for changing the courts' perspective.

## I. GENERAL VIEW OF ADULTERY IN TURKISH LAW

In Turkish law, adultery has been addressed both in criminal and civil law. As adultery has historically been considered a criminal offense under the criminal law, it is recognized as a ground for divorce. Therefore, although the subject of this study is adultery as a ground for divorce, it would be appropriate to briefly mention the effect of adultery as a criminal act on the mentality of Turkish law. In this respect, it would be helpful to briefly discuss the legal basis of adultery as a criminal act before discussing the dilemma raised by this act in civil law.

### A. As a Criminal Act

Since the Code of Hammurabi, adultery has been regulated as an unfair act.<sup>3</sup> However, there was an obscure line between tort and crime in the

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1 Yarg. 2. HD., E. 1982/5077, K. 1982/5531, 21.06.1982, <https://karararama.yargitay.gov.tr/> (Last Seen: 15.03.2024).

2 Barış **Erdoğan**/Esra **Köten**, "Yeni Toplumsal Hareketlerin Sınıf Dinamiği: Türkiye LGBT Hareketi", Marmara Üniversitesi Siyasal Bilimler Dergisi, Vol. 2, Iss. 1, 2014, p. 107; See <https://www.indyrturk.com/node/457061/haber/26-ilde-18-ya%C5%9Fve-%C3%BCzeri-2-bin-200-ki%C5%9Fi-ile-lgbt-hakk%C4%B1nda-g%C3%B6r%C3%BC%C5%9F%C3%BCld%C3%BC> (Last Seen: 15.03.2024).

3 Daniel E. **Murray**, "Ancient Laws on Adultery - A Synopsis", Journal of Family Law, Vol. 1, Iss. 1, 1961, p. 91-92.

past.<sup>4</sup> So, the act of adultery, which should have constituted a tort, was criminalized in many legal systems.<sup>5</sup> This act, which should have been subject to compensation or monetary sanctions, was subject to criminal punishment.

Adultery has been punished as a crime for quite some time in Türkiye.<sup>6</sup> According to the community's common understanding at that period, adultery was a grave offense. It was accepted as an act that degraded morality and ruined the family union, which is the headstone of society.<sup>7</sup> Additionally, it was acknowledged that this act caused the aggrieved party to desire revenge and hatred.<sup>8</sup>

According to the former Turkish Criminal Code nr. 765 Article 440, the woman who commits adultery will be punished. The one who acknowledges that the woman is married will be punished with the same sentence. However, according to Article 441, the husband will be punished only if he commits the act of adultery with a woman who is not married and if he commits it in the matrimonial home. This regulation indicates that the adultery of husband and wife was not subjected to the same conditions.<sup>9</sup> Therefore, first, the Constitutional Court of Türkiye abolished

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4 Murray, p. 89.

5 Even in some legal systems, adulterous acts have caused limitations on remarriage. See Mark **Strasser**, "Sodomy, Adultery, and Same Sex Marriage: On Legal Analysis and Fundamental Interests", *UCLA Women's Law Journal*, Vol. 2, Iss. 8, 1998, p. 326-329; Peter **Nicolas**, "The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct", *Florida Law Review*, Vol. 1, Iss. 63, 2011, p. 100; Ted N. **Echols**, "Decriminalizing Adultery: An Unanticipated Step in Restoring the Value of Marriage", *Liberty University Law Review*, Vol. 16, Iss. 2, 2022, p. 203-206.

6 Adultery as a criminal act has a legal basis from the Ottoman Empire for dishonoring the husband. Cem **Doğan**, "Bounds of Passion: Adultery, Gender and Modernization of Penal Practices in Ottoman Society from the Classical Age to 1915", *Mavi Atlas*, Vol. 1, Iss. 9, 2021, p. 44-52.

7 In fact, the act of adultery was regulated under the heading of crimes against family order.

8 See Faruk **Erem**, "Zina", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 1-2, Iss. XVIII, 1961, p. 126; Sulhi **Dönmezer**, "Zina Cürmü", *Adalet Dergisi*, Vol. 7, Iss. 41, 1956, p. 861-862; Özge **Yücel**, *Boşanma Hukukunda Kusur İlkesinden Kusurdan Bağımsızlığa Geçiş*, Seçkin, Ankara 2023, p. 67; Berkcan **Bekem**, *Boşanma Sebebi Olarak Zina (Tmk M.161)*, Seçkin, Ankara 2023, p. 55; Oğuz **Ersöz**, *Türk Hukukunda Zina Sebebiyle Boşanma*, *On İki Levha*, İstanbul 2018, p. 29; Namık **Yalçınkaya**/**Şakir Kaleli**, *Boşanma Hukuku*, Türk Hava Kurumu Basımevi, Ankara 1987, p. 604-605.

9 Distinctive legal provisions for men and women were often found in the abolished

Article 441 because it violated the principle of equality.<sup>10</sup> Then, the regulation regarding wife's adultery, article 440, was abolished by the Constitutional Court of Türkiye due to the same ground.<sup>11</sup>

The Constitutional Court decided that *“The husband must meet some requirements that are not necessary for the wife's adultery to be considered adultery, and these requirements represent that the husband has a legal prevalence over the wife. There's no reason to give the spouse this kind of dominance in the marriage. Since loyalty is a mutual obligation for both husband and wife. Therefore, not punishing the husband's simple adultery gives him a privilege over the wife that is incompatible with modern understanding and violates the equality of men and women, which rejects gender discrimination.”*<sup>12</sup> So, as it's seen, the justification for the decriminalization of adultery didn't depend on the discussion of whether the act of adultery was criminal or not. The act of adultery was annulled because it was contrary to the gender-equality.

On the other hand, many legal systems classify adultery as an act that can committed only by a woman. Or, if the act is committed by a man, lighter penalties and less compensation are regulated.<sup>13</sup> This is because, in

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laws. This is because, before legal modernization, there was no doubt about the effect of Islam on the laws. For example, the Former Turkish Civil Code Nr. 743 Article 152 stipulated that the husband was the head of the household. Thus, in a marital dispute, the husband's vote was considered superior to the wife's. Article 153 has stated that the wife must take care of the house. Again, women's employment was subject to the man's permission, according to Article 159. However, these provisions were abolished with the adaptation of the law to the equality of women and men. Nowadays, it can be argued that the fact that women and men are equal, at least in theory, suggests that homosexual partnership equality may also be possible. See the Former Civil Code nr. 743, <https://www.lexpera.com.tr/mevzuat/kanunlar/turk-kanunu-medenisi-743> (Last Seen: 15.03.2024).

10 Constitutional Court of Türkiye, E. 1996/15, K. 1996/34, 23/09/1996; for the full text <https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/1996-34-nrm.pdf> (Last Seen: 15.03.2024).

11 Constitutional Court of Türkiye, E. 1998/3, K. 1998/28, 23/6/1998; for the full text <https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/1998-28-nrm.pdf> (Last Seen: 15.03.2024).

12 Constitutional Court of Türkiye, E. 1996/15, K. 1996/34, 23/09/1996; for the full text <https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/1996-34-nrm.pdf> (Last Seen: 15.03.2024).

13 As an example of the double standard, under the 1857 Matrimonial Causes Act, to punish the husband for adultery, there should also be a marital crime such as physical violence. Hannah **Charnock**, “A Million Bonds’: Infidelity, Divorce and the Emotional Worlds of Marriage in British Women's Magazines of the 1930s”, *Cultural and Social History*, Vol. 14, Iss. 3, 2017, p. 368.

the past “*the women were not regarded as equals and were considered more in the nature of a property right.*”<sup>14</sup> By virtue of this quote, when considering adultery as an act of criminal law, it is not possible to state that gender equality is ensured. Although this issue will not be examined here since it is outside the scope of this study, it should be noted that the subjects are different, and the discrimination is transfigured, but it still exists.

