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FOREWORD

It is with great pleasure that I welcome you to the fifth edition of the SOAS Law Journal. I was delighted and honoured to be asked to write this foreword, and I am extremely grateful to the many students who played a part in producing this excellent testament to the SOAS School of Law as a community of scholars, rather than the neoliberal caricature of service provider versus customer.

I am proud that the first edition of the Law Journal was published in 2014 during my time as Head of Department. As history shows, academics (particularly male and greying ones) have a pretty poor record when it comes to claiming the credit due to others and so it is beholden upon me to stress that I played no role in its inception. Indeed, the only help I proffered was to hide my scepticism when I was approached with the idea of a student-edited law journal. Thus, whilst I did fulsomely welcome the idea, as I had done previously when others had suggested similar, I did solely in the belief that nothing would again come of it. The founding editors and the many talented colleagues they recruited are, however, made of sterner stuff, and with a mixture of charm, perseverance, obstinacy, and not a little cunning managed to produce not only that first edition, but a process which ensured the series would grow and prosper long after the initial cohort of associate, senior, and managing editors had departed SOAS.

American law schools, of course, have a much more established tradition when it comes to student-edited law journals, and the success and quality of the SOAS Law Journal owes much to the decision to adopt the American model; the entire student body, from first year
undergraduates all the way through to those writing up their PHDs are involved in its production. Adopting best practice not only achieved the goal of a high quality publication, but also provided the added benefit of allowing, nay forcing, the student population to cross the usual boundaries, not only between different years on the undergraduate degrees, but also the greater divides that normally stratify Masters students and PhD candidates. In short, the SOAS Law Journal brought the law school together; creating a single student body rather than a segregated mass of separate strands. We did not get everything right from day one, of course. Whilst there was an Honorary Board from the outset, there was no academic committee until we belatedly introduced one for the later editions to ensure a degree of academic rigour and scrutiny that was not built into the original model. Again, this had a dual benefit, introducing both a new and more objective quality threshold, whilst also bringing my academic colleagues into a meld which respects their authority but does not rely upon their direction – surely the learning and research culture every university seeks to achieve.

Enough looking back. I am delighted to see the SOAS Law journal in such rude good health and I look forward to its continuing success. Of course, this success relies ultimately on the quality of the articles published, and so finally it is my pleasure to thank the authors of the various papers that make up this current edition. For many, if not all of them, it will be the first time they have experienced both the pride and trepidation of seeing their work published for others to read, praise and criticise. It takes both courage and generosity to publish your work for strangers to see, and I hope you enjoy reading all they have to say.

Paul Kohler
EDITORS’ NOTE

In the four years since the SOAS Law Journal was first established, so much has changed. Social and political climates across the world have shifted drastically, and the legal systems intended to govern them continue to grapple with these changes with great difficulty. Human rights as a movement has come under greater scrutiny, with former champions of the cause now steering its deterioration domestically and internationally. In tandem, continued derogation from fundamental principles of international cooperation by states in all corners of the world suggests that international law is in crisis – and truly, it has been for some time. In many ways, the revolution of the modern world is one that has taken us back some years to the dark hours of the twentieth century, rife with right-wing nationalism, isolationist politics, and the omnipresent threat of nuclear war.

To our great relief, so much more has changed since those dark hours. International governance has arguably improved with greater checks and balances in the interdependence of states. On this 20th anniversary of the Rome Statute of the International Criminal Court, Gamaliel Kan brings us a poignant discussion on how binary presumptions of law are ill-suited to the nuance of victims-turned-perpetrators, with a detailed case study on Dominic Ongwen’s trial before the Court. In her study of the ‘Chez Maurice’ case, May Abi Samra invests us in the debate over sex trafficking laws in Lebanon by forcing us to examine just how complicit state-backed laws may be in facilitating the exploitation of vulnerable persons internationally, and how states might begin to remedy these flaws.
Equally as transformative as the cooperation between states in the 21st century, the rise of citizen journalism has birthed a demand for transparency and connectivity among global citizens unlike any the world has ever known. With relatively unobstructed access to the thoughts of our counterparts in nations far and wide, legal discourse has been transformed – and for the better. Comparative analyses of legal and political mechanisms both temporally and geographically allow us to nuance our understandings of law and society, and to develop them to the benefit of international law more broadly. In his article on the Turkish legal revolution, Irfan Cicekli accomplishes this by tracing modern Turkish law against its former self, as do Peter Obutte and Lilian Idiaghe in their evaluation of the impact of constitutional developments in Nigeria on natural resource revenues. Where civil rights are concerned, Poorna Mishra explores the impact of modern laws on historical truths and memory across Europe, while Tanvee Nandan examines the relationship between religion and employment, with a focus on the religious workplace.

We are proud to bring these issues to the fore of the discussion on our campus and beyond. In these last four years, we too have changed – from the breadth of topics to our standing as a quality medium for the dissemination of legal literature. To this end, we would like to thank those who have made this growth possible: to the SOAS School of Law, for their continued support of our student-led venture; to our honorary and academic boards for their feedback; and to our dedicated team of editors, past and present, for their diligence in their work with the SLJ.

Muzhgan Wahaj and Abbas Ebrahim Al Abbas
Editors-in-Chief
The “Chez Maurice” Case: Media and NGOs’ Legal Debates on “Prostitution” and Sex Trafficking in Lebanon

May Abi Samra

The apprehension of the largest sex trafficking ring in March 2016 sent shockwaves through Lebanese society, leading to a public debate in media, as well as within civil society institutions about “prostitution” and sex trafficking. The incident became known as the ‘Chez Maurice’ case, which exposed the plight of 75 Syrian and Iraqi women, who were held captive, coerced into sex slavery, and tortured. This Article presents an overview of the Lebanese ‘prostitution’ and human trafficking laws, from the Ottoman Empire rule until the present day. Subsequently, it analyses the legal debates in Lebanese media outlets following the ‘Chez Maurice’ case. In doing so, the Article draws the two sections together, arguing that the NGOs’ debate reproduces the divisive international one regarding sex trafficking and ‘prostitution’; while it overlooks the ‘Artiste’ visa scheme, which functions as a state-facilitated sex trafficking system, as well as the persistent targeting of
vulnerable Lebanese and Syrian refugees by “prostitution” and new trafficking laws.

Introduction

Outrage erupted in March 2016, following the discovery of the largest human sex trafficking network operating in Lebanon: 75 Syrian and Iraqi women were forced into sexual slavery and tortured, some for more than five years.1 TV stations, online and print media published women’s testimonies, portraying the level of inhuman treatment they were subjected to: being forced to have sex about ten times a day, after being sold into the sex trade by their families or husbands, or held captive after accepting an offer to work at a restaurant.2 They were tortured whenever they refused to ‘work’, did not collect enough tips, or when a customer was not satisfied. Approximately 200 abortions were performed

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*May Abi Samra is currently continuing research on sex trafficking and sex work in Lebanon on a project funded by Rosa Luxemburg Stiftung (Beirut Office). She holds a Master’s degree in Human Rights Law from SOAS, and a Master’s in Gender and Women Studies from the American University of Cairo.


on them over a period of four years by the gynaecologist Riad Boulos.³

The exposure of the ring in March 2016, after four of the trafficked women managed to escape, led to two police raids of the ‘Chez Maurice’ and ‘Silver B’ hotels, and apartments and cabins owned by trafficking ring suspects, where the women were imprisoned.⁴ Both of the hotels were located 20km north of the capital and owned by Maurice Geagea.⁵ Many Syrian women were trafficked into Lebanon following the war in Syria, while numerous international organisations reported an increase in the vulnerabilities of Syrian women and girls both in Syria and Lebanon⁶. Syrian and Lebanese

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³ Shaheen (n 1).
⁴ Hamzeh (n 2).
citizens who participated and led the trafficking cell were arrested in these raids, except for two trafficking cell leaders who managed to escape.7

The ‘Chez Maurice’ case is one of the first cases to be qualified as human trafficking since the passage of the 2011 Trafficking Law.8 Previous cases were charged with ‘facilitation of prostitution’,9 as per Article 523 of the Penal Code (hereinafter ‘PC’),10 which criminalised both the ‘prostitute’ and the male or female who ‘incited her [to] debauchery or the immoral act’.11 However, the 2011 Trafficking Law exclusively criminalises the trafficker, as it considers women forced into ‘prostitution’ to be victims, not criminals. In contrast to the PC’s Article 523 of ‘facilitation of prostitution’,12 the new trafficking law charges the human trafficker with a higher sentence.13 Nevertheless, this law also presents drawbacks which will be discussed within this Article.

The ‘Chez Maurice’ case initiated legal debates concerning the different and contradictory trafficking and ‘prostitution’

7 Shaheen (n 1); More details on arrests will be discussed in section 2.
8 Media sources named the case of the 75 women trafficked after the name one of the hotels ‘Chez Maurice’. The same name will be used to refer the case throughout this Article.
10 Article 523, Penal Code, entered into force 1 March 1943 [Hereinafter ‘Article 523 of PC’].
11 Ibid.
12 Ibid.
laws. Before the criminalisation of “secret prostitution” under the 2011 Trafficking Law and PC’s Article 523, ‘prostitution’ was legalised and regulated by a law, issued in 1931,\(^{14}\) giving licenses to establishments and to ‘prostitutes’.\(^ {15}\) However, the act of ‘prostitution’ existed far before the French Mandate, though it lacked a legal basis.\(^ {16}\) Following the criminalization of ‘prostitution’ at the end of the Civil War, the 1931 Prostitution Law was not terminated. However, during the Civil War in the 1970s, the government stopped issuing licenses, consequently making the practice of ‘prostitution’ unlicensed, and therefore unlawful. Nevertheless, ‘prostitution’ remains a lucrative business in Lebanon.\(^ {17}\) It is regulated by the “Artiste” visa scheme,\(^ {18}\) which orders the entry, the stay, and the contract of foreign women working in licensed super nightclubs, massage parlours,\(^ {19}\) and clubs.\(^ {20}\)

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\(^{14}\) Law of Preserving Public Health from Prostitution, entered into force 6 February 1931 [Hereinafter ‘1931 Prostitution Law’].


\(^{16}\) Jens Hansen, ‘Public Morality and Marginality in Fin-de-Siècle Beirut’ in Eugene Rogan (ed), Outside in: On the Margins of the Modern Middle East (IB Tauris 2002).


\(^{18}\) Regulation 10267, entered into force 6 August 1962 [Hereinafter ‘Regulation 10267’].

\(^{19}\) A legal definition of super night club and massage parlours will be provided in section 1’s legal overview.

\(^{20}\) Regulation 1756, entered into forced 18 September 1964 [Hereinafter ‘Regulation 1756’].
According to the “Artiste” visa scheme and Article 523, having sex in exchange for money is illegal. Yet, in reality, women are forced to or willingly engage in such practice. In addition to the one regulated under the ‘Artiste’ visa scheme, unregulated ‘prostitution’ consists of street pick-up or phone delivery ‘prostitution’.

This paper explores the legal and media debate following the ‘Chez Maurice’ case, and investigates how it relates to local laws and international discussions on human trafficking and ‘prostitution’. The first section presents a detailed overview of the local and the international laws on trafficking and ‘prostitution’ within the local Lebanese context, prior to and following the French Mandate. It reviews the legal texts and their implementation, and looks at discourses ‘on the law’ rather than ‘of the law’ (practices of judges and lawyers). The second section analyses the ‘Chez Maurice’ case highlighting the laws and the relevant practices; it explores the media coverage of the legal themes regarding the case, and the non-governmental organisations’ legal debates on ‘prostitution’ and sex work. The third section brings the legal

21 Ibid.  
22 Article 523 (n 10).  
23 Carol Mansour, ‘Passion Cannot Be Bought’ [2014] KAFA Details of the regulated ‘prostitution’ in Lebanon will be explained in section 1, quoting a documentary and a UN special rapporteur’s report.  
and media discussions of the previous sections together, and ends with concluding remarks.

The first section’s legal overview relies on primary sources from Lebanese laws and international conventions and treaties. Moreover, it includes academic articles and books tackling ‘prostitution’ and sex trafficking in Lebanon, in addition to reports, case law research, a short movie produced by KAFA (which translates into “enough” in Arabic) - the leading women’s rights organisation in Lebanon, and legal articles published in The Legal Agenda. In order to build the analysis of the legal debate in the second section, this paper will draw upon primary sources from local and international newspaper articles, recorded TV shows and documentaries, both in Arabic and English.

This paper will not engage in the international debate on ‘prostitution’ and sex work, unless the Lebanese media tackled it. In those cases, it will be exclusively related to the Lebanese context. As a final note on terminology, this paper uses the terms ‘prostitution’ and ‘prostitute’ in reference to their specific legal meanings, which carry pejorative connotations and a stigmatisation of sex work; for this reason, these terms will be placed in quotation marks. Furthermore, the usage of the term ‘sex work’ aims to emphasise the consensual nature of the practice.

I. Local and International Laws/Protocols on Trafficking and ‘Prostitution’

Lebanon’s ‘prostitution’ laws are embedded in its colonial history, in the processes of urbanisation, migration, globalisation, and in the production of marginality and morality. The emergence of these laws can be traced back to the Ottoman Empire, when ‘prostitution’ was firstly
regulated, and later to the French Mandate, during which ‘prostitution’ was legalised. This was followed by its legal abolition in the 1970s during the Civil War and its contradictory practices today, resulting from the ‘Artiste’ visa scheme and the 2011 Trafficking Law imposed by the US.

A. Colonialism and the 1931 Prostitution Law

During the 19th Century and the Ottoman Empire’s control, Beirut expanded from being a town to an urban centre of 6000 inhabitants characterised by a booming café culture.\(^{26}\) The clandestine practice of ‘prostitution’ was documented in ‘Souk Al-Ummuniya’,\(^{27}\) a geographically marginal and non-residential area in downtown Beirut, and in other parts of downtown Beirut.\(^{28}\)

‘Prostitutes’ were socially stigmatised by the authorities of the Ottoman Empire. During the 1880s, they came from Beirut’s outskirts and from Palestine and Syria to work in factories.\(^{29}\) Being away from their families depicted them as unmarriageable.\(^{30}\) The Ottoman authorities perceived the practice of “prostitution” in downtown Beirut as a dangerous disease that could infest its ‘moral’ areas. Therefore, a ‘pragmatic approach to administering public morality […] portrayed by state responsibility over the society’ regulated the closing times for ‘Souk Al-Ummuniya’, imposed taxes on

\(^{26}\) Brophy (n 24).
\(^{27}\) Translated as ‘public market’.
\(^{28}\) Referring to its location behind the former Ottoman Bank building.
\(^{29}\) Brophy (n 24).
\(^{30}\) Ibid.
coffeehouses, casinos and alcohol, and monthly municipality sanitary check-ups.\textsuperscript{31}

Similar taxes were imposed by the Ottoman Empire on ‘prostitutes’ in Egypt, and in May 1834, they were banished from Cairo to Upper Egypt.\textsuperscript{32} As the Egyptian historian Khaled Fahmy argues this move, which was never carried out before, shows that ‘prostitution’ was a lucrative business. The main goal of the ban was indeed to satisfy the public opinion, ‘which had become enraged by foreign tourists, effectively monopolising the services of the “dancing-girls”’\textsuperscript{33} However, ‘prostitutes’ lived a precarious reality: they were stigmatised and closely monitored by state authorities who feared their influence on the public.

The French Mandate perceived ‘prostitutes’ as sexual threats to the French soldiers in Lebanon,\textsuperscript{34} this led to increased regulations on French troops, singers, ‘prostitutes’, and dancers. ‘Prostitutes’ had to ‘register with the local police, carry identification cards, work in designated brothels and submit twice weekly to medical tests in separate health clinics that were built solely for this purpose’.\textsuperscript{35} This regulatory system was implemented firstly in France and then exported to the rest of Europe and its colonies, ‘less uniformly in British than French’ ones.\textsuperscript{36}

\begin{flushleft}
\textsuperscript{31} Brophy (n 24).
\textsuperscript{32} Khaled Fahmy, ‘Prostitution in Egypt in the Nineteenth Century’ in Eugene Rogan (eds), \textit{Outside in: On the Margins of the Modern Middle East} (IB Tauris 2002).
\textsuperscript{33} Ibid.
\textsuperscript{34} Elizabeth Thompson, \textit{Colonial Citizens: Republican Rights, Paternal Privilege, and Gender in French Syria and Lebanon} (Columbia University Press 2000).
\textsuperscript{35} Ibid.
\textsuperscript{36} Kozma (n 15) 2
\end{flushleft}
In Lebanon, the newly established procedures paved the way for the 1931 Prostitution Law, namely, the ‘Law of Preserving Public Health from Prostitution’,\(^{37}\) emphasises the medical and hygienic rationale behind the French Mandate’s policies. The law legalised ‘prostitution’, ‘al-Bagha’, by incorporating the previously established regulations, and defining ‘prostitution’ as ‘the work of every woman known for surrendering to men by committing adultery, ‘al fahsha’, in exchange for money, whether in secret or public’.\(^{38}\) Article 2 specified that every woman who works in ‘prostitution’, ‘bagha’, is called a ‘prostitute’, ‘mumis’.\(^{39}\) Additionally, the law differentiated between ‘public houses’, ‘al-buyut al-umumiya’ (where ‘prostitution’ is permitted)\(^{40}\) and ‘meeting houses’, ‘buyut al-talaki’\(^{41}\) (where ‘café girls’ live and can court men in ‘cafés’).\(^{42}\) Both ‘houses’ are places of ‘prostitution’, called ‘ dara’, and are thus subjected to the same regulations and licensing\(^{43}\) as ‘café girls’ and ‘prostitutes’.\(^{44}\) In addition to ‘prostitutes’ and ‘café girls’, the law refers to ‘Artistes’, who

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Britain abolished its regulations on ‘prostitutions’ in 1886 but put it in place in Egypt in 1883 and in Iraq in 1921. France abolished it in 1946 but administered it in Tunisia around 1883, 1912 in Morocco and 1920s in the Levant.

\(^{37}\) 1931 Prostitution Law (n 14).

\(^{38}\) Ibid, art 1.

\(^{39}\) 1931 Prostitution Law (n 14) art 2; in Arabic, the word ‘Mumis’ means woman who commits adultery; which is translated to ‘prostitute’ in English.

\(^{40}\) Ibid art 6.

\(^{41}\) Ibid, art 4.

\(^{42}\) Ibid, art 40.

\(^{43}\) Ibid, art 40.

\(^{44}\) Ibid, art 45.
do not have sex with clients, but rather work in ‘theatre, clubs or pubs’ and are subjected to medical tests.45

Both the ‘houses’, the ‘prostitutes’ and the ‘café girls’ are extensively controlled by the authorities to minimise diseases and to isolate the “houses” and “prostitutes’ from the public. Article 7 allocates one entrance to each ‘house’ and Article 19 restricts the movement of ‘prostitutes’ during weekends, holidays and weekdays.46 Moreover, ‘secret prostitution’ refers to sexual activity with a non-licensed ‘prostitute’ or in a non-licensed location, and is consequently penalised.47 However, the 1931 Prostitution Law gives ‘prostitutes’ the freedom to stop working at any time and forbids the owner of the house from using ‘any means of coercion or deceit to keep her’, even if she has debts.48

The 1931 Prostitution Law showed what Beth Baron referred to in her analysis on the relationship between state and honour in Egypt under the Ottoman and then the British colonial rule.49 The regulations did not aim to protect women; rather, they reinforced and perpetuated notions of honour and their hierarchical linkages over women’s bodies and the policing of their sexualities. From medical tests, to restrictions on movements and marginalisation of ‘prostitution houses, state interventions monitored adultery and ‘prostitution’ and ‘threw their weight behind customary notions of honour’.50

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45 Ibid, art 64.
46 1931 Prostitution Law (n 14).
48 Article 6 of the 1931 Prostitution Law specifies that only women can open or direct ‘prostitution houses’.
50 Ibid.
B. Article 523 of Lebanese Penal Code of 1943

How did the Lebanese government handle the 1931 Prostitution Law after Lebanon’s independence? In the period extending from 1943 (the end of the French Mandate over Lebanon) to the 1970s, the government continued to issue licenses for new establishments and ‘prostitutes’ under the 1931 Prostitution Law. However, the government stopped issuing licenses for new establishments and ‘prostitutes’ in the 1970s, which effectively suspended the implementation of the law while technically leaving it on the books.

