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*Decolonising Decriminalisation analyses: Did the Ottomans decriminalise
homosexuality in 1858?*

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Assessments of the decriminalisation of homosexuality are rarely questioned. It is widely accepted that the Ottomans decriminalised homosexuality in 1858 owing to the absence of penalties assigned to private same-sex intimacy. The reason for this misanalysis rests upon the universalisation of the Western formula for the decriminalisation of homosexuality. This assumption about the Ottomans has been made without examining how they had criminalised homosexuality in the first place. Two penal cultures that criminalised homosexuality differently cannot decriminalise it by way of the same legal framework. The current method excludes, moreover, the subject country's history. This elicits neo-orientalist conclusions such as the Ottomans' 'decriminalisation' of homosexuality in 1858 via the introduction of the 1810 French Penal Code, without an accompanying examination of how the Ottomans had criminalised homosexuality before 1858. This assessment method not only facilitates neo-orientalism, but also casts a significant doubt on this method's validity.

Keywords: word; decriminalisation of homosexuality, homosexuality in the Ottoman Empire, legal transplants, non-Western LGBTIQ+ rights,

1. Introduction¹

Decriminalisation of homosexuality refers to the legalisation of consensual private sexual activities or the absence of penalties assigned to private same-sex intimacy (Buist and Lenning, 2016). This formula for decriminalisation stems from the history of the Western penal regime (Woods, 2015; Rahman, 2014; Dalacoura, 2014).² Thus, the conceptualisation of decriminalisation is restricted to the Western legal experience in terms of same-sex intimacy. This framework of decriminalisation does not reflect non-

¹ I cannot thank enough my PhD supervisor Associate Professor Sara Ramshaw for reading and commenting on this article.

Western (or less-Western) countries' penal experience concerning same-sex intimacy. Western penal history also needs to be subjected to scrutiny using the method I am deploying in this article. The decriminalisation framework might not even reflect some of the Western penal experience in terms of same-sex intimacy; however, it is safe to maintain that a decriminalisation of homosexuality to the extent that it becomes a legalisation of private same-sex intimacy has been the product of Western legal jurisprudence. Acknowledging this, I posit the framework of decriminalisation as a Western construct. In addition, my focus is on misanalyses of decriminalisation of homosexuality due to the unquestioning restriction of decriminalisation within a single formula, which led to a series of misanalyses regarding the penal status of homosexuality, especially in non-Western jurisdictions.

There is a tendency to assess a country's status regarding the criminalisation of homosexuality from this Western benchmark without looking at the specific country's legal history and prior experience regarding penalising homosexuality. This assessment method induces inaccurate conclusions and demotes decriminalisation to a binary yes or no situation without acknowledging the possibility of different penal approaches to same-sex activity in the world. This being said, this method also equates – and thus reduces the usefulness of the definition – decriminalisation with legalisation of private consensual same-sex intimacy. This is because legalisation in the West means decriminalisation. However, what decriminalisation actually means is that what has been criminalised is no longer a crime. This ignores the penal regimes that have not criminalised, or that have leniently criminalised, same-sex activity, in a different way from the West. The formula that decriminalises homosexuality in the West replaces the actual meaning of decriminalisation. As a result, the actual meaning of decriminalisation of homosexuality no longer amounts to removing penalties for

homosexuality. Instead, it only amounts to the legalisation of private same-sex intimacy, which partially decriminalised homosexuality in some Western countries. This method of assessment presumes that all countries have criminalised same-sex intimacy in the same way that the West has. This Western-centric assessment method paves the way for imperialistic evaluations and false conclusions. This article aims to discuss the neo-orientalist artefacts (Rao, 2014) embedded within these decriminalisation assessments. Tackling this method requires a departure from the well-established decriminalisation denominators. This is made possible by the deployment of new assessment criteria, which allow room for nuances in different jurisdictions to be recognised and acknowledged. As mentioned, the well-established method for determining whether homosexuality has been decriminalised has been to compare a country's new penal codes with the Western framework of decriminalisation. This restricts the assessments to the non-existence of penalties assigned to private consensual sex in the subject country's penal code. Therefore, the subject country's penal history in terms of homosexuality is not acknowledged; it is in fact replaced with Western history. This article employs a method by which decriminalisation analyses are subjected to a validity test through a comparison between the old and new penal codes of the subject country. In this way, it reclaims the subject country's penal history within decriminalisation analyses.

In an aim to test the validity and reliability of this decriminalisation framework, this article critically examines the assessments that conclude that the Ottomans decriminalised homosexuality through transplanting the 1810 French Penal Code. Through the example of the Ottomans it also reveals the neo-artefacts of orientalism and imperialism embedded within the decriminalisation analyses. Although this article is limited to the Ottoman penal experience, it invites others to use this method and test the

validity of the decriminalisation framework for their countries, Western and non-Western.

The first section of this article discusses the development of the framework of decriminalisation of homosexuality in the legal field. It also examines the ways in which the decriminalisation history of the West became the denominator of decriminalisation analyses globally.

The second section examines the 1858 Ottoman Penal Code with regards to its contentious clause, which is deemed to have decriminalised homosexuality. It then provides an extensive evaluation of the sexual penal regime of the Ottomans before 1858. This section aims to enable the article to compare the Ottoman pre-1858 penal situation of homosexuality with the one that was implanted in 1858 from France.

The third section investigates the sexual penal regimes and the range of penalties assigned to homosexuality in the West before 1858. It analyses the differences in penal history between the West and the Ottomans in their conceptualisation, thus criminalisation, of homosexuality. Therefore, decriminalisation of homosexuality by the Ottomans cannot be assessed through the denominators that stem from Western penal history.

In the conclusion, by replacing Western legal history with that of the subject's jurisdiction, here, the Ottoman Empire's, I am able to deduce that what happened in 1858 cannot be defined as the decriminalisation of homosexuality. On the contrary, what is unveiled is that the 1858 Penal Code of the Ottoman Empire actually aggravated the penal status of homosexuality.

1. Decriminalisation of Homosexuality

Kees Waaldijk has examined the standard sequences in the legal recognition of homosexuality in Europe (Waaldijk, 1994). He identified that the decriminalisation process appears as the first stage of what is called the LGBTIQ+ rights concept. The baseline for legal recognition of same-sex desire is, therefore, decriminalisation. Following his insight, decriminalisation creates a ground for legal recognition in the European context.