Regardless, the decriminalization of adultery was an improvement in criminal laws. When one of the partners has been unfaithful, the only option available to repair the fractured family unit is a divorce.<sup>15</sup> So, rather than criminalizing adultery, it would be more acceptable to apply civil law sanctions to the act.<sup>16</sup> On the other hand, the critical fact regarding adultery as a criminal act is that the basis for the criminalization of adultery has been sexual intercourse, not the feelings of one party for the other.<sup>17</sup> Due to this approach, adultery has been regulated under divorce law with the false belief that sexual intercourse is required.<sup>18</sup>

## B. As a Ground for Divorce

According to the Turkish Civil Code nr. 4721, the grounds for divorce are categorized under two different headings: general and special. The type of divorce grounds matter, particularly regarding the burden of proof and material consequences.<sup>19</sup> Articles 161-165 of the Turkish Civil Code define special divorce grounds which are adultery, attempt against life, abominable or degrading treatment, committing a crime, leading a dishonorable life, desertion, and mental illness. As it's seen, the special grounds for divorce are listed individually in the code.

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14 **Murray**, p. 104. As it's seen not only in the Islamic states but also in the states which are in effect of another religion, the discrimination between men and women existed regarding adultery.

15 **Dönmezer**, p. 862.

16 **Erem**, p. 129.

17 **Erem**, p. 126.

18 See for the similar approach of courts **Nicolas**, p. 117.

19 The Swiss Civil Code provides a blueprint for Turkish family law regulations. Nevertheless, the “*no-fault*” basis of the Swiss Civil Code permits divorces without blaming one spouse over the other, contrary to Turkish regulations. Ingeborg **Schwenzer**/Tomie **Keller**, “Recent Developments in Swiss Family Law”, Public and Private International Law Bulletin, Vol. 1, Iss. 35, 2015, p. 8.

Even though adultery was decriminalized, the act stands as a special divorce ground to protect the social order.<sup>20</sup> In this regard, Article 161 of the Turkish Civil Code nr. 4721 states that *“If one of the spouses commits adultery, the other spouse can file a lawsuit for divorce. The right to sue shall cease within six months as of the date when the spouse with a right to sue learns about the cause of divorce and within five years as of the commencement of the act of adultery under any circumstances.”*

This article creates seemingly no gender-based discrimination, while there was no egalitarian regulation in criminal law. On the other hand, the absence of a legal definition regarding adultery, according to this article, causes legal inconsistencies regarding determining adultery. Therefore, the Turkish Civil Code nr. 4721 has a gap wherein the definition of adultery is absent, which is why the courts’ definition of this term matters. Due to this gap, the definition and elements of adultery shall have been made by doctrine and courts.

## II. THE DEFINITION OF ADULTERY

The widespread dictionary meaning of adultery is *“sex between a married person and somebody who is not their husband or wife.”*<sup>21</sup> This definition leaves open what is meant by “sex” and “somebody.” However, courts have reached a consensus regarding that “sex” means sexual intercourse, and “somebody” means a member of the opposite gender.<sup>22</sup>

According to Article 161 of the Turkish Civil Code, *“If one of the spouses commits adultery, the other spouse can file a lawsuit for divorce.”* As it is obvious, neither there a legal definition of the term adultery nor the elements which are the opposite party and sexual act. So, while deciding, the court shall interpret this term and its elements.

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20 Zafer **Zeytin**/Ömer **Ergün**, Türk Medeni Hukuku, 6. Edition, Seçkin, Ankara 2022, p. 203; The most significant marriage requirement is the obligation of fidelity, which adultery violates. Due to this, it is regarded by the law as the most severe cause for divorce. Mehmet **Erдем**/Aslı **Makaracı Başak**, Aile Hukuku, Seçkin, Ankara 2022, p. 103-104; Ömer Uğur **Gençcan**, Boşanma Hukuku 1. Cilt, 12. Edition, Yetkin, Ankara 2023, p. 159; Harun **Bulut**, Aile Hukukunda Boşanma Davaları ve Yabancı Unsurlu Davalar, Beta, İstanbul 2007, p. 5.

21 See for the definition: <https://www.oxfordlearnersdictionaries.com/definition/english/adultery?q=adultery> (Last Seen: 15.03.2024).

22 Bethany **Catron**, “If You Don’t Think This Is Adultery Go Ask Your Spouse: The New Hampshire Supreme Court’s Fault Interpretation of Adultery in Inre Blanchflower, 834 A.2d 1010 (2003)-Grounds for a Fault Based Divorce”, University of Dayton Law Review, Vol. 3, Iss. 30, 2005, p. 345.

In this scope, according to Turkish courts, adultery is generally defined as sexual intercourse between one of the spouses and a member of the opposite sex during the marriage.<sup>23</sup> Thus, first, there needs to be a marriage union; second, sexual intercourse needs to occur; and third, there needs to be a person of the other sex to discuss adultery in this context.

### A. Marriage Union

Adultery is an act that can only be committed by a spouse; therefore, speaking of adultery, there must be a marriage union. Regarding marriage as an element of adultery, there isn't any discussion. According to Article 185 of the Turkish Civil Code nr. 4721 "*Marriage establishes a union between spouses.*"<sup>24</sup> So, this union can only be established between a man and a woman. In other words, same-sex people are not allowed to marry according to Turkish law.<sup>25</sup>

### B. Sexual Intercourse

Sexual intercourse is "*sexual activity involving the insertion and thrusting of the male penis inside the female vagina for sexual pleasure,*

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23 İsmail **Dede**, "Türk Boşanma Hukukuna Farklı Bir Yaklaşım: Zina ve Haysiyetsiz Hayat Sürme Arasındaki Keskin Sınır", Marmara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 3, Iss. 23, 2017, p. 650; Turgut **Aküntürk**/Derya **Ateş**, Türk Medeni Hukuku Aile Hukuku İkinci Cilt, 22. Edition, Beta, İstanbul 2020, p. 244.

24 According to Article 2 (f) of the Marriage Regulation, marriage is a civil law agreement signed by a man and a woman in front of a duly authorized official to start a family.

25 Legal marriages of homosexual couples are not valid in Türkiye. Therefore, a divorce case cannot be filed on the grounds of adultery. Elif Nurbanu **Or**, Boşanma Davaları, 2. Edition, Adalet, Ankara 2022, p. 7; Candan **Yasan**, Milletlerarası Özel Hukukta Aynı Cinsiyetten Kişilerin Birliktelikleri, On İki Levha, İstanbul 2013, p. 72-74; Esen **Aydın**, "Maddi Hukuk ve Milletlerarası Özel Hukuk Açısından Eşcinsel Evliliklerin Değerlendirilmesi", Milletlerarası Aile ve Çocuk Hukukuna İlişkin Seçilmiş Makaleler, Beta, İstanbul 2017, p. 111; Metin **İkizler**/Özlem **Tüzüner**, Medeni Hukuk-II Aile Hukuku, Adalet, Ankara 2023, p. 95; On the other hand, the idea that marriage can only take place between a man and a woman has begun to fade. **Bekem**, p. 99; Kazım Sedat **Sirmen**, "Eş Cinsel Birliktelikler ve Bunların Kanunlar İhtilâfi Hukukunda Düzenlenişi", Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 58, Iss. 4, 2009, p. 856.



reproduction, or both.”<sup>26</sup> Yet, “the sexual conduct denoted by the unnatural act<sup>27</sup> was classified as distinct from penetration of a vagina by a penis that as required to prove adultery.”<sup>28</sup> The definition of this term, sexual intercourse, can refer to any penetrating or non-penetrating sexual activity that takes place between two or more persons.<sup>29</sup>

When it comes to sexual intercourse, there are exciting court decisions all over the world. For example, In the *Re Blanchflower*<sup>30</sup> case, the court concluded that an act does not constitute adultery if there is not an actual penis inside the vagina.<sup>31</sup> On the other hand, when LGBTQ+ people are becoming more publicly recognized, the different sexual intercourse types are becoming visible.<sup>32</sup> Regarding this matter, the Turkish doctrinal perspectives are not in agreement. Some say that sexual intercourse must take place<sup>33</sup>, while others interpret sexual intercourse from a broader perspective. And the viewpoint of Turkish courts is still conservative.