The government moved from legalising ‘prostitution’ in 1931 to effectively abolishing it in the 1970s. During the last year of the French Mandate, the Lebanese government ceased the issuing of licenses and issued Article 523 in the 1943 PC, which criminalised ‘secret prostitution’, ‘al-dara al-siriyah’. Article 523 of the PC criminalised and equated the unlicensed ‘prostitute’ and her ‘facilitator’, by imposing the same sentence (one month to one year) in the cases where the ‘prostitute’ was above 21. With the halt on giving new licenses in the 1970s, soon there were no licensed ‘prostitutes’. However, ‘prostitution’ persisted during the 15 years-long Civil War (1975-1990). Downtown Beirut and its ‘public houses’ were indeed on the so-called Green Line, the demarcation line separating Muslim and Christian factions in Beirut during the Civil War.

51 Brophy (n 24).
52 Article 523 of PC (n 10).
54 Baron (n 50).
Furthermore, it is important to allude to the biases in the implementation of the law. Surveys and case law illustrate how ‘secret prostitution’ was criminalised, and how women were prosecuted according to the PC’s Article 523. In 1999, a four-months-long survey, covering 161 of the 167 imprisoned women, showed that 21.2% of women were charged with ‘prostitution’; the second highest category of allegations after manslaughter (24.2%).55 Moreover, research looking at judgments of 121 cases of 228 women between 2005 and 2011 reveals that the office specialised in dealing with all ‘prostitution’ cases in Lebanon, the ‘Anti-Human Trafficking and Morals Protection Bureau’ (hereinafter ‘Anti-Trafficking Bureau’), does not investigate women’s claims during the questioning of the case when they mention that they were forced into ‘prostitution’, and that the proof used to convict them is prejudiced (for instance, ‘going out until 5 am’ was used as evidence against a woman in a particular case).56 Moreover, some women were subjected to ‘virginity’ tests57 and had to justify why they were not ‘virgins’.58 In addition, the office requires women to undergo drug testing, allegedly claiming that ‘prostitution’ and drug usage are linked.59

C. ‘Artistes’ Visa Regulations

Even if the Lebanese government criminalised ‘prostitution’, the practice continues to be present in two different areas: the regulated and unregulated.60 Unregulated ‘prostitution’

56 Saghieh and Frangieh (n 9).
57 ‘Virginity’ or ‘shame’ tests became illegal as of August 2012.
58 Saghieh and Frangieh (n 9).
59 Ibid.
60 Brophy (n 24).
consists of women who work on the street, or those who can be contacted by phone for ‘home deliveries’.\textsuperscript{61} Regulated ‘prostitution’ involves women who work in licensed establishments under the ‘Artiste’ visa scheme,\textsuperscript{62} and who usually come from the poorest parts of Eastern Europe.\textsuperscript{63} Both regulated and unregulated ‘prostitution’ are legally subject to arrest, as under PC’s Article 523.

The ‘Artiste’ visa scheme is a regulation issued in 1962\textsuperscript{64} and 1964\textsuperscript{65} by the General Directorate of General Security (hereinafter ‘General Security’).\textsuperscript{66} It regulates the entry, stay and work contracts of women ‘Artistes’ coming to Lebanon to work in ‘super night clubs’,\textsuperscript{67} defined by General Security as a ‘company or institution that presents artistic performances by foreign artists in closed spaces, where alcoholic drinks are offered with scenes and music, and where food is served or not’.\textsuperscript{68} ‘Artistes’ are defined as ‘a category that includes females working in super night clubs, from foreign and Arab nationalities who are 18 or older when

\begin{footnotes}
\item[61] Ibid.
\item[62] Ibid.
\item[64] Regulation 10267 (n 18).
\item[65] Regulation 1756 (n 20).
\item[66] General Security was established in 1959, and is one of the administrative departments of the Ministry of Interior, and its main role is to deal with foreigners living and working in Lebanon (visa controls and all entries and exists of foreigners).
\item[67] Hudas (n 64).
\end{footnotes}
applying for the “Artiste” visa’, and who are not allowed to have sex with clients.69 Notably, according to the UN Special Rapporteur who visited Lebanon in 2006, ‘officials are fully aware that these “Artistes” will engage in “prostitution” [evidenced] by the fact that the women are required to periodically test for HIV/AIDS and sexually transmitted diseases’.70 In contrast to women ‘Artistes’, men ‘Artists’ applying for visas to enter Lebanon are subject to different requirements, since they do not need to submit medical tests.71

The ‘Artiste’ visa scheme regulates medical tests, and restricts the movement of women to reduce their ‘public visibility’;72 thus, it is quite similar to the 1931 Prostitution Law’s provisions for ‘public girls’. ‘Artistes’ are subject to legally-separate labour regimes,73 which facilitate forced confinement and bestow slavery-like ownership powers, since the employer (sponsor) confiscates the passport of the ‘Artiste’, pays her recruitment fees, arranges her papers, and is the one who ‘receives’ her and ‘drops her off’ at the airport.74 Notably, this system is similar to the sponsorship system – the migrant domestic workers’ labour regime.75 The ‘Artiste’ visa scheme requires ‘Artistes’ to live in licensed hotels, and denies them the freedom of movement before 1 pm and after 8 pm. At 10 pm, a bus takes them to the establishment where they work until 5 am, and they are not permitted to have any

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69 Ibid.
70 Hudas (n 64) 14.
72 Hudas (n 64).
73 Ibid.
74 General Security (n 72).
75 Hudas (n 64).
days off. Medical tests must be repeated every 3 months. Additionally, the contract cannot be extended past six months; therefore, she has to leave the country, which limits the women’s ability to build relationships and friendships in Lebanon.

How do these women have sex with clients in this controlled system? The licensed establishments have an ‘arrangement’ allowing the client to buy sex from the ‘Artiste’: when he buys three drinks (between 60 and 80$) to the woman at the super nightclub, the ‘Artiste’ is allowed to have sex with him the next day. The client takes her out from the hotel at 1 pm and brings her back at 8 pm; which delineates the period during which she is allowed to leave the hotel, as specified by General Security. Whenever the women ‘Artistes’ are caught while engaging in a sexual intercourse, the police have the legal right to arrest them; yet, the super nightclub owner cannot be held accountable since sex occurred outside its premises and during the free time of the ‘Artistes’. It is also important to point out that this ‘system’ is facilitated by General Security, which specifies that the ‘Artiste’ is allowed to leave the hotel solely with a super nightclub client, who registers his name, phone number, and car license plate number when leaving with the ‘Artiste’.

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76 General Security (n 72).
77 Ibid.
78 Each drink gives 30 minutes to the client to sit with the ‘Artiste’ at the bar. If he wishes to sit with her longer he would need to buy a new drink, giving him 30 minutes more.
79 Mansour (n 23).
80 General Security (n 72).
81 General Security (n 72).
82 Mansour (n 23).
Women under the ‘Artiste’ visa scheme are trapped in the sex industry ‘through a system of debt bondage’.\textsuperscript{83} They pay from their salaries (between $400 and $1200) their roundtrip ticket to Beirut, medical tests ($330 each time), contract registration fees, sick days, medication, treatment and taxes, a part of the accommodation and food expenses.\textsuperscript{84} Therefore, ‘Artists’ are working to pay their debts, which usually end with the unrenewable six-month contract following which they must move to a new country, accumulating new debts.\textsuperscript{85}

This system facilitates exploitation and forced labour; additionally, many are not even aware of the sexual activities they have to engage in.\textsuperscript{86} When the ‘Artiste’ contract is signed at the General Security, its personnel are supposed to explain that ‘Artists’ are not allowed to have sex with clients.\textsuperscript{87} In reality, as mentioned earlier, when a client buys three drinks for the ‘Artiste’ at the super night club, she is forced to have sex with him the next day. Roger, a previous employee at an ‘Artiste’ hotel, explains that it is often the case that women who refuse to go out with clients would be subjected to rape.\textsuperscript{88} Other forms of coercion involve blackmailing and threatening the ‘Artiste’ to inform her family of her involvement in the sex industry.\textsuperscript{89}

Nizar Saghiieh, lawyer and the founder of The Legal Agenda, asserts that what is ‘central to the [“Artiste” visa] matter is the resignation of the political class from this issue’.\textsuperscript{90}

\textsuperscript{83} Hudson (n 64) 15.
\textsuperscript{84} Mansour (n 23).
\textsuperscript{85} Hudson (n 64).
\textsuperscript{86} Ibid.
\textsuperscript{87} Mansour (n 23).
\textsuperscript{88} Ibid.
\textsuperscript{89} Hudson (n 64).
\textsuperscript{90} Mansour (n 23).
Directives are issued by the General Security members, who are not elected officials and cannot be held accountable.\footnote{Ibid.} In this regard, the political-legal framework of the ‘Artiste’ visa regime and how it developed become clearer. More specifically, it is reflected in how the Lebanese government controlled the relocation of the sex industry in the 1970s, from downtown Beirut to the peripheries (15 km away from Beirut, in Maameltein area of Jounieh). This geographical transference of ‘prostitution’ was coupled with its criminalisation, it made women more vulnerable and subject to arrest, and the industry more marginalised and less visible, though ironically very much present with 75 super nightclubs and 4000 to 6000 new ‘Artistes’ being registered every year\footnote{Ibid.}.

D. The 2011 Trafficking Law

In discussing the local Lebanese laws on ‘prostitution’, it is crucial to mention that Lebanon has signed several protocols that address sex trafficking, which in fact contradict the ‘Artiste’ visa scheme’s regulations. More specifically, on August 24\textsuperscript{th}, 2000, Lebanon signed onto the UN Trafficking Protocol\footnote{Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000, entered into force on 25 December 2003, UN Doc A/45/49 (Vol. I) [Hereinfter ‘UN Trafficking Protocol’].}, which mandates state parties to take measures to criminalise human trafficking, and to prevent, protect, and
assist trafficking victims.\textsuperscript{94} The protocol claims to provide a ‘comprehensive international approach’,\textsuperscript{95} moving ahead from the previous international conventions and protocols against human trafficking.\textsuperscript{96} It also claims to develop along similar lines to the Convention on the Elimination of all forms of Discrimination against Women, which was also signed by Lebanon and focused on suppressing ‘all forms of traffic in women and exploitation of “prostitution” of women’.\textsuperscript{97} Moreover, the Revised Arab Charter on Human Rights of the League of Arab States of 2008 is an additional document signed by Lebanon prohibiting human trafficking,\textsuperscript{98} and banning ‘all forms of slavery and trafficking in human beings’, including ‘forced labour, trafficking in human beings for the purposes of “prostitution” or sexual exploitation’.\textsuperscript{99}

Following the UN Trafficking Protocol’s signature in 2010, the Lebanese government did not proceed to reform the implicated laws and practices until June 6\textsuperscript{th}, 2011, when the Lebanese parliament passed the 2011 Trafficking Law.\textsuperscript{100} To understand the rationale behind the passing of this law, it is


\textsuperscript{95} UN Trafficking Protocol (n 94) 2.

\textsuperscript{96} Mattar (n 95).

\textsuperscript{97} Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981, in accordance with article 27(1), UN Doc A/34/46, art 6.


\textsuperscript{99} Ibid, art 10.

\textsuperscript{100} Saghieh and Frangieh (n 9).
crucial to highlight that this act of legislature materialised when the US Department placed Lebanon on the Watch List of human trafficking. Such a decision could have led to cuts in US military funding to Lebanon (including USAID), which was vital to the country’s Armed Forces and Internal Security Forces.  

The new 2011 Trafficking Law provides a definition of trafficking, clearly identifying possible victims, including victims of sexual exploitation and forced labour. It also elevates penalties for traffickers (from five to fifteen years), especially if compared to PC’s Article 523 (from one month to one year). Consequently, this law led to the criminalisation of the trafficker, and not the ‘prostitute’, if evidence shows that she was forced to engage into ‘prostitution’. Nevertheless, the 2011 Trafficking Law presents remarkable gaps which undermine the rights of the trafficking victim, such as the placement of the burden of proving coercion on the victim. Hence, they can be prosecuted for crimes committed when they were trafficked, unless proof of coercion for these crimes is presented. Additionally, this law did not put forth a clear process for identifying human trafficking victims, and placed this burden of identification and the associated follow-up exclusively on one security

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101 Ana Maria Luca, ‘Human Trafficking and US Aid’ Now Lebanon (Beirut, 29 January 2013) 1.  
102 2011 Trafficking Law (n 13), art 586, s 1.  
103 Ibid, art 586, s 1.  
104 Ibid, art 586, s 2,3,4.  
105 Ibid, art 586, s 8.  
106 Ibid, art 586, s 8.  
apparatus, the Anti-Trafficking Bureau,\textsuperscript{108} thereby increasing the risk of corruption.\textsuperscript{109}

When explaining the defects of the 2011 Trafficking Law, it appears clear that the circumstances surrounding its approval were associated with a lack of political will for its implementation. In particular, the necessity of addressing the US sanctions, rather than the need of protecting trafficking victims, predominantly occupied the centre of discussions. This demonstrates why there was no interest in investigating the laws and regulations that facilitated human trafficking, as the ‘Artiste’ visa scheme did. Furthermore, the number of cases prosecuted under the 2011 Trafficking Law, following its passage, was extremely low (18 cases in five years).\textsuperscript{110} The majority of these cases involved Syrian child beggars, targeting one of the most vulnerable groups in Lebanon - Syrian refugees.\textsuperscript{111} Considering these observations, it becomes clear how the lack of political willingness explains the small number of prosecutions and the structural deficiencies in the implementation process, such as the inadequate training of judges.\textsuperscript{112}

\textsuperscript{108} U.S Department of State, ‘2016 Trafficking in Persons Report’ (US Department of State 2016). The Anti-Trafficking Bureau was established in 2014, by a ministerial decree, and is under of the Internal Security Forces and Information Branch that reports to the Ministry of Interior.

\textsuperscript{109} Saghieh and Frangieh (n 9).

\textsuperscript{110} Saghieh and Frangieh (n 9).


\textsuperscript{112} Ibid.
II. The Media Coverage of the ‘Chez Maurice’ Case

Following the legal overview of ‘prostitution’ and trafficking, this section analyses the media coverage of the ‘Chez Maurice’ case. Before delving into the controversial debates, this section provides an overview on the ‘Chez Maurice’ case and outlines the legal process it is currently undergoing.

A. The ‘Chez Maurice’ Case

At the ‘Chez Maurice’ and ‘Silver B’ hotels in Maameltein, known as the red light district of Lebanon, 75 Syrian and Iraqi women were detained and forced into sexual slavery, some for more than five years, amounting to the largest human trafficking cell ever captured in Lebanon.113 Women were tortured, electrocuted, flogged for arbitrary reasons (e.g. receiving client complaints, not collecting enough tips, not putting on make-up), and forced to have sex about 10 times per day, unprotected, if preferred by clients, and to continue working during menstruation by inserting pieces of cotton in their vaginas.114 The prices for sex ranged from $30 to $75 per service, and the money was collected by the guards together with the tips.115 The trafficking cell earned approximately one million dollars per month.116

113 Shaheen (n 1).
114 Hamzeh (n 2).
115 Shaheen (n 1).
Four women managed to escape and inform the police, who freed the women in two raids on March 27th and 29th, 2016. Furthermore, the police proceeded with arresting the guards and those who lured them from Syria and Iraq, by tricking women into immigrating for waitressing jobs or marriage, or practiced bride-purchasing with their families. One of the two trafficking cell leaders, Fawaz Ali Hassan, is still free until this day; whereas the second, Imad Rihawi, surrendered on TV on April 25th, 2016, one month after the first raid.117 Maurice Geagea, the owner of the hotels, and one of the cell leaders, who was already in prison on charges of facilitation of ‘prostitution’,118 was in fact freed while awaiting his trial, since arrests under criminal law can only amount to a maximum of one year.119

‘Chez Maurice’ exemplifies a rare case of conviction with human trafficking as per the 2011 Trafficking Law, instead of the ‘facilitation of prostitution’ charge in accordance with Article 523 of the PC. The Mount Lebanon prosecutor reached an indictment on April 16th, 2016, prosecuting a total of 26 Syrian and Lebanese persons,120 among whom, 23 were convicted for human trafficking,121 and three (the gynaecologist, the nurse, and the anaesthesiologist) for

119 Hamzeh (n 2).
120 Najjar (n 112).
121 2011 Trafficking Law (n 14).
abortion with women’s consent122 and suspicion of abortion without their consent.123 The case was transferred to the criminal court,124 whose interrogation was rescheduled three times due to the absence of some of the defendants.125 The fourth session is to be held on November 11th, 2017;126 with the knowledge that most of the prosecuted were freed while awaiting trial, but were not allowed to travel.127

B. Media and NGOs Debate

1- State Involvement and Failure

One of the recurrent topics tackled by the media and the NGOs is the state involvement and the intentional concealment of the trafficking practices at ‘Chez Maurice’ and ‘Silver B’ hotels. Suspicions of police corruption and involvement in passing information on upcoming police raids to trafficking leaders were raised because both hotels, where traffickers detained women who did not have an ‘Artiste’ visa, managed to operate for more than five years, even though being subjected to regular police raids.128

122 Article 542, Penal Code, entered into force 1 March 1943.
123 Article 543, Penal Code, entered into force 1 March 1943.
124 Decision of the prosecutor of Mount Lebanon, Peter Germanos No 2016/179 on 16 April 2016.
126 Ibid; the fourth session of November 11th was rescheduled to January 31st, 2018 for the same reasons as the previous sessions.
127 Hamzeh (n 2).
128 Ibid.
Notably, the hotel was closed for a few months in 2011 because of the discovery of a 17-year-old girl working there.129 In the testimonies published in news outlets, the trafficking victims revealed that in one of the police raids, they communicated their stories of forced ‘prostitution’ and torture to the police officers.130 Nevertheless, the police released them on the same day and gave Imad Rihawy access to their testimonies; as a result, he ordered their punishment at the hotel.131 The numerous raids and closures were coupled with frequent arrests of Maurice Geagea, the owner of both hotels. These details, in addition to news about the imprisonment of the owner not leading to the closure of the hotels, were extensively covered by media outlets, which led to allegations stating that the trafficking cell had political backing.132

Following the ‘Chez Maurice’ case, statements accusing the Lebanese government of corruption started circulating. For instance, the political leader Walid Jumblat openly blamed influential leaders in the ‘Morals Protection Bureau’ of complicity with the human trafficking cell.133 The Interior Minister responded to Jumblat’s allegations by demanding an internal investigation into the matter.134 Yet, he ordered

129 Human Rights Watch (n 6); it is not clear whether ‘Chez Maurice’ was closed as per article 523 of PC, or the 2011 Trafficking Law.
130 LBCI, ‘Report on Chez Maurice’s Prostitution Dossier’ (n 119).
131 Ibid.
134 Ibid.
the arrest of Nabil al-Halabi, a lawyer who specifically accused him of corruption and complicity in the case.\textsuperscript{135}

An additional subject tackling the shortcomings of the Lebanese government is the gaps in its implementation of the 2011 Trafficking Law. Human Rights Watch reported that some of the trafficking victims freed from the hotel after the first raid were released without being offered protection, leading to their re-capture by the same human trafficking cell.\textsuperscript{136} Moreover, as a result of the weak coordination efforts, these women had to wait several days in police custody before being offered shelter in local organisations.\textsuperscript{137} Furthermore, an essential legal gap is detected in the prolonged period of trials (two to three years).\textsuperscript{138} In previous cases, victims refrained from pressing charges due to the trials’ delays.\textsuperscript{139}

2- State-Sponsored Media

The ‘Chez Maurice’ media fury and the state’s cover-up of the allegations were faced with several statements by the Internal Security Forces during prime-time talk shows on TV,\textsuperscript{140} who continued to assert a shift in dealing with trafficking cases. Joseph Mousallem, the director of the communications department at the Internal Security Forces, explained that the security forces are now well-informed of

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\textsuperscript{135} Human Rights Watch, ‘Lebanon: Lawyer Held for Facebook Posts’ (\textit{Human Rights Watch, 31 May 2016). \<https://www.hrw.org/news/2016/05/31/lebanon-lawyer-held-facebook-posts> accessed 21 May 2017.\textsuperscript{136} Human Rights Watch (n 6).\textsuperscript{137} Ibid.\textsuperscript{138} Human Rights Watch (n 6).\textsuperscript{139} Ibid.\textsuperscript{140} Security apparatus under the Ministry of Interior.\end{flushleft}
the 2011 Trafficking Law, and that trainings were attended by
the Anti-Trafficking Bureau’s personnel, allowing them to
develop new measures to identify perpetrators and
investigate with victims.\textsuperscript{141} Moreover, Jhonny Haddad, the
director of the Anti-Trafficking Bureau, clarified that the
Bureau is dealing with ‘prostitutes’ differently and
acknowledged their possible victimhood.\textsuperscript{142} Haddad
emphasised that nowadays, in contrast to the period
preceding 2016, it will not be possible for human traffickers
to resume their trafficking activities after their release, as they
will no longer be charged with misdemeanours and low
sentences.\textsuperscript{143}

In the context of increased persecution of trafficking cells
following the ‘Chez Maurice’ case, several media outlets
reported cases of raids on ‘prostitution’ cells by the Anti-
Trafficking Bureau. Reports mentioned several arrests against
mostly Syrian women, working in street ‘prostitution’,\textsuperscript{144} via

phone deliveries and social media communication. Media reports often highlight the success of the Anti-Trafficking Bureau in arresting women working in ‘prostitution’ and their pimps under the PC’s Article 523.