Since the landmark decision of the United Nations Human Rights Committee, *Toonen v. Australia* (HRC 488/1992), the decriminalisation of homosexuality has amounted to the legalisation of private same-sex acts/sex. Prior to the international recognition of decriminalisation via this framework, equalisation of decriminalisation with private-sphere, consensual same-sex intimacy has been the trend among a considerable number of European countries (Woods, 2015; Asal, Sommer and Harwood, 2013; Adam, 1999; Sommer 2013; Sommer and Asal 2016). Following *Toonen*, the European Court of Human Rights adopted a similar approach in the decision of *Dudgeon v. UK* (7525/76, 22 October 1981). Accordingly, private-sphere, consensual same-sex intimacy became a well-established legal denominator for the decriminalisation of homosexuality, and public displays of affection were separated from decriminalisation (Waaldijk, 1994).

It is a common practice within scholarly studies to examine a country's legal status regarding same-sex relations in accordance with these indicators, all of which stem from the Western legal experience of same-sex intimacy. Although this framework of decriminalisation reflects mainly the Western European legal experience, its universalisation has brought about a tendency to assess a non-Western country's status regarding the decriminalisation of homosexuality through this Western benchmark,

without actually looking at non-Western legal histories and experiences of homosexuality.

One stark example is the 2015 world survey of state-sponsored homophobia, which was sponsored by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). This survey listed Turkey as a country that decriminalised homosexuality in 1858 and defined decriminalisation of homosexuality as either the abolition of laws criminalising consensual private same-sex acts or there being no mention of same-sex intimacy in the penal codes (Carroll and Itaborahy, 2016). These assessment criteria follow the Western formulation of decriminalisation of homosexuality. The ILGA report provides a typical example of how non-Western states are assessed through Western formulations of the decriminalisation of same-sex intimacy: '1858 The Turkish Imperial Penal Code of 1858 (thought to be based on the 1810 French Penal Code) makes no mention of consensual same-sex sexual acts between adults, and neither does the current Penal Code' (Carroll and Mendos, 2017).

This line of analysis is problematic in numerous ways. Firstly, it is limited to consensual, private-sphere same-sex conduct, which is how Western criminal theory defines homosexuality. Thus, the public display of same-sex intimacy, which was the experience of some of those in non-Western cultures', has been omitted from analyses.

Secondly, and consequently, this line of assessment also presumes that every country has had the same historical experience in terms of criminalising sodomy/same-sex desire and thus there is a single framework for decriminalisation that would legalise homosexuality globally. This pattern of thought presumes that there is one recipe for decriminalisation, which would improve the legal status of homosexuality in all jurisdictions. However, this single recipe stems from a legal history in which same-sex intimacy had been subjected to aggravated punishments such as the death penalty and

imprisonment. Therefore, removal of punishments for acts in the private sphere might have functioned as evidence of decriminalisation in countries that share similar legal experiences regarding same-sex intimacy. The other side of the coin, though, is that this single recipe does not correspond with a legal history that leniently punished or even never punished homosexuality. This Western-centric assessment method leads to the invisibility of the non-Western experience in queer criminology studies, as argued by Jordan Blair Woods. He asserts that criminological studies relating to decriminalisation decreased dramatically after the 1970s, when private same-sex intercourse no longer constituted a crime in the majority of the West (Woods, 2015; Rahman, 2014; Dalacoura, 2014). Following Woods' insight, decriminalisation studies shifted to assess non-Western states' compliance in relation to the Western threshold. The idea that posits that the de/criminalisation framework of the non-West should be in compliance with that of the West (Rahman, 2011) created the bedrock for the LGBTIQ+ rights concept, given that the decriminalisation process is the foundation of this rights concept.

The consequence of this problematic and universalist standard for decriminalisation leads us to question whether using this Western benchmark as a way of certifying which countries have decriminalised homosexuality is a secure method; or whether it is instead one that leads to speculative and false conclusions, which become neo-orientalist artefacts (Rao, 2014). This article argues that the legal and academic framework of the decriminalisation of homosexuality follows an imperialist narrative depicts an imperialist feature by disregarding non-Western legal history, thereby making it insignificant and immaterial in terms of law-making. In this sense, subjecting the decriminalisation analyses to scrutiny will also contribute to decolonising the framework of the decriminalisation of homosexuality itself.

Decriminalisation means that what was previously criminalised is no longer a crime. As such, decriminalisation of same-sex relations must occur in different formulations according to how it had been criminalised before. For instance, a country that has never criminalised same-sex relations cannot be analysed using the same indications as a country which imposed the death penalty for homosexuality. Accordingly, it seems necessary to verify a country's decriminalisation status by referring to its own legal history, and to what the punishment was for same-sex intercourse/sodomy before decriminalisation in accordance with Western standards.

2. The 1858 Ottoman Penal Code

The Ottomans went through comprehensive penal reform during the late 19th century. They adopted the 1810 French Penal Code, which had been influential throughout Europe at that time. The contentious article of the 1858 Ottoman Penal Code is as follows:

Art. 202—The person who dares to commit the abominable act publicly contrary to modesty and sense of shame is to be imprisoned for from three months to one year and a fine of from one Mejidieh gold piece to ten Mejidieh gold pieces is to be levied (Penal Code of the Ottoman Empire, 1858).

This is a translated version of Article 330 of the French Penal Code, which decriminalised homosexuality in France.³ In reality, this is a partial decriminalisation, which reduces decriminalisation to the legalisation of *private* same-sex activities. Prior to 1858, there were two other Ottoman penal codes (1840 and 1851), which did not mention consensual sodomy or private same-sex acts. As I will examine in detail below, the significant difference between those penal codes is that the 1858 code

³ This affirmed and maintained the position taken by the 1791 French Penal Code regarding the decriminalisation of homosexuality.

adopted the French Penal Code, which was the most influential penal code in Europe in terms of decriminalising homosexuality, whereas the 1840 and 1851 codes did not borrow from any European penal codes (Heinzelmann, 2014; Akgunduz, 2016). This allows me to conclude that there is a tendency to read legal reform based on legal transplantation through the legal consequences of that legislation brought about in the parent jurisdiction. In other words, the parent jurisdiction's legal history (France) is replaced with the law-taker's history (the Ottomans'), with no reference being made to the law-taker's history when analysing the decriminalisation. As mentioned above, it is very problematic that, although numerous sources refer to the 1858 penal reform as Turkey's decriminalisation of homosexuality, I have not come across any scholarly work that examines that legal reform with reference to pre-1858 conditions. Similar to the ILGA reports mentioned earlier, other sources state that the decriminalisation of homosexuality in Turkey occurred in 1858, relying on the absence of punishments assigned to private same-sex activity in the 1858 Penal Code. The fact that the borrowed French Penal Code decriminalised homosexuality in its own jurisdiction led to a presumption of the same impact within the Ottoman realm, without looking at how the Ottomans criminalised homosexuality before that penal reform.