### C. The Opposite Sex

In today’s world, same-sex relationships are becoming one of the primary focuses of social life. Even with the acceptance of the queer theory, same-sex families have begun to be recognized in the legal systems.<sup>34</sup> Even though we live in a time of heteronormative dynamics, homosexual relationships have been known since the Hellenistic era. It is well known

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- 26 Irving. B. **Weiner**/Edward W. **Craighead**, *The Corsini Encyclopedia of Psychology* (Volume 4), John Wiley& Sons, 2003, p. 1577.
- 27 “Before the rise of modern scientific knowledges, law governed sexuality as a set of acts, mainly distinguishing ‘unnatural’ from ‘natural’ acts. Many law codes still contain prohibitions against sodomy and other ‘unnatural’ acts.” Mariana **Valverde**, “A New Entity in the History of Sexuality: The Respectable Same-Sex Couple”, *Feminist Studies*, Vol. 32, Iss. 1, 2006, p. 155.
- 28 Karen **Pearlston**, “Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the Divorce Act, 1968”, *Canadian Journal of Law and Society*, Vol. 1, Iss. 32, 2017, p. 40-41.
- 29 See for the definition: <https://www.merriam-webster.com/dictionary/sexual%20intercourse> (Last Seen: 15.03.2024).
- 30 *Blanchflower v. Blanchflower*, 150 N.H. 226 (2003), [https://en.wikipedia.org/wiki/Blanchflower\\_v.\\_Blanchflower](https://en.wikipedia.org/wiki/Blanchflower_v._Blanchflower) (Last Seen: 15.03.2024).
- 31 **Catron**, p. 339.
- 32 **Pearlston**, p. 39.
- 33 Mustafa **Dural**/Tufan **Öğüz**/Mustafa Alper **Gümüş**, *Türk Özel Hukuku Cilt III Aile Hukuku*, 14. Edition, Filiz, İstanbul 2021, p. 107; Bilge **Öztan**, *Aile Hukuku*, 6. Edition, Turhan, Ankara 2015, p. 647; **Dönmezer**, p. 864.
- 34 Yv E. **Nay**, “Die heterosexuelle Familie Als Norm”, *Sozial Extra*, Vol. 1, Iss. 6, 2019, p. 372.

that men in positions of power in society were attracted to younger men, particularly during that era.<sup>35</sup>

The prevailing opinion in the Turkish doctrine states that to speak of adultery, this act must have taken place between two persons of the opposite sex. In other words, adultery is an act that can only occur between two people of the opposite sex.<sup>36</sup> So, according to the prevailing opinion, if the spouse has sexual intercourse with a person of the same sex, adultery cannot be discussed here.<sup>37</sup> The question to ask is where the doctrine comes to this conclusion when there is no definition of adultery in the legislation. The reason for this understanding may be born from the idea that people of different sexes are not allowed to be married in Turkish legislation. Therefore, both the legislator and the doctrine associate the concept of sexual intercourse only with heterosexual relationships.

### III. THE DILEMMAS

The most intriguing question is where the dilemmas mentioned in the title of this study arise from. It is a must to state that things are not crystal clear in Turkish law. This is because of the cultural structure of the society, social and economic conditions, and the fact that Türkiye is a bridge between cultures and the new beliefs and lifestyles of the latest generation.<sup>38</sup>

It is well known that the Turkish legislature cannot pass laws entirely diverted from religious principles, despite the Republic of Türkiye's Constitution declaring it as a secular state.<sup>39</sup> On the other hand, the Kemalist

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35 David M. **Halperin**, "Is There a History of Sexuality?", *History and Theory Journal*, Vol. 3, Iss. 28, 1989, p. 265.

36 Andreas **Schwarz**, *Aile Hukuku I*, Çev. B. Davran, İsmail Akgün Matbaası, İstanbul 1946, p. 143; Serap **Helvacı**, *İsviçre ve Türk Hukuklarında Boşanma Sebepleri*, Beta, İstanbul 2002, p. 1157; **Dural/Öğüz/Gümüş**, 14. Edition, p. 106; **Öztan**, p. 645.

37 Hakkı Mert **Doğu**, "Eşin Aynı Cinsten Biriyle Yaşadığı Cinsel İlişkinin Bazı Boşanma Sebepleri Bakımından Değerlendirilmesi", *KTO Karatay Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 4, Iss. 1, 2019, p. 88.

38 "All societies and cultures regulate sexual activity among their members. Certain pairings are permissible, while others are not; some acts are permitted, while others are forbidden." **Doğan**, p. 43.

39 Article 2 of the Republic of Türkiye's Constitution states that "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble."

reforms, the sociological,<sup>40</sup> non-religious, and cultural character of the new Turkish society,<sup>41</sup> the international treaties to which it is a party<sup>42</sup>, and the desire to have a modern legal system all work against the Turkish parliament and the Courts' willingness to deny homosexual relationships on a legal basis.<sup>43</sup> Besides, although religion has an influence on the acceptance of adultery as a defective behavior, sexual fidelity is more often associated with the concept of morality.<sup>44</sup>

The Turkish legislature has refrained from enacting regulations that would cause indignation, especially in the majority of society. It has made these regulations with more rounded and ambiguous sentences, thus leaving the issue of defining these terms to the principles regarding international agreements or doctrine opinions. The legislator relies on the interpretation of the courts to avoid conflicts.

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- 40 Sociological or economic aspects of society have been grounds for court decisions for a long time. For example, according to a study regarding same-sex infidelity in postwar divorce courts in the USA, courts ruled against wives who had engaged in homosexual activities; on the other hand, when the husband engaged in a homosexual relationship, they treated men with more tolerance. Because society wishes to keep men in marriage, if a man becomes an ex-gay husband with a heavy alimony burden, he may never be able to marry again. Alison **Lefkowitz**, “The Peculiar Anomaly: Same-Sex Infidelity in Postwar Divorce Courts”, *Law and History Review*, Vol. 3, Iss. 33, 2015, p. 669.
- 41 Zeynep Özlem **Üskül Engin**, *Hukuk Sosyolojisi Açısından Türkiye’de Evlenmenin Evrimi*, Beşir, İstanbul 2008.
- 42 For example, many legal norms (the iddah, the women’s surname, the joint custody, etc.) violating the equality of women and men have been brought before the European Court of Human Rights, and Türkiye has been forced to amend and annul these norms, to pay for material and moral damages. Ünal Tekeli v. Turkey, 29865/96

### A. Determination of the Opposite Sex

The definition of sexual intercourse is a Gordian knot. According to the Turkish Official Dictionary, adultery is defined as sexual intercourse between people who are not related by marriage, and sexual intercourse is defined as the act of union between a male and female or individuals who have assumed these roles through their sexual organs.<sup>45</sup> Nonetheless, there are circumstances in which, even though the existence of sexual intercourse is unquestionable, the partner is from the same sex. So, this brings up a dilemma: the opposite sex.

