SEXUAL MINORITY PUBLIC OFFICIALS' DISMISSALS BASED ON DISGRACEFUL AND SHAMEFUL ACT UNDER PUBLIC OFFICIALS' LAWS

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ABSTRACT

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Law as a state apparatus uses oppression to legitimize itself. This oppression can be the result of certain provisions' direct impact on an individual, but it can also be the result of the uncertainty that is created by a provision. Legal certainty is a principle that is accepted not just by jurisprudence in Turkey but by every legal culture around the world. Legal certainty entails that the individual subjected to law should know which concrete action and phenomenon are subject to which legal sanctions or consequences. Although legal certainty is protected under the second article of the Constitution in Turkey, some provisions still are unconstitutional. This thesis concerns the uncertainty that is created by Civil Servants Law No. 657 and General Law Enforcement Bodies Discipline Law No. 7068. These laws involve provisions concerning a public official's dismissal based on "disgraceful and shameful behaviour" and "unnatural [sexual] act." While failing to directly involve what "disgrace, shame and unnatural" entails, these provisions are a source for discriminatory dismissals of sexual minority public officials. To reveal this, this research involves in-depth interviews with LGBTI+ and cisgender heterosexual

women public officials who have been dismissed based on “disgraceful and shameful behaviour” and “unnatural [sexual] act;” and an analysis of cases concerning the abovementioned provisions. The research argues that legal institutions and state uses these provisions to police and manage sexual minorities in the workplace. It aims to create a uniform public official and punish those who do not comply with the government standards.

Keywords: Legal certainty, sexual minorities, feminist legal theory, queer legal theory, public service

ÖZ

TÜRKİYE'DE CİNSEL AZINLIK MENSUBU MEMURLARIN BAĞLI OLDUKLARI KANUNLARA GÖRE YÜZ KIZARTICI VE UTANÇ VERİCİ DAVRANIŞTAN DOLAYI MESLEKTEN ÇIKARILMASI

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Devletin araçsallaştırdığı bir yapı olarak hukuk, kendisini meşrulaştırmak için baskıyı kullanır. Bu baskı, belirli hükümlerin birey üzerindeki doğrudan etkisinin sonucu olabileceği gibi, bir hükmün yarattığı belirsizlikten de kaynaklanabilir. Hukuki belirlilik, sadece Türkiye'deki içtihatların değil, dünyadaki birçok hukuk kültürünün kabul ettiği bir ilkedir. Hukuki belirlilik, hukuka tabi olan kişinin hangi somut eylem ve olgunun hangi hukuki yaptırımlara veya sonuçlara tabi olduğunu bilmesini gerektirir. Türkiye'de hukuki kesinlik Anayasa'nın ikinci maddesinde korunsa da bazı hükümler halen anayasaya aykırıdır. Bu tez, 657 Sayılı Devlet Memurları Kanunu ve 7068 Sayılı Genel Kolluk Kuvvetleri Disiplin Kanunu'nun yarattığı belirsizliği inceler. Bu yasalar, bir kamu görevlisinin "yüz kızartıcı ve utanç verici davranış" ve "gayri tabii mukaranete" dayalı olarak memurluktan çıkarmaya ilişkin hükümler içermektedir. Bu hükümler, "yüz kızartıcı, utanç verici davranış ve gayri tabii mukarenetin" ne anlama geldiğini doğrudan içermemekle birlikte, cinsel azınlığa mensup kamu görevlilerinin ayrımcı bir şekilde görevden alınmasının bir kaynağıdır. Bunu ortaya çıkarmak adına, bu hükümlere dayalı olarak memurluktan çıkarılan

LGBTİ+ ve natrans ve heteroseksüel kadın kamu görevlileri ile derinlemesine görüşmeler; ve yukarıda belirtilen hükümlerle ilgili davaların analizi yapılmıştır. Araştırma, hukuk organlarının ve devletin bu hükümleri işyeri ortamında cinsel azınlıkları denetlemek ve yönetmek için kullandığını iddia etmektedir. Bu kapsamda devlet, tek tip bir kamu görevlisi oluşturmayı ve hükümet standartlarına uymayanları cezalandırmayı amaçlar.

Anahtar Kelimeler: Hukuki belirlilik, cinsel azınlıklar, feminist hukuk teorisi, kuir hukuk teorisi, memurluk

Dedicated to every being who yearns for a free and equal life…

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

The state, as an establishment, uses oppression for the sake of legitimizing itself. The legitimizing process occurs in state apparatus. Catharine A. MacKinnon (1989) defines these apparatus as forms of state expression. As a special form of state expression, the law can be an apparatus of state oppression. Jürgen Habermas (1996) defines the oppression of law as power. In other words, the law is a coercive force closely linked to violence and obedience. In this sense, law requires obedience not only to existing norms but also to the violation of these particular norms and rights by its own bodies.

Violation by law can occur through the law's own means. For instance, many democratic documents include the principle of legal certainty. Legal certainty holds that the individual should know which concrete action and phenomenon are subject to which legal sanctions or consequences (Constitutional Court Decision dated 7/4/2016 numbered E: 2015/94, K: 2016/27 , 2016). However, legislative wording also can be a means of violating this principle. Some rules fail to specify direct instructions for their application (as cited in Grattet & Jenness, 2005, p. 894), and the failure to specify can lead to uncertainty in the application. Uncertainty in the wording can lead to uncertainty and arbitration in the application as well.

The principle of legal certainty protects those who are subject to the law from the arbitrary use of state power (Maxeiner, 2008). However, the violation of this principle leads to the violation of the individual's own rights. Maxiener (2008) argues that law being determinate or certain is a false statement and sees legal certainty as a myth. In other words, it cannot be expected from the law to be absolutely certain. This thesis does not aim to discuss the mythical aspect of this argument but rather focuses on why it is important to discuss the uncertainty of some provisions within the scope of legislation in Turkey.

Turkish Public Servants Law No. 657 (*657 Sayılı Devlet Memurları Kanunu*) and General Law Enforcement Bodies Discipline Law No. 7068 (*7068 Sayılı Genel Kolluk Disiplin Hükümleri Hakkında Kanun Hükmünde Kararnamenin Kabul Edilmesine Dair Kanun*) include some uncertain provisions about public servants'/law enforcement officers' disciplinary punishment and dismissals. This thesis will focus on the created uncertainty in Public Servants Law No. 657 and General Law Enforcement Bodies Discipline Law No. 7068. It discusses how uncertainty is used as a means of state oppression. In this context, I will mainly focus on article 125 of Law No. 657 and article 8/cc of Law No. 7068 which concerns a public official's/law enforcement officer's disciplinary punishment.

The provision under Law No. 657 article 125 (1965) includes five different levels of disciplinary sanctions for public officials: warning, reprimand, pay cut, stoppage of progression, dismissal. One of the reasons for the dismissal of a public official appears as "engaging in disgraceful and embarrassing acts of a quality and degree incompatible with the title of public official" (*Memurluk sıfatı ile bağdaşmayacak nitelik ve derecede yüz kızartıcı ve utanç verici hareketlerde bulunmak*). "Disgraceful act" appears as a debated subject in the literature. Yıldırım and Kaman (2019, p. 167) give the example of a Council of State decision while trying to define what "disgraceful act" entails. According to the decision, "dishonour (*haysiyetsizlik*), unchastity (*iffetsizlik*), and misconduct at a level that prevents being left in office (*vazifede bırakılmaya mani suistimal*)" are the basis for what "disgraceful act" for a public official entail. This decision concerns a school teacher's clothes and their off-duty behaviour. The effort in the decision of the Council to define what public official's "disgraceful act" entail had failed in a way that it has brought even more uncertain terms such as "dishonour" or "unchastity" to the debate.

On the other hand, the provision under Law No. 7068 article 8 (2018) concerns acts that are subject to disciplinary sanctions. Parallel to the Civil Servants Law No. 657 article 125, Law No. 7068 article 8 also has different levels of disciplinary sanctions: warning, reprimand, pay cut, short-term suspension, long term suspension, and dismissal. One of the reasons for the dismissal of a public official appears as engaging in an unnatural act with someone or to engage in this act with another person's consent (*Bir kimseyle gayri tabii mukarenette bulunmak yahut bu fiili kendisine rızasıyla*

yaptırmak)[1]. Yıldırım (2018, p. 464) tries to find the definition of this term in Constitutional Court decisions. According to the Court (Constitutional Court Decision dated 29/11/2017 numbered E: 2015/68, K: 2017/166, 2017), unnatural act (*gayri tabii mukarenet*) is defined as engaging in unnatural sexual behaviour. This type of sexual behaviour can occur in many different ways and may differ from person to person or from society to society. The said behaviours are sexual behaviours that cannot be accepted as natural in all social orders and have a negative effect on the moral standards of the society.

In both attempts to define the terms "disgraceful act" and "unnatural act," more uncertain terms such as "honour, chastity, social order or moral standards of society" come up. It is argued that most rules within the legal system fail to specify direct instructions for their implementation and enforcement. In this case, the uncertainty of "what the law is" is not derived from a deficiency of legal meaning, rather from a surplus of possible interpretations of the meaning of the law. According to Grattet & Jenness (2005, p. 894), the uncertain nature of the law requires the actors within the legal system to give directions on how to apply the law. These directions should include elaborating or in some cases narrowing the scope of the law's application.

Although some researchers argue that legal actors should give directions to eliminate the uncertainty, I argue that legal actors intentionally create this uncertainty. This also becomes evident from the uncertain terms under the civil servants' laws. In this sense, the most effected groups from this uncertainty in law appear as sexual minorities who work within government institutions. These people are public officials who are not cisgender heterosexual males.

I argue that the state aims to impose its understanding of "morality" on the sexual minority workers by leaving space for interpretation to the provisions that involve uncertain terms such as "disgraceful and embarrassing act" and "unnatural (sexual)

[1] This provision was implemented parallel to the provision under the Turkish Armed Forces Disciplinary Law No. 6413. According to the Law No. 6413 article 153 (1930), "Military persons who engage in unnatural acts with a person or to engage in this act with other person's consent are also punished with the penalty of being dismissed from the Turkish Armed Forces, and for non-commissioned officers, even if their acts constitute another crime, they are punished to be withdrew from their rank." The original provision was brought up to deem homosexual sexual intercourses as "unnatural" and punish homosexual armed force members. (Pembe Hayat LGBTT Solidarity Association, Kaos GL Association, 2013).

act." Through the created uncertainty, the state as an employer of public officials gives somewhat an unlimited authority to dismiss the "immoral and dishonourable" unlawfully. This unlimitedness has the potential to resolve in an arbitrary procedure for sexual minority public official dismissals, where several violations of one's human rights can take place.

The societal tendency to out women and LGBTI+ individuals echoes into the workplace. One of the places where this is felt the most is government institutions. State's way of performing patriarchy is felt the most by the women and LGBTI+ public officials. Although it is always assumed that women and LGBTI+s struggle more in the workplace, the possibility to exist in such a patriarchal structure made me question what kind of struggles that these people face and how they experience the workplace against a white cisgender heterosexual man's experience.

The working environment seemed to be designed fit best for men's interests, whether be it the laws that protected them or more importantly the work culture that teared women and LGBTI+s down in every possible given chance. The best example for this is the existence of Article 125 of Law No. 7068 and Article 8 of Law No. 7068 that concerns a public official's disciplinary punishment and dismissal. After reading these two articles and sanctions for the first time as a law student, I realized that this sanction has a potential to be used as a weapon in "punishing" women and LGBTI+s in the workplace just for existing. This created some form of a discomfort for me as a feminist lawyer. To reveal in what ways this sanction is used as a weapon to punish women and LGBTI+ public officials living freely, I decided to get in touch with women and LGBTI+ public officials who have experienced or faced the risk of experiencing such disciplinary sanctions.

Before going into the field, I have designed my research questions to get a thorough grasp on the experiences of women and LGBTI+ public officials. I first wanted to understand what the motivations, practices, and effects of women and/or LGBTI+ public officials' dismissals based on the uncertain terms "disgraceful and embarrassing act" under Law No.657 and "unnatural act" under Law No. 7068 in Turkey. I also tried to understand why the lawmaker uses this uncertain terminology in the law, in what ways are these uncertain provisions used by the state to dismiss women and LGBTI+

public officials and how the uncertain nature of the provisions affects sexual minority workers.

I wanted to reveal the answers to the questions based on the experiences of women and LGBTI+ workers. Involving women and LGBTI+ public officials as a collective sample to a thesis is not a widely used method. Most of the existing research involves women (by women, I mean cisgender and heterosexual women) and LGBTI+s separately. I believe their experience within a government agency may have some similarities that might reveal a pattern. However, with these similarities, I do not intend to eliminate the unique experience or to make it all the same. In particular, I aim to distinguish this heterogeneity of sexual minority public officials vis-à-vis state through the unique life story of each person.

There is a political pattern in the way the state creates uncertainty and this thesis aims to reveal this pattern. The focus will be on exploring the motivations of the lawmaker while introducing the uncertain term "disgraceful and shameful act" and "unnatural [sexual] act" as reasons for dismissal of public officials. The political aspect of uncertainty is an important issue to discuss because it affects the lives of LGBTI+ and cisgender heterosexual women public officials and violates human rights. Although legal certainty is a constitutional norm and should be executed in all areas of legislation, the lawmaker still ignores this fact. This ignorance is also political and needs to be addressed.

The thesis gains its importance by revealing the gendered side of the subject. Although there are studies that discuss the unlawful dismissal of LGBTI+ employees and women employees, there is no study that takes into account the common points of dismissal based on immorality of LGBTI+ and women workers. Their dismissal has a common denominator that stems from the dominance of "immorality" in the society. Since this understanding is based on a patriarchal "moral" understanding of oppression, it is both LGBTI+phobic and misogynistic. A holistic approach to the issue through the experiences of the workers will help us to understand the unlawfulness in a more concrete way.

I argue that the state aims to impose the understanding of "morality" on workers by leaving room for interpretation on provisions containing terms such as "disgraceful

and shameful act." As the employer of public officials, the state, through the uncertainty created, somehow gives unlimited power to dismiss the "immoral." This unlimitedness has the potential to be resolved in an arbitrary procedure for dismissals of women and/or LGBTI+ workers where various human rights violations can occur.

In this context, I will argue that the uncertain provisions in Law No. 657 and Law No. 7068 are unconstitutional and contradict with basic legal norms and that these provisions are not a coincidence of unlawfulness, but a political choice of the state. This political choice paves the way for the state to transform the uncertainty created by the provisions into a tool of oppression.

In addition, the state tries to create a prototype of the public official profile while imposing its understanding of "morality;" public officials who comply with the state's understanding of "morality," "loyalty," and "principles." With the unlawful dismissal, the state almost "punishes" the public official who is "disloyal," "immoral," and "disgraceful" and deems this person as the "other." Therefore, the presence of women and/or LGBTI+ public officials in the workplace becomes precarious.

To reveal this pattern, I have conducted five semi-structured in-depth interviews with public officials who were dismissed or are currently facing the risk of dismissal from their jobs. All of the participants can be deemed as sexual minorities in the workplace. Public officials were comprised of one heterosexual woman, one gay man, one bisexual man, one trans man and one who did not want to label themselves. The research also includes insights from the court decisions of the participants. Out of the five interviewees, two of them agreed to share their case files with me. I have also reached out to two other participants who did not want to be interviewed but agreed that their case files can be used in the study.

This research is comprised of five chapters. The first chapter is an introduction revealing the definition of the problem, the purpose of the research, research questions, aim and significance of the study, definitions of the terms used in the study, limitations of the study, and assumptions of the researcher.

The second chapter includes relevant research and literature on the subject. It involves literature in the areas of legal certainty, queer and feminist theories' understanding of

law and state, sexual minorities within the state setting, bureaucracy, other country examples of public official dismissals based on discrimination and examples from Turkey. The third chapter involves the methodology of the research, research method(s), data collection, and data analysis. It also involves a discussion on the role of the researcher within the research and what being a feminist queer researcher means to the author. The fourth chapter lays out and discusses the findings of the research. It includes the analysis of the relevant court decisions and precedents in Turkey and in-depth interviews with sexual minority public officials who were dismissed or are currently facing dismissals based on their identity. The last chapter includes a short summary of the research as a whole, concluding remarks on the meaning of the data acquired, discussion on the analysis of the data and some recommendations for the practice and suggestions for further research.

CHAPTER 2

REVIEW OF RELATED LITERATURE

This chapter concerns the related literature and research in the areas of legal certainty, queer and feminist theory's understanding of law and state, sexual minorities within the state setting, bureaucracy, other country examples of public official dismissals based on discrimination and examples from Turkey.

2.1. Literature on Legal Certainty

Certainty becomes an issue when uncertainty and insecurity spread (Avila, 2016). To understand the impact of legal uncertainty on individuals' lives, we must first understand what legal certainty means. Legal certainty implies that legislative wording must be predictable. It must have clarity, stability, and intelligibility so that those concerned can calculate with relative accuracy the legal consequences of their actions (Paunio, 2009). Luno (as cited in Avila, 2016) sees certainty as a radical human anthropological need and "knowing what to hold on to" becomes a fundamental element of the individual and social longing for certainty.