3- Differentiation between Trafficking and ‘Prostitution’

It is important to note that the shift in the Anti-Trafficking Bureau’s dealing with ‘prostitution’, as portrayed by its director, was coupled with an emergent differentiation between ‘prostitution’ and sex trafficking. In particular, talk show anchors and the Anti-Trafficking Bureau started equating sex trafficking with forced ‘prostitution’. For instance, a prime-time show featured a transaction between a sex trafficker and a buyer (who was an undercover policeman), followed by the arrest of the trafficker. However, the Anti-Trafficking Bureau explained that this same woman was later arrested because she was accused of working as a ‘prostitute’ out of free will, thereby asserting the importance of the forced aspect of trafficking.

It is the forced aspect of trafficking in the ‘Chez Maurice’ case which granted the women moral leverage and apparent sympathy in the media coverage. Sandy Issa, the director of the Al Tahari website, who was one of the first to interview the ‘Chez Maurice’ women, angrily stated that instead of

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146 MTV Lebanon, ‘Prostitution and Trafficking... A Misdemeanor of Felony?’ (n 143).
148 Ibid.
portraying the trafficked women as working in ‘prostitution’, the media should rather emphasise the forced aspect of such ‘prostitution’.\textsuperscript{149} Moreover, one of the ‘Chez Maurice’ trafficked women challenged the biased questions of a TV anchor, who asked her whether it was possible for a woman to like or enjoy being a ‘prostitute’.\textsuperscript{150} She argued that the answer to such a question should be obvious because the concerned case is one of coercion into sexual slavery. Her answer intended to suggest to the viewers that the ‘Chez Maurice’ women were not having consensual pleasure during sex, and hence, they should not be demonised. This distinction between trafficking and ‘prostitution’ is an essential component of the principles of KAFA, Lebanon’s leading women’s rights organisation, whose debate with Human Rights Watch will be discussed in the following section.

4- Kafa and Human Rights Watch Debate

Four months after the ‘Chez Maurice’ raids, Human Rights Watch released a report on the case and on human trafficking in Lebanon.\textsuperscript{151} The report drew a differentiation between ‘consensual adult sex work’ and sex trafficking; the latter being non-consensual and forced. Human Rights Watch opposed the criminalisation of sex work, because it would infringe sex workers’ basic rights (the access to justice, to


\textsuperscript{150} MTV Lebanon, ‘After One Year of Its Closure... Lil Nashir Enters Chez Maurice with One of Its Victims’ (n 142).

\textsuperscript{151} Human Rights Watch (n 6).
health services and the protection against violence).\textsuperscript{152} However, it emphasised the prosecution of persons who forced or coerced others into providing sexual services.\textsuperscript{153}

On August 4\textsuperscript{th}, 2016, a week after the Human Rights Watch’s report, KAFA published a response, denouncing Human Rights Watch’s position on sex trafficking as ‘disappointing, misleading [and for] disallowing the protection of victims’.\textsuperscript{154} According to KAFA, the decriminalisation of sex work would only benefit pimps and sex traffickers, and would not provide protection for sex workers, as Human Right Watch argued.\textsuperscript{155} Based on this perspective, it can be concluded that KAFA does not differentiate between sex work and sex trafficking. Rather, KAFA can be seen to argue that sex work cannot be consensual, and denounces the term ‘sex work’ for alluding to consensual work/labour and neutrality, and consequently, to a form of gender bias.\textsuperscript{156} KAFA argues that in the sex trade industry, women’s bodies are coerced, ‘used’ as commodities, and exploited by the sexual desires of men.\textsuperscript{157} As a result, KAFA does not distinguish between ‘prostitution’ and sex trafficking, because they are both implicated in a comparable root, cause, and demand, and in a comparable impact on the victims.\textsuperscript{158} Based on this rationale, KAFA engages in calling for the criminalisation of sex

\textsuperscript{152} Ibid para 12.
\textsuperscript{153} Ibid.
\textsuperscript{155} Ibid.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid.
buyers, the decriminalisation of women ‘prostitutes’, and the abolition of the ‘Artiste’ visa scheme facilitating ‘prostitution’; it also engages in providing victims with exit programs and work alternatives.\(^\text{159}\)

KAFA has an Anti-trafficking and Exploitation Unit (hereinafter ‘Anti-trafficking Unit’), which was established prior to the ‘Chez Maurice’ case. The Anti-trafficking Unit leads advocacy campaigns on sex trafficking and ‘prostitution’, publishes research and campaign materials,\(^\text{160}\) and has produced a documentary\(^\text{161}\) that represents its views.\(^\text{162}\) KAFA’s published research focuses on the demand aspect, engages in interviewing sex buyers from diverse social and educational backgrounds, and uses the testimonies of sex buyers as an evidence of the gendered, patriarchal, and exploitative aspects of ‘prostitution’.\(^\text{163}\) They consider demand as one of the main causes of ‘prostitution’, evidenced by the analogy between the sex trade and any possible market, arguing that ‘if there is no demand, there would be no supply’. For this reason, KAFA advocates for the criminalisation of sex buyers in Article 523 of the PC.\(^\text{164}\)

III. Bringing Laws and Media Debates Together

This third section will draw final remarks and conclusions from the analysis of the coverage of ‘Chez Maurice’ and the

\(^{159}\) Ibid.
\(^{160}\) KAFA, ‘Myths about Prostitution’
\(^{162}\) Mansour (n 23).
\(^{164}\) Ibid.
overview of the ‘prostitution’ and trafficking laws in Lebanon.

A. International ‘Prostitution’ and Sex Trafficking Debate

Notably, the debate between KAFA and Human Rights Watch following the ‘Chez Maurice’ case seems to reproduce the international debate on ‘prostitution’ and sex trafficking,\(^{165}\) which is divided into two main camps. The first one, depicted by Human Rights Watch, argues for the legalisation of consensual sex work, emphasising its distinction from forced sexual exploitation or trafficking.\(^{166}\) Whereas the second, represented by KAFA, calls for the abolishment of ‘prostitution’ and the criminalisation of sex buyers and pimps or facilitators, claiming that consensual sex work does not exist as ‘prostitution’ is by essence forced and exploitative; it thus contests any differentiation between ‘prostitution’ and sex trafficking.\(^{167}\) Both of these deeply divided positions were present during the two years of


negotiations on the UN Trafficking Protocol. The coalition perceiving ‘prostitution’ as a legitimate form of labour is the Human Rights Caucus (hereinafter ‘HRC’), whereas the other regarding ‘prostitution’ as forced and a violation of women rights is the Coalition against Trafficking in Women (hereinafter ‘CATW’). The two positions can be summarised in a few words: the HRC and Human Rights Watch argue that sex workers are free consensual workers needing rights, and the CATW and KAFA claim that they are forced workers in need of saving.

KAFA’s rationale mirrors CAWT’s prior to the ‘Chez Maurice’ case. In 2010, KAFA and the Lebanese American University organised a conference on ‘prostitution’ and sex trafficking, wherein the main guest was the co-executive director of CATW at that time, Gunilla S. Ekberg. Consequently, it became clear that KAFA’s take on ‘prostitution’ in Lebanon was linked to the international debates, apparent in its rationale regarding sex trafficking, and its debate with Human Rights Watch after the ‘Chez Maurice’ case.

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169 Ibid.
170 Ibid.
B. The Lebanese Criminal Court Proceedings

Taking into account the trial postponements and the release of the main trafficking leaders in the case led to the observation that the current court proceedings of the ‘Chez Maurice’ case are in line with the Lebanese Law Criminal Court Proceedings. As a matter of fact, Article 106 of the CCP explicitly states the need to inform the accused prior to the start of the trial. This specification resembles what is stated in the ICCPR’s Article 14 about the need to inform the person being charged. Therefore, the need to complete this step legitimises the court delays in ‘Chez Maurice’, given that it was not completed one year after it was brought to court. Such a delay is very common in Lebanese criminal cases according to Muhana Ishak, the ‘Chez Maurice’ victims’ lawyer, asserting that cases are expected to take between two to three years. At the same time, it could be argued that such justified legal delays contradict ICCPR’s Article 14’s right to trial without delays; which points to the need to look at the Lebanese Criminal Court Proceedings that legalise court delays.

Moreover, the release on bail of Imad Rihawi and the main trafficking leaders is legally justified in Article 108 of CCP, allowing the detention of the accused while awaiting the trial

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172 Law Criminal Court Proceedings, No. 359, entered into forced 16 August 2001 [Hereinafter ‘CCP’].
173 Ibid, art 106.
175 Hamzeh (n 2).
176 Ibid.
177 ICCPR (n 174), art 14 (3) c.
for a maximum of six months, with the possibility of being extended once.\textsuperscript{178} This maximum detention period applies to trafficking charges, but not to drugs, murder, and terrorism charges.\textsuperscript{179} Some would argue for the inclusion of trafficking to the charges that do not allow the release on bail. Yet, as discussed earlier, having long detentions while awaiting trial contradicts ICCPR’s Article 14.\textsuperscript{180} Therefore, reforms should focus on the acceleration of Criminal Court Proceedings instead of calling for longer detention periods for the accused persons who await trials.

C. Impact of ‘Chez Maurice’ Case

As discussed in the previous section, the media fury on the ‘Chez Maurice’ case resulted in increased efforts by the Interior Ministry and its Anti-Trafficking Bureau to enhance their image. The media witnessed a shift in dealing with ‘prostitutes’ as possible trafficking victims; this coincided with the occurrence of new trafficking and ‘prostitution’ cells’ arrests, as reports indicate. The 2011 Trafficking Law was unprecedentedly applied to sex trafficking cases, since its passage. Yet, as Ghida Frangieh, a legal researcher on sex trafficking at The Legal Agenda, explains, it is still not possible to assess whether this proclaimed shift is being implemented practically, and whether it is true that trafficked women are not being charged with secret ‘prostitution’.\textsuperscript{181}

\textsuperscript{178} CCP (n 172), art 108.
\textsuperscript{179} Ibid, art 106.
\textsuperscript{180} ICCPR (n 174), art 14 (2).
\textsuperscript{181} Frangieh Ghida (Lawyer and Researcher), Legal Agenda (Face to Face Interview), 7 July 2017; at the time of writing this paper, it was still not clear whether the ‘Chez Maurice’ case was the exception or not; however, at the time of publishing (January 2018), it was obvious that the ‘Chez Maurice’ case was the
She asserted that "the question now is whether the authorities will treat other victims of sexual exploitation similarly to the Chez Maurice victims, and whether they will consider them as plaintiffs against their traffickers rather than charge them as criminals for engaging in illegal prostitution". 182

Nevertheless, the media coverage of the poignant testimonies of torture and sexual slavery of the ‘Chez Maurice’ women influenced the Lebanese public opinion. The prime-time talk shows extensively focused on the humanitarian aspect of the case, the devastating testimonies and the forced aspect of human trafficking, which gave moral leverage to the trafficked women. The media coverage of the case did not hold a moralizing tone on ‘prostitution’; instead, it focused on accusing the Internal Security Forces of the alleged cover-up and disregard of the 2011 Trafficking Law, which resulted in an increased awareness of the 2011 Trafficking Law, and the urgency of its implementation.

At the same time, similarly to the pre- ‘Chez Maurice’ period, the Anti-Trafficking Bureau is still targeting one of the most vulnerable groups in Lebanon and charging them with ‘prostitution’; Syrian refugee women,183 stateless Lebanese women,184 and domestic workers who escaped from their sponsors’ houses185 are being targeted and arrested for working in street ‘prostitution’ and sex phone deliveries.

exception, and women were again treated like criminals in courts, and tried with the prostitution law, even if they claimed that they were trafficked, according to Ghida Frangieh.

182 Ibid.

183 An-Nahar (n 146).

184 LBCI, ‘The Prostitution Cell Trajectory from Costabrava to Damour’ (n 144).

D. The ‘Artiste’ Visa Scheme and KAFA’s Problematic Position

The ‘Artiste’ visa scheme was not tackled by the media during its coverage of the ‘Chez Maurice’ case, because of the differentiation made between trafficked forced women and consensual ‘prostitution’. Following the analysis of the ‘Artiste’ visa scheme in the first section, women under the ‘Artiste’ contract cannot be regarded as working consensually, but rather, as forced into ‘prostitution’ through a debt bondage which prohibits them from terminating such a contract. However, the media did not link the trafficked women in ‘Chez Maurice’ to the ‘Artiste’ contracts’ trafficking, failing to draw the full picture of the state’s involvement and facilitation of sex trafficking within its meticulously regulated sex tourism sector, exploiting and trapping women by giving unlimited powers to super nightclub owners.

However, KAFA correlated between the ‘Artiste’ visa scheme and ‘Chez Maurice’ case, demanding the abolishment of the former186 – a position declared even earlier than the coverage of the ‘Chez Maurice’ case.187 Interestingly, the rationale behind the abolishment of the ‘Artiste’ visa scheme was its facilitation of ‘prostitution’, rather than its forced aspect, since KAFA regards all ‘prostitution’ as forced.188

KAFA’s position is problematic both on a theoretical and a practical advocacy level. On a theoretical level, KAFA has a

187 Jabbour (n 17).
188 KAFA, ‘Myths about Prostitution’ (n 160).
sex-negative approach, assuming that all sex workers in the world are victims who cannot possibly give consent, which moralises and shames female sexual activity and stigmatises sex as a denigrating experience. 189 This approach morally condemns ‘prostitution’ and takes away the agency of sex workers. It dehumanises their bodies since ‘the notion of a “prostitute” who is unharmed by her experience is an ontological impossibility’, which is ‘the ultimate exercise of power: to deny sex workers [their] very existence, to insist that [they] cannot be’.190 After the LAU performance, Ghada Jaddour from KAFA explained the work of ‘prostitutes’ with regards to the psychological and emotional repercussions it has on their bodies, humanity and honour; again focusing on the impossibility of consenting sex workers, and morally condemning their presence and their senseless bodies.191 They can solely exist as forced victims and because they were previously subjected to physical violence or rape, according to KAFA,192 again eliminating all agency from ‘prostitutes’.

The second repercussion of KAFA’s take is the broadening of its advocacy messaging, given its emphasis on the international discussions on ‘prostitution’ and sex trafficking, instead of merely focusing on the Lebanese context. As such, given that largely ‘Artistes’ are being trafficked, it seems clear from an advocacy perspective that focusing on the forced aspect of sex trafficking is more effective than arguing that all ‘prostitution’ is forced. Following the LAU performance’s debate, the audience predominantly expressed their

189 Jabbour (n 17).
190 Doezema (n 169).
191 Assaf Sahar (Director), ‘No Demand no Supply, a Rereading of Lebanon’s 2016 Sex Trafficking Scandal’ (Live Performance) Lebanese American University (May 2017).
192 Jabbour (n 17).
disapproval for KAFA’s abolitionist position on ‘prostitution’, which shows again how KAFA’s message evaded the debate to the international one on abolishment or legalisation of ‘prostitution’, instead of focusing on the regulated sex trafficking in Lebanon.

This section focused on KAFA as it is one of the two organisations that tackle ‘prostitution’ and trafficking in Lebanon, in addition to The Legal Agenda; which highlights a big gap in this topic. In academia, there is a lack of research tackling this subject in the Lebanese context; consequently, there is an insufficient awareness of the types of trafficking and ‘prostitution’ laws, the sex trafficking ‘Artiste’ visa scheme, and the devastating impact of PC’s Article 523 has on the most vulnerable. In this light, the analysis provided in this Article attempts to provide a legal and social overview of the topic, through the media coverage of the ‘Chez Maurice’ case and the NGOs’ debate, whilst having a sex-positive approach that does not dehumanise, victimise, or eliminate sex workers’ agency.

Conclusion

This Article investigates the media coverage of the ‘Chez Maurice’ case and its relation to sex trafficking and ‘prostitution’ in Lebanon, Lebanese laws, and international debates. Firstly, an overview of the local Lebanese laws was put forth, alongside the argument that Lebanon’s ‘prostitution’ policies and laws are embedded within its colonial history, its relationship with processes of urbanization, and the production of marginality, morality, and contradictory rhetoric on ‘prostitution’.

193 Assaf (n 191).
Lebanon moved from the regulation of taxes during the Ottoman Empire, to the French Mandate’s legalization and control of ‘prostitutes’ through the 1931 Prostitution Law; then to the breakdown of ‘prostitution’ in the 1950s with the halt on licensing and enactment of Article 523 of the PC, criminalising ‘prostitutes’ and their pimps. Moving into the present-day ‘Artiste’ visa scheme, which was constructed as a regulated legal system based on exploring women in debt bondage. The Article shows that the scheme relocated women from downtown Beirut to the outskirts, with a system that amounts to sex trafficking. This was followed by US sanctions on Lebanon, which led to the passage of the 2011 Trafficking Law. However, the law was hindered by a lack of a political will to implement it or identify and resolve the leading causes of human trafficking in Lebanon.

Secondly, an overview of the ‘Chez Maurice’ scandal, followed by an analysis of its succeeding legal media debates, was presented. The ‘Chez Maurice’ case is the exposure of the largest human trafficking cell in Lebanon. Most of the cell leaders were caught and charged with trafficking in accordance with the 2011 Trafficking Law, instead of the facilitation of ‘prostitution’ as per Article 523 of the PC; a debut of a legal breakthrough setting a precedent. The case’s interrogations are still ongoing at the time of writing this Article, and the case is expected to take a minimum of three years due to postponements as a result of the absence of some of the defendants. The media debates were analysed, tackling the state’s involvement and cover-up of the trafficking cell, and failure in the implementation of the 2011 Trafficking Law. This media depiction resulted in a state-sponsored media front from the Interior Ministry and its Anti-Trafficking Bureau, who asserted a shift from automatically charging ‘prostitutes’ with PC’s Article 523 to dealing with them as potential victims. This differentiation between sex trafficking and ‘prostitution’ was not only
portrayed in state-sponsored media, but also in prime-time talk shows, which gave moral leverage to the ‘Chez Maurice’ victims. This differentiation between ‘prostitution’ and sex trafficking was explored as an integral component of the NGOs debate between KAFA and Human Rights Watch, whose positions were explored. The latter separates between sex work and sex trafficking and opposes the criminalisation of sex work. In contrast, the former refuses the decriminalisation of sex work because it would benefit pimps and traffickers, it denies the possibility of sex work as a consensual practice since it exploits and commodifies women for men’s sexual pleasure, and calls for the criminalisation of demand.