According to article 40 of the Turkish Civil Code nr. 4721, “*Transsexual people feel themselves to be of the opposite sex, differently from their biological sexes, and they may be sterilized or not. Transsexual people who are naturally sterilized from birth or have been sterilized through surgery are allowed to undergo gender reassignment surgery.*” This article means that Turkish law accepts some people feel themselves to be of the opposite sex or sexless at all. However, the determination of the opposite sex in adultery cases in Turkish law presents the most significant challenge since modern gender and sex concepts are distinct from one another.

The Turkish judiciary has been finding it challenging to adjust to the new gender concepts since, as previously pointed out, it has continuously upheld the view that adultery must occur with a person of the opposite sex.<sup>46</sup> It is deliberate that courts do not rule by examining concepts such as non-discrimination, equality, feminism, humanism, and LGBTIQ+. In this way, they create a procedural self-restraint technique for themselves and try not to be in the eyes of the political power<sup>47</sup> or the public eye.<sup>48</sup>

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45 See for the definition: <https://sozluk.gov.tr> (Last seen: 01.01.2024).

46 Yarg. 2. HD., E. 2014/17883, K. 2015/8438, 27.04.2015; E. 2009/19858, K. 2010/3834, 02.03.2010; A person of the opposite sex is necessary for the act to be classified as adultery. For example, abnormal intercourse between a woman and another woman cannot be accepted as an act of adultery. Hıfzı **Velidedeoğlu**, Türk Medeni Kanunu Cilt II, 3. Edition, Tan Matbaası, İstanbul 1956, p. 164.

47 See <https://www.theguardian.com/global-development/2023/may/12/lgbt-receptayyip-erdogan-targets-gay-trans-rights-critical-turkish-election> (Last seen: 01.01.2024).

48 İhsan **Baştürk**, “Türk Anayasa Yargısı Perspektifiyle Erkeğin Zinası Suçu”, Hacettepe Hukuk Fakültesi Dergisi, Vol. 1, Iss. 8, 2018, p. 34.

They interpret the regulations with the dictionary meanings and don't bother themselves by using new interpretation methods such as queer.<sup>49</sup> The doctrine mainly supports this tendency of the courts.<sup>50</sup>

On the other hand, some ideas regarding homosexual adultery have arisen in time. This new wave claims that “*sexual interactions between people of the same sex should also be regarded as adultery, and this term needs broad interpretation.*”<sup>51</sup> In fact, according to this new idea, the proper terminology is that for a third party to be grounds for divorce on adultery, it must be a human being, regardless of gender.<sup>52</sup> In this regard, “*courts should avoid discrimination when interpreting the act of adultery, as the different application of the articles of the civil law to homosexuals is incompatible with the principle of equality before the law.*”<sup>53</sup> Besides, “*the individual with whom the sexually immoral spouse has interacted is not the concern of Article 161 of the Civil Code.*”<sup>54</sup>

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- 49 Harriet **Malinowitz**, “Queer Theory: Whose Theory?”, *A Journal of Women Studies*, Vol. 2, Iss. 13, 1993, p. 168-184.
- 50 **Velidedeoglu**, p. 164; **Yalçınkaya/Kaleli**, p. 626; **Schwarz**, p. 143; **Dural/Öğüz/Gümüş**, 14. Edition, p. 106; **Helvacı**, p. 1157; **Öztan**, p. 645; **Zeytin/Ergün**, p. 203; **Or**, p. 11-12; **Ersöz**, Zina Sebebiyle Boşanma, p. 71; **Bulut**, p. 5; Süleyman **Yılmaz**, Medeni Hukuk Cilt III Aile Hukuku, Yetkin, Ankara 2023, p. 164; Aydın **Zevkçiler**, “Medeni Kanun ve Cinsiyet Kargaşası”, *Türkiye Barolar Birliği Dergisi*, Vol. 2, Iss. 1, 1988, p. 270-271; Hüseyin **Hatemi**, Aile Hukuku, 9. Edition, On İki Levha, İstanbul 2021, p. 120; Emin **Şahin**, Aile Hukuku Davaları, 2. Edition, Adalet, Ankara 2012, p. 143; M. Zerrin **Akgün**, Evlilik Hukuku, Vakıf Matbaası, İstanbul 1946, p. 132; Bülent **Köprülü/Selim Kaneti**, Aile Hukuku, Özdem Kardeşler Matbaası, İstanbul 1985-1986, p. 157; Cem **Baygın**, “Evlilik Birliğinde Sadakat Yükümlülüğü”, 17-20 Şubat 2016 Türk Medeni Kanunu ve Borçlar Kanunu'nun 90. Yılı Sempozyumu Kitabı Cilt 2, Yetkin, Ankara 2017, p. 737-738; İnci **Biçkin**, “Medeni Yasa'da Zina Nedenine Dayalı Boşanma ve Sonuçları”, *İstanbul Barosu Dergisi*, Vol. 5, Iss. 80, 2006, p. 1884; Oğuz **Ersöz**, “4721 sayılı Türk Medeni Kanunu'nda Düzenlenen Boşanma Sebeplerine Genel Bakış”, *The Journal of Social Science*, Vol. 3, Iss. 5, 2019, p. 232-233.
- 51 **Erdem/Makaracı Başak**, p. 104; **Bekem**, p. 87; For example, Gençcan defines adultery as “*sexual activity with another human.*” Ömer Uğur **Gençcan**, 4721 sayılı Türk Medeni Kanunu Yorumu 1. Cilt, 5. Edition, Yetkin, Ankara 2023, p. 1226; “*Sexual intercourse between a married person and another person.*” Süleyman **Yılmaz/Abdulkerim Yıldırım**, Temel Hukuk Dizisi Medeni Hukuk (Başlangıç Hükümleri – Kişiler Hukuku – Aile Hukuku), 4. Edition, Seçkin, Ankara 2023, p. 223; “*Adultery is the breach of the fidelity in marriage. Having a sexual intercourse with somebody other than your spouse will constitute adultery no matter what.*” İpek **Sağlam**, Turkish Family Law, On İki Levha, İstanbul 2019, p. 121.
- 52 **Bekem**, p. 100.
- 53 **İkizler/Tüzüner**, p. 137.
- 54 **Gençcan**, Boşanma, p. 182; **Sağlam**, p. 121; This perspective also influences the

Today, sexual identity goes beyond gender and constitutes a part of social identity and, in legal terms, an element of personality. However, it should be noted that these discussions on sexual identity or sexual orientation are still far from being able to influence Turkish court decisions. So, while the Turkish courts discuss the requirement of the opposite sex, it has been seen in recent years that the gender indicated on identity cards and one's actual gender identification might differ from one another. This is because gender has become a concept that only categorizes the human body physically, and it is accepted that it has no other function.<sup>55</sup>

The question to be considered is whether the definition of adultery should consider the sexual identity that the third party has internalized and reflected to society or the psychical gender.<sup>56</sup> Perhaps the most critical issue to be resolved is how to determine the sexual identity of the third party in a case to which they are not a party of the law case and on whom the burden of proof will remain. Furthermore, since the research may violate a third party's rights, adopting this procedure will be illegal.

The viewpoint known as queer theory challenges the idea that heterosexual and cisgender identities are normative in any way.<sup>57</sup> In this scope, it's nonsensical to claim that a woman cannot enjoy having sex with another woman. The question is simple: will a married person care about the difference between same-sex infidelity and opposite-sex infidelity?

Most married people would view unfaithfulness as adultery even if it's happened between same-sex people.<sup>58</sup> When the husband or wife enjoys sexual pleasure, the other one does not think about the definition or level of sexual intercourse. The beliefs of spouses in the marriage don't depend on the type of sexual activity. Otherwise, it's similar to the way of thinking, like while penile-vaginal intercourse destroys the marriage, anal sex

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judgment of the courts. In a reformist ruling of İzmir 16. Family Court (E. 2014/495, K. 2015/844, 17.12.2015), in this framework, it was stated that "*the gender of the person with whom sexual intercourse is performed is not important in terms of the act of adultery.*" Yarg. 2. HD., E. 2016/6730, K. 2017/565, 17.01.2017, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

55 **Halperin**, p. 258-259.