Although some see certainty as a necessity, some argue that it is impossible to ensure certainty in the law and legal order. In this context, Avila (2016) states that legal uncertainty reached an unprecedented level due to mass information spreading to law and legislation. The author attributes this problem to living in an "information society" where there are many different interests. He argues that every individual and group seeks protection for their personal interests in legal norms: women, immigrants, ethnic minorities, environmentalists, consumers, liberals, conservatives, industrialists, workers, and exporters. He also claims that each group is lobbying for the enactment of norms that protect their own interests. As the interests of these groups naturally overlap, a multitude of norms come into force. This results in "chaotic" information

that then exists under the legislation. In short, Avila argues that we cannot talk about certainty and predictability in such a legal environment.

The Habermasian conception of “legal certainty” also sees this concept as somewhat problematic (Paunio, 2009). However, this idea focuses only on the way of applying legal norms rather than discussing the mass information available in the modern age. According to Habermas (1996), a legal system does not only consist of legal norms; it also includes built-in application procedures. Therefore, predictability or certainty in the application of these legal norms cannot be guaranteed. This theory reminds us not to view the law as determinative (Maxeiner, 2008). While Habermas' theory does not merely regard legal certainty as a myth, it does highlight its inherent tendency to be unpredictable.

A more radical perspective on legal certainty is the “radical indeterminacy thesis.” According to this thesis, “Law is not a rule system but chaos. The amalgamated contradictions form a structure that can yield no-however idealized-decision practice that would guarantee equal treatment and justice” (as cited in Habermas, 1996). For this, the law is always indefinite and never certain; any decision is legally justified in any case. Therefore, the law can basically be regarded as politics (as cited in Maxeiner, 2008). One of the moments when the political aspect of law shows its effect the most is when judges have unique individual discretion in deciding the outcome of the decision.

2.2. Literature on Judicial Discretion

The doctrine of judicial discretion implies that in cases in which it is uncertain what the law requires (namely, hard cases), judges/courts have the power to base their decision on their individualized evaluation since there is no legally required dispensation (Jennex, 1992, p. 473; Cornell Law Institute, 2020). Judicial discretion is granted to courts based on the case's particular circumstances rather than a rigid application of the law. It is argued that decisions made under this power have to be sound and be based on what is right and equitable given the circumstances (Cornell Law Institute, 2020). However, what is right and equitable may change from judge to judge and from time to time. Theorists like H.L.A. Hart and Ronald Dworkin have debated the possibility of a decision having one right and equitable solution.

Hart argues that there exists an indeterminacy in law. For him, the law can be conceptualized as a system of rules, however there are some rules that do not specify the correct outcome (Hart, 2012). This is due to the fact that not just legal language but the language in general is ineliminably open. All of the terms have a core meaning and a "penumbra." The penumbra of the term makes it unclear for the term to have one specific meaning (as cited in Kellogg, 2013).

According to Hart, a judge's responsibility is to apply the existing legal rules, however, when facing a hard case, the judge acts as a legislator by filling the gaps in laws by interpreting the already existing laws and policies. Yet, each judge, while interpreting the existing laws and policies, is going to come up with a different solution based on their past experience. Edward Levi argues that the social construction of a legal principle is a tentative and experimental process. The process is often drawn out over a period of many years (as cited in Kellogg, 2013).

Dworkin defines hard cases as a certain case that cannot be resolved by the use of an unequivocal legal rule, set out by the appropriate body prior to the event, then the judge has, accordingly to that theory, a 'discretion' to decide the case either way (Dworkin, 1978, p. 81). For Dworkin, hard cases can be distinguished into two types: a) a case without a rule, b) a case with a rule which offers 'incomplete, ambiguous or confliction guidance' (as cited in Galeza, 2013, p. 242). In both types of hard cases, judges have to apply a principle of articulate consistency. "Judges, like all political officials, are subject to the doctrine of political responsibility. This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make" (Jennex, 1992, p. 425).

Ümit Atılgan's study (2015, p. 527) on judge's perception of equity shows that in the cases discretion, the judge's pre-understandings on the certain meaning of the written law have vital importance. The participants to the study shows how in some examples pre-understanding of a legal norm become a direct final decision. In the cases of a needed discretion when the judge of the case is to make a "judgment," it is natural for the judge to bring their own "value judgment" to the decision. For this reason, it is

important to identify judge's value judgments through their social belonging and perceptions on other social group's values (Sancar & Ümit Atılgan, 2009, p. 29).

2.3. Feminist Theory on Law and State

Feminist and queer theorists have identified the state as a series of oppressive gender relations that needs to be changed. The state has the power to change policies, implement those policies and grant rights through these policies (Charles, 2000, pp. 1-5). Although the state has the power to change and implement the policies, the change and implementation of the policies rather occur in the representation of the dominant group, namely men (Hanmer, 1977; MacKinnon, 1989; Rhode, 1994). The state gives the right to men to be violent towards women (Franzway, Court, & Connell, 1989). In this regard, the state acts as the predominant leader in constructing gender relations within the society. Gender and sexuality are central to understand and theorize the state (as cited in Charles, 2000, p. 24). R.W. Connell (1990) argues that state as an authority has been effectively controlled by men, is biased towards the interest of heterosexual men. Foucaultian conception of the state as a concentration and institutionalisation of power which is continually contested both internally and externally. The state regulates power relations through the constitution of subjects within its discursive practices (Charles, 2000, p. 26). For this, the state uses its own apparatus. In this regard, law as a state apparatus also works as a means to constitute its subjects. Law is used to discipline populations.

"Law is not just," is a slogan that is made by the feminist movement towards the functioning of law (Uygur, 2015, p. 127). With a patriarchal presupposition, many spheres of our culture assume that the subject that they are going to deal with is going to be a white, middle-aged, cis-gender and heterosexual male. These areas take their presupposed "male subject" as their only respondent and associate through their operation. Much like any other area, the area of law and jurisprudence stems from the assumption that the subject is that "male" (Fineman, 2022, p. 2). Feminism also lacks jurisprudence. According to MacKinnon (1991), no woman had a saying in the design of legal institutions that rule the social order that both women and men live. While designing the legal institutions, the condition of women was also not taken into account, and their interest is not represented. To MacKinnon (1989), this design sees

and treats women; the way men see and treat women. For the law and jurisprudence, the existing legislation and provisions mostly apply and relate to a single standardized, monotype worker. According to MacKinnon (1989), this male dominance within the sphere of work, through the law, becomes legitimate, and the social dominance of men becomes invisible. Law adopts the male point of view; at the same time, it reinforces that view on society.

Much like law, the government institutions embody patriarchal assumptions, practices and values (Franzway, Court, & Connell, 1989). Within government institutions, those who have power are overwhelmingly men. Male networks are crucial for recruitment and promotion. Men with power also resist women's advancement within the institutional setting (Cockburn, 1991).

According to Annamarie Jagose (2009, pp. 160-161), feminist theory is a broad and heterogeneous thought project for a social critique that aims to break presuppositions and definitions of gender and sexuality. Much like feminist theory, the emergence of queer theory in the 1990s also brought a redefinition and transcending suppositions and definitions. However, these two thoughts do not exist for the aim to wane their relevance. Rather, according to Jagose (2009, p. 172), queer theory brings a new light to transcending identities and cultural codes. Although their projects are different, the author argues that, together, both feminist and queer theories have a chance to articulate the complexities of gender and sexuality. For this purpose, it is important to look at what queer theory says about law and its structures.

2.4. Queer Theory on Law and State

"Queer" is a term that resists to categories and definitions. It is a zone of possibilities (Jagose, 1996, pp. 1-5). Queer theory benefits from the endless possibilities not just in identities but also in institutions and structures. Critical queer legal theory, for instance, suggests law eludes itself from identities that are relative and fluid through time and focus on persons who are entitled to equal rights and treatments. For this theory, the norm should be deconstructed and the state of being a human should be centred (Erdoğan, 2020, p. 144). Yet there tends to be a tendency to categorize people and underline their differences and what is needed. For instance, many countries are witnessing a work on legal recognition for same-sex marriages. However, this

recognition is done through a non-queer lens (Leckey & Brooks, 2010, p. 23). Many courts and judges disregard the state of being a human and move on with more categories. Although through created categories, some countries experience changes and amendments in same-sex marriage laws, some countries' laws because of those categories were bound to result in human rights violations. A direct example for this, can be given from the Turkish Armed Forces Disciplinary Law No. 6413. This law included gay army members' "unnatural [sexual] act" as a punishable crime (*1632 Sayılı Askeri Ceza Kanunu, 1930*). This document passed into law in 2013. Many LGBTI+ organizations have stated that these provisions coming into force meant that same sex intercourses are going to be punished as "unnatural acts" (Pembe Hayat LGBTT Solidarity Association, Kaos GL Association, 2013). This provision does not just rely on certain categories, but also violate the rights of people who belong to those categories, namely sexual minorities.

Mary C. Dunlap (1979, p. 1131) defines sexual minorities as "homosexuals, transsexuals […] and other persons of non-traditional sexual identifications". According to the author, there exists a binary presumption in law. The legal system recognizes an absolute dichotomy between male and female. This imposes significant burden upon the sexual minority individual. According to Dunlap where specified, the term sexual minorities can also include cisgender heterosexual women because of the way women are treated by the society and law. The author even argues that there exists an essential commonality between women and LGBTI+ as sexual minorities. Both of these groups have suffered from the law and the government discrimination towards them. The government retains the power to assign sex identity to these groups through law. As long as the government has the power to assign certain roles to these groups, government has the power to sustain the series of discriminations.

For James D. Wilets (1997, p. 990), sexual minorities include individuals who have been distinguished by the society because of their sexual orientation, inclination, sexual behaviour or gender nonconformity. Parallel to Dunlap's understanding, Wilets involves both women and LGBTI+s to sexual minorities because for both of these groups, nonconformity with gender role expectations is enforced through violent and non-violent means. For both of these groups, violence through male dominance is performed both by the state and the society. This violence involves, violation of bodily

integrity and right to privacy. Although women and LGBTI+s can be grouped as sexual minorities, it is important to note the general advantages that cis heterosexual woman face in everyday life, compared to trans women, lesbian women, or AFAB[2] non binary people.

It is argued that, within feminist movement, state can be a consideration for protection, yet for the queer communities, it is the state itself that is identified as a substantial source of danger (Fineman, 2022, p. 4). State may be patriarchal and represent male power in historical and political conjuncture, but for some feminists it is not essentially patriarchal and can be changed. The possibility of change is demonstrated by the successful struggle of women (Walby, 1990). The liberal democratic state, which claims to be gender neutral, is obliged to respond to the demands because they claim this in its discourse. If it does not respond to the demands, the said demands have the potential to call into question the legitimacy of the state (Franzway, Court, & Connell, 1989). This shows a potential for the state to work within it. With this, it can be said that the state is experienced as both enabling and constraining as oppressive and responsive to pressure for change (Charles, 2000, p. 28). Therefore, the state is capable of such a change through its own mechanisms.

2.5. Shame Literature

Shame is an individual's isolation or reaction to the lack of social contact from other people. Eve Sedgwick links shame to visibility, spectacle, and performance. This shows how shame effects an individual both in a personal and societal level, shaping one's individual and cultural identity (McCann, 2014). For Sedgwick the experience of shame develops out of the social and continually works towards it. Shame reveals social expectations and stigmas. Therefore, it varies across cultures and time.

However, shame is not just a force of isolation for Sedgwick, it also has a transformative potential. The subject who experiences shame is self-aware and socially receptive. In addition, as much as shame changes and varies through cultures and times, it varies within individuals in the same society and at the same time period. According to the theory, shame is what makes identity. It outlines the individual in the

[2] Assigned female at birth

most isolating way imaginable. Sedgwick explains this through the examples of shame as "the way bad treatment of someone else, bad treatment by someone else, someone else's embarrassment, stigma, debility, bad smell, or strange behaviour" (Sedgwick, 2003, p. 37). It shows behaviours that have nothing to do with an individual shaping one's social and personal identity. Shame shapes what one is, whereas guilt attaches to what one does (Sedgwick, 2003, pp. 36-37). Through shame, a performance is created and for the author, this performance has a potential in thinking about identity politics (Sedgwick, 2003, p. 64). Sedgwick's theory shows us how shame and being shamed is political.

Martha C. Nussbaum's theory (2004) reveals how the law uses shame as punishment. According to the author, shame penalties are closely linked to the "primitive shame" that each person experiences. It is a ubiquitous emotion in social life. Shame marks people by the demands and expectations of societal norms. However, some people, are more marked out by shame than others. Societies select certain groups and individuals for shaming (Nussbaum, 2004, p. 174). This practice than serves as punishment for not complying with the social norms. Nussbaum also regards sexual minorities belonging to this groups and individuals who are punished for not complying with the social norms. According to the author, today there are two opposed views on the role of shame in the practice of law. The first view on shame holds that "law should protect the equal dignity of all citizens, both by devising ways in which those already stigmatized as different can enjoy lives of greater dignity and by refusing to make law a partner to the social infliction of shame." The second view, on the other hand, regards shame's impact as an important source for punishment. According to this view, "we [as a society] have lost the shared social and legal boundaries that shame once policed." This conservative view on shame holds that shame governs behaviour and is a powerful source for law (Nussbaum, 2004, p. 175).

For both Sedgwick and Nussbaum, shame is a source for change. Sedgwick argues that, shame acts as a motivator of change for the subject. Shame, if transformational, is performance (Sedgwick, 2003, p. 38). It effects the way people act and live. Sedgwick's theory is especially applicable for queer performativity. Shame attaches to the meaning of a prohibited act or behaviour and changes it (Sedgwick, 2003, p. 62). For Nussbaum, on the other hand, shame, at times, can be a morally valuable

emotion that has a constructive role in the development and moral change of the society (Nussbaum, 2004, p. 211). The author moves from the example of marriage equality. For a heterosexual couple, legal recognition of same-sex marriages brings an anxiety that is rooted in the loss of control over cherished “values” and it awakens a narcissistic fear and aggression (Nussbaum, 2004, p. 260). Changing an element in this complex belief system can bring a change in emotion (Nussbaum, 2004, p. 26). This then, sooner or later, brings a change in societal values and norms.

2.6. Other Country Examples and Similar Studies

Certainty in law should be demanded, especially if the uncertainty in question relates to the fundamental human rights of the individual. Uncertain terms regarding the dismissal of an employee in labour laws may result in a violation of the person's right to work. Although the uncertainty in question is valid for the dismissal procedures specified in Law No. 657 and Law No. 7068 in Turkey, unlawful dismissal of women and LGBTI+ workers is an international practice. Davis (1972) mentions in his article the dismissal of public-school teachers for immorality in the USA. By upholding the dismissal of a teacher, the court finds “homosexual behaviour” to be contrary and abhorrent to societal mores and moral standards. Therefore, homosexuality is portrayed as constituting an obvious unfitness for service in the public school system. What is deemed “immoral” is also intolerable. Even though the article is outdated and social norms and moral standards have changed, today's layoff practices still follow a similar pattern. “Homosexual behaviour” still fits reasons for immorality terminations (as cited in Connell, 2012). What is “immoral” within the bureaucratic state structure still cannot be tolerated.

The limits of immorality are defined in a more flexible but still parallel way in Thailand. However, it is argued that coming out in the workplace in Thailand has its unique complexities. It is especially complex for a transgender person who often challenges the binary view on gender. Coming out, according to Busakorn Suriyasarn (2016, p. 44), is often associated with negotiations to be accepted. Although it reduces self-stigma, it creates barriers in personal and professional life. The author argues that while masculine gay men and feminine lesbian women [to some extent] have access

to jobs, trans men and lesbian tomboys face the biggest challenge to access jobs, especially in public institutions (Suriyasarn, 2016, p. 208).

Although the US and Thailand cases are different, the procedure on women and LGBTI+ workers' dismissals have similar patterns. In each case, the normative understanding is being imposed on the non-cisgender and non-heterosexual non-male worker – on sexual minorities. In this way, a clear, certain and precise legislation is needed in each scenario for women and LGBTI+ workers' rights.

2.7. Examples from Turkey and Similar Studies

There is also a need for clear, certain, and precise legislation for women and LGBTI+ workers in Turkish legislation. The Turkish Constitution includes the principle of legal certainty. According to the 2nd provision under the Turkish Constitution, legal regulations must be clear, understandable, and enforceable in a way that leaves no room for hesitation and doubt at both the individual and administrative level. Regulations should also include protective measures against arbitrary practices by the authorities (Constitutional Court Decision dated 7/4/2016 numbered E: 2015/94, K: 2016/27, 2016). If we go down to the terms of some provisions of the Public Servants Law no. 657, we can see that certainty is not always the case in Turkish legislation.

The concept of "disgraceful and shameful act" under the Public Servants Law No. 657 does not express any meaning at first glance. Yıldırım and Kaman (2019) state that the concepts "engaging in disgraceful behaviour" and "shameful act" are debated terms, and it is not clear what to incorporate, they are uncertain. In this way, discussing the principle of legal security with the principle of legal certainty is important because security can be provided through a certain degree of predictability (Altundiş, 2008). However, to what extent the concepts "engaging in disgraceful behaviour" and "shameful act" are predictable is a debated subject.