Thirdly, this Article draws its conclusions by conjoining the laws’ overview and analysis of the first section with the media and NGOs legal debate of the second. It argues that KAFA and Human Rights Watch’s debate echoes the international discussions on ‘prostitution’ sex and trafficking, present in highly-polarized negotiations for the UN Trafficking Protocol. Moreover, the section portrays the complex and contradictory impact of the ‘Chez Maurice’ case on the Anti-Trafficking Bureau’s shift in dealing with ‘prostitutes’ and an increased public awareness about trafficking. However, the Bureau is still targeting the most vulnerable, as per PC’s Article 523, while the regulated sex trafficking under the ‘Artiste’ visa scheme and its super nightclub and massage parlours’ owners’ are left untouched. The Article then moves to argue that KAFA’s position is ethically problematic, as it dehumanises and denies the possibility of a consenting sex worker, having a sex-negative approach, and morally condemning sex work. Additionally, KAFA’s position is problematic from an advocacy perspective, since it reproduces the internationally divided debate which distracts the topic from its essential focus: ‘Artistes’ in Lebanon are forced and trafficked, in addition to
Article 523 which targets vulnerable women under threat of detention and arrest. Raising awareness of these facts is crucial, instead of evading the discussion to the international divisive debates.

The aftermath of the ‘Chez Maurice’ case catalysed the implementation of the 2011 Trafficking Law and the Anti-Trafficking Bureau and the public’s perceptions on trafficking. However, future investigations into the specific numbers and court proceedings will determine if trafficked women are still being charged with ‘prostitution’; and whether other ringleaders of sex are brought to justice. Therefore, it is crucial at this point to persist in restating the trafficking aspect of ‘prostitution’ in the media, to further pressure the ‘Anti-Trafficking Bureau’ to fight the trafficking cells, and ensure that the ‘Chez Maurice’ case’s leaders are brought to justice. Additionally, it is crucial to link sex trafficking to the ‘Artiste’ visa scheme in the media, since it has a big impact on public perceptions and, in turn, on policies.

Consequently, the cancellation of the Artiste visa scheme is necessary, in addition to legal reforms for Article 523 of the PC, as they result in the most vulnerable being still subjected to arrests, and in the protection of those who possess power and agency. The ‘Artiste’ visa scheme remains regulated and the number of Syrian vulnerable women working in the sex industry being subjected to regular arrests as per PC’s Article 523 is increasing. Finally, it is of crucial urgency to set in motion extensive fieldwork research on ‘prostitution’ and sex trafficking, whilst adopting a sex-positive approach in providing more political support for sex workers.
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This article argues that ‘memory laws’, laws that criminalise speech acts that negate certain historical atrocities, conflict with the right to freedom of expression as set out in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The approaches employed by the governing bodies of these treaties are examined, and a case is made for a purely context-based assessment when considering the impugned speech act, where the necessity principle governs. The guillotine effect of Article 17 of the ECHR is problematic as it removes any contextual analysis of whether restricting the speech act in question is in fact ‘necessary’. The European Court of Human Rights (ECtHR) should move closer towards the approach of the Human Rights Committee (HRC), where a limitation justified on the basis of content must also comply with the necessity principle. It is further argued that generic incitement laws are better equipped in dealing with extreme speech, as they can facilitate a more meaningful analysis of the ‘likelihood of harm’. Moreover, legislating on historical memory per se carries with it public diplomacy concerns. The slippery slope effect is evidenced in the EU Framework Decision on Combating Racism and Xenophobia (EU Framework Decision), which paved the way for new memory
laws concerning still-debated atrocities. The task of preserving historical memory should ultimately lie in non-legislative measures.

Introduction

‘Sticks and stones may break my bones  
But words will never hurt me.’

This old adage, generally confined to children’s playgrounds, is used to encourage the victim of name-calling or bullying to ignore the taunt and remain calm and good-natured. Its presence in a paper about law, genocide denial, and freedom of expression may be surprising, given the context in which it is usually heard. However, the verse’s basic notion, that one should rise above verbal insults and abuse, is one that is relevant to any discussion involving the limits of free speech. Words, as we know, can and do cause harm, and this is essentially why legislation dealing with negationist speech exists. Some ideas are considered so pernicious, so abhorrent, that the mere fact of uttering them is judged to be punishable. European states are increasingly turning to criminal law sanctions in the course of deterring the dissemination of such ideas and thereby preserving the collective memory of a society. Germany, France, and Spain are just three among several countries, which now have some form of ‘memory laws’ - national criminal laws against the negationism of certain historical facts – in place.1

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The adoption of such memory laws across Europe has sparked both academic and political discussion as to the interplay between law, history, and human rights. Law can be said to have ‘shaped historical memory’\(^2\), particularly in the context of modern constitutions, which stand largely ‘as responses to the arrival or overthrow of some…imperial power’\(^3\) and are effectively ‘codified memories of an overthrown past’.\(^4\) In this regard, law and history are, and always have been, inseparable.

Memory laws are but a ‘recent subset of the far broader, age-old category of law affecting historical memory’.\(^5\) Here, law is essentially being used to add what Heinze terms ‘expressive weight’\(^6\); the level of opportunity afforded to an opinion to be

\(^1\) States banning denial of a wider class of crimes: Spain (Penal Code, Art 607(2) against genocides’ justification), Luxembourg (Penal Code, Art 457-3 targeting Holocaust and other genocides), Liechtenstein (Penal Code, Section 283(1)(5), genocide and other crimes against humanity), Switzerland (Penal Code, Art 261 bis(4), genocide and crimes against humanity), Malta (Penal Code, Art 83B, genocide, crimes against humanity and war crimes), Slovenia (Penal Code, Art 297, genocide, crimes against humanity and war crimes) and Latvia (Penal Code, Art 74.1, genocide, crimes against humanity, crimes against peace and war crimes).


\(^3\) Ibid 4.

\(^4\) Ibid 4.

\(^5\) Ibid 3.

\(^6\) Ibid.
heard and discussed, to views already carrying strong substantive weight, and the intellectual merit present in a view or opinion. Garton Ash, too, describes memory laws, particularly those addressing Holocaust denial, as being a type of ‘expressive law’, one which makes a strong symbolic statement. The problem, he argues, is the knock-on effect that such laws have on both free speech and the study of history. Are we to have a ‘Brussels-approved list of genocides and crimes against humanity’? He argues that as one history of one group of people is given the special position of its denial being penalised by criminal law, other groups with a shared history will demand the same treatment for their own histories. Thus, a slippery slope can be created, ‘moving from one taboo to the demand for another’. Indeed, the scope of anti-negationist law has extended beyond the Holocaust, on both national and regional levels. This is a trajectory from which it is difficult to reverse course. It is also reflected in the insistence of a number of Eastern European states to include in the EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law crimes committed by the communist totalitarian regimes.

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8 Ibid.  
9 Ibid  
Making historical truth the business of any political authority comes with functional challenges. The current political climate in Europe, the US, and liberal democracies in general, is charged with fierce and persistent debate surrounding race, identity, and freedom of speech. We are embroiled in a global dialogue on what may or may not constitute inappropriate speech; indeed, the public consciousness has never been more receptive to how what we say may affect others. Whether for right or for wrong, European Muslims may question, for example, how it is acceptable that liberals criminalise the denial of that which they hold to be most sacred (the memory of the Holocaust) but give completely free rein on the portrayal of the Prophet Mohammad.\textsuperscript{10} Of course, these instances do differ, the former being a question of historical fact and the latter one of religious belief, and while they may not be comparable, the underlying concern about double standards is not entirely misplaced. In October 2015, the Grand Chamber of the European Court for Human Rights (ECtHR) considered whether the conviction of a Turkish national, Perinçek, by Swiss authorities, was in breach of his Article 10 Right to Freedom of Expression under the ECHR.\textsuperscript{11} Perincek was convicted for publicly proclaiming, among other things, that the Armenian genocide was an ‘international lie’ propagated by Western imperialist powers to divide the Ottoman Empire.\textsuperscript{12} The ECtHR, in holding that there had been a violation of Article 10 and that Perinçek’s comments were not an incitement of hatred, noted that ‘although statements made in relation to the Holocaust are presumed to promote Nazi ideology, which was anti-

\textsuperscript{10} Ibid.

\textsuperscript{11} Perinçek v Switzerland, App No 27510/08, (ECtHR, 15 October 2015).

\textsuperscript{12} Ibid.
democratic and inimical to human rights, the same automatic presumption did not apply\textsuperscript{13} to the events concerned here. Belavuscau has opined that distinguishing the Holocaust in this way from other comparable atrocities ‘projects a flimsy judicial iconography with the Holocaust rising over other “second-class” evils’.\textsuperscript{14} Effectively, a hierarchy of evil is created, in which the Holocaust is constructed as a ‘mega-genocide to which all else pales by comparison.’\textsuperscript{15}

Beyond the issues regarding state-ordained historical truth, the debate essentially concerns the conflict with freedom of expression that memory laws are embroiled in.\textsuperscript{16} The notion that memory laws can be compatible with international human rights law is the subject of much discussion. The right to freedom of expression, including the restrictions thereon, are set out in both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR.), two treaties which partly comprise the international human rights law framework. In many cases, memory laws effectively treat instances of denial of historical atrocities as \textit{ipso facto} forms of hateful incitement; they are seen to constitute incitement by virtue of their nature. It is this notion that has often led to the exclusion of negationist speech from a context-based assessment under

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{13} ‘Freedom of expression: hate speech – Holocaust denial’ [2016] EHRLR 101, 103.
\item\textsuperscript{15} Ibid.
\end{enumerate}
\end{footnotesize}
the ECHR and ICCPR. The equation of denial with incitement has meant that the impugned speech act has not always been examined under the ‘necessity’ principle, the notion that any interference with an individual’s freedom of expression must be necessary for the protection of public order and values, present in the freedom of speech articles in both treaties. This presents both practical and theoretical challenges. Although the approaches of the monitoring bodies, the ECtHR and the UN Human Rights Council (HRC), respectively differ in their treatment of the importance of both the content and context of a speech act, it will be demonstrated that there is room for improvement in both. The fundamental question that the monitoring bodies are confronted with is whether or not the denial of historical atrocities is removed from the protection of Freedom of Expression.

This article will show that the HRC’s context-based assessment of an impugned speech act is preferable to the ECtHR’s largely content-based approach. The ECtHR’s application of Article 17 is problematic, as it does not allow for a contextual analysis of whether a restriction on the speech act in question satisfies the necessity principle under Article 10(2). The Strasbourg Court’s approach must be modified to more closely mirror its UN counterpart, under whose approach a limitation justified on the basis of content must also comply with the necessity test. Furthermore, Temperman has argued that generic incitement laws are better equipped to tackle the issue of negationist speech as they can facilitate a more meaningful analysis of ‘likelihood of harm’, the principle that should guide in determining whether a speech act is protected by Freedom of Expression.17 Public diplomacy concerns shall be considered, especially the

17 Temperman (n 17) 160.
‘slippery slope’ argument\textsuperscript{18}, and it will be concluded that ultimately, preserving historical memory is a task that lies outside of the law.

To think back momentarily to our children’s verse set out at the beginning of this section: words can indeed hurt, but, to defer to the words of John Stuart Mill, it is suggested here that ‘false and pernicious views should be met with withering and accurate criticism’.\textsuperscript{19} Indeed, the way to counter hurtful and harmful speech ‘is with more speech, not less’.\textsuperscript{20}

I. The Schism in Europe – Memory Laws vs Freedom of Expression

Understanding the alleged conflict between memory laws and freedom of expression requires the international human rights framework relating to freedom of expression to be set out. The two primary treaties relevant here are the ECHR and the ICCPR. For the purposes of this Article, France and Germany have been taken as case studies, as they have ratified both of these treaties, and are members of both the Council of Europe and the European Union. Additionally, their domestic legal authorities have ruled important decisions on memory laws, and their legislative provisions were used as a base during the drafting procedure of the EU Framework Decision. Their legal provisions also differ in interesting ways; hence, the reason for selecting them as case studies. The relevant German laws also constitute the basis of similar laws in other European states.

\textsuperscript{18} Ash (n 8).


\textsuperscript{20} Ibid.
2.1 International Human Rights Law Framework

Freedom of expression has often been described as the ‘touchstone of all rights’.\(^{21}\) It serves as a ‘critical measure of a pluralistic and tolerant society’\(^{22}\) and its curtailment is often the defining feature of totalitarian regimes and authoritarian states. The right, however, is not absolute.

2.1.1 European Convention on Human Rights

Article 10(1) of the ECHR states that ‘everyone has the right to freedom of expression’\(^{23}\) and that the right shall include ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.\(^{24}\) Article 10(2), which has come to be known as the necessity test, sets out the limitations on this right, which can be translated into a three-part test: an interference by a public body with an individual’s freedom of expression is permissible if it a) is prescribed by law; b) pursues a legitimate purpose; and c) is necessary in a democratic society. In the ECtHR’s jurisprudence, examined in Section IV, it will be shown how the Court has attempted to balance these differing interests.

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\(^{23}\) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(1).

\(^{24}\) Ibid.
Article 17 of the ECHR is also of vital importance in this analysis, acting as a potential restriction on freedom of expression. It states that ‘nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention’. This is what is known as the ‘abuse clause’, a provision intended to prevent any undue interference with any of the Convention rights. The idea of an abuse clause in international human rights law emerged after World War II and has been inserted into various international and regional human rights instruments as European democracies’ ‘defence response to fascist and communist threats’. It is essentially the ‘revelation of the political climate that governed Europe at the time of elaboration of the Convention’.

The prime function of Article 17 is to arm democracy with the legal weapons necessary to prevent the repeat of history. In Kommunistische Partei Deutschlands v Germany, the former European Commission on Human Rights (ECommHR) approved the ban put on the Communist Party in Germany.

25 Ibid Art 17.
26 Ibid Art 10(2).
28 Ibid.
29 Ibid 57.
30 Ibid.
The Communist Party had proclaimed the goal of proletarian revolution and the dictatorship of the proletariat as a mission statement. The Commission relied on Article 17 of the ECHR, aimed at protecting the rights enshrined in the Convention by safeguarding the free functioning of democratic institutions. In short, the application of Article 17 precluded the Communist Party from relying on those Convention articles that guarantee freedom of opinion, expression, and association. In this manner, the abuse clause, when applied directly, categorically excludes certain expressions from the protection of Article 10. The impugned speech statements are simply not considered under Article 10’s protective scope – a contextual analysis does not occur. The necessity test has not been considered, and the speech act is without question deemed to constitute an abuse of a Convention right.

2.1.2 ICCPR

Article 19(2) of the ICCPR guarantees that ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds...’

The courts have expressly stated that the right is especially applicable to those ideas that ‘offend, shock or disturb the State or any sector of the population’.33

Article 19(3) of the ICCPR, reminiscent of the necessity test under Article 10(2) ECHR, delineates the boundaries of the right, which, again, can be subject to certain restrictions ‘as are provided by law and are necessary for respect of the

33 Handyside v United Kingdom (1976) 1 EHRR 737, para 49.
rights or reputations of others’34, and/or ‘for the protection of national security or of public order (ordre public), or of public health or morals’35.

Article 20 of the ICCPR, accepted by some scholars as a fourth paragraph to Article 19, does not provide for a specific right but sets out additional restrictions on other rights, in particular the right to freedom of expression. The first paragraph stipulates that ‘any propaganda for war shall be prohibited by law’36, and Article 20(2) reads: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.37 According to the traveaux préparatoires, Article 20 was drafted as a response to the horrors of the Nazi racial hatred campaigns. Some delegations argued for the need for an additional article, as the limitation clause in Article 19(3) was thought to be insufficient for the prevention of incitement to racial hatred.38 The relationship between Article 19 and Article 20 is of one that has important implications for the way in which the HRC has interpreted impugned speech acts under the Covenant. This shall be examined in Section III.

2.2 Memory Laws

Before any meaningful discussion of memory laws can take place, the terms ‘negationism’ and ‘denialism’, used

34 Ibid.
35 Ibid.
36 Ibid Art 20(1).
37 Ibid Art 20(2).
interchangeably here, must first be defined. As memory laws all have their roots in laws banning Holocaust denial specifically, the definition for Holocaust denial is given below. It can be defined as:

An attempt to negate the established facts of the Nazi genocide of European Jews, Roma, gays and lesbians as well as political opponents. Key denial assertions include that the murder of approximately six million Jews during the Second World War never occurred, that the Nazis had no official policy or intention to exterminate the Jews, and that the extermination camps such as Auschwitz-Birkenau never existed.39

2.2.1 France

The loi Gayssot (Gayssot Law)40 was adopted by the French Parliament in 1990; and was added as Article 24 bis into the 1881 Freedom of the Press law.41 Under this law, to ‘contest’42 the existence of crimes against humanity as defined in the Statute of the Nuremberg Tribunal is a punishable offence. Furthermore, the mere contestation of established facts can be prosecuted without any additional requirement of incitement to violence or hatred. Thus, the Gayssot Law effectively allows for a pure content-based restriction on freedom of

40 Law 90-615, 13 July 1990 (Gayssot Law).
41 Ibid (n 1).
42 Ibid.
This reflects what has been termed the ‘principal vehicle’\textsuperscript{44} argument, namely that Holocaust denial serves as the principal vehicle for anti-Semitism. The UN Special Rapporteur on contemporary forms of racism has stated that Holocaust denial ‘perpetuates long-standing anti-Semitic prejudices and stereotypes, by accusing Jews of conspiracy, world domination, and hateful charges that were instrumental in laying the groundwork for the Holocaust.’\textsuperscript{45}

Express incitement is therefore considered a given, by virtue of the nature of such a speech act. The necessity to punish is also deemed to be self-evident. French courts have argued that the Gayssot Law is compatible with Article 10 of the ECHR, as although it guarantees freedom of expression, it nevertheless provides for certain restrictions or penalties thereon. Article 17 of the ECHR has also been offered as a further justification for the loi Gayssot – ‘Holocaust denial constitutes an abuse of right within the meaning of Article 17 because the revisionist ideology represents a threat to any democratic society as it seeks to rehabilitate or justify the Nazi regime’.\textsuperscript{46} Christian Thomuschat further states that denial is, by nature, premised on the attempt to incite and is therefore ‘qualified denial’\textsuperscript{47}; it falls within the restrictions on

\textsuperscript{44} Ibid para 9.7.
\textsuperscript{45} Ibid.
freedom of expression. Under this view, there can be no such thing as ‘simple denial’ i.e. denial that does not attempt to incite.

Although there have been attempts to extend the Gayssot Law to other historical facts, none have endured. In 2012, a law seeking to punish the denial of legally recognised genocides was approved, but subsequently declared unconstitutional by the Constitutional Council on the basis that it was a restriction on freedom of expression that was not ‘necessary, appropriate and proportional.’ Although the Gayssot Law remains intact, this decision therefore implicitly closed the doors for the adoption of new memory laws. It also somewhat answers the question of why the Gayssot Law punishes Holocaust denial exclusively as opposed to the denial of genocides broadly. After all, more standard legal provisions dealing with racial abuse and defamation could easily be relied on, particularly if one accepts that Holocaust deniers are generally motivated by anti-Semitic intent. However, it is the exceptional nature of the Holocaust, which merits such legislation – the view that it is an incomparable event. Lobba comments that this exceptional legal regime ‘is justified even though this regime cannot be easily reconciled with what is normally constitutionally permissible.’ The ‘quasi-unanimous public abhorrence’ explains the legislative action.