3. Sexual Penal Regime and Criminalisation of Same-sex Relations in the Ottoman Empire Before 1858

Contrary to the common practice within Islam, the Ottomans had sultan-drafted, secular criminal laws, which were operational alongside shari'a laws. The first Muslim sultan known to introduce a secular criminal law was Fatih Sultan Mehmet (15th century) (Akgunduz, 2006, p.131). By doing this, the Ottoman Empire of the era demonstrated its own understanding of secularism (Schull, 2014). Although secular and religious laws

coexisted within the Ottoman legal system, the Sultan's intervention within the area of religious law could be regarded as one of the initial signs of Ottoman secularism (Imber, 1997).⁴ Since the 15th century, the Ottomans had their own Penal Code. My analysis focuses on the sultan-drafted penal codes, the 1858 Penal Code, and the ones that preceded it. Although Islamic law, including the Ottoman legal regime, was derived from manifold sources, the judges (*kadis*) were obliged to apply only the Quran (*shari'a*) and sultan-drafted codes or *kanuns*. (Heyd, 1973).

At this point, this issue of whether same-sex intercourse/sodomy was one of the crimes listed in the Quran (*hadd* crimes) gains importance (Habib, 2010). Interpretation of same-sex relations/intercourse/intimacy in the Quran deserves further elaboration. Not all Islamic legal scholars interpret the Quran in exactly the same manner regarding its attitude towards same-sex conduct. While they are largely in agreement that sodomy/*liwata*/same-sex intercourse was not an approved manner of sexual intercourse, dispute arises as to the nature of the punishment that should be employed (Habib, 2010). Since the Quran does not explicitly refer to homosexuality, Islamic legal scholars make conclusions about the appropriate penalty by drawing an analogy with other sexual rules. The nature of the punishment for homosexuality constitutes a long-standing debate for Islamic scholars. Scholars such as Imam Maliki, Imam Shafi Zuhri, Said B. Museyyeb and Suyani Sevri accept that homosexuality is implicitly classed as a crime (or crimes) in the Quran, and therefore falls under the scope of *hadd* (Kennedy, 2008) punishments. By drawing a parallel between fornication, adultery and homosexual conduct, they argue that the punishment should be stoning to death (*recm*) (Kennedy, 2008). Yet scholars such as Ebu Hanafi, Immaiye and Zahiriye counter this assumption that homosexuality was implicitly one of the *hadd* crimes listed in the Quran (Rehman

⁴ The process of systemic codification started with Beyazid II (1481–1512).

and Polymenopoulou, 2013–2014; Omar, 2012; Kennedy, 2008). They disagree with the affiliation of *liwata* (sodomy) with heterosexual adultery since *liwata*, by its very nature, does not result in procreation, and thus is not capable of ruining a lineage. In light of these discussions, the Hanafi school of legal thought departs from other schools in Islam by largely accepting that sodomy falls under the scope of the *ta'zir* crime type, a minor crime not listed in the Quran, and its regulation should, therefore, be left to the *kanun* (secular law) (Habib, 2010; Akgunduz, 2006). In other words, the punishment for sodomy would depend on the discretion of the state where *liwata* (sodomy) had taken place. Hanafi jurisprudence formulates secular state laws for punishment and recommends options ranging from physical chastisement to the death penalty; only early Hanafi scholars are reported to have excluded the death penalty from the list of punishments for sodomy (Habib, 2010). Yet these options allowed the Ottomans to determine their own appropriate punishment for sodomy (Miller, 2007; Acar, 2001) as they were following the Hanafi jurisprudence.⁵ As same-sex relations and sodomy were considered *ta'zir* crimes, which were left to the sultan's discretion and state penal codes, I will focus on the sultan-drafted secular codes as my main source in this article.

4. Criminalisation of Homosexuality by the Ottoman Empire and Europe Before 1858

Fatih Sultan Mehmet (Mehmet the Conqueror) drafted the first secular criminal code of the Ottoman Empire in 1488 (Akgunduz, 2006, p.347; Acar, 2001). The modern Turkish translation of this code does not explicitly mention sodomy (Akgunduz, 2006, p.347). The second penal code was drafted by Beyazid II, who reigned over the Ottoman Empire after Mehmet the Conqueror. This penal code was very similar to

⁵ It should be noted here that the Ottomans did not employ shari'a prescriptions concerning fornication and any other sexual crimes.

Fatih's and also did not prescribe any penalties for sodomy in its text (15th century) (Akgunduz, 2006, p.39; Acar, 2001). After Beyazid II, Yavuz Sultan Selim also codified a criminal law in which no penalties were incurred for sodomy and/or same-sex intimacy (16th century) (Acar, 2001). However, according to Acar, these codifications incurred a fine as punishment for sodomy (*liwata*) as their punishment was derived from interpretation of fornication (Acar, 2001). According to this argument, it is best to stay loyal to the textual interpretation unless there is evidence that suggests same-sex intercourse, *liwata*, or sodomy, was interpreted under the scope of fornication and therefore penalised without being explicitly mentioned. That said, Acar does not provide any evidence that would validate his analysis. Moreover, penalising same-sex intimacy does not adhere to the Hanafi school of law's classification of *liwata* (same-sex intercourse), which is regarded as outside of fornication. Acar's argument postulates that same-sex intercourse was implicitly penalised under the provisions that regulate fornication by Fatih the Conqueror, Beyazid II and Yavuz Sultan Selim (Omar, 2012).

Suleiman the Magnificent, who is also known as the Lawgiver, introduced the last authentic penal code of the Ottoman Empire, possibly between 1539 and 1541. This code explicitly mentioned sodomy/*liwata*/same-sex intimacy for the first time within Ottoman penal history (Ziadeh, 2015). The first section of this legislation, Articles 27, 32, 33 and 35, were about same-sex sexual activities and pederasty:

27—Furthermore, if a person's son yields to a pederast—if [the youth] is of age [*balig*⁶], [the *cadi*⁷] shall chastise the youth severely and a fine of one akce shall be collected for each stroke; and if he is not of age, his father shall be chastised because he has not guarded [him], but no fine shall be collected.