As the concepts are discussed, we can only remove the uncertainty by examining the impact of this provision on the employment experience of the public official. Although there is no specific research on the impact of these specific provisions, there is some research on the general work experience of LGBTI+ public officials. These studies show that work and dismissal experiences are truly on thin ice.

According to an annual survey of LGBTI+ public sector workers, respondents state that layoffs in the public sector may result from an LGBTI+ worker's conduct that violates "public morality." The understanding of "public morality" as an ideology is used for discrimination in public institutions as well as in society. This situation causes LGBTI+ workers to be stigmatized, excluded, and pushed into invisibility. Some participants rightly stated that the situation of LGBTI+ workers is not a disgraceful situation; should not be deemed "unfit" for a public official and this should be guaranteed by the law (O'Neil et al., 2020). However, practice and reality show otherwise.

A participant from the same study describes the LGBTI+ public sector worker as "the first victim of the fire" (O'Neil et al., 2020). This depiction is very close to the expression "disposable women" (Wright, 2006). Just like "disposable women" workers, LGBTI+ workers in both the private and public sectors do not have the chance to experience security and certainty, unlike their cisgender heterosexual and male counterparts. They are the first to be laid out or dismissed. The basis for their dismissal is not fixed and may change from time to time. The disposal in the case of public officials is carried out on women and LGBTI+s in Turkey. The following pages aim at laying out the motivations why these groups of public officials experience shame and uncertainty while their cisgender male counterparts do not.

CHAPTER 3

METHODOLOGY

Women and LGBTI+s are positioned as "other" against the dominant hegemonic masculinity in the workplace. This means that their positionality is subordinate under the cisgender heterosexual male. This is particularly evident in the workplace of a governmental institution. Women and LGBTI+ public officials experience the patriarchal state tradition immensely under the governmental institution setting. Some unspoken (and sometimes verbal and written) rules apply to both of these groups. Therefore, it is important to reveal in what ways they are positioned as "other" vis-à-vis the state tradition and patriarchal workplace. This chapter deals with the method, methodology, data collection tools and data analysis of my research. I will also discuss the role of the researcher and the limitations of the study.

Although the collective sample of women and LGBTI+s is not a commonly used method, some research can still be found. Johnson and Otto (2019) have employed queer, feminist and intersectional framework for a work place model for overcoming gender-based discrimination and harassment of women and LGBTI+. The authors apply a method involving the women and LGBTI+ through recognizing their heterogeneity. This helps them seek synergies to counter sexism as a common source of institutionalized oppression. With this, they come up with human resource management model that is more inclusive.

Asa Ekvall (2019) uses a similar sample group in their research project, namely women and gay men. In their PhD dissertation titled *Gender Inequality, Homophobia and Violence: The Three Pillar of Patriarchal Norms and Attitudes, and Their Relations*, they study the relations between patriarchy and violence against women and gay men. They justify their sampling through stating that gender inequality, heteronormativity and various forms of violence are related to each other. These

examples show that the use of a heterogeneous sampling model has the potential to better grasp the patriarchal state tradition more broadly.

3.1. Method

The research uses queer and feminist methodology and qualitative research method. I have conducted the research using a non-probabilistic sampling design with a purposive sample. The qualitative research includes semi-structured and in-depth interviews in an unstructured environment with five woman and/or LGBTI+ public officials, as well as an analysis of case files from First Instance Courts to the Highest Courts. Overall, the statements of participants were the main source of my research in finding out the aim of the provision under Law No. 657 and Law No. 7068.

3.2. Data Collection

3.2.1. In-depth Interviews with Women and LGBTI+ Public Officials

I have conducted five in-depth interviews between 12th of March and 18th of July 2022. The in-depth interviews lasted around one and a half hours on average. The shortest interview lasted 55 minutes and the longest lasted 1 hour 55 minutes. Two of the interviews I have conducted were face-to-face, the other three were online.

I have conducted the interviews with public officials who are women and/or identify themselves as LGBTI+. Three of the public officials have been dismissed based on "engaging in disgraceful and embarrassing acts" in their work life. One of the participants was currently in the administrative investigation procedure. One of the participants was a police officer, therefore, he was dismissed based on "engaging in unnatural [sexual] act". In particular, I aimed to get the participants to talk about the uncertainty created by the state.

The participants of the study consist of one cisgender heterosexual woman, a gay man, a trans man, a bisexual man, and a participant who did not want to label themselves with an identity. Two of the participants were guardians, one was a police officer, one was a civil servant, and one was a teacher.

I have reached out to the participants through the lawyers that I know from my own network and through Confederation of Public Workers' Unions (*KESK*). I have reached out to four of the participants through the lawyers from my own network and 1 of the participants through the Union.

I did not have the chance to conduct all of the interviews face-to-face because some participants lived far away and after my first two face-to-face interviews outside Ankara, I realized that I did not have the financial capacity to afford the trips to all participants' cities. It was also impossible for me to make time for those trips, as I had a full-time job and only had weekends.

I conducted two of the face-to-face interviews in a café that the participant has chosen. I especially wanted to go to a place that the participant has chosen for the participant to feel safer. The rest of the interviews were conducted in an online environment. I have used Google Meets for another and WhatsApp Video Chats for the two others. I have used different video communication apps for the comfort of the participants. Some participants have shared that they have never used Zoom and some shared that they do not have access to a computer. These conditions have forced me to use WhatsApp video chat over more convenient video communication apps. However, all of the online interviews worked technically fine at the end.

For the processing of the data, I have asked permission from the participants to make a voice record. All of the participants agreed to be recorded. Overall, the statements of the participants were the main source of my research in finding out the aim of the provision under Law No. 657 and Law No. 7068.

3.2.2. Case Files of Participants

Lastly, I have analysed the case files of the participants. All of the five participants have pursued a legal remedy after their dismissals. Only one of the participants was done with the legal procedures. Her legal struggle was through in the Constitutional Court. However, the four other participants were still continuing their legal struggle. Two of the participants are waiting the verdict from the Council of State, one participant is waiting the verdict of European Court of Human Rights and another participant is waiting for the verdict of Court of First Instance.

Out of the five participants, two of them have shared their case files with me. These case files included the decisions from the Courts of First Instance until the High Courts. Besides these two court decisions, I have also collected four Constitutional Court and three Council of State decisions. I have collected these decisions through the Constitutional Court and Council of State court decision search system. I have typed "principle of certainty", "non-discrimination principle", "public official", "unnatural act", "military penal code", "disgraceful and embarrassing acts" to the search bar. Overall, I have analysed nine women and/or LGBTI+ public official's court files. I also have analysed four First Instance Administrative Court decisions, six Council of State decisions, and three Constitutional Court decisions.

3.3. Data Analysis

I have analysed the collected data through transcribing the voice recordings and then reading them in a systematic way. For this, I have used the app *Transkriptor*. To eradicate the errors made by the app, I have also done proofreading for every interview.

After having the transcribed texts, I then analysed the context through *NVivo*. I have come up with twelve different subthemes under *NVivo*. Every subtheme included at least five entries, the most crowded theme was *colleague relations* with thirty five entries. For every subtheme, I came up with a bigger theme: morality, uncertainty and obedience. I included necessary remarks under every theme. For the court decisions, I also included necessary remarks under every theme.

3.4. Limitations of the Study

This research includes an analysis of the related court decisions and precedents in Turkey, semi-structured in-depth interviews with sexual minority public officials. As with the majority of studies, the design of the current study is subject to some limitations:

3.4.1. Sampling

The primary limitation to the generalization of these results is the sampling of the research design. The sampling included sexual minority public officials who were dismissed or are currently facing dismissal risk in their workplace based on their

identity. The sampling was not limited, meaning that any public official other than cisgender and heterosexual male public officials who were facing or experienced dismissals could be a part of this study. Although sexual minorities as a group are referred as minorities, the meaning of minority does not imply people being outnumbered but it rather implies being minorities in the sense of having power and autonomy.

The limitation for sampling was the struggle to reach out to sexual minority public officials who were willing to contribute to the study. The primary research design included a snowball sampling. With this, I would have the chance to start from my own network and then move on to a bigger network of people. I have started reaching out to public officials through the lawyers who have given legal support to sexual minority public officials who were dismissed or are currently facing dismissal risks. I have reached out to five people through these lawyers. The end of my semi-structured interview included a question regarding whether or not the participant knows a sexual minority public official who experienced a similar dismissal process. Out of five people, three of them have said that they knew at least two public officials who was dismissed based on disgraceful act or shameful behaviour. I have asked the participants to get in contact with these public officials to ask whether they also would like to be a part of this study. After getting in contact with the other subjects, the participants have shared that the subjects did not want to be part of this study.

I have gathered that this was the result of two aspects. The first aspect is the fact that I have managed to reach out to the first five participants through lawyers from my own network. This meant that these lawyers were giving consultation to the participants for several years (the shortest lawyer-client relationship was four years and the longest was twelve years old). They have already built up a relationship and the participants were already trusting the lawyers and their networks. Therefore, they did not feel threatened to be a part of my project. However, the participants' contacts might not feel safe or not that connected to my project to accept being a part of it.

The second aspect includes the overall openness of the participant. The dismissal or investigation experiences of the participants overall included a lot of detailed explanation on how one came to the position of being dismissed based on their

sexuality. Therefore, being part of this study was also, to some level, meant being open to relive the discrimination, alienation and hatred one more time. This is very understandable, as not every public official was open to narrate the whole experience. Out of the five participants I have reached out to, three of them have already talked and gave interviews to women and LGBTI+ organizations. They have given these interviews in hopes to reveal the unlawfulness that they have faced, seek justice and also inspire other LGBTI+ or women public officials in the workplace.

3.4.2. Economic Restraints and the Covid-19 Pandemic

The initial research design included only face-to-face in-depth interviews. Out of the five interviews that I have conducted, only two of them were face-to-face. This was based on two outside factors. The first factor is me being an unemployed graduate student during an economic crisis. At the early stages of my research, I was unemployed. The participants that I was getting in contact were all living in different cities. The first two participants that I contacted have luckily responded to me within the same time period and were living in the same city. With this, I had the chance to interview them in their own city, face-to-face. However, after the first two interviews, all of the other participants that I have reached out to responded to my e-mails in very different times. Two of the last three participants were living far away from me. The last participant, although was not far away, has responded to me at a bad time when I did not have the economic means to afford a visit to their city. Therefore, the last three interviews were conducted on video call.

Hesse-Biber (2014, p. 307) argues that face-to-face interviewing allows the researcher to assess the overall tenor and tone of the interview through nonverbal cues and the non-verbal cues are as crucial as the verbal cues in sensing the emotional climate of the interview or the situation. After conducting both face-to-face and online interviews in such an emotionally loaded subject, I agree with Hesse-Biber's argument. It was easier to grasp the emotions on the subject and it was also easier for the participants to direct their emotions and feel heard.

On the other hand, online interviewing also had its own advantages. Firstly, and most importantly, it was easier to schedule the meeting. One of the participants returned to my e-mail late at night asking whether I was available right at that time to do the

interview. I was. Within 15 minutes, we started the interview. Secondly, the interview subject was sometimes too personal to talk freely in a crowded café, however, this was not an obstacle in online interview. Participants were freer to talk about detailed information about their lives in the government institution from their own personal space.

3.4.3. Political Atmosphere

With every passing year, non-normative sexualities and identities in Turkey watch the state constantly and intentionally withdraw from their basic human rights. The pride parade bans from governorships since 2016, withdrawal from Istanbul Convention in 2021, constant impunity to perpetrators who target LGBTI+ and women, create a constant fear environment for all of the identities. The state infused hatred and discrimination to the non-normative sexualities had come to such a point that as of December 2022, hate parades were organized under the name "*Your Family is Under Attack, Take Action!*" targeting LGBTI+ identities in 11 different cities.[3]

The state of fear that was infused by the state and carried out by individuals and non-governmental organizations has made non-normative sexual identities refrain their identity and unique experience even more. This was evident in my research as well. Although I have got in touch with more than fifteen people who have been dismissed based on "immorality," many of the people that I have reached out refused to be a part of the research, and talk about their experience and make it visible. One of the people that I have reached out, agreed to share their anonymized court documents; they did not, however, want to talk about their experience.

Out of the fifteen people, five people who agreed to participate to the research were also in fear. They highly prioritized their inputs being anonymized. Only one participant insisted on his name being transferred to the research directly, he wanted his legal struggle to be heard. However, with the rising and constant hatred, as a researcher, I took initiative and decided to not include his name to minimize future damages.

[3] Starting in September 2022 from Saraçhane İstanbul, the hate parades continued in Urfa, Konya, Ankara, Trabzon, İzmir, Antep, Batman, Mardin, Van, Diyarbakır and Kayseri (Erol, 2022).

As a queer feminist activist lawyer in Turkey, I have entered the field with my own perception and background on the issue. I was both an "insider" and an "outsider" as Hesse-Biber (2014, p. 267) defines their positionality as a researcher. I was an insider in the sense that I could understand the shame and guilt that the state and men try to put on women and LGBTI+s. I have never been shamed in the way to be dismissed from my job, but I was shamed or abashed in the school setting, in former friend groups etc. However, I was also an outsider because I was positioned as a researcher and interviewer against the participant. I was the one who asked the questions. In a way, I was independent. Before even conducting the interviews, I prioritized the experiences and emotions of the participants vis-à-vis their positionality with the state.

CHAPTER 4

FINDINGS

4.1. Morality

The notion of morality makes a difference when we talk about "honourable public work." According to the Administrative Court decision based on Hasret's application:

> Article 125/E-g of the Civil Servants Law No. 657 aimed to carry out the public service by credible, reliable and reputable agents in the eyes of the society. The trust of the society in the people who are civil servants and who constitute the personal element of the public service will also ensure the trust and belief of the individuals in the administration.

For the Court, trust and belief can only be established through agents who are honourable and moral. Public officials set an example of honourable and moral people not just in the workplace but also outside of the workplace in their personal lives. According to the Administrative Court, "the Civil Servant must act with an exemplary and responsible attitude not only during the working hours but also outside the working hours." (Court of First Instance decision based on Umut's application).

The "exemplary and responsible attitude" that the court mentions is actually beyond a public official's trait. When we talk about sexual minority public officials, the court expects something beyond attitude. As Wilets mentions (1997, p. 990), when we talk about sexual minorities, nonconformity with gender role expectations is enforced through state. The expectation of the state is usually to suppress women and LGBTI+ individuals' sexuality and existence. For this, a gay man cannot be feminine, or a woman cannot exist as a sexual being, or a trans man has to confirm or fit into a binary understanding of "men" in the workplace. Anything that goes beyond of any of these scenarios gives the state and its agents the right to violate every right of women and LGBTI+ public officials. This also proves Wilet's argument that state is not the only

agent in violating women and LGBTI+ individuals' bodily integrities and right to privacy, it is also the society as a whole.

Morality is a required quality in being/becoming a public official. The state requires this quality and punishes the ones who fail to comply with its moral standards. The punishments in Law No. 657 and Law No. 7068 create the basis for an investigation or dismissal procedure to take place based on moral behaviour. The investigation for the participants of this research started once their "immoral" identity became known by their colleagues or supervisors/managers in the workplace. The participants' immoral identity was unveiled based on a specific incident that occurred outside the workplace. However, since the public official is also expected to fit into the "moral standard" outside of the workplace, the punishments in Law No. 657 and Law No. 7068 become strictly applicable. The punishments were used to dismiss trans, gay men and "impure" cisgender women.

One participant shared that he was subjected to administrative investigation after a notary disclosed his trans identity to his school. Mehmet is a trans male teacher in a small city. He had a failed transition surgery. He was about to sue the doctor who performed the failed procedure. When he instigated a warning to the doctor, he forgot that his trans identity would also be learned by the notary. A short time later, a message came to Mehmet's phone from an anonymous number:

> *The youth of this country should be young people with national feelings, not LGBT youth. Our President's orders and views on this matter are final. Neither this nation nor this state allows women to be men in the Republic of Turkey, as Allah cursed, because it sets a bad example for our children. Enemies like you, devoid of religion, morality and Islam, will not be able to teach our next generation of children. Our town and its people will not trust their children with you. With the support of the state and the nation, we will wipe out people like you from this country. By Allah's leave, you and immoral people like you who want to benefit from this state in our country, which has many national and spiritual feelings, will not be justified in this justice system, but will be tried and held accountable. In final words, LGBT organizations, doctors who change your*

sex, and people like you, the hospitals that do these operations … Each of you give an account one day first to our holy justice, then to the holy creator.

A similar message was sent to the school principal, which included the revelation of Mehmet's gender experience. After this message, the investigation process started for Mehmet.

One participant claimed that the investigation procedure started after her exposure became known on the Internet. As a cisgender heterosexual woman, Hasret was a public official in a penal institution in a big city. She had an abusive partner at the time and was constantly threatened with doing things that she did not want to do. One day, her former abusive partner drugged Hasret and filmed her. He later used this film to continue forcing her into a relationship. After being appointed to official duty, Hasret wanted to cut ties with her partner as soon as possible. The rejected ex-partner uploaded Hasret's footage on the Internet. After a while, these images were noticed by some of her colleagues. After they became known to the manager, she was exiled to a small village to be dismissed.