56 **Dede**, p. 652; **Doğu**, p. 89; Oğuzhan **Ünsal**, "Haysiyetsiz Hayat Sürme Nedeniyle Boşanma", İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi, Vol. 7, Iss. 12, 2022, p. 243.

57 See for more information: [https://en.wikipedia.org/wiki/Queer\\_theory](https://en.wikipedia.org/wiki/Queer_theory) (Last seen: 01.01.2024).

58 **Nicolas**, p. 98.

or cunnilingus is excusable.<sup>59</sup>

Rapid developments, especially about sexual orientation, further challenge the courts that are trying to catch up with modernity as slow as molasses. So, from the court's point of view, it cannot be denied that the understanding of adultery comes from religious grounds.<sup>60</sup> So, the courts should rule through prudentialism to maintain public order. Thus, they tend to avoid adopting homosexual relationships on a legal basis.<sup>61</sup> On the other hand, when homosexual relationships have become more publicly recognized in Türkiye, same-sex relationships cannot be ignored legally anymore.<sup>62</sup> In sum, Turkish courts must find a way to integrate their traditional views with the new regulations resulting from recent developments in gender roles.

## B. Determination of the Sexual Intercourse

Sexual intercourse causes a dilemma because even though there is no legal definition or explanation regarding sexual intercourse in the article, sexual intercourse is accepted as a requirement for adultery.<sup>63</sup>

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- 59 “Unlike legal definitions of adultery which rested solely upon penetrative sexual intercourse, the magazines’ understandings of what constituted a breach of marital fidelity were far more elastic and encompassed a much broader range of acts.” **Charnock**, p. 370. This finding holds significant value in revealing light on the standard view of infidelity within marriage unions.
- 60 Talip **Yiğit**, “Boşanma ve Zina İlişkisi: Türkiye ve Avrupa Birliği Üye Ülkelerin Yasa Uygulama Örnekleri”, *Asos Journal*, Vol. 1, Iss. 46, 2016, p. 204; Not only in the scope of Islam but also in other religions. Yv **Nay**, “Qu(er) zum Recht? Normalisierungsprozesse gleich- und transgeschlechtlicher Elternschaft durch Recht”, *Die Praxis Des Familienrechts*, Vol. 2, Iss. 14, p. 373; **Nicolas**, p. 105; **Doğan**, p. 43.
- 61 The majority of those who oppose the legal recognition of homosexual relationships argue that homosexuality does not exist in nature. Cansu **Çapkıncı**, *İnkâr ile Kabul Arasında Bir Hak: Eşcinsel Bireylerin Evliliği*, On İki Levha, İstanbul 2021, p. 48; For example, **Zevkliler**, argues that the concept of gender exists in nature only as male and female. **Zevkliler**, p. 267.
- 62 The Swiss Civil Code provides a blueprint for Turkish civil law regulations. Therefore, the new rules on the Swiss Code are essential for Turkish civil law. Albert Howe **Lybyer**, “Turkey Walks Abreast with the Modern World”, *Current History*, Vol. 4, Iss. 24, 1926, p. 578-581; However, even though in Switzerland there have been many new regulations regarding same-sex relationships, Turkish legislators haven’t done any reform to uniform the law yet. For Swiss reforms, See **Nay**, *Queer zum Recht*, p. 373; **Schwenzer/Keller**, p. 13-14.
- 63 **Nicolas**, p. 118; **Gençcan**, *Boşanma*, p. 180; According to Ersöz, abnormal sexual intercourse that has to be accepted as perverted, even if it is had with a person of the opposite sex, is not considered adultery. **Ersöz**, *Zina Sebebiyle Boşanma*, p. 75.



The court's decisions and doctrine do not define this term or set a framework. Courts tend to understand sexual intercourse by its ordinary meaning.<sup>64</sup> However, the interpretation of the ordinary meaning of sexual intercourse excludes homosexual activities. In this case, even if the court accepts that the act of adultery can occur between persons of the same sex, the injured party still will not be able to rely on this divorce ground as long as the court continues to require "normal" sexual intercourse.<sup>65</sup> In other words, if having sex with its classical meaning is a requirement for adultery, then it is impossible to commit adultery between the same gender.<sup>66</sup>

This perception may be based on the courts' view regarding sexual intercourse as a procreation way.<sup>67</sup> Even in these circumstances, this perception is deceptive when the spouses are infertile, on sexual abstinence or contraception. Because with this criterion, any relationship that is not for reproductive purposes, e.g. homosexual intercourse, oral or anal sex, and masturbation, will be considered as a disease.<sup>68</sup> However, according to the International Classification of Diseases of the World Health Organization, homosexuality ceased to be a mental illness in 1992.<sup>69</sup>

Associate fidelity with penetrative sexual intercourse supports the idea that sex is not for pleasure in marriages; thereby, this idea denies all the other sexual acts between spouses.<sup>70</sup> So, the court should interpret the term

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64 **Catron**, p. 341; While some courts define adultery as sexual intercourse with the classical meaning, the other courts define this term as sexual intercourse, oral sexual intercourse, or anal sexual conduct as covering all forms of sexual activity. **Nicolas**, p. 117.

65 For instance, in doctrine, even those who believe that adultery might occur between people of the same sex try to meet the penetration requirement to discuss adultery. **Erdem/Makaracı Başak**, p. 104-105; Close physical contact without sexual intercourse, such as petting, making out, or kissing, is not adultery. **Şahin**, p. 143; **Yılmaz**, p. 166; Full sexual intercourse is necessary. **Köprülü/Kaneti**, p. 158; **Ersöz**, Zina Sebebiyle Boşanma, p. 72; On the other hand, according to some opinions, penetration is not required, but the person of the opposite sex is required. **Or**, p. 8; **Biçkin**, p. 1884.

66 This interpretation may even lead to the conclusion that even a person suffering from sexual impotence cannot commit the act of adultery. Yarg. 4. CD., E. 1951/2191, K. 1951/2191, 28.03.1951 <https://kazanci.com.tr/> (Last seen: 01.03.2024).

67 Mark **Strasser**, "Marital Acts, Morality, and the Right to Privacy", New Mexico Law Review, Vol. 1, Iss. 30, 2000, p. 44-47.

68 **Çapkıncı**, p. 35; **Yasan**, p. 58.

69 See the complete list: <https://www.who.int/standards/classifications/classification-of-diseases> (Last seen: 01.01.2024).

70 **Strasser**, Marital, p. 46; On the other hand, adultery is a concept that does not only cover sexual fidelity but also emotional and mental fidelity. **Baygın**, p. 731.



sexual act by considering the changes in social structure. In such circumstances, courts should apply analytical thinking to interpret the term by considering recent developments rather than merely referencing a dictionary to determine its definition.<sup>71</sup> It is discriminatory to allow a heterosexual couple who does not wish to have children to marry while denying a homosexual couple the same privilege based on reproductive criteria.<sup>72</sup> Herein, this research aims to ensure that the courts are just. In other words, it prevents the courts from discriminating.

In this context, Article 161 of the Turkish Civil Code should be interpreted in the spirit of the times. Life's constantly evolving conditions must be acknowledged because the primary purpose of this article is to prevent the obligation of sexual fidelity from violating family unity. Therefore, the concept of sexual intercourse should be interpreted broadly, and courts should interpret the meaning of the article in a way that best serves the purpose of the law.<sup>73</sup>

It is noticeable that the queer method has become popular, particularly in the last few years, to interpret the existing legal regulations for same-sex relationships. From this view, the act of adultery violates the moral commitment between spouses. Therefore, it is erroneous to accept that this violation can only occur through sexual intercourse.<sup>74</sup>

On account of this, adultery must be considered as any sexual act which breaks the fidelity between spouses.<sup>75</sup> There should be a judicial slippage from the point of view which requires a penis for adultery to gay intercourse.<sup>76</sup> As is obvious now, sexual intercourse has its manifestations. Therefore, homosexual intercourse should also be recognized within the

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71 **Catron**, p. 347.