⁶ According to the Hanafi school of law, females reach the age of puberty at nine, males at 12 years old.

⁷ This is translated as 'judge'.

...

32—If a person who is of sound mind [and] of age commits sodomy—If he is married and rich, a fine of 300 akce⁸ shall be collected from him; and a person in average circumstances a fine of 200 akce shall be collected; and from a poor person a fine of 100 akce shall be collected; and from a person in worse circumstances a fine of 50 or 40 akce shall be collected.

33—And if the person who commits sodomy is unmarried—From a rich one 100 akce shall be collected as a fine, from one in average circumstances 50 akce, and from a poor one 30 akce,

...

35—If little boys from among the townspeople or peasants (Turks) perform sexual acts with one another, the *cadi* [judge] shall punish them a fine of 30 akce shall be collected from each one (Heyd, 1973).

The prominent feature of these codes is the nature of the punishments. Unlike its Western European counterparts, which are detailed further below, the penalty for sodomy was monetary punishment, differing according to the wealth and social status of the offender. The lenient characteristics of this set of codes become evident when compared to the severe punishments in Western Europe at that time (Dynes and Donaldson, 1992).

The punishment for sodomy in Western Europe from the 16th to the 19th centuries was the death penalty. In the German Empire, sodomy was punishable by death (1532) (Boes, 2002), while in English law buggery had been introduced as a crime punishable by death during the reign of Henry VIII (1509–47). This penalty in England continued until 1861, when it was reduced to life imprisonment (Moran, 1996). In France, until 1810, sodomy was punishable by death and by the confiscation of the property of the offenders (Goodrich, 1976; Sibalis, 1996). In Geneva, from the 14th to the 17th centuries, the punishment was death by burning, hanging or drowning (Berkowitz, 2012, p.231). Similarly, in Spain and the Dutch Republic (Joordam, 1989),

⁸ Currency of the Ottoman Empire.

sodomy carried with it the death penalty (Gilbert, 1981; Fradella, 2002). It should be noted that the emergence of sodomy as a serious offence in Western Europe started from the 12th century and was due to the diffusion of Roman Law (Gilbert, 1981; Von Bar, 2007, p.260; Fradella, 2002). By the 15th century, sodomy had been codified as an offence punishable by death throughout Europe (Gilbert, 1981; Von Bar, 2007, p.260; Fradella, 2002). This evidence clearly shows that the 16th-century Ottoman Penal Code was more tolerant of sodomy than its Western European counterparts (Monter, 1981). This also confirms that the Ottoman and the Western penal regimes in relation to same-sex intimacy were different from each other.

Ottoman legislation and that of Western Europe are analogous in that they regulate sodomy under the same sections as fornication and bestiality (Berkowitz, 2012). However, the Ottoman Penal Code departed from the European model by following the shari'a order of assigning different penalties to different economic and marital statuses (Ze'evi, 2006, p.60). Penalties were relative to the offender's status, such as married/unmarried, Muslim/non-Muslim (Ze'evi, 2006, p.60). Exemplifying this was the fact that sodomy committed by a married man was penalised more heavily than sodomy committed by an unmarried man. It is also important to note that no distinctions were made in favour of female offenders regarding sexual crimes, and equal punishment was prescribed for heterosexual adultery and homosexual sodomy (Ze'evi, 2006, p.64). Unlike the modern criminal law system, which relies on the status of the victim, the Ottoman system determined punishment in accordance with the status of the offender.

As has been explained, the punishment given for sexual crimes between consenting adults was monetary (Ze'evi, 2006). The exemption to this fine was pederasty,⁹ which was penalised by flogging, as well as monetary punishment.¹⁰ Although pederasty was subject to a heavier punishment than sodomy, it was still a more lenient penalty than that of the European penal codes of that century.

According to an archival study conducted by Zarinebaf, sexual offences constituted 0.6% of the case law in the Ottoman Empire between 1721 and 1725, and the act of sodomy (as in same-sex intercourse/relation/intimacy) was rarely prosecuted. One reason for this was that the standard of proof was set very high in terms of sexual crimes in general within the Ottoman penal regime (Heyd, 1973). One of the cases noted within the registry of case law in Uskudar/Istanbul was the 1562 case in which Imirza B. Sevindik alleged that Veli and Musa forced his sons to *liwata* (have intercourse) (Uskudar Case-Law Registry 26, Vol 7, 11.). However, as he could not find any witnesses, this allegation could not be proved. It was noted by the *kadi* that the accused could not be prosecuted without any evidence (Uskudar Case-Law Registry 26, Vol 7, 11).

When prosecution did occur, the punishment was solely monetary (Zarinebaf, 2010). One example of this emerges from a 1524 case in which Timurhan b. İsmail Levend Pîri was tried because he displayed inappropriate sexual behaviours on a street in Istanbul. According to the case report he was seen kissing Muslim boys on the street. It was noted that *ta'zir* punishment was administered (Uskudar Case-Law Registry 05, Vol 3, 106.).

⁹ Pederasty could be defined as an emotional and sexual relationship between an older man and a male youth. See: John R. Ungaretti, 'Pederasty, Heroism, And the Family in Classical Greece' (1978) 3(3) Journal of Homosexuality 291–300.

There is a body of scholarship that endeavours to overshadow this Ottoman penal regime's leniency towards same-sex intimacy by arguing that the death penalty was theoretically possible in *ta'zir* crimes. Although scholars such as Akgunduz and Acar have examined Ottoman case law for more than 20 years, they have not provided any case law or codification that confirms their argument. (Akgunduz, 2006; Acar, 2001). This argument also contradicts the fact that early Hanafi scholars are reported to have excluded the death penalty from the list of punishments for sodomy (Habib, 2010). However, even if it was possible to penalise sodomy with the death penalty under Hanafi jurisprudence, it is imperative to emphasise that the sultans of the Ottoman Empire had not chosen to penalise sodomy by death. The Ottoman penal laws had penalised sodomy with punishment by fine.

Comparing this with the situation in Western Europe, although it has been pointed out that the application of sodomy laws was not frequent in Western Europe (Boes, 2002; Godbeer and Winiarski, 2014), a documentary collection of police and court archives on sodomy in early modern France, and a broader study by Crompton and Fone (Merrick and Ragan, Jr, 2001; Crompton, 2006; Fone, 2001, p.238), cast significant doubt on this observation. These sources reveal numerous cases between the 13th century and the 18th century in which 'sodomites' were burned alive. The same studies also reveal that penalties were gradually reduced to imprisonment, starting from the mid-18th century (Merrick and Ragan, Jr, 2001). Supporting these studies, historical research has led to the assertion that public trials for sodomy took place, especially in Britain during Victorian times (Cocks, 2006).