The investigation procedure for a participant began after his affair with another man was disclosed to the police. Barış is a gay man who is a former police officer. He had an affair with another civilian man in the police house. When Barış's partner entered the Police House, he introduced himself as a police officer. After the security investigated the identity of Barış's partner, it turned out that he was not actually a policeman and he managed to infiltrate the institution through Barış. After security forced Barış's partner to reveal his phone and messages to them, other police officers convinced Barış's partner to make false statements against Barış. With these false statements, Barış had to be held in police custody for one night on the charge of major sexual assault. However, Barış and his partner's relationship and sexual intercourse, was consensual. Barış's former partner withdrew from his statement after a while, stating that he had given his statement under pressure. The court ruled that Barış was innocent. However, after being deemed innocent he was transferred to another city. After a year and a half of work at this new location, a new investigation has been started. This investigation was based on the General Law Enforcement Bodies

Discipline Law No. 7068 Article 8. This article regulates engaging in “unnatural [sexual] act”. He was dismissed according to this provision.

Another example is an investigation that was opened after a participant’s social media profile was revealed. The participant had pictures of himself on his social media profile and stated that he was open to flirting and having sex with men. Ahmet is a bisexual man who is a public official in a big city. One day, a complaint came to the police about Ahmet marketing himself as a prostitute on the internet and uploading pictures of him in “women’s clothes.” Ahmet did not know who made the complaint and later learned that it was a random person who took Ahmet’s social media profile and reported it to the Cyber Crimes Unit. It was later revealed that the same person was complaining about all homosexual dating accounts in the area. However, Ahmet stated that he is the only person who got into trouble at work because he is the only public official. Upon this complaint, Ahmet’s workplace also became aware of the situation and started an investigation. He was suspended after giving testimony. Ahmet then applied to the court. The Court of First Instance deemed Ahmet’s situation appropriate and returned him to his duty. After Ahmet was reassigned, he realized that there was a problem as the workplace was not giving him his normal workload. After a while, Ahmet was reassigned to another place in a small town. The basis for this reassignment was reported to Ahmet as “according to the code if you have an administrative or forensic investigation, it is not appropriate for you to stay at your old post. You need to be reassigned.” Although Ahmet’s case was approved by the court, he was still unlawfully reassigned to a new small town.

One participant's investigation began when he got into a fight with a man, and this was misinterpreted by his colleagues as if he was having an affair with this man. Onur is a civil servant in a public institution. Although he was previously in a senior manager position in the institution subjected to the Law No. 657, because of an investigation concerning his private life, he was relegated to a lower position. The incident occurred in Onur’s duty location which was a small city at that time. People have speculated that he was having an affair with a man. After this speculation, his manager started an investigation. Later on, he was relegated to a position that was not subjected to Law No. 657 but Law No. 399 which concerns contracted public officials. Onur’s legal

struggle began 11 years ago, and currently, his case is before the European Court of Human Rights.

The dismissal procedures of these participants reveal that the state and court-imposed understanding and "standard" of morality echo into the workplace. The colleagues, managers and supervisors, while being the complainants or investigators to the dismissal procedure, acts as if they are the state. The need to comply with moral standards then becomes something that other public officials also require from their colleagues or workers. The public official who is once deemed immoral then faces a constant fear of shame. This reminds us of Sedgwick's theory on shame (2003). Within the public work environment, the existing legal norms reveal the social expectations from public officials and possible stigmas that they can face if they act "immoral." The possibility of being ashamed, and therefore isolated in the workplace shapes the public official who faces the stigmatization of being "immoral." Just like Sedgwick claims, it shapes the public official's identity, not just in the workplace but in everyday life. It outlines the individual in the most isolating way imaginable (Sedgwick, 2003, p. 37). To survive within the work environment, the "immoral" public official needs to be in constant performance. If they are not straight, they need to act straight; if they are not cis, they need to "act" or "pass" cis; if they do not comply with an ideal "pure," "modest" public worker type, they need to act like one.

This acting means that these workers need to lie or hide their actual identity. LGBTI+ participants shared that they do not have an open identity at work. Participants identifying themselves as LGBTI+ stated that none of their colleagues knew their sexual orientation or gender identity.

Barış said that he was a very private person. No one knew about him as he kept his personal life private in the police force. Ahmet also said that he secluded himself at work. Likewise, Mehmet expressed that because he is a trans man, he constantly resorts to some lies to live a normal life at work.

Respondents who are still in public service stated that they are in a really difficult situation and that they are afraid that people at work will find ways to fire them. Mehmet:

> My biggest concern is that people from the school or the Provincial Directorate of National Education pay a student at my school to accuse me of sexual assault. They can even resort to this way. I'd rather be fired for being LGBT. But they can't fire me because of my identity because you know that being LGBT does not prevent me from being a public official. It will hurt me more if they expel me by using a student because they can't legally expel me. And they might have done it. If I hadn't withheld my identity, they would have definitely resort to it. I hid my identity and there was nothing around, they still circulated my half-naked photos. I can't even imagine what they would do if I revealed my identity.

Participants who did not identify as LGBTI+ stated that they were not open either, but they interpreted this openness as not being open about the person's private life and experience. This meant that they did not chat with their colleagues about their personal lives and personal troubles. Even when they were asked about their personal lives, they usually avoided the questions or were angry with their colleagues who were overcurious.

Mehmet claimed that his colleagues like to meddle in other people's business. This usually made him quite angry. Mehmet:

> I am exempt from military service in the Online System of the Ministry of National Education. People at school also looked at the system, they asked me questions. Even the principle asked me why I was exempt from military service. I replied, 'what does it have to do with you?' The principle replied, 'of course it's none of my business, but I was just curious'. Curiosity is not such a good thing, I replied. Am I wondering about your military service or how you conceived children? People at school want to know even details like this about your life.

One participant attributed his compliance to the ideal "public official" identity to his hard work. He expressed that his hard-working identity is what made him fit into the workplace. Ahmet: "I worked deservedly. When I left the job, my ex-chief told me that no one works like me."

Shame marks people by the demands and expectation of societal norms (Nussbaum, 2004, p. 174). For the fear of being punished because of shame, the participants were forced to fit into the social norms. This force for change in participants' behaviours and acts reminds us a performance through transformational shame (Sedgwick, 2003, p. 38). In the fear of being ashamed, Ahmet has shaped his identity: he was a hard worker. This identity, while masking his potential "embarrassing" identity of being a bisexual man, worked as a gateway to existing under a strict public institution. This

has helped Ahmet to gain trust in the workplace. Even after being resigned, he felt that he fit into the public work environment. Ahmet:

> After being reassigned, I returned to my job. They really liked me at work and made me feel very welcome when I came back. They said we are glad you're back. I told them I would apply for a reassignment. A friend of mine from work told me, Ahmet, don't apply for reassignment, what happens should only concern you, don't act according to other people's wishes. I realized they heard something about my investigation. Yet no one judged the situation, no one said anything to my face. Even though it still bothers me to know they're talking about it, no one has cut ties with me because of the situation. They were even happy that I started working again. Some hugged me, some called me, some congratulated me. My friends from work told me, "what was said, who said it, who did what, don't let this bother you. If you mind these, you cannot live with that."

Although shame is a powerful source that shapes one's identity and can be a gateway to fit into the public work environment, gender and gender roles also play a significant role in deeming one "immoral." This is especially evident when we compare the experience of cis men, also including cis gay man who "pass" as "straight," and cis women. While Ahmet, a bisexual man who created an identity of a hardworking public official, did not have much hard time in dealing with workplace relations. Hasret, on the other hand, a cis woman, was also a hard-working public official. Hasret shared that since her investigation started in the workplace, she was very lonely at work and that even her housemates in the lodging house did not stand up for her. Hasret:

> My manager was aware of my images that were exposed on the internet. The next day they called my five housemates. All five testified against me that my exposed images were taken in the lodging buildings. But it was a lie. After a while, the girls told me that the manager said they would be fired if they didn't talk against me. They said they were forced to do what they did.
>
> …
>
> If you're known for something like that, it doesn't matter, man or woman, no one will listen to you. They are directly ashamed of you. Those who love the dishes I once made, those who like to chatter and joke with me, have all become enemies. They can't bear the sight of me at work.

Hasret said she was exiled from her first place of work to a small town. She was also not welcomed in her new workplace since her new colleagues became aware of Hasret's "reputation." Hasret:

> The manager wanted to meet me. He wanted to tell me that he did not want a "marked public official" especially as "marked woman public official". He stated that because of your "name" there will be people who will walk around you. I don't want a troubled workplace. There will be problems at work because of your situation. Therefore, he asked me to apply for reassignment. I went there for exile, and the manager did not want me there.

After her case was accepted in the Constitutional Court, Hasret was reassigned to her former position. She also stated that she felt lonely in her new duty location and her "reputation" was following her wherever she goes. Hasret:

> I came to my new workplace and started working. Management didn't want me either. They called me the woman with the bad name or the 'famous' public official. Staff didn't talk to me. However, when I first started working there, everyone was waiting for me with curiosity. There was a newly appointed public official. One of the former public officials told the new one about me. He said to that person, 'Hasret is a good person, but still don't get too close'. Someone else sat far away from me when he noticed that he was sitting right behind me. I'll never forget this.

Shame has an isolating impact in the workplace for the "immoral" public official. Whenever given the chance, not just legal institutions, but individuals use shame as a form of punishment. Much like Nussbaum argues, out of work relations of the participants reveal shame's constructive potential. Most of the participants have shared the long and weary dismissal experience with their friends. Most of them have found an ongoing psychological, physical and economic support from talking to their friends. One participant shared that he found solidarity in both LGBTI+s and people who do not identify as LGBTI+. Barış:

> I have three-four friends that I shared my legal struggle with. I love and respect them a lot. They are very intelligent people and they know my struggle is a rights and law struggle. These people are people that I see very often and get support from. Not all of them are LGBTI+ but they are valuable and special enough to know my process.

Another participant has shared that the people who he relies most on are both heterosexual cisgender man. Them not being LGBTI+ however was not an issue for them to support Mehmet on his legal and social struggle. Mehmet:

> I have outed myself to two of my friends. Two of my friends that I trust and am sure of… Two of my heterosexual biological male friends whom I care a lot… They also became really angry about the process. They are also people who think that people's gender identity and sexual identity are no one's business. They

> even found the fact that the issue being subjected to investigation odd. As I said, they supported me a lot. They are still supporting me.

One participant shared that he was in solidarity with many of his LGBTI+ friends. Ahmet:

> I told my homosexual friends a lot. They have supported me a lot. However, they cannot stop gossiping in the meantime. I had to beat a couple of people up. They are very filthy people. A couple of people helped me a lot. They supported me a lot. My female friends supported me. I have cut ties with people who have gossiped behind my back. I threatened them. When I returned to my workplace. They spread rumours about me being busted in the workplace.

Ahmet has also stated that sharing the experience with his LGBTI+ friends was sometimes a burden. Because of his LGBTI+ friends' gossiping and spreading rumours, he has felt somewhat distanced from the LGBTI+ movement and the identity. Ahmet:

> I have been inside the LGBT for years. Solidarity is very little. LGBT torments each other the most. I did not face that much torture from heteros. They were always telling 'he should not have done it… who knows what he did? He is a public official, is being dismissed that easy?'. When I heard a couple of my friends in fate, I faced them. I said to them 'we are friends in fate, how can you say something like that'?

It can be seen that although sharing the experience of shame with peers has an impact, not all of the participants have felt the constructive, or namely hopeful, part of it. Some participants have felt that sharing their story with their friends and peers have resulted in further shame. In some cases, being put to more shame by peers have resulted in further isolation. As Nussbaum argues, the loss of control over cherished "values" by the participant's peers was revealed as narcissistic fear and aggression. This fear and aggression was portrayed in certain ways. One participant stated that she has shared the experience with one of her girlfriends. However, her girlfriend has shared her experience with others. Hasret: "I told my experience to one of my unmarried girlfriends. I hosted her and her boyfriend in my house before the pandemic. Her boyfriend was looking at me very differently. Turns out, she has told everything to her boyfriend."

When Hasret shared her dismissal experience with her current partner, her partner also spread every detail to his sisters and brothers. Hasret:

> When we first met with my boyfriend, I told him what happened to me in detail. He was the first man that I was sharing the experience with. I was genuinely trusting him, because he is a reliable and good person. But he has a wrong perspective. He is always scared that the case is going to be heard. One time, my boyfriend told everything to his brother when he was drunk. His brother then went on to tell everything to their sister. Her sister came and told me everything. I feel like whoever it is, this issue will always come back to me.

Hasret has also shared that whenever she shared the experience with others, everyone tried to blame everything that has happened on Hasret: "You are the reason for this disaster. They always touch on the issue to you. You are always the one to blame. You are the one who makes concessions. They always told me 'They can hurt you as much as you let them'."

Reflecting back on Sedgwick's theory on shame, Hasret's insights on her experience shows how she was left without a support mechanism. She was isolated in the workplace and therefore tried to find solidarity in her friends, partners and peers, however that also resulted in an isolation where she actually is not physically alone but rather mentally. Shame has shaped Hasret's identity. This was because of her peers, friends and partners who have acted like the state in judging and labelling one's morality based on an act. They have punished Hasret just like an authority through shame. This shows how the provisions on Law No. 657 and Law No. 7068 is not just applicable to the court and state organs, but it is also applicable to individuals. The said provisions have labelled Hasret as "immoral" and the people around her without questioning have agreed that this label was fitting and Hasret deserved every punishment and action that came after her "incident." The lack of solidarity in public officials' "shame" experience results in people becoming state-like figures.

Although peers and friends can usually be a place to lean on, the family appears as an institution with further discrimination and isolation. When it comes to sharing their experience with their families, the majority of the participants have shared that they hid the whole lawsuit process from their family. Hasret has shared that during the investigation procedure, she had to go to Ankara to give testimony at the Ministry of Justice. She has shared that there were other people also waiting for their investigation procedures. Hasret: "Everyone had their relatives with them. I was alone."

The participant shared that after her sister found out about the subject matter of her dismissal case; she refrained from showing any support. Hasret:

> When my sister heard about the subject matter of the case, she did not support me. She said 'go, clean this where or however you like it. If our brothers find out, they will kill you. They would go to jail. Go clean it yourself. Stay away from them.' She did not support me at all. There is one sister who knows in the family, and she tells me to keep the family away from all of this. I waited for her to come to the investigation with me, but she did not.

After Hasret's application to the Constitutional Court was accepted, the court decision was published on the Constitutional Court website. Although the published decision only included Hasret's initials in the heading, the content of the case included all of Hasret's institutional information and background. Hasret has shared her concerns about her family finding the case out on the internet. Hasret: "After the Constitutional Court decision was published, I feel like they know about the case. It looks like they know it. I try not to stay too long with them. When there are conversations on political or legal issues, I try to stay out of them."

Some participants either did not mention the lawsuit process with their family at all or shared the lawsuit process as if the process was not about their dismissal but about something else. Ahmet: "My family knew that I was dealing with legal issues. However, they do not know the subject of the lawsuit. I told them I had a lawsuit without mentioning the subject matter."

Although Ahmet did not mention the subject matter of the lawsuit, he shared that his big brother was always there for him especially financially. Yet Ahmet has shared that the financial aspect of the issue was not the hardest part, it was the nonfinancial part of it.

The initial strategy of the participants was to hide the whole situation from their families, there was only one participant who shared the whole process with his family and stated that his family is a place for him to lean on. Barış: "My family knows everything that has happened to me. They are my biggest supporters."

Most respondents stated that they were in contact with sexual minority public officials who had similar dismissal experiences. Mehmet shared that one of his teacher friends was also trans. He said that his friend Hasan had to run away from his job to move

abroad to catch his breath from all the harassment. However, he ran into a teacher from a school abroad whom he had known before. The teacher exposed Hasan. After that, Hasan felt that other teachers' glances have changed. Hasan once caught another teacher at school secretly filming him. Mehmet commented on how Hasan is still worried at his new school abroad. Mehmet has shared this story with unease, but it could have been felt that it was important for him to feel not alone. Sharing a similar "shame" experience usually had an empowering effect on all of the participants because the isolation that they felt in their public work environment was disappearing for a moment when they share their similar experiences with peers. Although they feel that they are not alone for a moment, experience sharing still does not make the fear go away.

Barış noted how much his other LGBTI+ friends pay attention to their every move in the institutions they work for and that they try not to reveal themselves. Barış added that his friends shared how scared they were after what Barış experienced in the Police Force. They told him they were too scared to even think about it. Barış:

> You know how they say a culture of fear, there really is a culture of fear in the Police Force and Judiciary. There are many LGBTI+s in government institutions and they are all so scared. Our identity will be revealed, our affairs will be known… I have some friends, who don't share that they are public officials. They don't share this with anyone, thinking that one day their names or identities will be revealed. But why should people be afraid? Why should we be afraid of what we do outside of work?