72 **Çapkıncı**, p. 98; **Bekem**, p. 89; It is discriminatory to prohibit same-sex couples from getting married. Nergis **Karadağ**, Cinsel Azınlıkların Bireysel Hakları-Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku Çerçevesinde, On İki Levha, İstanbul 2008, p. 110.

73 **Bekem**, p. 88-89; With the sexual revolution, the definition of sexual intercourse transforms into every activity that people do to obtain sexual pleasure. **Ünsal**, p. 241-242.

74 According to **Gençcan**, the concept of sexual intercourse should be interpreted broadly. Otherwise, the acts of people who engage in activities for sexual pleasure naked in a bed do not constitute adultery. **Gençcan**, Boşanma, p. 181.

75 **Strasser**, Marital, p. 43; **Catron**, p. 344; **Or**, p. 3.

76 Mehmet **Erdem**, Aile Hukuku, 2. Edition, Seçkin, Ankara 2019, p. 102; Ahmet **Kılıçoğlu**, Aile Hukuku, 6. Edition, Turhan, Ankara 2022, p. 92-93; Ömer Uğur **Gençcan**, Boşanma Tazminat ve Nafaka Hukuku, Yetkin, Ankara 2015, p. 135-136.

concept of sexual intercourse.<sup>77</sup> For example, oral sex is not necessarily penetrative<sup>78</sup>, but it is still sexual intercourse.<sup>79</sup> If the court accepts this understanding, one of the issues that must be addressed is which criteria should be used to define sexual intercourse; in this regard, they may answer the question: Can simply a passionate kiss be interpreted as sexual activity, for instance?

First, proof of gratification or orgasm should not be necessary to prove sexual intercourse. According to the Court of Cassation, breach of a fidelity obligation is the simplest definition of adultery.<sup>80</sup> The Turkish Court of Cassation states regarding criminal law that the acts need to have a sexual purpose; sexual pleasure is not necessary for punishment.<sup>81</sup> Even though criminal and civil law processes differ, these decisions show the court's approach. According to some doctrinal opinions, the fact that the spouse is caught in the act of preparation for sexual intercourse with another person is a presumption of the existence of adultery.<sup>82</sup> From a different perspective, acts like touching, kissing, and embracing must entail the use of a sexual organ to be regarded as adultery.<sup>83</sup>

Second, proving adultery is circumstantial because, generally, there is no witness to sexual intercourse.<sup>84</sup> In this scope, the Turkish Court of Cassation accepts the plausible proof.<sup>85</sup> For example, flirting or having any

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77 **Halperin**, p. 267-268; **Bekem**, p. 88-89.

78 **Pearlston**, p. 43.

79 For instance, the court recognizes homosexual activity as sexual contact even in the absence of evidence of orgasm. This is because the court cites highly suggestive evidence of mutual sexual interest and states that if there is an object gratification of sexual impulses, there is evidence of sexual intercourse. Katherine **Arnup**, "Mothers Just Like Others: Lesbians, Divorce and Child Custody in Canada", Canadian Journal of Women and the Law, Vol. 1, Iss. 3, 1989, p. 22.

80 Yarg. 4. HD., E. 2014/1656, K. 2014/17564, 22.12.2014, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

81 "*The activities involving contact are not motivated by sexual desire, so they are not recognized as a sexual crime,*" The General Assembly of Criminal Chambers of The Court of Cassation, E. 2017/901, K. 2021/323, 29.06.2021; E. 2018/261, K. 2023/203, 05.04.2023, See for the full-text <https://kazanci.com.tr/> (Last seen: 01.03.2024).

82 **Erdem**, p. 103; **Kılıçoğlu**, p. 92; **Gençcan**, p. 147.

83 Mustafa **Dural**/Tufan **Ögüz**/Mustafa Alper **Gümüş**, Türk Özel Hukuku Cilt III Aile Hukuku, 15. Edition, Filiz, İstanbul 2022, p. 107; **Öztan**, p. 647.

84 **Pearlston**, p. 50; **Biçkin**, p. 1887.

85 Hakkı **Demirel**, "Zinanın İspatı", Adalet Dergisi, Vol. 2, Iss. 4, 1956, p. 433; **Velidedeoğlu**, p. 164-165; **Erdem/Makaracı Başak**, p. 105; **Akıntürk/Ateş**, p. 246-247; **Şahin**, p. 144-145; **Or**, p. 20; **Baygın**, p. 741; **Bekem**, p. 122; **Bulut**, p. 5; **Yılmaz**, p. 167.

other kind of intimate relationship with another person does not constitute adultery. However, these behaviors may constitute a de facto presumption of adultery. This is because it is often not possible to detect adultery in the act itself. For this reason, various events and facts proved that there was adultery.<sup>86</sup> If the judge is satisfied that the judge has not detected adultery in the act of adultery can decide to get a divorce. For example, the Court of Cassation stated that if a woman meets another man and kisses him in the streets when her husband leaves home, this is not adultery but is considered leading a life without dignity.<sup>87</sup> In another decision, it has stated that although it is established that the defendant's wife held hands and had dinner with another woman and was seen together in a car, these actions are not sufficient to create a presumption of adultery. Since these were acts of flirtation, it was accepted that they constituted a breach of trust, and within this framework, it was stated that the conditions for adultery as a ground for divorce were not met.<sup>88</sup>

The Court of Cassation ruled that, even though the right circumstances were created for adultery to occur, the failure of sexual engagement to occur for unavoidable reasons can nonetheless constitute an attempt at adultery and be grounds for divorce. It is quite rare to prove adultery, which naturally happens in extreme secrecy. Some assumptions imply adultery exists based on certain behaviors, attitudes, and hints. In this regard, the fact that the conditions for adultery have been met, but the act itself has merely reached the stage of an incomplete effort is sufficient for a divorce based on adultery. The defendant, in this case, was discovered in the bedroom with a male while naked. This inference is adequate justification for an adulterous divorce.<sup>89</sup> In another case, having nude pictures of the defendant was considered sufficient justification for an adulterous

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86 “A photograph of the spouse and another woman in the bathroom, half-naked, that seems to show them in an intimate situation” Yarg. 2. HD., E. 2019/4012, K. 2019/12142, 11.12.2019; “living in the same house as if married to another woman” Yarg. 2. HD., E. 2020/1606, K. 2020/5481, 09.11.2020, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

87 Yarg. 2. HD., E. 1995/772, K. 1995/1889, 16.02.1995, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

88 If there are behaviors that do not reach the level of sexual intercourse but violate the obligation of fidelity, the general ground for divorce should be applied. Baygın, p. 731; Yarg. 2. HD., E. 2019/3109, K. 2019/7529, 20.06.2019, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

89 Yarg. 2. HD., E. 1993/7903, K. 1993/7941, 23.9.1993, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

divorce.<sup>90</sup> Although Turkish courts do not require sexual intercourse to rule a divorce on the grounds of adultery, the aim of the court is not the lack of penetrative sexual intercourse. Here, the court concludes that sexual intercourse may have occurred based on the presumptions. So, the court still seeks for the “normal” sexual intercourse.

On the other hand, all these decisions above are regarding adultery between the opposite sex. Although these decisions do not involve same-sex sexual relationships, they are essential in understanding the court’s approach to the definition of the term sexual intercourse. This is because if the court can decide on adultery without penetrative intercourse, this understanding may also be applied to same-sex adultery. In conclusion, the definition of adultery should not be focused on the relationship between the genitalia. However, the Turkish courts have failed to come up with the right solution.