The Ottoman Penal Code of Suleiman the Magnificent stated that same-sex intercourse/intimacy was a minor crime and, in this sense, not only departed from strict

interpretations of the Quran but also revealed a disparity with severe Western penal regimes.

Two important conclusions may be drawn from these facts. Firstly, the penal regime regarding same-sex desire in the Ottoman era historically differs from the Western experience; and, secondly, there had been a period when there was a lenient legal accommodation of same-sex intimacy/sodomy within Ottoman/Turkish history.

5. Transplantation of the 1810 French Penal Code

Nineteenth-century Western criminal law was undergoing a change as well. As mentioned earlier, the modernisation of criminal law resulted in legal reforms in many European countries. One aspect of this reform movement was the re-evaluation and reframing of the punishments for sodomy by Enlightenment thinkers. For example, scholars such as Montesquieu, Beccaria and Voltaire opposed the criminalisation of sodomy on the grounds that obtaining proof was difficult due to its private nature, and that the punishments were not proportional (Richter, 1977). The legal motivation underpinning the replacement of the former Ottoman penal regime regarding same-sex intimacy with the French regime is, however, obscure and there is no evidence that suggests that a discussion had taken place in justification of this.

Before deconstructing the nature and outcomes of this legal transplant,¹¹ it would be useful to evaluate the adopted French Penal Code and its sphere of influence at that time. Unlike the Ottoman Empire's voluntary borrowing of this code, the Netherlands adopted French legislation as a result of having been invaded by France and, as a consequence, was forced to decriminalise sodomy (Sibalis, 1996), only to recriminalise it soon after gaining independence from France in 1814 (Sibalis, 1996).

¹¹ The term 'legal transplants' refers to the moving of a rule or a system of law from one jurisdiction to another. The term was first coined by Alan Watson (Watson, 1974).

The 1810 French Penal Code had been influential throughout Europe, with both Belgium and Luxembourg adopting it. This supports the argument that it was not only the Ottoman Empire but also the whole of Europe was under the influence of a wave of legal reform (Elliot, 2011). Even France continued to reform its legislation and adopted new regulations in 1863 and 1882, raising the age of consent to 13 years, as well as restricting the public display of same-sex relations (Sibalis, 1996). With another legal reform in the 1880s, same-sex contact in the public sphere was criminalised in France and, finally, in 1942 under the Vichy government, the age of consent was raised to 21 years for same-sex relations in the private sphere (Sibalis, 1996). The French authorities amended the 1810 Penal Code several times before 1858. However, in 1858 the Ottomans borrowed the initial version of the 1810 French Penal Code.

Numerous sources report that penalties against sodomy had been repealed by the adoption of the 1810 French Penal Code in 1858 under the Tanzimat reforms (Wintemute, Tønnesson Andenæs, 2001; ILGA, 2015). As contradictory as it may sound, while the 1810 French Criminal Code, which was adopted by the Ottomans, removed punishment for sodomy/same-sex intimacy and employed a new sexual regime (Haggerty, 2000, p.344), the same article that decriminalised sodomy by restricting it to private, consensual same-sex intercourse in France did not have the same effect in the Ottoman Empire – and later in Turkey, as the following section will detail.

6. Did the Ottomans decriminalise homosexuality in 1858?

Following the penal codes authored by Suleiman the Magnificent in the 16th century, the last Ottoman Penal Code (1858), which allegedly decriminalised sodomy/same-sex intimacy, included these articles that regulate sexual offences:

Art. 201—Whoever dares to behave contrary to public decency by making it a habit to incite and entice young persons from amongst males or females to obscenities by perverting or deceiving them or facilitating the

means of the coming about thereof is punished with imprisonment for from one month to one year; and if this matter of perverting or deceiving in this manner proceeds from persons who are the father or mother or guardian, they are to be punished with imprisonment for from six months to one year and a half.

Art. 202—The person who dares to commit the abominable act publicly contrary to modesty and sense of shame is to be imprisoned for from three months to one year and a fine of from one Mejidieh gold piece to ten Mejidieh gold pieces is to be levied. (The Ottoman Penal Code, 1858)

After the adoption of this French Penal Code, the Ottoman authorities amended their penal code several times. However, *liwata*, homosexuality or any other expression that explicitly refers to same-sex intimacy was absent from the legal texts. Yet, at the same time, with each amendment they adopted more restrictions on public expressions of sexuality, including same-sex attraction. Thus, Article 202 was amended by an addendum dated 3 Jemazi'ul-Akhir, 1277 (17 December 1860), the text of which is as follows:

Those who address impertinent innuendos to young persons either males or females are to be imprisoned for from one week to one month and those who act outrageously with their hands for from one month to three months.

Those who in female attire enter places which are the abode of women are, for this act alone, to be imprisoned for from three months to one year, and if after their so entering in disguise they have set themselves to do a *Jinayet*¹² or *Junha* legally necessitating a more severe punishment than this punishment, they are to be punished with the punishment for such act.

A further addendum (No. 2) to Art 202 was made on 6 Jemazful-Akhir, 1329 (4 June 1911):

If, with the intention of committing obscenities contrary to public decency, women are made to dance in open places, or in semi-open places such as vineyards and gardens which the people may easily become aware of, the persons who make them dance and the women who voluntarily so dance are to be punished with imprisonment for from one month to one year.

¹² *Jinayet* and *Junha* are types of crimes within the Ottoman criminal law.