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48 French Constitutional Council’s Judgment, 28 February 2012, No 2012-647 DC.
50 Pech (n 46) 21.
51 Ibid.
2.2.2 Germany

Germany’s approach to the penalisation of negationism is undoubtedly shaped by the dark history of the Third Reich. Section 130(4) of the German Penal Code provides: ‘Whoever, publicly or at a meeting, disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine’.52 Although the German Penal Code requires an element of incitement, Lobba comments that German courts have adopted an interpretation according to which, in effect, any denial of the Holocaust fulfils per se this requirement.53

The Auschwitz Lie54 case ruling helped to clarify the relationship between freedom of expression and Holocaust denial. Irving, a well-known revisionist British historian, had been invited by a far-right political party to talk on his view that the persecution of Jews during the Third Reich was a lie. The meeting was permitted on the condition that Irving would not engage in negationist speech. The far-right party took judicial action against this governmental decision, alleging that Irving’s right to freedom of expression had been violated. The Court, in its ruling, made a distinction between

54 Auschwitzläge (Auschwitz Lie) Case, (German Constitutional Court 13 April 1994) No BVerfGE 90, 241.
statements of fact and statements of opinion. Facts are characterised by an objective relationship between the utterance and reality, whereas opinions are personal assessments, and are characterised by a subjective relationship with their content.55 Thus, the protective scope of Article 5 of the German Basic Law (which guarantees freedom of expression), covers freedom of opinions but not factual statements that are unequivocally untrue, as such statements do not contribute anything to the formation of public opinion.56 Those denying the Holocaust, in the view of the Court, offer factual assertions, whose untrue nature has been established beyond doubt; they are therefore not protected.

Pech, critical of the Court’s reasoning, states that ‘the distinction between fact and opinion is not an easy one to work out in theory and in practice’.57 The distinction, described by Post as ‘deeply obscure’, is arbitrary and of a subjective nature. In the case of Historical Fabrication59, the Court ruled that a book arguing that Germany was not to blame for the outbreak of the Second World War could not be listed as ‘immoral’ or ‘dangerous’ merely for containing a false interpretation of a historical event. According to the Court, the argument qualified as an opinion and was thus protected speech under Article 5 of the Basic Law (which covers freedom of expression). It is difficult to reconcile the rationale of the Court in this case with the rationale in the

55 Ibid, para B(II)(1).
56 Ibid.
57 Pech (n 46) 14.
59 Historical Fabrication Case 90 BVerfGE 1 (German Constitutional Court 1994).
Auschwitz Lie case, as it is not entirely clear why one was considered opinion and the other fact.

Interestingly, the Court emphasised that even if Holocaust denial was considered an opinion and could fall within the area covered by Article 5, it would still not be protected, as it would violate the criminal provisions protecting the Jews living in Germany from insult. It is thus the ‘notoriously untrue nature’ of the Auschwitz Lie that merits the penalisation of denial for Germany. The history of German society ‘justifies a special moral responsibility’ on the part of German citizens to guarantee the dignity and security of the Jews residing there; the legal justifications essentially take a backseat. It is this ‘special moral responsibility’ of Germany, which Garton Ash opines makes it senseless to generalise German practice for the rest of Europe.

2.3 The Council Framework Decision on Combating Racism and Xenophobia

France and Germany are interesting examples of two differing approaches to memory laws, both in their provisions and their rationales. French law does not require incitement, while in Germany, a likelihood of disturbing the public peace, even if only as a formality, must be found. While France’s justifications for the Gayssot Law revolve around the idea that Holocaust deniers pursue racist and

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60 Pech (n 46).
61 Ibid, 15.
62 Ash (n 7).
anti-democratic aims, Germany focuses on the grossly untruthful nature of deniers’ claims. Yet, what both of these countries’ legislations have in common is that they punish Holocaust denial exclusively. That is – their laws do not extend to the denial of other historical atrocities. However, a handful of States now do punish the denial of other historical crimes: Spain, Portugal, and Switzerland, for example, include in their legislations other genocides and crimes against humanity. Switzerland, for example, punishes the denial of the alleged Armenian genocide, as seen in the discussion of the Perincek case. Luxembourg and Liechtenstein too, do not single out the Holocaust, but ban the denial of any genocide.

The EU Framework Decision, adopted by the Council of the EU in 2008, aptly reflects the divide in Europe over the denial of historical atrocities; the 1996 Joint Action64 and the Additional Protocol to the Convention on Cybercrime65 saw the emergence of a dichotomy of approach across EU member states. The Framework Decision, the latest step of the EU’s anti-racism policy, intended to harmonise the national criminal laws of EU member states on offences involving certain manifestations of racism and xenophobia. It urges member states to take the measures necessary to ensure, inter alia, that ‘publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes’66 be punishable. What is most striking about the Decision, is that it imposed, for the first time, an express obligation on member states to criminalise

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64 Council of the European Union, Joint Action to combat racism and xenophobia, No 96/443/JHA, 15 July 1996.
66 European Union Framework Decision, Art 1(1)(c).
genocide denial when it is ‘directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin carried out in a manner likely to incite to violence or hatred’.67 However, Article 1(2) of the Decision, evident of the compromise involved in the process, stipulates that ‘Member States may choose to punish only conduct which is...carried out in a manner likely to disturb the public order or which is threatening, abusive or insulting’.68 This optional limitation has an arguably small threshold to satisfy, and essentially enables countries such as France and Germany – so-called ‘militant democracies’69 – to continue to punish denial when collective, as opposed to individual, interests have been harmed. The Decision defines neither ‘public order’, nor ‘likely’, and so member states are permitted to decide when an act of denial becomes likely to disturb the public order. Nevertheless, Lobba considers that the provision may prove useful in respect of the denial of the Armenian or Srebrenica genocides, where the dangerous character of expressions is not considered self-evident.70

II. Approach of the Human Rights Committee

While the views of the HRC are not legally binding, they carry moral and political obligations. Moreover, the HRC interprets the provisions of the ICCPR, a legally binding instrument, and so its findings therefore have a ‘judicial

67 Ibid, Art 1(1)(c)-(d).
68 Ibid, Art 1(2).
69 Pech (n 46).
70 Lobba (n 49) 66.
flavour'. Hence, its jurisprudence is important in determining the future of the way in which domestic memory laws are implemented, as its rulings on freedom of expression expound how the right is to be applied.

3.1 The ‘Principal Vehicle’ Argument and a Content-Based Approach

The ‘principal vehicle’ argument mentioned in Section II – the notion that Holocaust denial serves as the principal vehicle for anti-Semitism – informed the HRC’s early case law on negationist speech. In *Faurisson v France*, a literature professor, in a magazine interview, reiterated his views that the ‘myth’ of the gas chambers was a dishonest fabrication. He was charged and convicted of offences, and claimed that the Gayssot Law infringed his Article 19 right to freedom of expression in his communication to the HRC. The HRC applied the three-part test set out in Article 19, and found that the restriction had indeed been provided by law (Faurisson was convicted under the Gayssot Law), it pursued a purpose under Article 19(3)(a) (Faurisson’s statements triggered anti-Semitic feelings), and that it was necessary to achieve a legitimate purpose (the Gayssot Law served as a tool against racism). It concluded that ‘the statements made by the author, read in their full context, were of such a nature as to raise or strengthen anti-Semitic feelings’.

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73 Ibid, para 9.6.
The Committee’s ‘opaque’\textsuperscript{74} reasoning, although ‘embedded in “context” considerations\textsuperscript{75} (e.g. mention was made of the general problem of anti-Semitism in France), did not engage in any concrete risk assessment. It did not consider, under the necessity principle, what the likelihood of harm flowing from the impugned speech act was. The state was not asked to come up with any proof that Holocaust denial has indeed caused anti-Semitism to spread in France.\textsuperscript{76} Despite the fact that human rights monitors would likely have backed up this argument, the point remains, according to Temperman, that France ought to have been ‘cross-examined’ and required to make some efforts in order to make their case properly.\textsuperscript{77} The necessity of the restriction was considered to be beyond doubt, given the content of the speech—the categorically intolerable denial of historical atrocities.\textsuperscript{78}

\textit{3.1.1 The Necessity Principle}

Although the HRC in \textit{Faurisson} explicitly cited Article 19(3) as the rationale for its decision, it was clearly alluding to Article 20(2) of the ICCPR, which orders state parties to prohibit by law certain types of hateful incitement. The concurring opinion of member Rajsoomer Lallah, who in the \textit{Faurisson} case would have justified the restriction on the basis of necessity, states that in this case the necessity principle is

\textsuperscript{74} Andrew Legg, \textit{The Margin of Appreciation in International Human Rights Law: Deference and Proportionality} (OUP 2012) 98.


\textsuperscript{76} Ibid 153.

\textsuperscript{77} Ibid 154.

\textsuperscript{78} Ibid 154.
‘merged with the very nature of the expression which may legitimately be prohibited by law’.79

According to this logic, a restriction on a speech act which engages Article 20(2) is automatically deemed to satisfy the necessity principle of Article 19(3). So, any restriction on a speech act that falls within the scope of Article 20(2) is therefore justified without necessitating an examination of the conditions laid out in Article 19(3)(a) and (b). This approach reflects the HRC’s oldest case law on hate speech.

This represents a ‘complete disregard of context’.80 Temperman argues that ‘the entire rationale of the necessity test is that the state faces the burden to prove the existence or applicability of those special factors’81. Those factors are ones that influence whether or not the speech act will result in the likelihood of adverse acts being committed against the target group, i.e. the reputation or influence of the person committing the speech act, the status of the targeted group within society, and the medium through which the speech act is made. However, such contextual elements were not even deliberated over in Faurisson. The idea that a restriction on a speech act is automatically justified under Article 19(3) if it engages Article 20(2), is not tenable.82 If this were to be the case as Temperman highlights, it would mean that speech acts fall either into Article 19 with its safeguards surrounding restrictions, or into Article 20(2) where the act would altogether be excluded from protection. This approach means

79 Faurisson (n 72); Individual opinion by Rajsoomer Lallah, para 4.
80 Temperman (n 75).
81 Ibid.
82 Ibid.
that the state does not have to prove the necessity of the interference with free speech.

Herein lies the problem with domestic memory laws, particularly in countries such as France where no proof of harm requirement exists. Little room is left for a context-based risk assessment. It may be counter-argued that surely states cannot wait passively until the possible effects of denialism actually materialise. Herz and Molnar state that context itself is the answer to this question.\textsuperscript{83} The prosecutorial authorities need to monitor the overall situation in which the negationist speech is uttered, and thereby decide whether interference is necessary. In Faurisson, the Committee missed an important opportunity to establish an international legal framework to justify memory laws; not taking the necessity of combating Holocaust denial for granted could indeed have served to stop the abusive applications of memory laws.\textsuperscript{84}

3.2 Towards a Context-Based Assessment

3.2.1 Malcolm Ross v Canada

The case of Malcolm Ross V Canada\textsuperscript{85} concerned Ross, a schoolteacher, who in his spare time published books and pamphlets and made public statements reflecting discriminatory views towards Jews. Local media had covered his writings, allowing his ideas to gain notoriety in the community. Ross was removed from his teaching post, and a

\textsuperscript{83} Michael Herz and Peter Molnar (eds), The Content and Context of Hate Speech: Rethinking Regulation and Responses (CUP 2012).

\textsuperscript{84} Temperman (n 75).

Board of Inquiry held that the School Board was vicariously liable for Ross’ discriminatory conduct.

In response to Ross’ freedom of expression complaint under the ICCPR, the HRC held that Ross’ statements did amount to express incitement. In its consideration of the merits of the communication, it applied the three-part test set out in Article 19 of the ICCPR. It concluded that the restriction on Ross’ freedom of expression was provided by law, that it pursued a legitimate purpose in that it aimed to protect the Jewish community’s right to have an education free from bias and prejudice, and finally, that the removal of Ross from his teaching position was necessary as a causal link had been shown between the expressions of the author and the ‘poisoned environment’ that had been created for Jewish children in the school district, where they ran the risk of being bullied or marginalised.

In considering the necessity principle, the Committee accepted that the content of Ross’ negationist pamphlets alone did not justify Canada’s restrictions on his speech. However, Ross’ statements encouraged ‘true Christians’ to hold those of the Jewish faith in contempt. The influence exerted by schoolteachers may justify restraints ‘in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory’. The Committee further noted that ‘the actions taken against the author…were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context’. The fact that Ross’ appointment to a non-teaching position shortly after his removal (with only a

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86 Ibid, para 4.3.
87 Ibid, para 11.6.
88 Ibid, para 11.7.
minimal period on leave without pay) is significant as it highlights that the restriction on his freedom of expression did not go further than that which was necessary to achieve its protective functions. It was thus justified. The Committee’s holistic, integrated approach in this case was a step away from content-based bans; it invoked Article 20 as an additional argument in the interpretation of Article 19(3). The HRC postulated that ‘restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3…’.

3.2.2 General Comment No 34

The implication made in Ross, that Article 20-derived bans must also satisfy the necessity principle, was confirmed beyond doubt in the Committee’s General Comment No 34. Paragraph 49 reads:

Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on State parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed…

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89 Ibid, para 10.6.
90 General Comment 34, (HRC 11-29 July 2011) CCPR/C/GC/34, para 49.
Faurisson has therefore been completely overruled; General Comment No 34 demands that proof is required. There must be actual evidence of incitement against a targeted group, with repercussions being likely. The requirement of likelihood and other context factors, and the requirements of necessity and proportionality that come with the references to Articles 19 and 20 make it unlikely, according to O’Flaherty, that memory laws ever pass the human rights test.\textsuperscript{91} Thus, the Gayssot Act, with its outright content-based prohibition on denial, does not meet the requirements of the test.

III. The Approach of the European Court of Human Rights

In Handyside v United Kingdom\textsuperscript{92}, the ECtHR stated that ‘freedom of expression constitutes one of the basic conditions for the progress of democratic societies and for the development of each individual’.\textsuperscript{93} However, with regard to Holocaust denial, the Strasbourg Court’s jurisprudence departs from general principles on free speech,\textsuperscript{94} despite its 30-year-long development of case law on Holocaust denial. It has shown an eagerness to throw out cases entirely, by mobilising Article 17 of the ECHR (the abuse clause), rather

\begin{itemize}
\item \textsuperscript{92} Paolo Lobba, ‘Holocaust denial before the European Court of Human Rights: Evolution of an Exceptional Regime’ [2015] EJIL 237, 238.
\item \textsuperscript{93} Handyside (n 33).
\item \textsuperscript{94} Lobba (n 49) 239.
\end{itemize}
than examining the merits of the complaint under Article 10 (freedom of expression and its limits).

Unlike the ICCPR, the ECHR does not categorise different extreme speech acts. Whereas the ICCPR’s Article 20(2) contains the notion of ‘incitement’, effectively distinguishing between hate speech that does incite and hate speech that does not, there is no such notion in the ECHR; ‘incitement’ has no special legal meaning under the Convention. While this may appear to suggest that the Strasbourg Court is allowed to be more preoccupied with content alone, this is not strictly the case, as the necessity principle of Article 10(2) still insists that a concrete risk assessment is made on the basis of context factors.

4.1 Article 10(2) and a Content-Based Assessment

In the first phase of the former ECommHR’s case law on negationism, Article 17 was mainly omitted from the Commission’s analysis; the assessment did therefore seek to satisfy the necessity principle, even if it ultimately fell short of substantiating that harm may be imminent. This phase was, however, short-lived. As will be seen, the employment of Article 17, in both a direct and indirect fashion, is what has informed most of the ECtHR’s jurisprudence on negationism.

4.2 Article 17 – The ‘Abuse Clause’

4.2.1 Direct Application and ‘Clearly Established Historical Facts’
The *Kommunistische Partei Deutschlands* case, mentioned in Section II, demonstrates the direct application of Article 17 to cases where the Strasbourg organs were confronted with totalitarian doctrines. After the ECommHR was abolished, the ECtHR continued to emphasise the special status of Holocaust denial and revisionist speech. This is where the ‘guillotine effect’\(^95\) of the abuse clause – the categorical exclusion of a class of speech from the protective scope of Article 10 – began to take shape. In *Lehideux and Isorni v France*\(^96\), the shift in interpretation of Article 17 took place.

Lehideux and Isorni were presidents of the Association for the Defence of the Memory of Marshal Petain (who was the head of state of Nazi-driven Vichy France), as well as authors of an advertisement for the Association, which praised Petain’s actions during the Second World War. They were both convicted of the public defence of war crimes and collaboration, and they complained that their convictions were contrary to their right to freedom of expression under Article 10 of the ECHR.\(^97\)

The applicants in this case had been supporting one of the conflicting theories in the debate about Petain’s role during World War II. These theories were part of an on-going debate among historians.\(^98\) The Court’s role in the instant case was limited to verifying whether or not the interference with the applicants’ right to freedom of expression could be regarded as ‘necessary in a democratic society’ within the meaning of Article 10(2). Although ‘morally reprehensible’\(^99\), the fact that

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\(^97\) Ibid.
\(^98\) Cannie and Voorhood (n 29) 60.
\(^99\) Ibid.
the applicants omitted historical facts, which were a matter of common knowledge, could not in itself justify the state’s interference. The ‘doublegame theory’, according to the Court, does not belong to the category of ‘clearly established historical facts’\textsuperscript{100} such as the Holocaust. Therefore, unlike the Holocaust, its negation or revision could not be removed from the protection of Article 10 by Article 17. Thus, applying Article 17 would ‘entail a content-based exclusion of a certain set of expressions from the scope of the free speech principle’.\textsuperscript{101} As pointed out by Cannie and Voorhoof, this interpretation of Article 17 has a myriad of ‘undesirable consequences’.\textsuperscript{102} Nevertheless, the potential of the guillotine approach introduced in \textit{Lehideux} was demonstrated in the following landmark case.

In \textit{Garaudy v France}\textsuperscript{103}, Garaudy had published a book in which he claimed, among other things, that no gas chambers existed in the extermination camps and that if many Jews had died, this was due to deportations. Additionally, he denied that the Nazis had an official policy of extermination of the Jews. Garaudy was charged and convicted, under the Gayssot Law\textsuperscript{104}, for ‘denial of crimes against humanity’. The Court declared Garaudy’s freedom of expression complaints inadmissible, and stated that ‘denying the reality of clearly established historical facts, such as the Holocaust...does not constitute historical research akin to a quest for truth’.\textsuperscript{105} The true purpose of such denial is ‘to rehabilitate the National

\textsuperscript{100} Ibid.
\textsuperscript{101} Lobba (n 92) 242.
\textsuperscript{102} Cannie and Voorhoof (n 29) 64.
\textsuperscript{103} ECtHR, \textit{Garaudy v France}, App No 65831/01, Decision of 24 June 2003.
\textsuperscript{104} Law 90-615, 13 July 1990 (Gayssot Law).
\textsuperscript{105} Ibid.
Socialist regime and, as a consequence, accuse the victims themselves of falsifying history’.\textsuperscript{106}

In a famous formulation, the Court said:

\begin{quote}
The denial or rewriting of this type of historical fact undermined the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights...their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.\textsuperscript{107}
\end{quote}

This approach is akin to that of the HRC in \textit{Faurrison}, in which contextual factors were deemed irrelevant; the necessity of the interference was a given. The Court’s stance is especially important in this case as ‘revisionism’ is equated with ‘the most serious forms of racial defamation of Jews and of incitement to hatred of them.’\textsuperscript{108} Due to this, denialism of this type of historical fact is incompatible with democracy and human rights. Yet this reasoning, Pech opines, cannot be easily reconciled with the Court’s logic and reasoning in relation to other historical events, where the Court has stated that it is not its task to settle historical debates.\textsuperscript{109} According to Pech, it is highly doubtful that the Court would apply the \textit{Lehideux} principle to cases concerning, for example, the Armenian genocide, as it is unlikely to find that those

\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
\textsuperscript{108} ECtHR, \textit{Garaudy v France}, App No 65831/01, Decision of 24 June 2003.
\textsuperscript{109} Pech (n 46) 37.
questioning the Armenian genocide are motivated by racist intent or hatred of the Armenian people. Though it is true that these principles apply to questions that are still part of a continuing debate, and the Holocaust has been ruled to belong to the German-inspired category of ‘clearly established historical facts’ and therefore exempt from the principles, when a historical fact becomes ‘clearly established’ has not been explained. The phrase was coined by the ECtHR in *Lehideux and Isorni v France*, where the Court stated that the case ‘does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.’ The line-drawing problems raised cannot be evaded, as is evident from the case of France, wherein legislative proposals to criminalise the denial of the Armenian genocide rapidly led some MPs to put forward Bills aimed at criminalising the denial of the alleged Vendean genocide, or of the Ukrainian genocide.