Barış also said that he has LGBTI+ friends from the Police Department. He had a friend who was dismissed because of his sexual identity and later reassigned to his position. However, after being reassigned, he left his job voluntarily. Barış had another police friend who was dismissed in the 2000's. Barış has shared his friend's former dismissal experience with an aim to get an encouragement to outcome their ongoing legal struggle. Their friend's former experience was a basis for hope.

Although some participants got encouraged with their friend's former legal struggle, some participants encouraged other public officials to file lawsuits as their case set a precedent in Turkey. Hasret, for example, said her case inspired another female police officer, Umut, to take legal action and they are still in touch; Hasret stated that Umut always shares her gratitude to Hasret for inspiring her. Hasret: "You have to continue

to exist. You will exist, this way you can set an example. For instance, a few people after me took my case as a precedent and they were reassigned to their jobs."

Some of the participants continued the legal process just to set a precedent and set an example for future dismissal cases. Barış:

> Some comforts can't be obtained without some difficulties. I see myself in this role …We don't have a procedure in the European Court of Human Rights. If the Council of State does not approve my request, my case will be the first case before the ECtHR from Turkey as an LGBTI+ police officer. I'm fighting a battle in this field. My family understood this. People like you got it and stood behind me. Even if I die after 50-60 years, my name and case number will be in the archives of the Constitutional Court and the ECtHR … I will leave a monument behind.

Although all of the participants were having a legal struggle for more than five years, their identities that they have shaped through their "shame" was a point of hope. However, being hopeful about their peers' legal struggles' outcome was only a small portion of their experience. All of the participants were quite wearied because of the legal procedure. Ahmet: "The intangible part of it is so wearying. The result is not tangible, it is intangible."

The participants have been struggling for years with the possibility of having a "positive" legal outcome with no actual possibility of being accepted in their workspace and society as a whole. Some participants shared that they have already struggled a lot because of their identity, in the outside world. After experiencing everything in the outside world, still struggling in the workplace have made them even more tired. Mehmet:

> I was really upset at the beginning. However, I was not upset because of the possibility of losing my job. My identity became really heavy for me. Yes, I knew it was going to be hard. I knew it really well, and it was really hard. The process was really hard. I came to a place in life though. I remember the nights that I slept on a bench and was really broke. Now, I have a house for myself, I have a job, I have a steady income. This is really important for a trans person. We have struggled a lot with my trans friends. The discrimination part is harder than all of the hunger and thirst.
>
> We have already struggled enough. We already had a really hard life. Just when I was going to find comfort… And I do not have that much left to my retirement. Just as I should get comfortable, why such a thing [investigation] is happening to me? I questioned this a lot. I struggled to eat for three-four days, then I adapted

> myself to the situation. Fast adaptation is a quality of trans people, we accept the situation really fast and adapt ourselves. Because we experience this discrimination a lot. After that, I started making fun of the teachers and principals in my school. I started lying more, and I was trying to make them uncomfortable, I liked seeing the facial expression of discomfort. I started enjoying the situation. However, as I said, I was pretty upset at the beginning. I thought what right do they have to do this to me? This [my identity] is not a choice. I cannot choose this. You cannot decide when to become a man or a woman. I did not choose this. Just because of this… And until now, the operations and the procedures were very painful. I have had three procedures, I will keep on having more procedures probably. I am on hormones for the last eleven years. It has a certain derangement to my body. I have lost my family, my friends, my loved ones starting the [transition] procedure. It has an emotional breakdown. As I said, I am not even counting the physical struggles, being hungry, being thirsty, sleeping on benches, being helpless, and being alone… I am not counting these. After all that I have been through, I thought why they are doing this to me. I only thought about this.

Most of the participants are still dealing with a legal procedure that lasted for more than five years. One participant shared that having a legal dispute against the state that you are living in is pretty upsetting. Barış:

> [After the dismissal process] I realized the country that I am living in. I realized how challenging the country that I am living in is. And you know what upsets me the most? I am engaged in a legal dispute against the country that I am living in. I am also in a dispute with the people of this country. %55 of the people vote for this government and the government does not recognize me. And there are people who do not recognize me and who also do not vote for this government. Maybe the percentage is at %60-70. Who would understand that my struggle is a human rights struggle? I am not harming anyone. If I am not allowed to live my personal life, why am I living? While living my personal life, should I ask my chief's permission? I am not going to live in fear. Why are you stealing my life?

One participant whose legal procedure was concluded successfully after twelve years shared that winning the case brought only an instant happiness and fulfilment. However, after being reassigned to their post, the participants realized that nothing has changed. Hasret:

> It has been a really long process. Yet, you cannot forget about the trauma. I remember hearing from my lawyer, that I have won the lawsuit, it was such a joy. I felt really relieved, I forgot about everything for a second, I have made a huge success. I forgot about the abuse, insults, humiliation, everything was over, and I started making plans. I should start valuing myself. You should first cut your hair and buy new clothes. I should do this and that. I thought about a lot of things. I even said I will change my name, thinking that my name might have

> been written in a lot of places. I thought no one will know. Then I instantly was reassigned to my job. It started once again really bad. After starting the job on really bad terms, I realized that I was successful at nothing. You can be a precedent in law but you cannot be a part of society. The decision of the Constitutional Court only made me satisfied and relieved for a moment.

The sexual minority public official is punished through shame. The legal provisions in Law No. 657 and Law No. 7068 take their power from this social punishment through shame and bring a legal dimension to it. The punishment starts from the workplace through the constant shame and isolation from colleagues and supervisors; after this, the sexual minority public official experiences an administrative investigation where they are subjected to a legal penalty with being expelled or dismissed; then the sexual minority public official who is subjected to unlawfulness files a lawsuit which will not going to result for years, the obstacle to find a legal remedy punishes the “immoral” public official for once more. Even if their case is concluded in favour of them, a sexual minority officer can never be acquitted of being "immoral". Society and law have already punished them once. This puts the sexual minority public official into a constant weariness.

4.2. Uncertainty

Although participants’ feelings and weariness were closely related to their surroundings’ attitudes and perceptions, the provisions under Law No. 657 and Law No. 7068 infuses and reinforces the perception of society. As one appeal court decision explains (Administrative Court decision based on Hasret’s application), “shameful behaviour is, acts that are contrary to the general moral values established in the society in which people live. These acts and behaviours are perceived as immoral by the majority of the society.” Another first instance court decision (Court of First Instance decision based on Umut’s application) perceives “such” public official’s behaviour as shameful because they are “crimes that are against the high moral values established in the society and that are aimed at destroying the morality and family order.” The Constitutional Court (Constitutional Court Decision dated 29.11.2017 numbered E. 2015/68, K. 2017/166, 2017), explains “unnatural [sexual act]” as “engaging in unnatural sexual behaviour.” For the Court, this type of sexual behaviour can occur in many different ways and may differ from person to person or from society to society. “The said behaviours; are sexual behaviours that cannot be accepted as

natural in all social orders and have a negative effect on the moral standards of the society" (Constitutional Court Decision dated 1.4.2015 numbered E. 2014/118, K. 2015/35, 2015).

The uncertainty in the wording of "morality" and "unnatural act" helps the provisions to become applicable in every setting and time. The provisions were applicable when they were enacted in 1930 and 1982, and the provisions are (somehow) still applicable now.

The context and timelessness of the wording is an intended quality. This intention of being uncertain leaves public officials who are facing the possibility of dismissal in a vulnerable position. As Avila (2016) reminds us, certainty becomes an issue when uncertainty and insecurity spread. The provisions under Law No. 657 and Law No. 7068 should have had clarity, stability, and intelligibility so that the concerned public official could have calculated the legal consequences of their actions (Paunio, 2009). However, as Habermas argues (1996), the law does not just consist of legal norms but also built-in application procedures. For the subject to be certain about the law, the subject should both be acquainted with the legal norms and their built-in application procedures. Although it is impossible for the subjects of law to be aware of the norms and application of laws entirely, the public officials who are participating in the study are more aware of the provisions under Law No. 657 and Law No. 7068 and their applications than a regular subject of the law.

During the interviews, the participants shared all the investigation and dismissal procedures. This was the sharing of all legal proceedings, usually starting from their written petitions to the workplace, ministries or the presidency, filing lawsuits in the Courts of First Instance, appealing to higher courts, including the Constitutional Court of Turkey and the European Court of Human Rights. Barış: "My legal battle started in 2018. The case is currently in the Council of State. This is not an easy case. It's a long-term case. Maybe it will even go to the European Court of Human Rights."

After years of unlawfulness and arbitrary treatment in the workplace, it turned out that all participants were forced to know their rights, how a legal procedure takes place, and the possible consequences. Barış:

> I was relieved after the administrative investigation started. Because after that, your legal rights come into play. You realize that the upcoming dismissal is illegal as it is against the non-discrimination rule. When you learn about the multiple dimensions of the situation, you become more aware and responsive. I am much more comfortable after being dismissed. Right now, who said what, who did what… I do not feel under pressure.

It was seen that all of the participants were equipped to act as lawyers in their own cases. Ahmet shared that the legal procedure has endowed him with perfect knowledge of the law: "This process has equipped me with the administrative procedure, constitutional procedure and criminal law."

Barış: "I researched homosexual cases in Turkey. There are a couple of homosexual cases in the Council of State in Turkey. There are two finalized cases in the Constitutional Court, but both of them resulted negatively."

Onur:

> You know, I wish I have the chance to study law. I am capable of working as a lawyer. I can bring perspective to any issue. I have improved. Bring me a legal document… I do all of the legal work of my regional manager. I use such legal words, people get shocked. I improved a lot because of all of the legal stuff that I had to deal with.

Some participants have accidentally or intentionally met high court judges to discuss their cases and their situation. Barış:

> In homosexual Constitutional Court cases, there was one judge who voted against both decisions. He is still incumbent. I reached this judge by my own means. I met him for 6-7 times. I explained my legal process. Luckily, he listened to me and genuinely gave me help and legal advice. He told me that if my case comes before the Constitutional Court, I would not be reappointed. However, ECtHR would definitely rule for my reassignment. He told me that all of the members of the Constitutional Court are morally and legally on my side. They are also on the side of people who feel the same as me. However, since they feel a certain responsibility towards the society and state, and since these judges also have connections, they cannot rule decisions in favour of me and people like me.

Although the principle of *ignorance of the law excuses no one (ignorentio juris non excusat)* is an applicable principle for laws in Turkey,[4] the principle still has some exceptions. Formerly, the principle was applicable to all legal norms in Turkey. After

[4] See Criminal Code No. 5237 Article 4

an amendment in 2005, this principle became only applicable to criminal laws in Turkey. However, as Güngör (2007, p. 156) points out, even for criminal laws, there is an exception in being ignorant of the law. Güngör lists these exceptional situations as follows: cases where it is not possible for anyone to know the content of the prohibitive rule correctly due to objective reasons such as the inability to distribute the official gazette, the contradictory provisions in the text of the law, general confusion about the interpretation of the law, and the constant misinterpretation and application of the law by the courts.

If the chance to be ignorant of the criminal laws applied to the situation of public officials who are subject to Law No. 657 and Law No. 7068, these public officials' excessive knowledge of the law is actually a projection of the state's oppression. The participants, because of the uncertainty in the wording of the provisions, were left in a precarious position. This precarious position has forced the participants to do legal research in not just the existing legal norms but their every single application. In a Habermasian sense, the participants were literally certain about the law that was applicable to them. However, even this knowledge did not help them gain a certain trust and relaxation in their legal process. The uncertain wording gives a chance for the next judge to interpret the wording "immoral" or "unnatural [sexual] act" in whichever way they prefer. So even if the participants have read every former legal decision and precedent concerning the provisions under Law No. 657 and Law No. 7068, the next higher court judge can interpret the wording as something completely else.

Because of the uncertainty in the application, the current political atmosphere and ideology gain significant importance in the judges' decisions on deeming a behaviour "moral" or "natural." All of the participants were in the same mind-set stating that the current government and political conjuncture complicated the legal procedure. Hasret:

> My misfortune is that I experienced such a thing during this government. If there was another government, I do not think I would have experienced this. It could have been easier. These people did not let the law operate. My case thankfully returned from the Constitutional Court. It was a really long period.

Barış: "My lawsuit is a conjectural lawsuit."

Barış has shared that he has met with one of the members of the Constitutional Court. The judge has told Barış that the judges in the Constitutional Court are on his side. However, the judge also shared that the other judges have a certain responsibility towards the people and the state, and they cannot rule in favour of him. When asked what this responsibility towards the state is, Barış answered:

> It is the commitment to the government. Because when you look at the recent Constitutional Court judges, there are always people from the same [political] background. Next year, we are going to elect a new president. This president can gather all of the head judges and can tell them 'We will never send cases to the European Court of Human Rights. There will be no human rights violation in this country.' Then, I think, these cases may result in favour of us.
>
> …
>
> Or think about this. If our president could just say 'homosexuals are also people of this country and they will not face any discrimination', then maybe the cases in the Council of State can soften a little. Or the Constitutional Court cases can soften a little. However, the president is the highest person, when he goes and says something [against LGBTI+] then no one under him can come up and say something.

The participants share that the country setting is a major reason of the turn of events. Barış:

> If I was born in Holland, if I was a police officer in Holland, then none of these things would have happened to me. If I was in Italy, Germany, France, these things would not have happened to me. If I was born in Iran, they would have stoned me till I died. In Turkey, they kill you when you are alive.

Ahmet: "They do such bizarre things in the country… They disguised the whole lawsuit. None of the lawsuits in Turkey is definite."

One participant shared that the town that he works in is, much like the whole country, is a really corrupt place.

Mehmet:

> There are always fights and attacks in our school. These are pretty big fights with knives and meat cleavers. The police never intervene. It is so bizarre. For instance, there are harassment and child abuse cases. Neither the prosecution office nor the police force intervenes. My former duty location was also a small town. There was also a child abuse case in the school. The child committed suicide after being abused and left a letter behind. The governor personally threw a veil over the case. There are always little girls being sexually abused, and the

> governor or the prosecutor throws a veil over the incidents. The families shake hands on the closed cases. Here is a place like this. In a place like this, when the subject comes to changing sexes, you can imagine what they would do. When the subject comes to a teacher changing sexes, when the subject comes to 657, think about what they will do.

Some of the participants shared that if the government was different, the legal procedure would have concluded in a faster and more efficient way. Barış:

> We have a state culture, and our state culture is male, like "father state," right? And, wherever the current government is [politically] positioned, the institutions under the state are also positioned in the same direction. For example, if the president of Turkey is homosexual. What would happen? Or if the president of Turkey is a Christian, what would happen? All of the institutions, the media, other commissions, the Turkish Industrialists' and Businessmen's Association (TÜSİAD), the bosses, all would change directions. This shows that we do not have the rule of law in the country.

Ahmet: "The Ministry [of Justice] operates like a family business. They do everything through their own head. Law - maw… They cover everything up."

The existence of uncertain legal provisions helped the government to interpret the laws to their current moral and political understandings. Barış has shared that "engaging in unnatural act" is an uncertain term. Barış:

> The wording 'unnatural act' under Article 8 [of General Law Enforcement Bodies Discipline Law No. 7068] is referred to engaging in a chat with someone, becoming friends with someone, connecting with someone or companionship in an unorthodox way. There is no shame in law. I will be very frank. When people are not satisfied sexually, they use certain objects, right? As a matter of fact, these objects are sold in sex shops or certain websites. Then, people who buy and use these objects are also engaging in unnatural sexual acts. Then what is a 'natural sexual act'? 'Natural act' is only a woman and a man's sexual intercourse without using condoms. The acts other than this fall under 'unnatural act'. There is no institution which can define the meaning of the term 'unnatural act'. Then, every institution can put anything under 'unnatural act'.

When asked what the lawmaker means by the "disgraceful and shameful act", Ahmet has answered: "They look at the issue through their [state's] own moral understanding. The judge decided based on his moral understanding. And when they think of morals they think of LGBT."

Similarly, Hasret has shared that "shameful" is a really relative term. Hasret:

> For instance, I can give 'shameful' examples from the workplace. There are married couples in the workplace. And the woman has an affair with another person in the workplace. Everyone hears about this. They do not find this strange. They always say hi to her. But when it comes to me, no one says hi to me.
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> …
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> What can be 'shameful'? I do not know, I thought about it for years. But I do not know what it means exactly. Should I be 'shameful' because of my womanhood? Being a woman is already a 'shameful' thing. Allegedly, your gender is something to be ashamed of. According to them, 'being shameful' is the worth of a woman.

The public official is presented as the projection of the state's ideal of citizen. Therefore, state's imposition of morality on public officials makes it seems like it has a legitimate ground. The obedience and submission of a public official to the state means the sustainability of the state.

4.3. Obedience

Much like Hasret points out, one's gender and sexuality appear as something to be ashamed of in the workplace. For this, the public worker has to comply with a very strict standard of "public official" image. This image usually contradicts the existence of sexual minorities. To fit into the very strict standard of "public official," the subject has to be straight, cisgender, and (preferably) men. Women's existence in public institutions is only tolerated if they do not appear as individualized beings, without their sexuality, their interests, or joys. This is also partially applicable to heterosexual, cisgender men. They, too, have to exist as ordinary and non-individualized beings.