### C. Determination of the Ground for Divorce

Since marriage is a heterosexual legal relationship for the Turkish Courts, the heteronormative dynamics rule the divorce. As mentioned above, Articles 161-165 of the Turkish Civil Code define special grounds for divorce which are adultery, attempt against life, abominable or degrading treatment, committing crimes, leading a dishonorable life, desertion, and mental illness. This dilemma has had the effect that court decisions are based on false grounds for divorce. In the case of sexual intercourse with a person of the same sex, the courts used to decide that this act should be considered as leading a life without dignity.<sup>91</sup> This means that everyone in the society who is in a relationship not classified as heterosexual leads a life without dignity.<sup>92</sup> The courts and doctrine have thus supported this

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90 Yarg. 2. HD., E. 2016/24076, K. 2018/10959, 15.10.18, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

91 Leading a life without dignity, in the decisions of the Court of Cassation, is defined as behaving oneself for a period in a manner inconsistent with the principles of honor and dignity within the understanding of society. For example, this divorce may occur if a woman texts and talks frequently with another man. Yarg. 2. HD., E. 2016/6272, K. 2016/15892, 13.12.2016, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

92 Instead of being considered an element of adultery, homosexuality was included as one of several sexually unethical actions. Also, it’s accepted as a most unusual relationship in which two women are engaged. **Arnup**, p. 21; Akıntürk/Ateş describe sexual intercourse between people of the same sex, using terms such as sodomy and lesbianism. And unfortunately, they do not recognize it as adultery, categorizing it together with bestiality. **Akıntürk/Ateş**, p. 246; **Şahin**, p. 143; Baygın also mentioned homosexual adultery together with bestiality. **Baygın**, p. 738.

conclusion for a long time.<sup>93</sup>

On the other hand, lately, it has begun to be considered that the act of homosexual adultery should not be viewed as leading a life without dignity.<sup>94</sup> Because the personality or gender of the other party is inconsequential when a spouse shares his or her sexual desire with another individual and violates the obligation of sexual fidelity.<sup>95</sup>

If adultery is not discussed as a ground for divorce in same-sex relationships, at least this act should be considered as a degrading treatment.<sup>96</sup> Leading a life without dignity occurs when a person adopts a lifestyle that destroys morality, ethics, dignity, and honor. Acts such as sexual intercourse in exchange for money or drug addiction can be included in the scope of leading a life without dignity. On the other hand, it is not possible to include homosexuality within the scope of this ground for divorce. Otherwise, there would be a question of discrimination.<sup>97</sup>

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93 **Dural/Öğüz/Gümüş**, 14. Edition, p. 106; **Helvacı**, p. 1157; **Yılmaz**, p. 164; **Akıntürk/Ateş**, p. 246; **Şahin**, p. 143; **Köprülü/Kaneti**, p. 158; **Biçkin**, p. 1881-1882; According to Hatemi, the ground for divorce depends on whether the act constituting adultery is continuous or not. If the relationship is continuous, it constitutes leading a life without dignity. Otherwise, the general ground for divorce should be applied. **Hatemi**, p. 120; **Baygın**, p. 738; Zevkliler defines the sexual orientation of homosexual persons as perversion. **Zevkliler**, p. 277-278; Ünsal accepts the adultery of persons of the same sex; however, he still states that it would be leading a life without dignity if it were not based on the ground of adultery. **Ünsal**, p. 241; According to Ersöz, abnormal sexual intercourse that has to be accepted as perverted, even if it is had with a person of the opposite sex, is not considered adultery. On the other hand, the ground for divorce depends on whether the act constituting adultery is continuous or not. If the relationship is continuous, it constitutes leading a life without dignity. **Ersöz**, Zina Sebebiyle Boşanma, p. 75-76.

94 For example, in the previous edition, **Dural/Öğüz/Gümüş** considered this to be leading a life without dignity. In the new edition, their mind has changed. Although they insist on the position that same-sex relationships do not constitute adultery, they state that, in this case, the general ground for divorce should be applied. **Dural/Öğüz/Gümüş**, 15. Edition, p. 106.

95 **Kılıçoğlu**, p. 92.

96 **Erdem/Makaracı Başak**, p. 104.

97 **İkizler/Tüzüner**, p. 141-142; For example, Zeytin and Ergün define the scope of leading life without dignity with homosexuality. **Zeytin/Ergün**, p. 204; **Akıntürk/Ateş**, while giving examples for leading life without dignity, they emphasize “*abnormal sexual intercourse habits.*” **Akıntürk/Ateş**, p. 253; According to Köprülü/Kaneti, homosexuality should be defined under the grounds for divorce as leading a life without dignity. **Köprülü/Kaneti**, p. 164; The law does not explain the concept of leading life without dignity. Therefore, if this ground for divorce is interpreted broadly, a new obligation is imposed on the spouses: to lead a life with

Discrimination against individuals of different orientations occurs when the courts adopt the point of view that those who do not identify as heterosexuals lead lives without dignity.<sup>98</sup> At this point, it should be mentioned that protecting or supporting same-sex relationships has never been the goal of Turkish courts. Nonetheless, it is important to note that the court rulings constitute a violation of rights as discrimination is expressly prohibited by the international to which Türkiye is a party.

On the other hand, the ignorance of the courts and legislature regarding same-sex relationships does not negate the existence of these relationships in Türkiye. The state's prohibition of registered unions or marriages may harm the institution of marriage in time. Beyond the violation of the right to marry, this would increase the number of people in unregistered unions in society.<sup>99</sup>

The concept of fault-based divorce presumes that there is an innocent and a guilty spouse.<sup>100</sup> Due to the guilty spouse's violation of their marital obligations, the innocent spouse is entitled to a divorce. The aim of allowing fault-based divorce is to provide an innocent spouse with some compensation for the offensive behavior of a guilty spouse.<sup>101</sup> Thus, according to Article 236 of the Turkish Civil Code, "*Each one of the spouses or their heirs shall be right holders of half of the residual value. Receivables shall be exchanged. In case of divorce due to adultery or attempt at life, the judge may decide to revoke or reduce the share of the spouse at fault in residual value in an equitable manner.*" In this scope, not only is it unethical, but based the divorce on leading a life without dignity results in loss of rights.<sup>102</sup> The victim's filing for divorce on the grounds of

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dignity. **Yücel**, p. 141; Bulut gives "*abnormal sexual intercourse*" as an example of leading life without dignity. **Bulut**, p. 21.

98 Neo **Khuu**, "Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights", UCLA Law Review, Vol. 1, Iss. 184, 2017, p. 204-205.

99 **Strasser**, Sodomy, Adultery, and Same Sex Marriage, p. 315.

100 Fault or no-fault-based divorce matters under Turkish law regarding the decision and its financial consequences. The General Assembly of Criminal Chambers of The Court of Cassation, E. 2018/456, K. 2021/1511, 30.11.2021.

101 **Catron**, p. 343.