Pech suggests a ‘better and more traditional option’ than relying on the notion of ‘clearly established historical facts’. He argues that it is the goal pursued by revisionist historians that should be focused on. For example, in *Garaudy*, the Court agreed with France that the applicant’s goal was not a quest for historical truth but actually the rehabilitation of a criminal regime. This assessment was based on the applicant’s lack of respect for the research standards that academics must

100 Ibid.
110 Ibid.
112 Ibid.
113 Pech (n 46) 36.
114 Ibid.
comply with. This is far more preferable than broad legislative bans.

4.2.2 Indirect Application

Article 17 has also been invoked indirectly, as an ‘interpretative aid’\footnote{Cannie and Voorhoof (n 29) 58.} in the analysis of the necessity of state interference. In many cases against Austria, the Commission and the Court have repeatedly stated that ‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention’.\footnote{Ibid 59.} This led to the conclusion that the interferences by the state were necessary in a democratic society, within the meaning of Article 10(2) of the ECHR. The case of \textit{Kühnen vs Germany}\footnote{ECommHR, \textit{Kühnen v Germany}, App No 12194/86, Decision of 12 May 1988.} constitutes one of the building blocks of the Strasbourg organs’ jurisprudence regarding Holocaust denial, and is an apt example of this ‘indirect’\footnote{Cannie and Voorhoof (n 29) 58.} approach. In this case, the revival of the National Socialist German Workers’ Party was advocated. The Commission declared that as the applicant’s policy ‘clearly contains elements of racial and religious discrimination’\footnote{Ibid.}, they had found that the applicant was ‘essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are...contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the
Convention’.\textsuperscript{121} Despite the indisputable link with totalitarianism demonstrated by the Commission, the scope of the abuse clause seems to have been extended to include every activity, which may be ‘contrary to the text and spirit of the Convention.’ In cases following \textit{Kühnen}, this type of speech has consistently been judged to be ‘discriminatory against Jewish people’. In \textit{Walendy v Germany}\textsuperscript{122}, an infamous Holocaust denier claimed in an editorial that no gas-asphyxiation techniques had been used at the concentration camps. The Commission’s assessment of Germany’s interferences with his freedom of expression largely boiled down to invoking and explaining the relevance of Article 17. However, the Commission did not address the question of how the act of denial made it likely that the target group would face harm. The absence of any contextual analysis constitutes a threat to freedom of expression, as the necessity of the interference has not been justified under Article 10(2).

\textit{Hans Jorg Schimanek v Austria}\textsuperscript{123} further highlights the missed opportunity for the Court to elaborate on the risk stemming from negationism. The facts of the case indicate a sense of urgency behind the interferences with a neo-Nazi’s freedoms. Schimanek was convicted for leading an association that sought to revitalise the National Socialist regime, contrary to the Austrian National Socialism Prohibition Act. This would have been the perfect occasion for the Court to ‘link up necessity considerations with “likelihood” and “imminence” arguments’, i.e. how likely is it that harm will occur to the targeted group, and how imminent is this harm? The facts of

\textsuperscript{121} Ibid.

\textsuperscript{122} ECtHR, \textit{Walendy v Germany}, App No 21128/92, Decision of 11 January 1995.

\textsuperscript{123} ECtHR, \textit{Hans Jorg Schimanek v Austria}, App No 32307/96, admissibility decision of 1 February 2000.
the case lend themselves especially well to a context-based assessment. However, the Court again fell back on the indirect invocation of Article 17, and thus the case was in no way differentiated from other cases concerning negationism. This was a lost opportunity for the Court: it could have highlighted the dangers of negationism by pointing to the sense of urgency underlying the interferences with Schimanek’s freedom of expression. However, it did not consider the necessity of the interferences with regard to Schimanek’s activities.

Cannie and Voorhoof note the striking way in which the Strasbourg organs ‘lean on the findings of the national courts’; once considered at the domestic level to be Holocaust denial, the protection of Article 10 is categorically denied. Despite the existence of the margin of appreciation doctrine under which deference is owed to domestic decision-makers in interpreting the ECHR in light of their countries’ historic and cultural specificities, this margin is never unlimited and is always accompanied by European guidance. The way the ECtHR leans on national courts’ decisions, however, means that the application of the abuse clause leads to the finding that the interference was necessary in a democratic society. In Remer v Germany, for example, the Commission stated that ‘the public interests in the prevention of crime and disorder in the German population due to incitement to hatred against Jews...outweigh, in a democratic society, the applicant’s freedom to impart’ negationist publications. In reality, therefore, whether Article

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124 Temperman (n 67) 166.
125 Cannie and Voorhoof (n 29) 67.
127 Ibid.
17 is applied directly or indirectly, the difference is nominal and the impact is similar. The strict requirements of proof mandated by Article 10(2) are made redundant; the impugned speech act is only formally considered under this provision. This constitutes a threat to freedom of expression under the ECHR, and sends member states the message that certain restrictions are so blatantly permitted by European human rights standards that any threshold of proof at a national level need not justify them.

4.2.3 Undesirable Effects of the Abuse Clause

The abuse clause, it is argued, has undoubtedly been somewhat detached from its original purpose, which strictly confined it to those situations threatening the democratic system of the state itself.\(^\text{128}\) The general purpose of the abuse clause has repeatedly been said to ‘prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention’.\(^\text{129}\) Yet, the Strasbourg organs have stretched their scope to any act that is incompatible with the ECHR’s underlying values. In *Leroy v France*\(^\text{130}\), for example, the Court’s language implied that Article 17 applies in cases of racism, anti-Semitism, and Islamophobia.\(^\text{131}\) This is far removed from its original purpose.\(^\text{132}\)

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\(^{128}\) Cannie and Voorhoof (n 29) 62.

\(^{129}\) Cannie and Voorhoof (n 29) 57.


\(^{131}\) ECtHR, Leroy vs France, 2 October 2008, Application No 36109/03, para. 27: ‘La Cour est d’avis que l’expression litigieuse ne rentre pas dans le champ d’application des publications qui se verraient soustraites par l’article 17 de la Convention à la protection de l’article 10. (…) le message de fond visé par le requérant – la destruction de l’impérialisme américain – ne vise
Could it be argued that such a widening is only beneficial for a democracy? The case of *Jersild* highlights one of the practical significances of applying Article 10. The case concerned the conviction of a Danish journalist for aiding and abetting a group of young people in making abusive and racist remarks by broadcasting their views, amounting to incitement to hatred. The ECtHR implicitly seemed to refer to Article 17 as to the contents of the remarks, but the case was still considered under Article 10(2). A significant feature of the case therefore became obvious, that the programme was in the context of a serious discussion on anti-immigration views in Denmark. The programme’s purpose could not have been said to be the propagation of racist views and ideas, and hence the impugned interference was found to be unnecessary in a democratic society. Keane reflects, with regard to the Article 10/Article 17 dichotomy, that ‘the “balancing process” and analysis of the element of proportionality would have been removed if the case had been examined under Article 17; indeed, *Jersild* would not have passed the admissibility stage, and based on content alone, the Danish State would have been justified in prosecuting the journalist, irrespective of the context of the news piece’.

pas la négation de droits fondamentaux et n’a pas d’égal avec des propos dirigés contre les valeurs qui sous-tendent la Convention tels que le racisme, l’antisémitisme ou l’islamophobie.’.

132 Ibid 63.
134 Cannie and Voorhoof (n 29) 69.
135 Ibid.
136 Cannie and Voorhoof (n 29) 69.
4.3 Perinçek v Switzerland

*Perinçek v Switzerland* was the first case before the ECtHR concerning the denial of a historical event other than the Holocaust. The facts are outlined in Section I. Here, the judgment is discussed.

The ‘turning point’\(^{137}\) of this ruling lies in the fact that the Court examined the case pursuant to Article 10 of the ECHR. The application was decided through a balancing exercise, involving all interests at stake. Certainly, regarding the criticisms above, this is significant: the ECtHR applied the three-part test mandated by ECHR, and found that the interference was provided by law given that it had a legal basis in Swiss law, and that it sought to attain the legitimate aim of the rights of others. However, the necessity condition was not satisfied. Key to the Court’s refusal to apply Article 17 was the fact that Perinçek had not denied the massacre against the Armenians, but only the legal classification of ‘genocide’ given to those events. The notions of necessity and proportionality were also applied by the Court. The Court noted that while Holocaust denial cases arose in states which had experienced Nazi horrors and which therefore, to echo Pech’s phraseology, had a ‘special moral responsibility’\(^{138}\) to distance themselves from them, there was no direct link between Switzerland and the events that took place in the Ottoman Empire in 1915.\(^{139}\)

The Court distinguished *Perinçek* from the Holocaust denial cases, on the grounds that concrete historical facts had been

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\(^{138}\) *Perinçek* (n 15) para 243.

\(^{139}\) Ibid.
rejected (not simply their legal categorisations), and the negated historical facts had been clearly established. Holocaust denial, the Court said, ‘must invariably be seen as connoting an antidemocratic ideology and anti-Semitism’.\textsuperscript{140} Pech’s prediction that the Court would be reluctant to apply this reasoning to cases involving genocides other than the Holocaust has indeed manifested.

Lobba comments that the judgment is commendable in that it distances itself from the abusive and expansive application of Article 17. Pursuant to the case law, the application could have been summarily dismissed on the basis of Article 17, yet, the Court refined its jurisprudence and held that the abuse clause may be applied to negationism insofar as expressions are directed to incite to hatred or violence.\textsuperscript{141} This provision’s scope has therefore, been clarified and the Court has stood by its intention to confine its use to ‘extreme cases. However, although the Court’s approach in \textit{Perincek} does show evidence of a more context-based approach, whether or not it forecloses future abusive applications of the abuse clause remains to be seen. The Court, notably, did not question the exceptional regime with regard to Holocaust denial, nor exclude the possibility that this presumption could be applied to other forms of denialism.

\textbf{4.3.1 The ‘Holocaust Distinction’}

Despite the clarification, the approach employed by the Court was still problematic. It was forced to distinguish its own body of case law on Holocaust denial, which automatically presumes that denial constitutes incitement. This notion was

\textsuperscript{140} Ibid, para 253.
\textsuperscript{141} Ibid.
not analysed in the judgment, although the possibility of the ‘exceptional regime’ regarding Holocaust denial being applied to other forms of negationism was not excluded either. Nevertheless, drawing the distinction effectively created a hierarchy of genocide.142 Proper recognition was not given to the offensive nature of Perinçek’s statements – describing the atrocities, as an international lie and attributing blame to the Armenians are from benign. Belavusau argues that while criminal measures against genocide denial make little practical or normative sense, distinguishing the Holocaust in this way ‘gives the Turkish government a green light for fostering xenophobic, Turkic-centric identity’.143 The Court, he states, failed to acknowledge the existence of anti-Armenianism as a specific ideology prevalent amongst Turkish nationalists. Perinçek, he points out, is an active member of Talat Pasha Committee, an organisation concerned with the rehabilitation of a central military criminal responsible for the massacres of Armenians. It is difficult to see, then, how an admirer of Talat Pasha is any less anti-Armenian than a neo-Nazi fan of Heinrich Himmler is anti-Semitic.144

4.3.2 Perincek’s Wider Impact

Article 46 of the ECHR’s obligation to conform to the final judgment of the ECtHR only applies to the states that were parties to the proceedings – in this case, Switzerland. However, although they are not formally obliged to, other countries may abide by the Court’s findings if they find them

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142 Supra n 16.
143 Belavusau (n 19) 548.
144 Ibid.
to be persuasive and generalisable.\textsuperscript{145} Furthermore, principles established within the Convention system have a ‘special significance’\textsuperscript{146} for the EU, as they play a vital role in defining the fundamental rights, and it is respect for these fundamental rights that is a condition of the lawfulness of all EU measures.\textsuperscript{147} This leaves the question of the longevity of the EU Framework Decision.

Due to the Decision’s broad language covering all genocides, it could be declared null and void by the Court of Justice of the EU, if it is found to violate the right to freedom of expression as derived, in part, by the case law of the ECtHR. On the other hand, there may transpire to be no contradiction between the Decision and the Perinçek principles. After all, it does request the punishment of denialism only to the extent that the expression is directed against a person or group defined by race, religion or other grounds, and is carried out in a manner likely to incite to hatred or violence. In addition, the Decision allows EU Member States to further reduce the scope of the prohibition, for example, by requiring that utterances jeopardise public order or cause damage to others. However, it remains to be seen whether the Court of Justice of the EU will adhere entirely to the findings of this ECtHR judgment when called upon to interpret the Framework Decision.

\footnotesize{146} Ibid 75 .
\footnotesize{147} European Court of Justice, Kadi v Council and Commission, Grand Chamber, 3 September 2008, C-402/05 P and C-415/05 P, paras 283-284. See also Art 52(3) of the Charter of Fundamental Rights of the European Union.
IV. Beyond Memory Laws

Through an examination of the case law of both the HRC and the ECtHR, the problems inherent in memory laws are evident. The need to penalise speech that is likely to incite violence is undeniable, yet the overly specific nature of memory laws results in the dismissal of context considerations, as seen from the early jurisprudence of the HRC, and the ongoing approach of the ECtHR.

5.1 Generic Incitement Laws

The unqualified criminalisation of negationism at large ought to be ruled out, Lobba propounds, due to its excessive curtailment of freedom of expression.\(^\text{148}\) A possible option is to target denialism only when it is harmful, and to restrict punishment to conduct that is qualified by racist or discriminatory intent. This, however, still brings up the problem of unequal treatment of victim-groups. Furthermore, focusing on the perpetrator’s intent entails a degree of judicial discretion, which can lead to abuse. The lesser evil would seem to be the punishment of negationism only where it amounts to incitement i.e. a likelihood of harm occurring to the targeted group, concluded through the assessment of contextual factors.

In fact, the HRC’s General Comment No 34 ultimately means that concrete cases of Holocaust denial are only in certain circumstances punishable by a state, under generic

incitement laws based on Article 20(2) of the ICCPR. Only if a state can show concrete evidence that proves the likelihood of discrimination or violence resulting from the negationist speech act, will the speech act be punishable. When well crafted, such generic hateful incitement laws will steer the parties in an incitement case to ‘meaningful legal battles’, as questions of context will be key i.e. what was the likelihood that the speech at would leave to adverse action? In Gerd Honsik v Austria, the Austrian judicial authorities went to great pains to obtain third party expert information demonstrating the fact that Honsik, in his denial of the Nazi gas chambers, was of course wrong and could therefore be said to have carried out ‘National Socialist activities’ within the meaning of the National Socialist Prohibition Act. An investigating judge of the Vienna Regional Court appointed a contemporary history expert to prepare a report on the existence of the gas chambers, which was completed five years after the criminal proceedings against Honsik were instituted. Honsik was only convicted when the report had been finished. This case serves as a convincing argument in favour of generic incitement laws, as for all the good intentions of the Austrian judicial bodies, focusing on ‘incitement’ and ‘likelihood’ is preferable compared to content and the obvious falsehood of it, as in the present case the offender was only convicted after five years. Had he been convicted under a more generic incitement law, the court’s focus on the likelihood of harm occurring would have meant a far less lengthy wait.

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149 Temperman (n 75).
150 Ibid.
151 ECommHR, Gerd Honsik v Austria, App No 25062/94, admissibility decision of 27 February 1997.
152 Cannie and Voorhoof (n 29) 54.
Additionally, the illogicality of completely dismissing Holocaust denial under Article 17 on the basis of it being contrary to the ECHR’s underlying values, but not applying this same reasoning to expressions that incite violence, is difficult to overlook. The latter expressions are far more likely to render citizens in physical danger, and destroy their enjoyment of the rights that inform the ECHR. These kinds of expressions are consistently treated under Article 10(2), enabling the Court to consider all factual elements. If the abuse clause is not necessary to defend democracy against alleged calls for violent action, then surely it is also not necessary to defend democracy against negationist speech. Domestic laws should therefore aim to tackle incitement and model themselves after Article 20(2) of the ICCPR.

In 2011, the UN Office of the High Commissioner for Human Rights organised four regional expert workshops which resulted in the Rabat Plan of Action\textsuperscript{153}, a worldwide critical endeavour to conceptualise the prohibition of advocacy or hatred that constitutes incitement. It states:

Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable

\textsuperscript{153} Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.
probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.\footnote{Ibid, para 22.}

With its focus on context, the Rabat Plan of Action provides a good starting point for states to build upon such legislation.

### 5.2 Education

In 2009, the \textit{Terezin Declaration}\footnote{Terezin Declaration on Holocaust Era Assets and Related Issues, adopted by 46 countries on 30 June 2009 in Terezin (Czech Republic).} was approved by 47 countries at the Holocaust Era Assets Conference in Prague. In it, a number of recommendations geared towards repudiating Holocaust denial are made, among them for states to ‘support or establish regular, annual ceremonies of remembrance and commemoration, and to preserve memorials’\footnote{Ibid.}, as well as to ‘include education about the Holocaust and other Nazi crimes in the curriculum of their public education systems.’\footnote{Ibid.} Pech highlights that EU member states should find inspiration from this, and focus energy and resources on establishing and supporting education programmes about genocides and crimes against humanity in general.\footnote{Pech (n 46).} Education, scholarship, and advocacy are the central means through which to deal with negationism.
Conclusion

Despite the demeaning nature of negationist speech, narrowly tailored memory laws outlawing simple denial constitute a huge threat to freedom of expression, not least due to the categorical exclusion of speech acts falling under them from a contextual analysis under Article 10(2) ECHR. The Strasbourg Court’s jurisprudence is not yet on par with its UN counterpart, the HRC, which does employ a context-based approach, especially in light of its General Comment. The Strasbourg Court’s content-oriented approach and abusive application of Article 17 poses structural dangers, and does not appropriately consider proportionality or the balancing of interests. The example given to member states as a result of this practice is a cause for concern; as international instruments and their judicial interpretation as ‘higher’ norms can legitimise national practices, the ECtHR’s approach appears to suggest that certain restrictions are so blatantly permitted by European human rights standards that these need not be justified by any threshold of proof at a national level.159

Interestingly, the ICCPR also contains in its Article 5(1) an abuse clause, very similar to that of the ECHR. It was inspired by the same fear for totalitarian movements, yet it has only been applied once. The HRC’s jurisprudence is evidence of the fact that negationist speech can indeed be dealt with within the confines of international human rights law’s speech-protective framework; its context-based approach based on Article 19(3) of the ICCPR is an exemplary approach. The Strasbourg Court has shown traces of a similar approach, in its early phase as well as in its glorification cases

159 Cannie and Voorhoof (n 29) 72.
i.e. in *Lehideux* and *Leroy v France*, where traces of a contextual approach were found. The Strasbourg Court should attempt to move closer to the HRC’s approach, and the abuse clause should be viewed symbolically as a declaration in light of which the whole ECHR should be read: a strong ‘no’ to speech acts and activities contrary to the Convention’s values of democracy. However, before this conclusion can be reached about an impugned speech act, all factually and legally relevant elements of the case, with a particular focus on context and proportionality, must be taken into account. Indeed, it is context that is key: to treat all alleged hate speech under Article 10 of the ECHR, with an emphasis on the necessity test, is preferable from a human rights perspective, as an individual’s right to freedom of expression is upheld, so long as it does not constitute incitement.

Lobba posits that if Article 17 must be employed, the ordinary necessity test envisaged by Article 10 should be followed, and Article 17 should return to act as an interpretative principle, a ‘medium through which certain interests linked to democratic stability penetrate the balancing test conducted pursuant to Article 10’. Thus, the flaws of the guillotine approach would be avoided. The abuse clause would guarantee that states’ demands are given due consideration and an eventual rejection of an application would convey a clear-cut message against negationist speech. Furthermore, the Court would be able to take account of the historical, social and political context in which the expression was disseminated. The major benefit of this approach is that

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161 Cannie and Vorhoof (n 29).
162 Lobba (n 110) 251.
the scope of acceptable restrictions would differ from state to state and vary according to the event that is subject to denial, the impact of the expression being dependent on the historical and social conditions specific to the country in question.163 This is a commendable approach, as it recognises the importance of context – likelihood of harm, and whether a speech act does or does not incite and when no doubt rests on where, and when, it is uttered. Indeed, this approach is far more desirable than a blind, content-based ban, which is what narrowly tailored memory laws essentially seek to legitimise. Moreover, as societies are becoming increasingly multicultural, the norms of free speech cannot simply be answered in the boundaries of the nation state. In several societies in Central and Western Europe, a myriad of cultures, faiths and ethnicities are represented. Mass migration has meant that we now live in a world that is increasingly connected, and even if we are not physical neighbours, we are on the Internet. Thus, enacting narrow memory laws banning certain speech content without a regard for context can set society on a slippery slope, wherein more and more groups will demand legal recognition for their own respective histories. As Garton Ash puts it, now ‘everyone is in Rome and the Romans are everywhere’.164 Roughly the same time that Perincek was convicted in Switzerland for denying the existence of an Armenian genocide, Turkish writer Orhan Pamuk was prosecuted for saying that what happened to the Armenians was in fact genocide. What was state-ordained truth in Switzerland was state-ordained falsehood in Turkey. This highlights the issue with states directly legislating on historical truth. For this reason, generic incitement laws that focus on context and likelihood of harm are more appropriate.