One first-instance court decision justifies the standardization of a public official ideal by stating, "the execution of the public service by agents who have lost the necessary prestige causes the individuals' trust in the administration to be shaken, and causes some undesirable negative developments in the person-administration relations" (Court of First Instance decision based on Hasret's application). The state, to gain the trust of the people, has to have a certain standard of workers. The trust coming from the people ensures the continuity of the patriarchal and cis-hetero normative state. The appeal court supports this claim. According to the Court (Administrative Court decision based on Hasret's application),

> There is no doubt that it is imperative that the administration, which is a tool for the healthy execution of the public service, should be equipped with the authority to take the necessary measures in order to carry out this service well. For this reason, it is natural for the administration to seek to have certain characteristics while regulating its agents who will carry out the public service. It is also natural for the state to use their agents efficiently after agents obtain the status, if they are to disrupt the service, if it is impossible to get more efficiency from them, it is natural to exclude the agents that harm the mechanism of the administration and the execution of the public service.

The mechanism, that is the state, has to survive and continue. For this, the state excludes or isolates anyone who has the chance to disrupt the mechanism. The mechanism can only operate through "governable people." These people are both the public and the public official. The governability of the public official eases the governability of the general public. Therefore, the creation of an ideal "public official" is a necessity in the continuity of the state.

The Constitutional Court (Constitutional Court Decision dated 21.1.2015 numbered E. 2013/9660 , 2015) states that,

> It is clear that disciplinary sanctions are established in order to maintain the order of a public or private organization, to ensure that it works efficiently, quickly and beneficially, and to protect its honour and dignity. The purpose of disciplinary punishments, especially for individuals carrying out public duties, is to bind the public official to his/her duty, to ensure the proper execution of the public service, and thus to ensure the peace of the institutions. Disciplinary penalties are applied in order to perform public services properly and to act in harmony within the hierarchical order. The expression "In order to ensure the proper execution of public services..." in the second paragraph of Article 124 of Law No. 657 also reveals the stated purpose of disciplinary penalties. In this context, as a result of the practices related to disciplinary law, certain restrictions on the actions and actions of public officials are based on the stated legitimate grounds.

With the state's efforts to create an "ideal" public official type being effective, the "public official" position becomes something people aspire to be. Becoming an "ideal" person within society while benefiting from a certain safety and comfort is something desirable by the public. Most of the participants shared that they had a certain expectation when they become public workers. Hasret:

> Official duty has a feel. How can I say? … Or are we over exaggerating? Being a judge, a prosecutor, a public official, doing a desk job, is there a certain comfort when viewed from the outside? It has an attitude. Yes, not just a working woman, like a titled working woman.

Many shared that they were public servants in hopes of finding security and stability. However, some participants shared that they were public workers in the hope of pleasing their families. When asked why he was a public worker, Barış replied:

> Some economic concerns, some family pressure … To be honest, I never wanted to be a cop. My father and brother are police officers. After the death of my father, I applied at the insistence of my brother and mother. It happened like that. Having members of the police force in your family was an advantage. Even though I got very low scores in the Public Personnel Selection Examination (KPSS), I took it.

Onur: "My father is retired from a ministry as an inspector. My brother is a diplomat. I am a child of public officials. I have experienced public official life since childhood." Hasret: "One day, when I become a public official, I'll support my father. My dream was my father. Dad always says I can't pay you back. At least I made it."

Hasret shared that despite facing many difficulties in their public office, her job made her dream of making her father proud come true. However, she also shared that after the dismissal procedures and after returning to work, they realized that public service was not what they had dreamed or hoped for. Hasret:

> The official duty that I exaggerated is very different from the actual official duty I'm living now.
>
> …
>
> Even after winning the case, they pacified me for two years. They didn't give me my job. I've been waiting around the corner for two years. I won the case in 2014 but they only gave me a new job in 2017. Can you imagine?

The same participant said that being in the public sector is still also an advantage, as it is impossible to experience something like this in a private company and hope to return to work. The public work still had some structure and she benefited from this structure one time. Hasret:

> They do not allow you to work in the private sector. Even in public institutions, the manager wrote to the Ministry three-four times after he was appointed, 'I don't want to work with a public worker like her, I cannot get efficiency from her'. However, a sensible person from the Ministry refused the manager's request, 'never write to me about this again'. So thankfully I work in the public sector, at least I have a job at the end of the day.

For the participants to be somewhat thankful for having the safety of being a public official, they have to overlook the fact that they need to maintain their public official identity throughout their lives. The Constitutional Court decision states that (Constitutional Court Decision dated 3.4.2014 numbered E. 2013/1614, 2014),

> In an area subject to strict rules and conditions such as the personnel regime, it is natural for public authorities to have a wide margin of discretion, which varies according to the nature of the activity and the purpose of the restriction. … It is clear that especially public officials may be subject to restrictions in terms of some elements of private life that are integrated with their professional lives.

Accordingly,

> (…) by accepting this duty, the applicant, who has a certain responsibility as a civil servant, voluntarily participated in the discipline and attitude demands arising from being a public official. Based on the stated foundations, this system, by its very nature, imposes restrictions on the rights and freedoms of the individual that cannot be applied to any citizen. Because the public interest expects full compliance from public officials in terms of the professional and ethical rules that they must comply with. It is clear that the applicant's behaviours contrary to professional and ethical rules may have a certain effect on the dignity of public officials and in this context, the public service, especially in terms of some private life elements that may have a connection with his professional life (Constitutional Court Decision dated 21.1.2015 numbered E. 2013/9660 , 2015).

Many of the respondents who experienced discrimination while facing layoffs said that being a public official was a full-time identity. Ahmet claimed that other public officials and managers assumed that the life of a public official was just Law No. 657. Although Law No. 657 regulates the rights of public officials, it also regulates the duties of public officials and the rules to be applied to them.

Hasret shared with her manager that the reason for her exposure to the internet was her abusive ex-partner. However, another manager at work told her what public official means and that she must be a full-time public official and act accordingly without excuse. Hasret said that she told the incident to the former Minister of Family and Social Policies in the hope of being reassigned after her dismissal. The Minister phoned the former Minister of Justice. The phone was on loudspeakers, and the Minister of Justice, in response to Hasret's request to be brought back to office, said, “Are you aware of the crime she has committed? She was exposed on the internet. Such a public official can’t be appointed within the Ministry of Justice.”

All of the participants stated that one cannot experience an outside life, and that every move must be made carefully to fit the ideal 'public worker' type. Hasret:

> Everybody is your honour guard, everybody thinks you are strange… People will look at you differently, even if you change your outfit a little, wear a new shoe, or do something different. You are a public official but you are ashamed to wear a certain outfit. You do not deserve it; they do not give you a chance.

Ahmet: "Government institutions do not see your 100 right doings. They see your 1 wrong."

Some participants greatly regretted being public servants. Barış said that he should not have chosen to become a police officer in the first place. He noted that he was not the only person who thought so. Barış's family, which led him to become a police officer at first, has a similar mind-set with Barış. They also think that he should never have been a police officer. With this, all of their relationships and experiences outside of the workplace were often extremely rummaged.

One of the participants, a teacher, stated that the teachers working in the Ministry of National Education are quite *trash*. The participant also shared how the other teachers loved prying on other people's personal lives. Teachers did this at a level that affected LGBTI+ (especially trans) teachers psychologically and physically. According to the participant, the only thing stopping these teachers is Law No. 657 and the rules. If they did anything to LGBTI+ teachers, they would have to deal with the legal consequences.

In general, public work has been described as an abusive environment. This shows how the state seeks constant obedience from its subjects. The state regulates power relations through the constitution of subjects within its discursive practices (Charles, 2000, p. 26). With this discursive practice state also ensures its power. Although feminist theory considers the state as a potential bargainer for women's protection, it seems that queer theory is right in identifying the state as the substantial source of danger. Hasret:

> Among all the bureaucrats of the Ministry of Justice, I was tortured more than with all the ignorant Kurdish people in my own village. If I was in my village, they would say "you did wrong to us" and just kill me. However, these people are killing you constantly, yet you can't hold your head up high.

The public servant standard was extremely difficult to meet, and that standard does not change even when you are acquitted. Hasret: “Even if you set a precedent in law [as a person], you can’t find a place [in the institution].”

Within the public institution context, you have only one chance. You can either obey the very strict rules and standards of being a public official or you cease to exist under the public institution. Once the rules and standards have been violated you become unforgivable. For an LGBTI+ or a woman, obedience to the state and its institutions means the erasure of their identity and existence. To obey, an LGBTI+ has to “pass” as cisgender and heterosexual. Even if we assume this as a plausible standard, some people are still not going to appear cisgender or heterosexual. The state is always going to deem one “not standard” enough. These people, first and foremost are always going to be first the LGBTI+s.

Although a cisgender and heterosexual women’s job may be easier in terms of complying with normative standards, the state “standard” of being a public official still puts a huge burden on women. If they are single, they need to have partners only to be married in the future. If they do not get married for a long time, they are a threat to both men and other women in the workplace. If they are in a relationship but it is an abusive one, it is their own problem to be fixed.

For both LGBTI+s and cisgender heterosexual women, being a public official is a “safety net” that they pay a huge price for. The paid price affects how the participants perceive their future life and work. While some participants were not hopeful of what the future would bring, all of the participants had plans to keep on working either in the public sector or in another sector. Some participants were hopeful for the future and wanted to continue living despite what had happened at work. Ahmet:

> There’s a lot to do, you know... I came here [to a village]. What am I going to do? I will do something. I will attend online courses. I will get involved with design stuff. I’m a trained photographer too, I have a camera. And, also, I can’t live without sex. My boyfriend is coming to visit me next week.

Two of the participants said that they want to advance their posts in the public sector. Hasret: “My next goal is to take the institutional exams and get promoted. I was scared until now but I can do it. I’ll do this, I’ll work for it. At least I can become a manager. I only have this… I have my job.”

Another participant shared that they want to get into a law school and become a lawyer in the hopes of working pro bono for people in need. Ahmet:

> I have another dream because this has been a wound inside me. I hated being a public official with all my heart. No matter what happens, I will finish studying Justice with distance education. I was enrolled in 8 law classes last semester however I could not pass the exam because of the legal process. My goal is to pass all of these classes and then I will ask for a transfer to a law school and start studying law… However, no matter what, I will finish the distance school and I will resign from my position. Then I will work pro bono, especially in administrative disputes. And I will fling living my sexuality and my affairs in people's faces. I will wear my wig, do my makeup and wear my tog.

Another participant said that he wants to enter university once again, this time to study a subject they are passionate about. Mehmet:

> I am currently studying to enroll in a second university. I am thinking of studying music teaching. If the political conjuncture does not change, if this government stays, I will seek asylum and leave the country for sure. I do not want to live in this country with these laws and people.

Another participant said that they feel freer in their private sector job and they will continue to work there. Barış has been working in the private sector for the last three to four years. When asked if he wants to continue his public service after the Council of State decision, he said he would not want to return now. He added that he is more comfortable in his new job and in a different sector.

One participant shared that he wanted to request a reassignment as soon as possible to change his location to a larger city. Mehmet:

> I'll have the right to apply for reassignment this June; I will apply as soon as possible. But I don't know if I can go back to my job … Unfortunately, in the small villages of our country, there are many people who make the private life of others their business. Therefore, I feel that I will be more comfortable if I leave after the investigation is complete.

In the face of the price paid to their colleagues, supervisors, to judges and the law, sexual minority public officials feel weary but they have plans about the future. Even if the participant, who felt the most hopeless and lonely at first, even if she was hesitant at first, when asked about their plans, got excited about the possibility of being promoted and talked about preparing for the promotion exams. This shows that the use of shame as a punishment tool always brings about a change. The sexual minority

public official, who has difficulties in civil service, is motivated to change their future with the transformative power of shame. This motivation may appear in the form of working to acquire a new profession (like becoming a lawyer), proving to their colleagues and surroundings that they can exist in the same order by being promoted, or the possibility of living their identity freely by establishing plans to change cities or countries. As Sedgwick and Nussbaum show, shame always brings with it change and transformation.

CHAPTER 5

CONCLUSION

This research moved from the assumption that law as a state apparatus uses oppression to maintain its power. Those subjected to the law should not just obey the law but also obey the law's violation of their rights. Legal certainty, as a principle, exists under many legal cultures to ensure that those subjected to the law should know which concrete action and phenomenon are subject to which legal sanctions or consequences. Yet, much like in any legal culture, jurisprudence in Turkey shows that some provisions' wordings do not comply with this principle. Two articles of law that make up the content of this thesis are Public Servants Law No. 657 Article 125 and General Law Enforcement Bodies Discipline Law No. 7068 Article 8. Both of these provisions included sanctions on public officials' "disgraceful and shameful act" and "unnatural [sexual] act." Although public officials are prohibited from engaging in disgraceful, shameful or unnatural acts, the laws are not certain enough to understand what these terms mean.

To define what a public official's "disgraceful act" entails, Yıldırım and Kaman (2019, s. 167) give the example of a Council of State decision. According to the decision, "dishonour, unchastity, and misconduct at a level that prevents being left in office" are the basis for what a "disgraceful act" for a public official entails. For "unnatural act," Yıldırım (2018, s. 464) looks at a Constitutional Court decision. According to the decision, an unnatural act (*gayri tabii mukarenet*) is defined as engaging in unnatural sexual behaviour. The said behaviours are sexual behaviours that cannot be accepted as natural in all social orders and have a negative effect on the moral standards of society. In both attempts to define the terms "disgraceful act" and "unnatural act," more uncertain terms such as "honour, chastity, social order or moral standards of society" come up.

Some authors (Grattet & Jenness, 2005, s. 894) argue that the legal system's uncertain nature requires the legal system's actors to give directions on how to apply the law. These directions should include elaborating or, in some cases, narrowing the scope of the law's application. However, in this thesis, I argue that legal actors intentionally create this uncertainty. This uncertainty especially affects sexual minorities, namely LGBTI+ and cisgender heterosexual women. Within the governmental institution setting, LGBTI+ and cisgender heterosexual woman public officials are the ones who seem most affected by the uncertain provisions concerning a public official's "disgraceful or unnatural act".

To reveal how these uncertain provisions affect sexual minority public officials' work and dismissal experience, this research employed in-depth interviews with five sexual minority public officials. The participants were comprised of a heterosexual woman, a bisexual man, a gay man, a trans man and a participant who did not identify themselves as any of those labels. The research also included an analysis of participants' case files.

The analysis showed that most participants had certain expectations before becoming a public official. For some, public duty meant security and stability; for others, it meant pleasing their families or making them proud. After starting to work, most participants realised public work was different from what they dreamed of. The public official is presented as the projection of the state's ideal of a citizen. Therefore, the state's imposition of morality on public officials makes it seem like it has a legitimate ground. The obedience and submission of a public official to the state mean the sustainability of the state. However, the existence of different sexualities, sexual orientations and gender identities within the public institution structure brings a threat to the sustainability of the state. To overcome this threat, the state and its apparatus develop certain strategies. One of these strategies is using shame and isolation.

The sexual minority public official once deemed "immoral" is constantly ashamed and isolated by their colleagues and supervisors. Although the amount of shame and isolation can be experienced at different levels by different genders and sexual orientations, they are directed and imposed on sexual minority public officials through the demands and expectations of societal norms (Nussbaum, 2004, s. 174). This

imposition is done through individuals, public institutions and legal institutions to a point that sexual minority public official is punished not just by institutions but by individuals through shame. The inter-office relationships that participants have talked about included anecdotes concerning colleagues treating them as “others” and alienating them because they are sexual minorities who have “engaged in” disgraceful or unnatural [sexual] acts.

The legal provisions in Law No. 657 and Law No. 7068 take their power from this social punishment through shame and bring a legal dimension to it. The punishment starts in the workplace through the constant shame and isolation from colleagues and supervisors; after this, the sexual minority public official experiences an administrative investigation where they are subjected to a legal penalty of being expelled or dismissed; then the sexual minority public official who is subjected to unlawfulness files a lawsuit which will not end for years, and the obstacle to find a legal remedy punishes the “immoral” public official for once more. Even if their case is concluded in favour of them, a sexual minority officer can never be acquitted of being "immoral". Society and the law have already punished them once. This puts the sexual minority public official into constant weariness.

The participants shared that their case would have been concluded in shorter amounts of time if it was not for the current government and political conjuncture. When asked about the uncertainty of the wording of the provisions concerning “disgraceful and shameful act” and “unnatural [sexual] behaviour,” participants shared that whoever is in the current government fills in the blanks on uncertainties. The current moral understanding of the government and society affected the impact of those provisions and the consequences.

In the face of the price paid to their colleagues, supervisors, judges and the law, sexual minority public officials feel weary, but they have plans for the future. Even if the participants felt hopeless and lonely, and were hesitant at first, when asked about their plans, they got excited about the possibility of being promoted and talked about preparing for the promotion exams. This shows that the use of shame as a punishment tool always brings about a change. The sexual minority public official, who has difficulties in civil service, is motivated to change their future with the transformative

power of shame. This motivation may appear in the form of working to acquire a new profession (like becoming a lawyer), proving to their colleagues and surroundings that they can exist in the same order by being promoted, or the possibility of living their identity freely by establishing plans to change cities or countries. As Sedgwick (2003) and Nussbaum (2004) show, shame always brings with it change and transformation.