According to widespread positivist assumption, these articles implanted from the French Penal Code in 1858 decriminalised homosexuality in the Ottoman Empire owing to the absence of penalties addressing private same-sex activities. This poses an important question. What would happen if we changed the benchmark of this analysis? Would we come to the same conclusion if we reanalysed these laws through a basic definition of decriminalisation instead of examining them through the Western conceptualisation? The definition of decriminalisation is ‘a deliberate legislative action to remove a particular form of conduct from the list of offences’ (Nuotio, 2011). If this definition of decriminalisation is broken down into its components, required are: (1) deliberate legislative action; and (2) removal of a particular form of conduct from the list of offences. This basically translates to: what used to be a crime is no longer so. Regarding the first strand of the definition – ‘deliberate legislative act’ – as mentioned above, the 1810 French Penal Code inspired the 1858 Ottoman code (Heinzelmann, 2014). This leads to the question of whether the authorities examined the whole French text in detail before transplanting, and whether they subsequently became aware of the fact that they were also adopting the articles regulating same-sex desire. The most important argument against this would be that the 1858 Ottoman Penal Code consisted of 264 articles, whereas the 1810 French Penal Code had 484 articles, which would suggest that the Ottomans did not copy the French Penal Code in its entirety and were more selective than is generally presumed. Furthermore, the 1858 Ottoman Penal Code maintained some types of shari’a penalty, such as blood money.¹³ This evidence suggests that the Ottomans did not adopt the whole French code without any pre-examination; on the contrary, they deliberately chose sections and opted to blend some

¹³ *Diyet* – blood money – is the amount of money the murdered had to pay to the family of the murder victim, similar to compensation. Penal Code of the Ottoman Empire (1858) (n 5) Article 183.

of the content with the Ottoman criminal approach, while implanting others directly. In the light of this evidence it can be concluded that this adoption was a deliberate legislative act.

The second component of the above definition of decriminalisation requires the removal of a particular form of conduct from the list of offences. As explained previously, assumptions imposed through Western benchmarks are problematic. Determinations of which conduct was removed by the Ottomans requires a comparison between the various Ottoman penal codes. If we compare the 16th-century Ottoman penal codes with the 19th-century Ottoman penal codes, we can determine whether or not the Ottomans actually decriminalised same-sex intimacy.

In terms of pederasty, the 16th-century penal code, Article 27 (Heyd, 1973), prescribed that the minor/his father were to be punished by chastising plus monetary punishment. However, the 19th-century penal code is silent regarding the assignment of punishments to minors or their fathers. Concerning the public display of pederasty, the 16th-century penal code, Article 20 (Heyd, 1973), stipulated that an offender (either male or female) caught kissing a boy on his way (in the streets), or addressing indecent words to him, or approaching him¹⁴ would be chastised. This could be in the form of monetary punishment, but could also lead to imprisonment, depending on the discretion of the judge. On the other hand, in the 19th-century penal code, Article 202 established that the public outrage against modesty should be imprisonment for a term of three months to one year. A further amendment to this Article in 1860 prescribed that ‘impertinent innuendos to minors of either sex [were] to be punished with imprisonment

¹⁴ In the Turkish language there are no gender pronouns (‘O’ refers to he/she/it); this might cause translation problems in terms of determining the sex of the perpetrator in these codes. However, the victim was mentioned as a male and in both cases the perpetrator includes male persons. Therefore, this article covers pederasty.

from one month to three months and acting outrageously with their hands from one month to three months’.

In terms of same-sex intimacy/sodomy, the penalty assigned by the 16th-century penal code, Articles 32, 33 and 35, was as follows: ‘if the age of puberty has been reached, punishment varies from 300 akce to 400 akce depending on the marital, economic and religious status of the offender’ (Heyd, 1973, p.103). However, in the 19th-century penal code, Article 202 dictates that public outrage against modesty should be punished with (*alenen fiil-i seni icra*) imprisonment for three months to a year (The Ottoman Penal Code, 1858). Interpretation of what was decriminalised and criminalised in Article 202 needs further elaboration.

Given this picture, it would be quite hasty to deduce that with the adoption of the French Penal Code in 1858 homosexuality was decriminalised in the Ottoman Empire, at least without first examining the new dynamics of the punishment system adopted via this law. With this dramatic change in the criminal system, it is necessary to deconstruct whether the textual absence of private same-sex activity in this penal code could mean that it had been decriminalised.

Before delving into a detailed examination of Article 202, there are three general conclusions that could be drawn from the above comparison. Firstly, the 1858 Penal Code deployed imprisonment as the primary punishment, departing from monetary punishments, and thus became more authoritarian. Following the same pattern, the criminalisation of abortion occurred for the first time in Ottoman/Turkish history with the adoption of the 1810 French Penal Code, and this is another example that supports the fact that change in the country’s sexual regime resulted in authoritarianism and a harsher sexual regime (Miller, 2007). Secondly, a modern criminal approach was adopted. This means that the legal system started regulating punishments according to

the *victim* and not the offender. Moreover, there was a change in the terminology. For example, thresholds such as reaching the age of puberty, which might vary from one person to another, were replaced with universal, stable thresholds that would be applied to everyone equally. This was also followed in terms of the public/private distinction as well. The penalties bluntly included the terms ‘private’ and ‘public’ in the text of the 1858 Penal Code, which has not been explicitly mentioned in the previous Ottoman Penal Codes. Thirdly, regarding sodomy regulations in the 16th-century penal code of the Ottomans, Articles 32, 33 and 34 (Heyd, 1973, p.103) imply that both public and private sodomy were to be punished equally by monetary means. However, Article 220 of the 1858 Ottoman Penal Code, which allegedly decriminalised homosexuality, prescribed imprisonment for public indecency. In this way, public display of homosexuality was criminalised more heavily than it had previously been with the 1858 Ottoman code, which is accepted to have decriminalised homosexuality.

If we proceed with our analysis of the articles of the 1858 Ottoman Penal Code, it can clearly be seen that sodomy (male-to-male same-sex intercourse and intimacy) and its modern terminology, homosexuality, disappeared from Ottoman legal discourse. However, it would be perhaps too optimistic to conclude that homosexuality/sodomy was decriminalised as a consequence of this disappearance, particularly when the shift in criminal and sexual regimes at that period of the Ottoman Empire is taken into consideration. There is a vast amount of literature which suggests that the structure of the sexual regime was turned upside down through the adoption of Western laws in the cause of modernisation, economic growth and/or a sense of inferiority in the late 19th century (Heyd, 1973, p.95; Ze’evi, 2006; Drucker, 2012; Kinli, 2013).

Expanding upon his argument, one of the dramatic signs of this upside-down shift could be seen in the language deployed for the regulation of sexual crimes. There

is a notable difference between the last authentic Ottoman Penal Code and the one that Kanunname-i Ceza (1858) borrowed from the French Penal Code. The latter departed sharply from the former as a result of following the French structure in regulating sexual offences (Ze'evi, 2006, p.70). In the 16th-century Ottoman Penal Code, sexual offences were articulated and named, whereas the 1858 Ottoman Penal Code was silent on sexual acts and, moreover, used indirect language. In this regard, some scholars have argued that the Ottomans' legal discourse on sexuality, including same-sex relations, shifted after the adoption of these laws (Ze'evi, 2005).