102 For example, "*in the cases reviewed above, engagement in a homosexual act was interpreted by the courts as something a quite distinct from adultery which involves, by judicial standards, normal or natural sexual conduct between a man a woman. Had the grounds upon which a divorce was granted not also been a factor determining the custody of children.*" **Arnup**, p. 23.

adultery is critical for their ability to secure compensation and submit a contribution claim.<sup>103</sup>

Even if, in court decisions, the ground for divorce is accepted as leading a life without dignity, also it is often not possible to rely on this ground for divorce. For this special ground for divorce to be accepted, leading a life without dignity must be continuous. In this context, if two persons of the same sex have sexual intercourse for one time, this reason for divorce cannot be relied upon.<sup>104</sup> In a case before the Court of Cassation, it's understood from the collected evidence that the wife talked and exchanged messages with another man on her cell phone. According to the decision, to talk about the existence of leading a life without dignity and to decide for divorce for this reason, the behavior of the spouse, which conflicts with the general value judgments of the society and which is of a negative nature, must show continuity and this behavior must make cohabitation unexpected for the other spouse. So, one-time behavior that does not show continuity is insufficient for a divorce decision based on the reason for leading a life without dignity. Even though this behavior of the defendant woman has made the plaintiff unable to expect to live together, since it is understood that it is not continuous, it cannot be considered as leading a life without dignity.<sup>105</sup>

When we look through it from the family law lens, people of the same sex can legally form civil unions<sup>106</sup> and even get married, have children<sup>107</sup>,

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103 Emel **Badur**, “Zina ve Hayata Kast Nedeniyle Boşanma Halinde Kusurlu Eşin Artık Değerdeki Payı”, Çankaya Üniversitesi Hukuk Fakültesi Dergisi, Vol. 1, Iss. 2, 2016, p. 53-56; Fahri Erdem **Kaşak**, “Zina veya Hayata Kast Nedeniyle Artık Değerdeki Pay Oranının Azaltılması veya Kaldırılması (TMK M. 236/II)”, Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi, Vol. 2, Iss. 1, 2020, p. 111-130; **Ünsal**, p. 244; **Sağlam**, p. 121.

104 It is essential that the relationship with another person must be embraced as a lifestyle and that this way of living must show continuity to discuss the presence of a life without dignity and to make a divorce decision based on this basis. Yarg. 2. HD., E. 2011/1829, K. 2011/23825, 28.12.2011, <https://kazanci.com.tr/> (Last seen: 01.03.2024); **Hatemi**, p. 120; **Baygın**, p. 738; **Ersöz**, Zina Sebebiyle Boşanma, p. 75-76.

105 Yarg. 2. HD., E. 2011/22536, K. 2012/17686, 26.06.2012, <https://kazanci.com.tr/> (Last seen: 01.03.2024).

106 **Schwenzer/Keller**, p. 13.

107 Homosexual couples and their children are the new players of family law. Katherine R. **Allen**, “Ambiguous Loss After Lesbian Couples with Children Break Up: A Case for Same-Gender Divorce”, Family Relations, Vol. 2, Iss. 56, 2007, p. 175; **Nay**, Queer zum Recht, p. 368.



and divorce<sup>108</sup> in several countries.<sup>109</sup> On the other hand, there is little research that analyzes same-sex relations as a ground for divorce.<sup>110</sup> As a result of this, same-sex unions and divorces are uncommon in society despite their existence. Homosexual relationships are now visible in the Turkish society. For this reason, courts should consider these relationships, especially regarding grounds for divorce.<sup>111</sup> As in the presence of evidence proving the existence of a homosexual relationship, the courts do not reject these relationships altogether but only consider them as another ground for divorce. This approach is not correct.<sup>112</sup>

## CONCLUSION

Making decisions involving same-sex union legalization is a challenging task for courts. Yet, since Türkiye is a secular state, it wouldn't be impossible. In particular, the legal structure meets with the regulations of the European Union. In other words, there is no legal barrier preventing courts from acknowledging same-sex relationships in their decisions. The Turkish Civil Code No. 4721, along with different regulations, prohibits same-sex marriage and registered unions. However, Turkish Constitution Article 90 states, "*In the case of a conflict between international treaties, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail.*" International treaties mandate that

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108 Nora **Gustavsson**/Ann **MacEachron**, "Gay Divorce", *Social Work*, Vol. 3, Iss. 59, 2014, p. 283-284; Aaron **Hoy**, "Accounting for Same-Sex Divorce: Relationship- vs. Self-Focused Divorce Accounts and the Meanings of Marriage among Gays and Lesbians", *Journal of Divorce & Remarriage*, Vol. 5, Iss. 61, 2021, p. 322-324.

109 See: [https://en.wikipedia.org/wiki/Legal\\_status\\_of\\_same-sex\\_marriage](https://en.wikipedia.org/wiki/Legal_status_of_same-sex_marriage) (Last seen: 01.03.2024).

110 See **Allen**, p. 175; **Arnup**, p. 320.

111 From another perspective, even if there is a legal basis for same-sex marriage, the court may not accept same-sex relations as a divorce ground because there is no legal regulation regarding the adultery of same-sex people. See *Thebeau v Thebeau*, 2006 NBQB 154, <https://heinonline.org/HOL/Welcome> (Last seen: 01.03.2024).

112 The same judicial dilemmas have occurred throughout history. As an example, in the USA, courts denied the wife's fault for divorce even though they proved the husband's homosexual activities. Besides, in these cases, the husband has no intent to deny their homosexual activities; the courts emphasize that they continue their heteronormative marriage. These courts believed that the marriage union could be saved because the husband still has the capacity to have sex with the wife. **Lefkowitz**, p. 688. So, as it's seen, the courts have tended to support heteronormative relationships and, of course, the husbands, who are the main stone of it in history at different times and eras.



courts follow the prohibition of discrimination and treat everyone equally before the law.

Adultery is only one of the reflections of same-sex unions in the Turkish judiciary. Naturally, Turkish courts are aware that decisions regarding adultery do not inevitably permit same-sex unions. Nonetheless, the courts believe that they are acknowledging the possibility of same-sex relationships if they permit same-sex adultery. As stated before, notwithstanding Türkiye is a secular state, the religious rules that a significant percentage of the population embraces cannot be disregarded when it comes to the administration of the judicial system.

As is well known, a significant percentage of the population in Türkiye believes in Islam. So, adultery is an act forbidden in the Quran. The Qur'an defines adultery as an act that breaches Allah's prohibitions and becomes a sin. However, adultery referred to here is with the opposite sex. The Qur'an makes it clear how it views homosexuality. The Qur'an states that all individuals possess one sex. An individual must behave in a manner that's appropriate for his or her gender, such as a man or a woman. Because of this, it is challenging for courts to make decisions that encourage homosexual relationships while dismissing social standards and the expectations of society.

In this scope, the laws need to be revised in this direction to make courts think from a broader perspective. For example, the prohibition defining marriage under the Turkish Civil Code nr. 4721, which states only a man, and a woman can be married, might be revised. A proposal to gender neutralize the clauses regarding special divorce reasons is not necessary because the Civil Code's provisions on adultery have already been regulated neutral.

The structure of laws is not the primary issue with Turkish legislation. As previously mentioned, the Turkish legislature has a lengthy history of enacting laws that comply with EU legislation. In this case, greater diligence is required to ensure that the principles of equality and anti-discrimination are followed in order to avoid facing compensation decisions from the European Court of Justice. Doctrinal views are one of the courts' most significant instruments for interpretation. Here, the primary issue to be resolved is not the revision of the law but rather their interpretation. Within this perspective, an objective and widespread critique of court rulings prohibiting same-sex unions—particularly on an international level—is one of the most effective tools available to bring a solution.

Nevertheless, many commonly accepted social standards have shifted as Turkish society ages. In this scope, same-sex partnerships are no longer

a taboo in society. Thus, the Turkish courts must also respect and empathize with homosexual relationships. The courts should consider these relationships and use new methods, such as queer, to interpret legal regulations. In this context, for the first and last time in its history, the second Civil Chamber of the Court of Cassation considered same-sex sexual intercourse as adultery in a divorce case 2016/6730E and 2017/565K, 17.01.2017. Unfortunately, this decision has not set a precedent and has become widespread. To spread awareness regarding the High Court's viewpoint, publications and research, especially by the doctrine, should aim to change the judiciary's perspective on same-sex unions.

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