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APPENDICES

A. APPROVAL OF THE METU HUMAN SUBJECTS ETHICS COMMITTEE

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ORTA DOĞU TEKNİK ÜNİVERSİTESİ
MIDDLE EAST TECHNICAL UNIVERSITY

Sayı: 28620816 /

27 EKİM 2021

Konu : Değerlendirme Sonucu

Gönderen: ODTÜ İnsan Araştırmaları Etik Kurulu (İAEK)

İlgi : İnsan Araştırmaları Etik Kurulu Başvurusu

Sayın Ayşe Ceylan TOKLUOĞLU

Danışmanlığını yürüttüğünüz Selin ALTAY'ın "Türkiye'de Kadın ve/veya LGBTQI+ İşçi ve Memurların İş Kanunları Kapsamındaki Ahlaka İlişkin Belirsiz Hükümlere Dayalı İşten Çıkarılmaları" başlıklı araştırması İnsan Araştırmaları Etik Kurulu tarafından uygun görülmüş ve **432-ODTU-2021** protokol numarası ile onaylanmıştır.

Saygılarımızla bilgilerinize sunarız.

Prof.Dr. Mine MISIRLISOY
İAEK Başkanı

B. TURKISH SUMMARY / TÜRKÇE ÖZET

Giriş

Devlet, kendini meşrulaştırmak adına baskıyı kullanır. Meşrulaştırma süreci devlet araçları aracılığıyla gerçekleşir. Catharine A. MacKinnon (1989), bu araçları devletin ifade biçimleri olarak tanımlar. Devlet ifadesinin özel bir biçimi olarak hukuk, devlet baskısının bir aracı olabilir. Jürgen Habermas (1996) hukukun baskısını güç olarak tanımlar. Başka bir deyişle hukuk, şiddet ve itaatle yakından bağlantılı zorlayıcı bir güçtür. Bu anlamda hukuk, yalnızca mevcut normlara değil, aynı zamanda bu belirli norm ve hakların kendi organları tarafından ihlaline de itaat etmeyi gerektirir.

Hukuki belirlilik ilkesi bu bağlamda ihlali durumunda itaati gerektiren bir hukuk prensibi olarak karşımıza çıkmaktadır. Hukuki belirlilik, bireyin hangi somut eylem ve olgunun hangi hukuki yaptırımlara veya sonuçlara tabi olduğunu bilmesi gerektiği anlamına gelir. Ancak kanunun lafzının açık olmadığı durumlar bu ilkenin ihlalini gündeme getirir. İlke tam da kanun lafzının yaratacağı karışıklıkla birlikte gündeme gelebilecek keyfi uygulama ve yaptırımları ortadan kaldırmayı amaçlamaktadır (Maxeiner, 2008).

657 Sayılı Devlet Memurları Kanunu ve 7068 Sayılı Genel Kolluk Disiplin Hükümleri Hakkında Kanun Hükmünde Kararnamenin Kabul Edilmesine Dair Kanun anlam bakımından belirli olmayan hükümler içermektedir. Bu tez, söz konusu kanunlarda yer alan hükümle birlikte yaratılan belirsizliğe odaklanmaktadır. Söz konusu kanun maddeleri 657 Sayılı Kanun'un 125. Maddesi ve 7068 Sayılı Kanun'un 8/cc maddesidir. 125. madde, memurluk sıfatı ile bağdaşmayacak nitelik ve derecede yüz kızartıcı ve utanç verici hareketlerde bulunmayı, 8/cc maddesi ise bir kimseyle gayri tabii mukarenette bulunmak yahut bu fiili kendisine rızasıyla yaptırmayı düzenlemektedir.

Danıştay'a göre "utanç verici davranış", "haysiyetsizlik, iffetsizlik ve vazifede bırakılmaya mani suistimal" durumunda gündeme gelmektedir (Yıldırım & Kaman,

2019, s. 167). “Gayri tabii mukarenet” ise Anayasa Mahkemesi tarafından “doğal olmayan cinsel davranışlarda bulunmak” olarak tanımlanmaktadır (29/11/2017 tarihli E: 2015/68, K: 2017/166 sayılı Anayasa Mahkemesi Kararı, 2017). Karara göre, bu davranışlar farklı şekillerde gerçekleşebileceği gibi kişiden kişiye ve toplumdan topluma farklılık göstermektedir. Bu davranışlar toplum düzeni tarafından “doğal karşılanması mümkün olmayan” davranışlardır.

Mahkemelerin “utanç verici ve yüz kızartıcı davranış” ve “gayri tabii mukarenet” kavramlarından ne anladığını araştırmak “onur, iffet, toplumsal düzen ve toplumun ahlaki değerleri” gibi bir dizi belirsiz kavramın daha karşımıza çıkması durumunu gündeme getirmektedir. Kanun hükümlerinin hepsinin belirli olması imkânsızdır. Hukukun belirsiz doğası, bazı yazarlara göre (Grattet & Jenness, 2005, s. 894) hukuk sistemi içindeki aktörlerin hukukun nasıl uygulanacağına dair bazı talimatları vermesini gerektirir. Bu yönergeler, yasanın uygulama kapsamının bazı durumlarda detaylandırılmasını veya daraltılmasını içermelidir.

Bazı yazarlar belirsizliği ortadan kaldırmak için hukuki aktörlerin harekete geçmesi gerektiğini savunsa da bu tez hukuki aktörlerin kasıtlı olarak bu belirsizliği yarattığını savunmaktadır. Bu durum, memurların bağlı oldukları kanunlardaki belirsiz hükümlerden de anlaşılmaktadır. Bu anlamda hukuktaki bu belirsizlikten en çok etkilenen gruplar devlet kurumlarında çalışan cinsel azınlıklar olarak karşımıza çıkmaktadır.

Devlet “yüz kızartıcı ve utanç verici davranış” ve “gayri tabii mukarenet” gibi belirsiz terimler içeren hükümlerde yoruma yer bırakarak, cinsel azınlık mensubu memurlara kendi “ahlak” anlayışını empoze etmeyi amaçlamaktadır. Yaratılan belirsizlik aracılığıyla, hukuk memurların işvereni olarak devlete, “ahlaksız ve onursuz” memuru hukuka aykırı bir şekilde görevden alma konusunda bir nevi sınırsız yetki vermektedir. Bu sınırsızlık, cinsel azınlık mensubu memurların çeşitli insan haklarının ihlalinin meydana gelebileceği görevden alınmalarını keyfi bir prosedürle sonlandırma potansiyeline sahiptir.

Metodoloji

Bu belirsiz hükümlerin cinsel azınlık mensubu memurların çalışma ve işten çıkarılma deneyimlerini ne şekilde etkilediğini ortaya çıkarmak amacıyla cinsel azınlık mensubu beş kamu görevlisi ile derinlemesine görüşmeler gerçekleştirilmiştir. Katılımcılar bir heteroseksüel kadın, bir biseksüel erkek, bir gey erkek, bir trans erkek ve kendisini herhangi bir cinsel yönelim veya cinsiyet ifadesi ile tanımlamayan bir katılımcıdan oluşmuştur. Araştırma aynı zamanda katılımcıların dava dosyalarının bir analizini de içermektedir.

Cinsel azınlık mensubu olarak natrans heteroseksüel kadınlar ve LGBTI+ların örneklem olarak ele alınması çok yaygın değildir. Ancak cinsel azınlık olarak natrans heteroseksüel kadınların ve LGBTI+ların ele alınması patriarkal devlet kültürü ve kurumsallaşmış baskıyı daha katmanlı şekilde ortaya çıkarabilme imkanı yaratmaktadır. Bu çalışma, LGBTI+lara oranla natrans heteroseksüel kadınların cinsel yönelim ve cinsiyet kimlikleri açısından yaşadıkları ayrıcalıkları görünmez hale getirmeyi amaçlamaz. Bilakis günlük hayatta cinsel yönelim ve cinsiyet kimliği ayrıcalıklarının ne gibi hayatta kalma stratejileri haline gelebileceği incelenir.

Araştırmada kuir ve feminist metodoloji ile nitel araştırma yöntemi kullanılmaktadır. Araştırma olasılıksız bir örneklem tasarımı üzerine kurulmuştur. Nitel araştırma, beş kadın ve/veya LGBTİ+ kamu görevlisi ile yapılandırılmamış bir ortamda yarı yapılandırılmış ve derinlemesine görüşmelerin yanı sıra İlk Derece Mahkemelerinden Yüksek Mahkemelere kadar uzanan dava dosyalarının analizini içermektedir. Genel olarak, 657 Sayılı Kanun ve 7068 Sayılı Kanun kapsamındaki hükümlerin amacını ortaya çıkarmada, katılımcıların beyanları araştırmamın ana kaynağı olmuştur.

Literatür Taraması

Hukuki kesinlik, belirsizlik ve güvensizlik yayıldığında bir sorun haline gelir (Avila, 2016). Luno (Avila'da alıntılandığı gibi, 2016) kesinliği radikal bir insan antropolojik ihtiyacı olarak görür ve "neye tutunacağını bilmek" kesinliğe duyulan bireysel ve toplumsal özlemin temel bir unsuru haline gelir. Habermas'a (1996) göre, bir hukuk sistemi yalnızca hukuk normlarından oluşmaz; ayrıca yerleşik uygulama prosedürlerini içerir. Bu nedenle, bu yasal normların uygulanmasında öngörülebilirlik veya kesinlik garanti edilemez.

Kanunun uygulanmasındaki belirsizlikle birlikte hâkimin kanunun lafzını nasıl yorumladığı gerçeği de önem kazanır. Hâkimin takdir yetkisi, kanunun neyi gerektirdiğinin belirsiz olduğu durumlarda, hâkimlerin/mahkemelerin kararlarını bireyselleştirilmiş değerlendirmelerine dayandırma yetkisine sahip olması anlamına gelir (Jennex, 1992, s. 473; Cornell Law Institute, 2020). H.L.A. Hart ve Ronald Dworkin gibi teorisyenler hâkimin takdir yetkisini kullanarak tek ve hakkaniyetli kararın verilme olasılığının olup olmadığını tartışırlar. Hart'a göre her hâkim mevcut yasa ve politikaları yorumlarken geçmiş deneyimlerinden yola çıkarak farklı bir karar verecektir. Dworkin'e göre ise kanunun lafzının açık olmadığı durumda hâkimler "açık tutarlılık" prensibine göre karar vermelidir. Ümit Atılgan'ın hâkimlerle yaptığı çalışma (2015, s. 527) göstermektedir ki hâkimin takdir yetkisinin gerektiği durumlarda yazılı hukukun anlamına ilişkin ön kabuller hayati öneme sahiptir. Bu yüzden hâkimlerin ön yargılarını araştırmak gerekir.

Feminist ve kuir teorisyenler devleti değiştirilmesi gereken bir dizi baskıcı cinsiyet ilişkileri olarak tanımlarlar. Devlet, politikaları düzenleyen, uygulayan veya değiştiren yapıdır (Charles, 2000, s. 1-5). Ancak devletin politikaları düzenleme, uygulama ve değiştirmesi her zaman erkeklerin lehine olmuştur (Hanmer, 1977; MacKinnon, 1989; Rhode, 1994). Devlet, toplum içinde toplumsal cinsiyet ilişkilerinin inşasında baskın lider olarak hareket eder. Bu inşada devlet hukuku araçsallaştırır. "Hukuk adil değildir", feminist hareket tarafından hukukun işleyişine yönelik bir slogandır (Uygur, 2015, s. 127). Hukuk, erkek bakış açısını benimser; aynı zamanda topluma bu bakış açısını dayatır (MacKinnon, 1989).

Feminist hareket içinde devletin bir koruma unsuru olabileceği tartışılır; ancak kuir hareket için devlet önemli bir tehlike kaynağı olarak tanımlanmaya devam eder (Fineman, 2022, s. 4). Devlet kategorilerden oluşur. Kuir teori, sadece kimliklerde değil, kurum ve yapılarda da sonsuz olasılıklardan yararlanır. Eleştirel kuir hukuk kuramı, hukukun göreceli ve zaman içinde değişken olan kimliklerden sıyrılması ve eşit haklara ve muameleye odaklanması gerektiğini ileri sürer. Bu kurama göre, norm yapı söküme uğratılmalı ve insan olma durumu merkeze alınmalıdır (Erdoğan, 2020, s. 144). Kuir hukuk kuramı, hukukun insanları belirli kategorilere koyması ve onun üzerinden yargılamasını eleştirir. Bu eleştiri, hukuk ve insan ilişkisini yeniden düşünmek açısından önemlidir.

Hukuk ve insan ilişkisi açısından "utanç" da üzerinde durulması gereken bir kavram olarak karşımıza çıkmaktadır. Eve Sedgwick'e göre utanç, bir bireyin izolasyonu veya diğer insanlardan sosyal temas eksikliğine tepkisidir. Utanç, sosyal beklentileri ve damgaları ortaya çıkarır. Utanç kimliği yaratan bir güçtür (Sedgwick, 2003, s. 36-37). Utanç bir performans yaratır ve bu performans kimlik politikaları ile yakından ilişkilidir (Sedgwick, 2003, s. 64). Martha C. Nussbaum ise hukukun utancı bir cezalandırma aracı olarak kullanmasını savunur. Utanç insanları sosyal normların talep ve beklentileriyle lekeler. Ancak bazı insanlar diğer insanlara oranla utançla daha fazla lekelenirler (Nussbaum, 2004, s. 174). Bu pratik daha sonrasında sosyal normlara uymayanları cezalandırma aracı olarak kullanılır.

Her iki yazar için de "utanç" bir değişime sebep olur. Sedgwick'e göre bu değişim (2003, s. 62) utancın kabul görmeyen veya yasaklanan bir harekete tutunması ve onu tamamen değiştirmesi ile gerçekleşir. Nussbaum (2004, s. 211) ise utancın bazen bir duygu olarak toplumun ahlaki değişimi üzerinde yapıcı bir etki bıraktığını savunur. Utanılan "hareket/davranış" başta toplumun üzerinde narsistik bir korku ve öfke yaratır. Ancak bu korku ve öfke zamanla bu hareket veya davranışın toplum tarafından kabul görmesine sebep olabilir. Cinsel azınlık mensubu memurların memurluktan çıkarılma deneyimleri iş arkadaşları veya müdürlerinin korku ve öfkesini gözler önüne serer.

Ahlak anlayışı üzerinden yaratılan belirsizlikle birlikte devlet tarafından talep edilen itaat, cinsel azınlık mensubu memurların deneyimlerini üzerinde durulması gereken bir konu haline getirir. Bu kapsamda memurların aktarımlarıyla birlikte ahlak, belirsizlik ve itaat üzerinde durulacak üç ana başlık olarak karşımıza çıkar. Ahlak kavramı, "onurlu kamu hizmetini" konuşurken üzerinde durmamız gereken ilk konulardan biridir.

Bulgular

Ahlak Üzerine Bulgular

Hasret'in başvurusu ile açılan dava sonucu İdare Mahkemesi'nin verdiği kararda "657 sayılı Devlet Memurları Kanununu 125/E-g maddesi, kamu görevinin inanılır, güvenilir, toplum nezdinde itibarlı ajanlar eliyle yürütülmesini amaçladığı" üzerinde

durulur. “Memur sıfatı taşıyan ve kamu hizmetinin personel unsurunu oluşturan kişilere toplumun güven duyması, bireylerin idareye olan güven ve inancını da sağlayacağı” altı çizilen başka bir husustur. Mahkemeye göre güven ve inanç ancak onurlu ve ahlaklı memurlar aracılığıyla tesis edilebilir. Söz konusu onur ve ahlak yalnızca iş yerinde değil iş yeri dışında da memurlar tarafından sergilenmelidir. Umut’un başvurusu ile açılan dava sonucu İlk Derece Mahkemesi bu durumu “Devlet Memurunun yalnız görev yaptığı mesai saati içerisinde değil, aynı zamanda mesai saatleri dışında da örnek ve sorumluluk anlayışıyla hareket eden bir tavırda olması gerekmektedir” gerekçesi ile açıklamıştır.

Ahlak, memur olmak için gerekli bir niteliktir. Devlet bu niteliği arar ve ahlaki standartlarına uymayanları cezalandırır. 657 Sayılı Kanun ve 7068 sayılı Kanun'da yer alan cezalar, ahlaki davranışlara dayalı olarak soruşturma veya görevden alma sürecinin işletilmesine zemin oluşturmaktadır. Bu araştırmanın katılımcılarına yönelik soruşturmalar, “ahlaksız” kimliklerinin iş arkadaşları veya iş yerindeki amirleri/müdürleri tarafından öğrenilmesiyle başlamıştır. Katılımcıların hepsinin “ahlaksız” kimlikleri, iş yeri dışında meydana gelen ve iş yeri ile bağlantısı olmayan belirli bir olaya dayanarak ortaya çıkarılmıştır. Ancak memurun işyeri dışında da “ahlak standardına” uyması beklendiğinden, 657 Sayılı Kanun ve 7068 sayılı Kanun'daki cezalar katı bir şekilde uygulanabilmektedir. Söz konusu kanundaki yaptırımlar, trans, gey erkekleri ve “iffetsiz” natrans kadınları işten çıkarmak için kullanılmıştır.