A certain amount of evidence could be provided in defence of this argument. Firstly, Ottoman reformers codified sexual offences under the section 'About Crimes Concerning Violation of Honour [*Irz*¹⁵]' (Ze'evi, 2006), following the French version, which bracketed them in the section on 'public offences against decency' (Sibalis, 1996) or, in an alternative translation, 'attacks on morals' (Penal Code of France, 1810). The phrase 'abominable act' was used instead of same-sex intimacy (John Alexander Strachey Bucknill; Haig Apisoghom Sdepan Utidjian, 1913, p.150). In a study of the translation from the Turkish text, it was remarked that 'the abominable act or infamous act is literal, and includes outrage either by way of natural or unnatural intercourse (i.e., sodomitical or sexual)' (Strachey Bucknill, Utidjian, 1913, p.150). Secondly, the Ottomans abandoned shari'a-based classifications, such as Muslim/non-Muslim and married/unmarried, and replaced them with adult/minor, consent/force and public/private (Ze'evi, 2006). Thus, instead of using the language employed by the 16th-century Ottoman Penal Code, the Western-influenced 1858 Ottoman Penal Code deployed vague, ambivalent terminology by which same-sex/sodomy disappeared from

¹⁵ *Irz* in modern and Ottoman Turkish refers to a person's sexual integrity and purity.

legal texts. It is also important to note that not only sodomy but also other ‘unnatural’ sexual acts, such as bestiality, vanished from the text of the 1858 Ottoman Penal Code.¹⁶

6.1. Why the 1840 and 1851 Ottoman Penal Codes are not considered to have decriminalised homosexuality, despite the absence of penalties for same-sex intimacy

If the textual absence of private same-sex intimacy as an offence is the basis of decriminalisation claims, why are the previous Ottoman Penal Codes (1840 and 1851), which also did not contain any reference to sodomy or same-sex intercourse, not declared to have decriminalised homosexuality? (Gokcen, 1987) Several scholars working on Ottoman criminal law share a view that the 1840 and 1851 penal codes did not regulate every type of crime, but instead focused on urgent issues with an emphasis on ‘life, property, and honour’, which would save the Empire from decline (Gokcen, 1987; Miller, 2005, p.32). According to Miller, these laws functioned as a reformulation of the state and authority through modern principles (Miller, 2005, p.45). By virtue of these penal codes, the sultan’s monarchy was gradually replaced by a modern authoritarian state: firstly, by adopting the principle of equality before the law (of everyone, including the sultan); and, secondly, through subrogating the sultan’s status with the state, which became the only reference of sovereignty within the 1851 Penal Code (Miller, 2005).

Similarly, it is argued that the 1840 and 1851 penal codes only regulated crimes that were not mentioned in the Quran (Gokcen, 1987). This implies that the aim of these penal codes was to engender a law that would also cover non-Muslims, would remedy

¹⁶ Criminalisation of fornication was not mentioned but there was another article regulating amnesty for the husband from killing his wife or the man she committed adultery with. Article 188—He who has seen his wife or any of his immediate female relatives with a man committing adultery, he may beat, injure, or kill one or both of them, in these cases, he will be exempt from penalty.

the injustice between the Muslim and non-Muslim populations, and perhaps encourage the latter to stay within the Empire. This argument postulates that shari'a was still operational thus offences described in the Quran were only applicable to Muslims, and same-sex intimacy could be criminalised in accordance with the Quran. This line of argument would lead to an assumption that, although sodomy/same-sex intimacy was not listed as a crime in these secular penal codes, it could still have been punishable by Islamic law. However, as mentioned before, the Ottomans were following the Hanafi school of law, which classes sodomy as a *ta'zir* crime (misdemeanour), the penalty for which fell under the discretion of the state. The state did not prescribe any penalties in the 1840 and 1851 penal codes. Therefore, the absence of sodomy/same-sex intercourse as an offence within these criminal codes cannot be explained by the fact that the shari'a law was still operational within the Ottoman Empire, since the Hanafi school of law leaves the regulation of same-sex intercourse to state law. Moreover, this line of argument does not explain the shift that occurred within Ottoman criminal law and correspondingly fails to address why the previous Ottoman codes explicitly criminalised sodomy/same-sex intimacy (with monetary penalties) and why they stopped mentioning it in subsequent penal codes. As a result, there were no punishments explicitly assigned to same-sex activity in these penal codes, just like the later 1858 Penal Code. These codes were not deemed to have decriminalised homosexuality. They were criminal codes as well and if the criterion for decriminalisation was the absence of punishment assigned to private same-sex intimacy, both the 1840 and 1851 Ottoman Penal Codes fulfilled this requirement and deserve to be recognised as having decriminalised homosexuality. However, it is largely accepted that it was the 1858 Penal Code that led to decriminalisation. The reason for this conclusion stems from the fact that the 1858 Penal Code transplanted the French Penal Code, which decriminalised homosexuality

in France. The assumption has been that one formulation of decriminalisation could decriminalise same-sex intimacy in every country. However, the French formulation was built on decriminalisation in private and did not consider public display of same-sex intimacy as a component of the decriminalisation framework.

6.2. The Ottoman Penal regime regarding the public display of same-sex intimacy

The 16th-century laws punished sodomy with a fine, regardless of where it happened. There was no explicit reference to ‘public’ or ‘private’ in these codes. As such, could it be argued that the notion of a public/private divide was not acknowledged by the 16th-century penal code? If the text of the Magnificent Suleiman’s codification is subjected to scrutiny, it can be revealed that there was a particular expression that might imply the public sphere, namely, ‘approaches him on his way’ in Article 20 (Heyd, 1973, p.100), which criminalises the public display of pederasty. Thus, the public and private distinction was already acknowledged in Kanuni the Lawgiver’s penal code (16th century). Further evidence can also be found in the case law mentioned earlier: Timurhan b. İsmail Levend Pîri was tried in 1554 because he displayed inappropriate sexual behaviours on a *street* in Istanbul. According to the case report, he was kissing Muslim boys on the street and, *ta’zir* punishment was accordingly administered (Uskudar Case-Law Registry 05, Vol 3, 106).