163 Ibid.
164 Ash (n 17).
The question of whether a unique regime with regard to Holocaust denial is justifiable remains. It is difficult to accept that generic rules dealing with hate speech are not considered adequate to confront this issue. If the Court does, however, consider that Article 17 should undoubtedly be invoked in such cases, it should refrain from making declarations that legitimise such a unique regime in broader contexts. The judgment in Perinçek did to a certain extent settle this, by suggesting that the denial of historical atrocities other than the Holocaust is not presumed to incite, and so will be treated under the usual necessity test. Yet, in attempting to make a distinction of principle, the Court gave the impression of ‘picking and choosing’ within a hierarchy of genocides.

It is, in conclusion, unconvincing that memory laws are truly needed in order to prevent totalitarian regimes that threaten democracy. What should guide courts when deciding whether or not to restrict a speech act is whether it is truly necessary in a democratic society for the state to step in. In this regard, the models of denial, which penalise simple denial (i.e. without proof of incitement), are in complete conflict with the freedom of expression guarantees set out in international law. Even the German model, which is more in line with the incitement principle, and is arguably justifiable due to Germany’s ‘special moral responsibility’, seems inadequate in practice. Though content-based bans have their basis in the need to prevent public disorder and violence, they fundamentally underestimate the capacity of liberal democracies to dismantle negationist speech through counter-speech. Garton Ash makes the simple point that unless a state can prove that speech intentionally incites
crime, it has no right to ban it.\textsuperscript{165} One of the principles he lays out is: ‘We allow no taboos in the discussion and dissemination of knowledge’.\textsuperscript{166} He draws on the proposition enunciated by Mill in \textit{On Liberty}: if we genuinely want to discover the truth, then it must be through persuasive, and not coercive, means. Truth will endure, and be continually rediscovered, despite suppression.\textsuperscript{167} Demonstrably false statements, i.e. genocide denial, give the truth, in the words of Mill, a ‘clearer perception and livelier impression of truth produced by its collision with error’.\textsuperscript{168}

\textsuperscript{165} Timothy Garton Ash, \textit{Free Speech: Ten Principles for a Connected World} (Yale University Press 2016).
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The Prosecution of a Child Victim and Brutal Warlord: The Competing Narrative of Dominic Ongwen

Gamaliel Kan*

In 2007, UNICEF estimated that there were more than 250,000 children serving as child soldiers globally. The phenomenon of the child soldier defies criminal law’s binary characterisation of ‘innocent’ and ‘guilty’, and challenges prevailing moral prescriptions of ‘good’ and ‘evil’. The child soldier manifests as both ‘victim’ and ‘perpetrator’. This paper examines the effects of child soldiering on agency, and questions whether former child soldiers ought to be prosecuted for crimes committed in the continuity of their forced conscription. The case study focuses on former Lord’s Resistance Army’s (LRA) Commander, Dominic Ongwen. This article analyses the competing narratives of Ongwen as victim and as perpetrator before the International Criminal Court (ICC). The paper goes on to investigate how the Pre-Trial Chamber’s subscription to the ‘perpetrator’ narrative may jeopardise international norms aimed at protecting child soldiers, and dually how its acknowledgment of agency in the Ongwen case sets a strong message against impunity.
Introduction

He loved hunting birds... He would make a hole in a papaya fruit and use it to draw the birds... then he’d give the birds to the other children.¹

This is how Madeline Akot remembers her nephew, Dominic Ongwen. It is a fond memory of a man said to be responsible for the deaths of more than 345 civilians in 2009 during the Makambo Massacre in Congo.² Madeline’s memory of Ongwen is of a time shortly before he was abducted by the Lord’s Resistance Army (LRA) while on his way to school at only 10 years old. Like many LRA abductees, Ongwen was taught to kill, maim, and to fight against the Museveni Government.³ He was set apart from other abductees for his efficiency and loyalty, leading to his rapid promotion within

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the ranks of the LRA. In 2005, the International Criminal Court (ICC) issued arrest warrants for five of the top LRA commanders, including Joseph Kony, Vincent Otti, and Dominic Ongwen. On 26 January 2015, Ongwen appeared before the ICC for the first time.

Ongwen is the first person charged before the ICC with crimes he suffered himself as a child. He is a complex political victim, one who ‘participated in acts that victimise others, even themselves’.4 He complicates the simplistic narrative of the victim as ‘pure’ and ‘innocent’, and the perpetrator as ‘evil’ and ‘guilty’.5 As the Kemetic proverb expresses: ‘The tyrant is only the slave turned inside out.’ This paper seeks to explore the competing narratives of Dominic Ongwen’s case, his agency, and his prosecution before the ICC despite his status as a former child soldier. The first section of this paper looks at the different narratives of Ongwen’s case before the ICC and the dilemmas of the Court in subscribing to one narrative, with his monolithic status as a perpetrator neglecting to account for the effects of child soldiering on individual agency. The second section will discuss the defence of duress, determining Ongwen’s eligibility for duress by examining his agency. His entry into the LRA, the conditions he was subjected to and his actions within the ranks of the LRA will be considered in determining his eligibility for the defence. The final section concludes the discussion with a reflection on whether the ICC is correct to prosecute Ongwen despite his troubled history, and what can be learned from this case going forward.

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5 Ibid.
I. Ongwen’s Charges before the ICC

On 23 March 2016, the Pre-Trial Chamber II (Chamber) confirmed 70 charges of crimes against humanity and war crimes against Ongwen for crimes allegedly committed between 2002 and 2005, including: murder, conscription, the use of child soldiers under the age of 15, and sexual and gender-based crimes, including forced marriage, rape, and sexual slavery.  

The Defence presented two main arguments to undermine Ongwen’s criminal responsibility. They first argued that Ongwen remained a child soldier until the day he left the LRA in January 2015 because his early abduction, indoctrination, and his upbringing in an ‘environment of ruthlessness and duress’ disconnected him from the ‘social construct of normal society in Northern Uganda’, thereby suggesting that he failed to reach the mental maturity of an adult. Thus, they argued Ongwen should be excluded from any individual criminal responsibility considering he benefits from the legal protection afforded to child soldiers under international law. The fact that Ongwen was once a victim was not dismissed by the Prosecution; initially, Prosecutor, Benjamin Gumpert voiced his sympathy for Dominic Ongwen:

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6 Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-01/15 (23 March 2016) (Pre-Trial Chamber decision) <https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF> accessed 30 December 2017.

He himself, therefore, must have gone through the trauma of separation from his family, brutalisation by his captors and initiation into the violence... It may, therefore be as much sorrow as in anger that some of the accusations that the Prosecution brings against Dominic Ongwen are heard.8

Gumpert’s sympathy for Ongwen was short-lived. Referring to an episode where Ongwen spread false information on Mega FM, a local radio station in Gulu, claiming that he would release his soldiers, Gumpert noted, ‘Now [that] people are happy with what they heard over Mega FM, he will shock them by starting to kill civilians seriously’.9 He went on to claim that this representation of Ongwen was reflective of his true state of mind. Gumpert explained why Ongwen should be held accountable despite his troubled history:

The phenomenon of the perpetrator-victim is not restricted to international courts ... it’s familiar in all criminal jurisdictions. Drug dealers rarely boast serene, untroubled childhoods ... But this is no reason to expect that crimes can be committed with impunity ... Each human being must be taken to be endowed with moral responsibility for their actions. We have a choice

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9 Ibid 21.
... and when that choice is to kill, to rape, and to enslave, we must expect to be held to account.  

The second argument raised the defence of duress under Article 31(1)(d) of the Rome Statute (Statute). The Defence argued Ongwen did not voluntarily commit the alleged crimes, with his actions having been the result of the forced adaptation to the LRA’s brutal environment and indoctrination. The Defence claimed that Ongwen’s experience in the LRA was instinctive in that his survival depended solely on his compliance with the organisational rules under Kony’s leadership. It was argued that Ongwen could not then be held responsible as he could not have controlled the ‘ruthless environment’ he had been raised in since childhood.  
To counter this narrative, the Prosecution highlighted the organised and hierarchical structure of the LRA, and specifically, how Ongwen ascended the ranks of the LRA through his own initiative. The Prosecution emphasised Ongwen’s growth in power and authority with every promotion, and his use of that authority to ‘carry out operations and gain praise from the leader of the LRA’.  
Paolina Massidda, principal counsel of the ICC’s Office of Public Counsel for Victims, further undermined the Defence’s ‘victim’ narrative by describing intercepted radio communications in which Ongwen’s laughter could be heard following an atrocity. Massidda noted that his laughter represented ‘not the state of mind of somebody under duress, rather, […] the state of mind of somebody who is enjoying and proud of what he is doing’.  

11 Defence Brief (n 7) 50–57.  
12 Prosecution Transcript (n 8) 53.  
The Chamber dismissed both Defence arguments. It was held the first argument that Ongwen remained a child soldier until the moment he surrendered was without legal basis; the Chamber did not elaborate further. For the argument of duress, the Chamber held that there was no evidence indicating Dominic Ongwen faced any threats of imminent death or serious bodily harm, as Ongwen’s stay in the LRA, understood to be the source of the threat, was not beyond his control, citing that LRA escapes were not rare. The Chamber also held the Defence failed to demonstrate the necessity and reasonableness of Ongwen’s actions in order to avoid the supposed threat. Notably, the Chamber commented that ‘if… Dominic Ongwen could not have avoided accepting … forced wives, he could have avoided raping them… he could have reduced the brutality of sexual abuse.’

The two narratives of the case put before Chamber were significantly at odds. The Defence’s portrayal of Ongwen was contemplated with an understanding of his forced adaptation to circumstances beyond his control. On the contrary, the Prosecution’s portrayal of Ongwen was of someone endowed with agency, one capable of making moral choices despite his upbringing in a brutal environment.

The Chamber appeared to have adopted the Prosecution’s narrative of Ongwen’s case, viewing him as a rational individual who acted on his own initiative, with little reference to his abduction or childhood in the LRA. Despite the gravity of Ongwen’s alleged atrocities, he was a victim
prior to becoming a perpetrator; his entry into the LRA was involuntary, and he is arguably a product of the ruthless system forced upon him. In dismissing his victimhood in the assessment of his ‘agency’, the Chamber effectively rendered inadmissible any protections afforded to child soldiers in the Ongwen case. Ongwen was instead viewed as a voluntary member of the LRA, with an explicit focus on his conduct as an adult.

In the Lubanga judgment, the Trial Chamber acknowledged that child soldiers’ ‘experiences can hamper children’s healthy development and their ability to function fully even once the violence had ceased’. They also recognized that the ‘response to war-related trauma by... child soldiers... is complex and frequently leads to severe forms of multiple psychological disorders’, with the child soldiers often having ‘little skills to handle life without violence’. The effects of child soldiering in Lubanga were contemplated with continuity over time. In contrast, the effects of child soldiering were discontinued in the Ongwen case, implying somehow that the psychological effects of child soldiering had either stopped or had become negligible once Ongwen became an adult. As the Defence put it, ‘the crime of conscription of child soldiers is a continuous crime. It is inapposite to suggest that this crime ended the moment Dominic became 15 and has no impact’.

The complexities of child soldiering remain ‘a poorly understood scourge particularly susceptible to simplistic

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16 Prosecutor v Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, (Judgment) ICC-01/04-01/06 (10 July 2012) 39.
17 Ibid 40–41.
18 Defence Brief (n 7) [46].
thinking... entangled in the binary reductionism of criminal law’s categorisation of pure victim and ugly perpetrator.\textsuperscript{19} Thus, as the Ongwen case progressed to the Trial Chamber, it is crucial for the ICC to develop a standard for the defence of duress and to answer to uncertainties including: to what extent and under what circumstances should the impact of child soldiering be considered to have continued into adulthood? Should the duress defence be a mitigating factor or an exonerating defence for former child soldiers?

II. The Defence of Duress

Perhaps the most influential case regarding duress was the Erdemovic case, in which the Appeals Chamber of the ICTY rejected duress as a complete defence for the murder of civilians to ‘assert an absolute moral postulate... for the implementation of international humanitarian law.’\textsuperscript{20} The decision was not unanimous, with Judge Cassese dissenting to develop a four-part test for duress to constitute a complete defence.\textsuperscript{21} Cassese’s opinion has heavily influenced the drafters of the Rome Statute, particularly with the adoption of duress as a complete defence under Article 31(1)(d) of the Statute with a similar test as that identified by Cassese. For Ongwen to successfully raise the defence of duress under the Rome Statute, he must satisfy three requirements:


\textsuperscript{20} Prosecutor v Erdemovic (Joint Separate Opinion of Judge McDonald and Judge Vohrah) Case No. ICTY-96-22-S (7 October 1997) 83.

\textsuperscript{21} Prosecutor v Erdemovic (Separate and Dissenting Opinion of Judge Cassese) ICTY-96-22-S (7 October 1997) (Cassese’s Opinion) 16.
1) Threat of imminent death or serious bodily harm;
2) The acts are necessary and reasonable to avoid the threat; and
3) No intention to cause a greater harm than the one sought to be avoided.22

i. Threat of Imminent Death or Serious Bodily Harm

Ongwen must first demonstrate that he was under a threat of imminent death or serious bodily harm against himself or another person at the time the alleged crimes took place. This encompasses continuing threats. The threat must be real and not merely believed to exist by Ongwen only.23 In determining this, the environment Ongwen was subjected to in the LRA must surely be examined.

The LRA came into being under the leadership of Joseph Kony, aiming to topple the Museveni government and to rule Uganda under the Biblical Ten Commandments. Notorious for its abduction of children, the LRA seeks to raise ruthless fighters indoctrinated with loyalty to the cause, relying on the malleability of a young child’s morality.24 Once abducted, the children are made to forget their previous lives, reminded that escape is impossible, and raised to accept LRA beliefs and values. To inculcate loyalty, Ongwen was put in the home of Vincent Otti, LRA’s current Deputy Leader, who was at the time an LRA Commander.25 Like other abductees, Ongwen was forced to undergo brutal training to ‘initiate’

25 Baines (n 3) 7.
him into the LRA.\textsuperscript{26} His initiation included hard labour, long marches, frequent canings, beatings, and cleansing rituals which would entail blood tasting and rolling in the blood of the dead.\textsuperscript{27} Any violations of the LRA rules resulted in beatings or even death. Abductees were forced to witness and participate in beatings and killings of persons, usually of those who attempted to or were suspected of trying to escape. Displays of remorse or discontent with the LRA were cause for suspicion, and were punishable in the same way.\textsuperscript{28} This indoctrination of fear and violence sent a clear message as to how escapees would be punished.

An abductee described the torture experienced by escape suspects:

What they do first is, when you are still new, beat you about 500 times… Then they force you to watch terrible things… One of us was brought in front of us and killed there so that we could see… They force us to do it… anyone among you who tries to escape will be killed the same way… this might be the first time you see a person getting killed, this will-traumatise you and make you very afraid.\textsuperscript{29}

High-ranked combatants were also subject to threats of death or serious bodily harm. While the death of Vincent Otti has yet to be confirmed by the ICC, the Prosecution formally

\begin{itemize}
\item \textsuperscript{26} Ibid.
\item \textsuperscript{27} Ibid 8.
\item \textsuperscript{28} Ibid.
\item \textsuperscript{29} Ariadne Asimakopoulos, ‘Justice and Accountability: Complex Political Perpetrators. Abducted as Children by the LRA in Northern Uganda’ (Master’s Thesis, Utrecht University, 2010) 31.
\end{itemize}
acknowledged his death in her opening statement in Ongwen’s trial.\textsuperscript{30} This is consistent with the Vice-President of South Sudan Riek Machar’s testimony and witness statements before the ICC that Otti, along with three other LRA members, had been shot as ‘they were alleged to have been interested in escaping’.\textsuperscript{31}

These testimonies illustrate that orders from Kony constituted law, and were to be followed regardless of rank. Indeed, rank may be seen as mere survivability. As an abductee, Ongwen had been subjected to the brutal indoctrination and initiation training under the constant threat of death or serious injury. There is a strong case to suggest that these threats continued throughout his promotions within the LRA, up to and including his time as a Commander.

\textit{ii. Necessity and Reasonableness}

In establishing duress, Ongwen must further demonstrate that his actions were necessary to avoid the aforementioned threat, and that a ‘reasonable person’ in his position would have succumbed to and made the coerced decisions as he had done.\textsuperscript{32} The Prosecution’s narrative holds that Ongwen had ample opportunity to desert the LRA, in that he could have


\textsuperscript{32} Werle (n 23) 206.
‘order[ed] his troops to lay down arms and go home… after all... he didn’t have to fear the... brutal canings or peremptory executions he himself ordered.’33 Though it may be true that Ongwen possessed more authority relative to his comrades, any perceived opportunity to desert the LRA is certainly more complex than is presented by the Prosecution. As a child abductee, Thomas Kwoyelo shared a similar experience to Ongwen; he rose to the rank of an LRA Colonel before being captured by the Ugandan forces in 2009. Kwoyelo’s account of his experience in the LRA, even within his ranks, was likened to the relationship of a dog to its master.34 He recalled:

My master was Kony and everything I did came from Kony; the attacks, the ambushes, the abductions. When he tells you, ‘ambush a car there and come back with twenty-five new recruits’, you do it because otherwise he will kill you.35

Even as Kwoyelo rose through the ranks, he noted that an escape was not simple. High-ranked LRA combatants are more valuable insofar as they hold a greater degree of knowledge about the organisation; they are in effect a liability to the LRA in the event of desertion or capture. As such, they are often subject to stricter surveillance and are always accompanied by fighters, strictly spied upon by Kony.36 Kwoyelo described his situation as being ‘caught up between two deaths’ – either death in the bush or death trying to

33 Prosecution Transcript (n 8) 21.
34 Asmakopoulus (n 29) 49.
35 Ibid.
36 Ibid 32.
escape. It was also common for Kony to personally guard commanders’ ‘wives’ and children to discourage desertion. An LRA escapee recalled her conversation with Ongwen after he was injured in 2002, saying that ‘he felt very bad because the rebels threatened to kill him if he escapes; they also [told him]… his homestead would be burnt down.’ Even if Ongwen had the opportunity to escape, it is not unfeasible that he may have feared for the safety of his families or community. Indeed, LRA revenge attacks are common. This fear of retaliation is evidenced in victim testimonies:

...many abductees are very afraid for the revenge they [the LRA] take on your family when you escape. They keep records of all the abductees and their clans and go back to your community to kill for example your father as a punishment.

If I plan to escape, they will come to my village and kill many people to revenge. So what will my community think of me? “You escaped from the LRA and see what happened to us!” You know what negative consequences there can be for you or for your village once you escape.

The narrative that Ongwen ought to have escaped is evidently an oversimplification. His continued stay in the LRA and his willingness to kill, as highlighted by the Prosecution, may well have been a forced adaptation for survival in a brutal environment. Michael Wessells, a psychosocial and child protection practitioner at Columbia

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37 Ibid 49.
38 Baines (n 3) 14.
39 Asmakopoulus (n 29) 50.
40 Ibid 33.
University, has commented that child soldiers either ‘play stupid’ or ‘play smart’, and demonstrate their willingness to kill to avoid being killed and to secure better security, food, and quality of life in the ‘bush’.\(^{41}\) Although Ongwen may have ‘played smart’ and adopted the ‘bush mentality’ in his attempt to survive his brutal environment, it cannot be assumed that Ongwen genuinely embraced the LRA ideology in doing so. It may well be that Ongwen involuntary suppressed his moral sensibilities to create the illusion of assimilation in the LRA ideology. The distinction between these narratives ought to be a fundamental consideration in the determination of duress.