Katılımcıların işten çıkarılma süreçleri, devletin ve mahkemenin dayattığı ahlak anlayışının ve standardının işyerine yansıdığını ortaya koymaktadır. Meslektaşlar, müdürler ve amirler, işten çıkarma sürecinin şikâyetçisi veya soruşturmacısı olurken, sanki devletmiş gibi davranırlar. Ahlaki standartlara uyma ihtiyacı, diğer kamu görevlilerinin de meslektaşlarından veya çalışanlarından talep ettiği bir şey haline gelir. Bu şekilde bir kere ahlaksız sayılan kamu görevlisi, daha sonra sürekli bir utanç duygusuyla karşı karşıya kalır.

Mevcut yasal normlar, çalışma ortamında kamu görevlilerinden beklenen sosyal beklentileri ve “ahlaksız” hareket etmeleri durumunda karşılaşabilecekleri olası damgaları ortaya koymaktadır. Utanma ve dolayısıyla işyerinde izole olma olasılığı,

“ahlaksız” damgasıyla karşı karşıya kalan kamu görevlisini değiştirir. Tıpkı Sedgwick'in iddia ettiği gibi, bu normlar kamu görevlisinin kimliğini sadece işyerinde değil, günlük yaşamda da şekillendirir. Bireyin sınırlarını hayal edilebilecek en soyutlayıcı şekilde çizer (Sedgwick, 2003, s. 37). “Ahlaksız” kamu görevlisinin çalışma ortamında ayakta kalabilmesi için sürekli bir performans içinde olması gerekir. Heteroseksüel değillerse, “heteroseksüel” gibi hareket etmeleri gerekir; natrans değillerse, natrans "davranmaları" veya "hareket etmeleri" gerekir; ideal bir “saf”, “mütevazı” kamu çalışanı tipine uymuyorlarsa, öyleymiş gibi davranmaları gerekir. Bu durum da LGBTI+ memurların işyerinde kimliklerini asla açık etmemeleri gerektiği anlamına gelmektedir.

Katılımcılar, kimliklerinin açık edilmesi durumunda iş yerinde iş arkadaşları veya müdürleri tarafından memurluktan çıkarılmalarının bir yolunun bulunacağını dile getirmişlerdir. Kendilerini LGBTI+ olarak tanımlamayan katılımcılar da her ne kadar kimliklerinin açık edilmesi üzerine ciddi bir endişe duymasalar da özel hayatlarında yaşadıklarının öğrenilmesi olasılığına karşılık kendilerini sürekli izole etmişlerdir. Utanç insanları lekeler (Nussbaum, 2004, s. 174). Hem lekelenen hem de izole olan cinsel azınlık mensubu memur utanç ile tam anlamıyla cezalandırılmıştır. Bu çalışmanın konusunu oluşturan kanun maddeleri de gücünü tam olarak bu toplumsal cezalandırmadan alıp cezalandırmaya sosyal bir boyutun yanında hukuki bir boyut da kazandırmaktadır.

Farklı kimlik ve yönelimlere sahip katılımcılardan her biri toplum ve hukuk tarafından dayatılan bu utancı farklı şekilde deneyimlemişlerdir. Utanç bazı katılımcıları daha fazla mimlemiştir. Özellikle natrans ve heteroseksüel bir erkek gibi iş yerinde var olabilen katılımcılar, natrans ve heteroseksüel erkek gibi atanamayan katılımcılara oranla daha az izole olmuşlardır. Çoğu katılımcı akranları ve arkadaşlarıyla yaşadıkları deneyimi paylaşabildiklerini aktarmış ancak deneyimlerini aileleriyle paylaşamadıklarını ve çoğunlukla durumu gizlemeye çalıştıklarını ve yalan söylediklerini dile getirmişlerdir. Katılımcıların hepsi benzer şekilde memurluktan çıkarılmış bir memur ile iletişim halinde olmuştur. Katılımcılardan bazıları memurlarla iletişime geçerek kendi hukuki süreçleri hakkında bilgi sahibi olmaya çalışırken bazı katılımcılar da dava süreçleri sonuçlandıktan sonra başka memurlara hukuki süreçleri hakkında bilgi sağlamışlardır.

Her katılımcının hukuki mücadelesi en az 5 yıldan fazladır sürmektedir. Birçok katılımcı iş yerinde yaşadıkları onlarca ayrımcılıktan sonra bir de çok uzun ve yorucu bir hukuki süreç deneyimlemenin kendilerini iyice yıprattığını dile getirmiştir. Bu uzun süreç, cinsel azınlık mensubu memurların birden fazla şekilde katmanlı şekilde cezalandırmaya maruz kaldığının kanıtıdır. Memur ilk başta iş yerinde kendisine dayatılan "utanç" duygusuyla izole olur ve cezalandırılır, ardından iş yerinde yürütülen idari süreci deneyimler ve hukuki anlamda bir cezalandırmaya maruz kalarak ihraç edilir veya işinden atılır, hukuka aykırılık söz konusu olduğundan açtığı davanın yıllarca sonuçlanmaması dolayısıyla bir kere daha bir nevi ahlaksız olmakla cezalandırılmış olur. Memurun davası sonuçlanmış ve davayı kazanmış olsa bile cinsel azınlık mensubu memur "ahlaksız" olmaktan hiçbir zaman aklanmaz. Toplum ve hukuk onu bir kere cezalandırmıştır bile.

Belirsizlik Üzerine Bulgular

Bütün bu süreç kanun hükümlerinin lafzının belirsizliği ile başlamıştır. 657 Sayılı Kanun ve 7068 Sayılı Kanun kapsamındaki belirsiz hükümler toplum algısını aşılar ve pekiştirir. Utanç verici davranış veya gayri tabi mukarenet kavramları ile yaratılan belirsizliğin bir nebze de giderilmesi için katılımcıların mahkeme başvurularını incelemek gerekmektedir. Hasret'in başvurusu ile istinafa götürülen davada, Bölge İdare Mahkemesi "utanç verici hareketleri" "…içinde yaşanılan toplumda yerleşmiş genel ahlaki değerlere tezat olan ve toplumun büyük çoğunluğunun bu yönde değerlendirdiği fiil ve hareketler" olarak tanımlar. Umut'un başvurusu ile açılan davada İlk Derece Mahkemesi "utanç verici davranış" konusunda "adı geçen personellerin söz konusu eylemlerinin utanç verici hareketler olarak nitelendirilmesi gerektiğinden, toplumda yerleşmiş yüksek ahlaki değerlere tezat olan, adap ve aile düzenini tahribe yönelik olan cürümler olduğundan görevli memurların sorumsuzca hareket ettiği" değerlendirmesinde bulunmuştur. Anayasa Mahkemesi ise "gayri tabi mukarenet" kavramını "doğal olmayan yoldan cinsel davranışta bulunma" şeklinde tanımlanmaktadır. Mahkemeye göre, "bu tür cinsel davranışlar çok farklı şekillerde ortaya çıkabileceği gibi kişiden kişiye veya toplumdan topluma farklılık gösterebilir. (…) söz konusu davranışlar; tüm toplum düzenlerinde doğal olarak kabul edilmesi mümkün olmayan, toplumun ahlâkî standartları üzerinde olumsuz etkisi bulunan cinsel davranışlardır."

“Ahlak” ve “gayri tabii mukarenet” ifadelerindeki belirsizlik, hükümlerin her ortam ve zamanda uygulanabilir hale gelmesine yardımcı olmaktadır. Hükümler, 1930 ve 1982'de yürürlüğe girdiklerinde uygulanabilirken bugün hâlâ uygulanabilir haldedir. Lafzın bağlamı ve zamansızlığı amaçlanan bir niteliktir. Bu belirsiz olma niyeti, meslekten atılma olasılığıyla karşı karşıya kalan kamu görevlilerini savunmasız bir konumda bırakmaktadır. Bu savunmasız ve kırılgan konum, katılımcıların hukuk karşısında haklarının kapsamlı bir şekilde farkında olmaları zorunluluğunu doğurmuştur. Habermas’ın (1996) üzerinde durduğu gibi hukuk yalnızca normlardan oluşmaz, aynı zamanda yerleşik uygulamaları da barındırır. Katılımcılar, söz konusu kanun hükümleri ile ilgili yalnızca normun lafzını değil, normun geçmişte nasıl uygulandığı ve olası uygulanma ihtimallerinin bilgisini de haizlerdir. Katılımcıların hakları ve olası uygulamalardan bu kadar fazla haberdar olmak zorunda kalması da devletin cinsel azınlıklar üzerinde kurduğu tahakkümün bir başka yansımasıdır.

Katılımcıların hepsi devletin uyguladığı bu tahakkümün mevcut hükümetin varlığı ile birebir ilgili olduğunda hemfikirlerdir. Mevcut hükümetin yarattığı politik atmosfer, mahkemelerin kararlarını ciddi ölçüde etkilemektedir. Katılımcılardan bazıları, hükümet değişmiş olsaydı davalarının farklı şekilde sonuçlanacağından emindiler. Kanunun lafzındaki bu belirsizliğin, mevcut hükümet tarafından, kendi politik ideolojilerini azınlık gruplar üzerinde kullanma aracı olarak uygulandığı görülmektedir. Politik ajandalarına uymayan kişilerin varlığı, “utanç verici davranışın” mevcut hükümet tarafından araçsallaştırılarak cezalandırılmaktadır. Memurlardan beklenen şey bir çeşit tek tipleşme ve itaattir.

İtaat Üzerine Bulgular

Kişinin cinsiyeti ve cinselliği işyerinde utanılacak bir şey olarak görülmektedir. Bunun için kamu çalışanı çok katı bir “memur” standardına uymak zorundadır. Bu imaj genellikle cinsel azınlıkların varlığıyla çelişir. Kişinin katı "memur" standardına uyması için öznenin heteroseksüel, natrans ve (tercihen) erkek olması gerekir. Kadınların kamu kurumlarındaki varlığı, cinsellikten, ilgiden, zevkten yoksun, bireyleşmiş varlıklar olarak görülmediği sürece hoş görülebilir. Bu kısmen heteroseksüel, natrans erkekler için de geçerlidir. Onlar da sıradan ve bireyselleşmemiş varlıklar olarak var olmak zorundadırlar.

Bir İlk Derece Mahkemesi, verdiği kararda bu durumu şu şekilde gerekçelendirir:

> Kamu hizmetinin gerekli saygınlığı yitirmiş ajanlar eliyle yürütülmesi, bireylerin idareye olan güven duygularının sarsılmasına, kişi-idare ilişkilerinde arzu edilmeyen olumsuz bazı gelişmelere neden olabileceği kuşkusuz olup, Kanun böylesi bir tehlikenin zuhurunu önlemek için önlem almış ve müsebbiplerinin Devlet memuriyetinden çıkartılması suretiyle idare aygıtından bu tür ajanların ayıklanmasını öngörmüştür.

Bir başka kararda ise Bölge İdare Mahkemesi memurun devlete bağlılığını şu şekilde gerekçelendirilmiştir:

> İdarenin kamu hizmetini yürütecek olan ajanlarını statüye alırken birtakım özelliklere sahip olmasını araması ne kadar doğal ise de statüyü aldıktan sonra ajanlarını verimli biçimde kullanması, hizmeti aksatacak, kendisinden artık verim alınması imkânı kalmamış, aksine idarenin mekanizmasını ve kamu hizmetinin yürütülmesine zarar veren ajanlarını bünye dışına çıkarması da o kadar doğaldır.

Bir mekanizma olarak devlet devam etmek zorundadır. Bunun için, devlet, sistemi aksatma şansı olan herkesi dışlar. Mekanizma ancak "yönetilebilir insanlar" aracılığıyla işleyebilir. Bu kişiler hem halk hem de kamu görevlileridir. Kamu görevlisinin yönetilebilirliği, halkın yönetilebilirliğini kolaylaştırır. Dolayısıyla ideal bir "kamu görevlisinin" yaratılması, devletin bekası için bir zorunluluktur. Devletin "ideal" bir kamu görevlisi tipi yaratma çabalarının etkili olmasıyla birlikte "kamu görevlisi" pozisyonu, insanların olmak için çabaladığı bir statü haline gelir. Belirli bir güvenlik ve rahatlıktan yararlanarak toplumda "ideal" bir insan olarak, halk tarafından arzu edilen bir durumdur. Katılımcıların çoğu bu yüzden "memur" olduktan sonra belirli bir statü ve güvenlik beklentilerinin olduğunu dile getirmiştir. Bu statüyü edinme bireysel bir yerden olabileceği gibi aile ve akrabaları tatmin etme amacıyla da gerçekleştirilebilir. Ancak bu statü belirli bir bedel ödenerek elde edilir. Katılımcıların kamu görevlisi olmanın verdiği güvene ve statüye bir nebze olsun şükretmeleri için, kamu görevlisi kimliklerini yaşamları boyunca sürdürmeleri gerektiği gerçeğini göz ardı etmeleri gerekmektedir. Bu gerçeği göz ardı edemeyen bazı katılımcılar, memur olduklarından büyük pişmanlık duyduklarını dile getirmişlerdir. Memuriyet hem LGBTİ+'lar hem de natrans heteroseksüel kadınlar için büyük bir bedel ödedikleri "güvenlik ağı" olarak var olur.

İş arkadaşlarına, müdürlere, hâkimlere ve hukuka karşı ödenen bu bedel karşısında cinsel azınlık mensubu memurlar yorgun olmalarına rağmen yeni planlara sahiplerdir. En umutsuz ve yalnız hisseden katılımcı bile planları sorulduğunda başta çekimser yaklaşsa bile terfi etme olasılığına karşı heyecanlanıp sınavlara hazırlanmaktan bahsetmiştir. Bu göstermektedir ki utancın cezalandırma aracı olarak kullanılması beraberinde her zaman bir değişimi de getirir. Memurluk statüsü içerisinde güçlük çeken cinsel azınlık mensubu memur, utancın yarattığı dönüştürücü güç ile geleceğini değiştirme konusunda motivedir. Bu motivasyon, kendisini yeni bir meslek edinmek için çalışma, terfi ederek aynı düzen içerisinde var olabildiğini iş arkadaşlarına ve çevresine kanıtlama, ya da şehir veya ülke değiştirme planları kurarak sahip olduğu kimliği özgürce yaşayabilme olasılığını kazanma şeklinde karşımıza çıkar. Sedgwick ve Nussbaum'un gösterdiği gibi, utanç beraberinde her zaman bir değişimi ve dönüşümü getirir.

Sonuç

Bu araştırma, devletin araçsallaştırdığı bir yapı olarak hukukun gücünü sürdürmek için baskıyı kullandığı varsayımından hareket eder. Hukuka tabi olanlar sadece hukuka değil, haklarını ihlal eden yasalara da uymalıdır. Hukuki belirlilik, ilke olarak, hukuka tabi olanların hangi somut eylem ve olgunun hangi hukuki yaptırım veya sonuçlara tabi olduğunu bilmesini sağlamak için birçok hukuk kültüründe güvenceye alınmıştır. Ancak, herhangi bir hukuk kültüründe olduğu gibi, Türkiye'deki içtihat, bazı hükümlerin lafzının bu ilkeye uymadığını göstermektedir. Bu tezde, yasal aktörlerin kasıtlı olarak bu belirsizliği yarattığı savunulmuştur. Kanunun lafzının yarattığı belirsizlik, devletin kendi ahlak anlayışını dayatmasına önayak olur ve devlet bu anlayışa koşulsuz bir itaat talep eder. Kamu çalışanı olarak cinsel azınlık mensubu memurlar da bu ahlak anlayışından en çok etkilenenler haline gelirler.

Devlet, memurların işvereni olarak, dayattığı bu ahlak anlayışını meşrulaştırır ve bu anlayışa itaat etmeyeni cezalandırır. Ancak bu cezalandırma tek katmanlı değildir. Cinsel azınlık mensubu memurları cezalandırma, iş yerindeki ayrımcılık ve utandırmadan başlar; ardından kurumda yürütülen idari soruşturma süreciyle hukuki bir boyut kazanır ve cezalandırma uzaklaştırma ya da meslekten çıkarılmayla devam eder; hukuksuzluğa karşı dava açan cinsel azınlık mensubu memurun hukuki

mücadelesi yıllar sürer ve bu süreç de bir kez daha cinsel azınlık mensubu olduğu için cezalandırılmasına sebep olur. Hukuki olarak aklanmış olsa bile cinsel azınlık memuru hiçbir zaman hayalini kurduğu "güvenli ve stabil" memuriyet hayatını yaşayamaz. Katılımcıların paylaşımları her ne kadar bir yılgınlık ve çaresizlik gösterse de katılımcıların hepsinin gelecek hakkında planları vardır. Bu da göstermektedir ki "utanç" beraberinde her zaman değişimi ve dönüşümü getirmektedir.

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