In light of the above, the widespread assumption that homosexuality was decriminalised in 1858 overlooks the fact that the public display of same-sex attraction was criminalised far more heavily than had been the case under the codes of Suleiman the Magnificent. The punishment given for public homosexuality in the 1858 Ottoman Penal Code was imprisonment for three months to one year, under the category of ‘abominable act publicly contrary to modesty’. This is clearly a misleading consequence of reading Ottoman history from Western benchmarks, which brings about the

restriction by way of the criminal status of the private consensual same-sex activity. It can thus be concluded that, with the adoption of the 1810 French Penal Code, the Ottomans started to associate heterosexuality with the public sphere and homosexuality with the private sphere. Irem Kirimli argues that what was in fact adopted in the 1810 French Penal Code was the binary understanding of Western sexuality, thereby institutionalising heterosexuality as the only sexual orientation that could appear in the public sphere in the Ottoman Empire by means of legal transplantation (Kinli, 2013).

As discussed previously, one rationale underpinning the decriminalisation of homosexuality within the Western domain was that obtaining proof was difficult owing to its private nature. Yet this private nature of same-sex intimacy could itself be a result of heavy punishments deployed by the Western criminal penal codes. As the punishment was very harsh in the West, same-sex relations had to be more discreet than they had been in the Ottoman Empire. Given this public dimension of same-sex intimacy in the Ottoman Empire, the argument concerning the private nature of homosexuality in relation to Western legal history did not reflect the Ottoman history. Research into the decriminalisation of homosexuality cannot only assess the private exercise of same-sex intimacy. When the 1858 Penal Code limited same-sex intimacy to the private sphere, this brought about the criminalisation of same-sex discourse within the public sphere in the Ottoman Empire. While the monetary punishment was no longer applicable to private same-sex intimacy, public same-sex intimacy was criminalised more heavily by the 1858 Ottoman Penal Code. The severity of punishment for this public display was raised dramatically, from monetary punishment to between three months' and one year's imprisonment, with the transplantation of 'public abominable act' from the 1810 French Penal Code.

6.3. What does ‘public abominable act’ refer to?

Public perpetration of same-sex intimacy was subjected to monetary punishment in the Penal Code of Suleiman the Magnificent, which was in force from the 16th century until 1840. Nevertheless, in Article 202 in the 1858 Penal Code, which is considered to have decriminalised homosexuality, there is a correlation between ‘public’ and ‘abominable acts’. From this, it has been argued that private and consensual same-sex intercourse was not an offence and was thereby decriminalised. However, I argue that this conclusion confuses the disappearance of same-sex discourse with decriminalisation. In other words, the public display of homosexuality or discourse of same-sex intimacy was subject to punishment without explicitly articulating it. The explicit expression of same-sex desire vanished from legal texts through the installation of Western laws.

Ze’evi argues that the disappearance of sexual discourse during the 19th century did not only occur within the legal realm; it also disappeared from the medical and literary domains in the same century (Ze’evi, 2005). This poses an important question: why did the alleged decriminalisation of sodomy lead to an intolerance towards it within the medical and literary fields? Contrary to the expected function of decriminalisation, it actually reduced the public display of same-sex sexuality in the Ottoman era. This reinforces my argument that the public occurrence of sodomy was criminalised more heavily than it used to be with the adoption of Western penal structures regarding same-sex intimacy. Thus, it can be concluded that it was not actually decriminalised, but instead a new formulation of same-sex intimacy was transplanted from France. In this new framework of decriminalisation, same-sex intimacy was confined to the private sphere and any public reference to it was diminished and assigned heavier punishments within the Ottoman experience.

In the West, decriminalisation coincided with the medicalisation of homosexuality. In other words, homosexuality emerged as a disease that required

diagnosis (Duff, Farmer, Marshall, Renzo, and Tadros, 2011, p.26; Kinli, 2013). In this sense, discussions around same-sex attraction did not stop but were directed to a different realm, namely that of medicine. However, the Ottomans, and later Turkey, could not produce any policy regarding same-sex attraction other than one that silenced it.¹⁷ Thus this discourse totally vanished from their culture and, in this way, decriminalisation ironically brought with it the realms of condemnation, and as ironic as it may sound, criminalisation, of same-sex intimacy (Ze'evi, 2005). Following this analysis, it can be concluded that the space that same-sex intimacy used to enjoy and occupy in the Ottoman Empire was narrowed to the private sphere and penalties for the public display of same-sex intimacy had been increased by means of legal transplantation.

7. Conclusion

Reducing the decriminalisation of homosexuality to the legalisation of private same-sex intimacy is not an accurate yardstick. This framework for decriminalisation is a product of Western legal thought. It does not correspond with the Ottoman experience of de/criminalisation of homosexuality. As a result, application of this yardstick makes the Ottoman penal history an insignificant element when analysing their very penal history. What happened in 1858 could not be read as decriminalisation of homosexuality, when the Ottoman penal history is introduced into the analysis of decriminalisation. This was evidenced through a comparison between the 16th-century penal codes and the 1858 Penal Code, which allegedly decriminalised homosexuality. That comparison allowed the article to decolonise the assessment method by introducing the Ottoman's legal history to the analyses, instead of following the indicators that stem from Western penal

¹⁷ One of the reasons could be that the Ottomans' loss of leadership within medical and scientific realms led to handing over production of knowledge to the Western world.

history. When the assessment method for determining the penal status of homosexuality is decolonised, it can no longer be concluded that the Ottomans decriminalised homosexuality in 1858. On the contrary, the Ottomans introduced heavier punishments for the public display of same-sex intimacy in 1858, which this long-established assessment method fails to address. As this article has argued, while the public and private display of same-sex intimacy had been penalised with monetary punishments by Suleiman the Magnificent's Penal Code (16th century), the 1858 Ottoman Penal Code imposed a three-month to one-year imprisonment for the public display, which amounts to criminalisation. However, the formula for decriminalisation of homosexuality, as developed through Western legal history, hinders the exposing of the real picture in a country whose legal history does not comply with Western legal history's penal regime regarding same-sex intimacy.

Decriminalisation of same-sex intimacy is the benchmark of the LGBTIQ+ rights concept. Limiting decriminalisation to private same-sex intimacy and the absence of penalties in the penal codes, without investigating how it had been criminalised in the subject country before, not only obscures the decriminalisation analyses but also clouds our understanding of further steps in the LGBTIQ+ rights concept as a whole.

The proposed method in this article wishes to open up a discussion regarding the rarely questioned assessment methods that are employed to measure the LGBTIQ+ rights concept in a particular country, in the process debunking the legal myths surrounding LGBTIQ+ history and the state of LGBTIQ+ rights at the present time.