The Prosecution in \textit{Lubanga} recognised that in reality, child soldiers have no free will – indeed, ‘the oppressive environment deprived freedom of choice’.\(^{42}\) The same can be said for Ongwen.\(^{43}\) While other strategies may certainly have existed in surviving the LRA, Ongwen may have regarded the ‘play smart’ strategy as the most reliable and realistic. In such an approach, it had been necessary for him to adhere to the LRA ideology, to adopt the ‘bush mentality’, and to demonstrate a willingness to kill in order to guarantee his own safety, his families’, and that of his community.

According to Cassese, in assessing the reasonableness of one’s actions, ‘the various ranks of the military or civilian

\(^{41}\) Baines (n 3) 10.
\(^{42}\) \textit{Prosecutor v Thomas Lubanga Dyilo} (Opening Statement), ICC-01/04-01/06, 26 January 2009
\(^{43}\) Baines (n 3) 10.
'hierarchy' must be taken into account.44 Thus, Ongwen may be judged according to the standard of his rank as an LRA Commander.45 As a commander possesses more authority and assumes greater risk, Ongwen would need to demonstrate a higher level of resistance and acceptance of risk. This is challenging, as Ongwen was abducted against his will, indoctrinated and terrorised by constant threats. The structure of the LRA is different to that of a traditional military, as high‐ranked combatants enjoyed little autonomy in the hierarchal structure – the punishment for non‐compliance to Kony’s laws would be death regardless of title. While it is yet to be determined by the ICC, it is worthwhile noting that Ongwen ought to be considered a member of both the military and civilian hierarchies in the unique context of the LRA, given his involuntarily conscription and an overwhelming amount of psychosocial evidence concerning the absence of child soldiers’ agency.

The assumption for the defence of duress is that, ‘the ordinary person is too weak to refuse an order if there is a risk that he will be killed’.46 The Einsatzgruppen case and Cassese’s opinion suggest that in assessing the reasonableness of one’s actions, one does not need to ‘perform acts of martyrdom’ by sacrificing his life to avert the threat.47 The ICC should as such be cautious in applying the standard of the reasonable man to Ongwen’s case. Setting too high a standard for Ongwen would mean that the Court expects the ordinary and reasonable person to perform heroic

44 Werle (n 23) 209.
45 Cassese’s Opinion (n 21) 45.
47 Cassese’s Opinion (n 21) 37, 47.
acts. Such an approach would be fundamentally at odds with the purpose of the defence of duress. The Court ought to adopt a humane and realistic approach in assessing Ongwen according to the standard of the reasonable man. In doing so, it would need to contextualise his rank in the LRA and the agency of the child soldier such as to avoid imputing an expectation of heroism in the defence of duress.

iii. Proportionality of Harms

The final requirement for establishing duress is likely to be the most difficult for Ongwen to satisfy, as it requires that he demonstrate that he did not intend to cause greater harm than what he sought to avoid. This requires a proportionality test where the crimes committed must be deemed ‘the lesser of two evils’.48 If Erdemovic had been tried before the ICC, it is unlikely he would have satisfied this requirement as the murder of approximately seventy Muslim men is unlikely to constitute a greater harm than his own death.49 Similarly, in Ongwen’s case, the sheer number of civilian deaths from the attacks on the Pajule, Odek, Abok and Lukodi IDP camps is unlikely to constitute an intention to cause lesser harm. This is problematic, as satisfying the proportionality test would require a judge to balance Ongwen’s life against the lives of others, posing serious philosophical, moral, and legal challenges. As Judge Cassese pointed out, ‘how can a judge satisfy himself that the death of one person is the lesser evil that the death of another?’50

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48 Ibid 16.
50 Cassese’s Opinion (n 21) 42.
Judge Cassese did, however, point out that in an event where ‘there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does, then duress may succeed as a defence’.51 As discussed earlier, it is understood that Kony’s authority was absolute. If Ongwen is able to demonstrate that the attacks would have been carried out with or without him, as is likely the case, he may satisfy the proportionality test. Ongwen may argue that the brutal environment and the sheer number of abducted children in the LRA meant that if he refused to carry out the attacks, other abductees would have assumed his position and carried out the attacks. This would align with the position of several scholars, who attribute Ongwen’s rise in the LRA ranks to him simply outliving his superiors.52 For instance, the deaths of Ongwen’s superiors, including Brig. Charles Tabuley, Brig. Tolbert Yardin Nyeko, Brig. Acel Calo Apar, and Brig. John Matata, created a vacuum in field operations, which in turn forced Kony to promote Ongwen to fill the void.53 As of 2004, according to the UN Office for the Coordination of Humanitarian Affairs (UNOCHO), the LRA had abducted approximately 30,000 children since the 1980s.54 With this number of recruits at his disposal, it would not be inconceivable for Kony to simply replace Ongwen with someone who, like him, would succumb to the pressures of the LRA environment and carry out attacks as and when they are ordered.

51 Ibid.
52 Baines (n 3) 13.
53 Ibid.
All the same, there are aggravating factors in Ongwen’s case that certain work against his interest in claiming duress – namely, the signature brutality of his attacks, his participation in the planning of attacks at ‘Control Altar’, and his general conduct, particularly in his proposal to attack the Lagile camp in April 2003 through his own initiative. \(^{55}\) Witnesses have consistently described Ongwen as a champion of the LRA’s murderous campaigns. One witness claimed Ongwen stated that the LRA must attack and kill civilians in camps because they supported the Ugandan government and not Kony. \(^{56}\) Another witness claimed that Ongwen called for the killings of religious leaders who urged the LRA to enter into peace negotiations with the government, and that the LRA should, ‘sing one funeral song and kill all of the Chiefs and delegation that went there [to meet Kony for peace talks]’. \(^{57}\) Certainly, these testimonies are potent illustrations of a malicious intent to kill civilians. Ongwen may be seen to have failed to use all his powers to stop the attacks, and may further be found to have instigated them of his own volition.

The Trial Chamber is therefore likely to claim it would be too speculative to assert the victims would have died anyway, as Ongwen was a vocal supporter and was involved in the proposal and planning of the attacks. If Ongwen could not have prevented the attacks, he should not have, through his own initiative, participated in the planning and carrying out of the attacks. Without Ongwen’s proactive input, it could be reasonably understood that some of the victims would not

\(^{55}\) Prosecution Transcript (n 8) 28.
\(^{57}\) Ibid 202.
have been targeted and would have continued to live. As such, Ongwen may not be seen as having done all that he could to save the victims before yielding to duress.\textsuperscript{58}

It appears that Ongwen had adopted the ‘play smart’ strategy excessively, rendering the over-expression of his eagerness to be disproportionate to his survival. In this context, Ongwen may be seen as having embraced the LRA’s brutal ideology through his own initiative. His actions were aimed for him to thrive in the LRA, rather than simply to survive. His agency, though limited, should not be regarded as non-existent. By going the extra mile to plan and propose attacks and further brutalise what were already depraved attacks, Ongwen appears to have utilised whatever little agency he had to commit atrocious acts.

\section*{III. Mitigating Factors for Ongwen}

The defence of duress is highly unlikely to exonerate Ongwen from his alleged crimes. With that said, the Trial Chamber may be likely to use Ongwen’s claim of duress as a mitigating factor, as was the case in the ICTY Appeals Chamber’s approach to Erdemovic. A contextualised analysis of Ongwen’s childhood and his agency would need to be the cornerstone of the Trial Chamber’s judgment. The judgment must expand and elaborate on the psychological effects of child soldiering and the extent of its effects on the agency of former child soldiers in their capacities to make decisions.

With an estimated more than 250,000 child soldiers in the world, Ongwen’s story is not an isolated tragedy.\textsuperscript{59} His

\begin{footnotesize}
\textsuperscript{58} Cassese’s Opinion (n 21) 42.
\end{footnotesize}
experience is in many ways familiar to the thousands of current and former child soldiers trapped in the binary definitions of ‘victim’ and ‘perpetrator’. Despite this, our understandings of child soldiers and their individual agency remain insufficient. The Ongwen case will have an insurmountable impact on future proceedings that are likely to cement the approach to former child soldiers in international and domestic courts. This case provides an unprecedented opportunity for the ICC to develop an appropriate understanding of the effects of child soldiering and to develop a humane and realistic international standard for the defence of duress in these cases.

**Conclusion**

In Uganda, perspectives on justice concerning Dominic Ongwen differ drastically. One account suggests that ‘he is a victim of circumstances […] if the world wants to punish him twice, that would be injustice.’60 The countervailing sentiment suggests that,

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\text{... Ongwen should also be punished severely...}
\text{If things were to be done the Acholi way, then he should also be killed! That way his family would suffer just as we have.}^{61}
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61 Ibid.
There is no universal Northern Ugandan view on whether Ongwen should be prosecuted. While some view him solely as a victim, others regard him as a perpetrator, and indeed some others recognise his complex status as a political victim. Among those who recognise his special status, some prefer the local Mato Oput reconciliation mechanism, while others would prefer that Ongwen be tried before the Court with the promise of a lenient punishment. The debate largely turns on perceptions of ‘justice’, and whether justice ought to be restorative or retributive.

Prosecuting Ongwen before the ICC is a necessary step. While his agency may certainly be viewed as limited in the context of the alleged attacks, it would be incorrect to claim that he possessed no agency at all. Prosecuting Ongwen may act as a deterrent, sending a clear message to victims-turned-perpetrators that their victimhood will not excuse them from accountability for abhorrent actions. Perhaps more importantly, the ICC must use this opportunity to reiterate that the defence of duress is not intended to be used as blanket immunity for all complex political victims. The case of Dominic Ongwen serves as a moment of reflection for the world of international law, and for us all, to question the salience of the binary narratives of ‘good’ and ‘evil’, of ‘victim’ and ‘perpetrator’.

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62 Asmakopoulus (n 29) 44.
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Reclaiming Nigeria’s Natural Resource Frontiers after AG Federation vs. AG Abia & 35 Ors

Peter C Obutte* & Lilian Idiaghe**

Natural resource endowment is not a matter of choice for any country, though resource-rich States have a choice on how they appropriate and manage their resource wealth. Natural resource revenues are finite in nature and as such they require sustainable management and use. While it is necessary for the purpose of fiscal equities e.g., cohesion and promotion of harmony in sharing petroleum revenues between the Federal Government and the oil producing areas, lack of consensual fiscal model presents a challenge in a multi-level governance of a federal system such as Nigeria. Different sharing formulas have been employed over the years with same occasioning different reactions from the federating units. Resource control and allocation in Nigeria has been made particularly famous by the decision of the Supreme Court in Attorney General of the Federation v. Attorney General of Abia State and 35 others and the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 respectively. The far reaching implications of that decision and the Act include a grave delimitation of Nigeria’s territorial and natural resource frontiers as guaranteed under national and international law. The paper establishes that these frontiers have been
rolled backwards in the attempt to confer on the oil-producing states, less than what the Constitution guarantees them. The paper further argues that the proviso to Section 162 (2) on exploitation of Nigeria’s creates an impetus for the development of the nation’s other viable mineral resources apart from oil and gas on the one hand; and the need for the Supreme Court to revisit the decision in the best interest of the country.

Introduction

The optimum utilisation of natural resources requires credible management and administrative effectiveness. It has been noted that the first challenge facing any resource-rich country is ensuring the public is able to extract as much of the value of resources that lie beneath its land as possible. Even in countries with stable and mature democracies, there is an ongoing struggle by oil and gas and mining companies to seize as much of the wealth for themselves as they possibly can.1 The situation is no different in Nigeria, wherein the

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resource management function with respect to any particular industry becomes more complicated if the responsibility for national economic management and the agency for tapping the industry’s resources are separated, and more so if their interests are divergent. The politics of resource control has its genesis in the way revenues from petroleum-related economic activities have become the mainstay of the Nigerian economy, and as such, resource control has been described as Nigeria’s key fiscal federalism issue.

In fundamental ways, the politics and economics of Nigeria have been shaped by the control of revenues from oil. The Biafran War of the late 1960s was in part an attempt by the eastern region – predominantly Ibo – to gain control over oil reserves. Apart from the successive military dictatorships which plundered oil wealth, the most notable being General Sani Abacha, stories of transfers of large amounts of undisclosed wealth abroad are legion in Nigeria.

The Constitution treats natural resources as a national heritage, and economically, the Nigerian State is endowed with the requisite power over its resources. As an agent of development, the State appropriates and centralises surplus from export commodities in the name of accelerating

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5 T Shelley, Oil: Politics, Poverty and the Planet (ZED Books 2005) 59.
development.\(^6\) Thus, the theory and practice of ownership and control of mineral resources in Nigeria is that of absolute ownership and control in favour of the Federal Government of Nigeria. In this capacity, the Constitution reposes absolute ownership of all natural resources in Nigeria in the Federal Government.\(^7\) The Petroleum Act of 1969, the Land Use Act of 1978, as well as the proposed Petroleum Industry Bill, vest ownership of petroleum resources in the Federal Government. As a result, States have no legal rights to oil and gas reserves in their respective territories. Furthermore, the oil and gas industry is on the Exclusive List, and all laws in relation to this industry are drafted and enforced by the National Assembly at the federal level.

I. Federal Structure and the Politics of Resource Allocation

It is a general rule, albeit not an absolute one, that economic emphasis is the first concern of a federalist or quasi-federal system of government, as against political considerations.\(^8\) Moreover, federalism and resource control have been


\(^7\) Exclusive power to legislate on matters relating to ‘mines and minerals, including oil fields, oil mining, geological surveys and natural gas; including nuclear energy, is vested on the federal government. See generally, items 39 and 41, of Second Schedule, Legislative Powers, Part 1, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria (CFRN) 1999.

\(^8\) AB Akinyemi, PD Cole, W Ofanagoro (eds), Readings in Federalism (Nigerian Institute of International Affairs 1980) 247.
described as twins whom mutually complement each other.9 The fiscal relationship between the centre and the periphery, before and since the era of formal federalism in Nigeria, has been described as resembling the relationships between householder and housekeeper, or tantamount to a paymaster of the piper dictating the tune.10

Ethnic factors, considerations, and pressures also affect the mode of resource allocation and distribution in many ways. The most emphasis is placed on the ‘sharing of the national cake’,11 whilst less emphasis is placed on the production, or at least on the sustainability of the ‘cake.’ As such, it has been asserted that the interest of the Nigerian State, which represents an over-centralised federation consisting of the ruling elite from larger ethnic groups, is in continuously producing oil.12 It has even been proposed that oil revenues be transferred from the public to the private sector in order to reinitiate growth in Nigeria.13 However, the private sector is

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far from infallible and Gylfason makes the following analogy: ‘if judges prove corrupt, the solution is not to privatize the judicial system, rather the solution must be to replace the failed judges and reform the system by legal or constitutional means aimed at securing the integrity of courts’.14

Since the late 1940s, several criteria have been used to allocate revenue among the states. The principles adopted to date include derivation, fiscal autonomy, national interest, equality of states, population, balanced development, social development, and absorptive capacity. Other principles such as need, development, independent revenues, continuity of government services, financial comparability, fiscal efficiency, tax efforts, minimum national standards, and equality of access to development opportunity, have been used to attempt to devise a legitimate means of sharing centrally generated revenues.15 However, the principle of derivation has unequivocally attracted the most significant attacks and protestations.16 The principle contemplates that the receipt of revenue from the Federal Government by State should be proportionate to their contribution to the national revenue, though the principle has gradually been eroded.

Bureau of Economic Research Working Paper 9804  
The 1999 Constitution also provides a revenue-sharing formula that enables states that have natural resources within their territories to be entitled to a stipulated percentage of the revenue which accrues directly to the Federation Account from the exploitation of any such resources.

The Federal Government has created Special Accounts containing funds which are federally generated and to be paid into the Federation Account for vertical sharing among the three levels of government. Jega maintains that in a federal system, the contributions of a federating unit as a source of national revenue must be recognised such that in the sharing of revenues, a reasonable compensation proportionate to that contribution is granted. This is without prejudice to the imperatives of equality, need, and equalisation. The problem in Nigeria has been the total neglect of the derivation principle and the aggressive, if not reckless and insensitive promotion of other variables perceived to favour the North.

Moreover, MacMahon notes that federalism itself is a system of government well-suited for a country where there exists vast diversity and heterogeneity. It is best suited for a country where two or more groups differ in language or otherwise, or where a homogenous people are spread over a large area but share sufficient interests to enable action through a central government whilst leaving parts to be self-governing for important purposes.

\[17\] Jega (n 3).
\[18\] Ibid.
While the economics of Nigeria’s federalism is rather fascinating, in reality the bigger question is: why does federalism hold a special appeal for Nigeria and control for the federal government? The simple answer is that in the Nigerian model of federalism, which has evolved over time, control of the federal government determines the allocation of development resources. Given the evolution of the Nigerian federal structure over the years, constitutional recognition and prescription for the ownership of and control over resources can only be thought of as apt for a credible social order, such that in times of doubt, the constitution can stand above the fray and determine the ownership and quantity therein of said resources.

Nigeria is a federal state by virtue of Section 2(1) of the 1999 Constitution:

‘Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria.’

Subsection 2 of the same Section also provides that Nigeria shall be a Federation consisting of States and a Federal Capital Territory. Each tier is assigned respective spheres of jurisdiction by the Constitution, and in a federal system of government, the tiers of government ought to share political power as expressly stated in the constitution. As such, revenue is shared among these constituents of Nigeria; a common distributable pool account known as the ‘Federation Account’ maintains all revenue paid into and collected by the Federal Government.

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21 Ibid 2(2).
22 Section 162(1) of the 1999 Constitution (n 21).
It is imperative to note the constitutional roots of the politics of revenue allocation in Section 162 of the 1999 Constitution of the Federal Republic of Nigeria. In the wordings of subsection 2 of the article under reference, it is provided that:

the National Assembly shall take into account the allocation principles especially those of population, equality of states, internal revenue generation, land mass, derivation as well as population density; provided that the principle of derivation shall be constantly reflected in any approved formula as not less than thirteen percent of the revenue accruing to the federation account directly from any natural resource.²³

However, the lingering question remains: what exactly does the Constitution mean by the expression: ‘not less than thirteen percent of the revenue accruing to the federation account’?

The present formula for the allocation of revenue in Nigeria is heavily tilted in favour of the Federal Government. The formula for allocation since the commencement of democratic rule in 1999 is as follows: Federal Government – 48.5%, State Governments – 26%, Local Governments – 20%, and Special Funds 7.5%.²⁴ However, with the decision in AG Federation v. AG Abia State & 35 Ors,²⁵ the president modified the revenue sharing formula to transfer much of the percentage in special funds to the Federal Government, and as a result, the Federal Government now collects 54% of the allocation from the

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²³ Ibid 162(2).
²⁴ RJ Rotberg, Crafting the New Nigeria: Confronting the Challenges (Lynne Rienner Publishers 2004) 89.
Federation Account. The implication of the above position is that the concentration of excessive financial power at the centre potentially leads to abuse and erosion of the political and economic strength of its federating units. This has been identified as one of the deformities of the federal system as it operates in Nigeria, which necessitates the extortion, degradation, and consequent underdevelopment of the Niger Delta region. Ojefia identifies a pressing need for a re-examination and re-structuring of the federal system of government in Nigeria to reflect fair and equitable distribution of resources and an acceptable measure of autonomy at all levels of the constituent part of the federation.

II. Implications of Permanent Sovereignty over Natural Resources

The principle of Permanent Sovereignty Over Natural Resources as it stands today in international law is largely credited to the United Nations (UN); the UN has categorically been referred to as the mid-wife who birthed the principle. The principle is embodied in a number of Nigerian legislations which, in their promulgation, were aimed at appropriating this right on behalf of the Nigerian State. The Petroleum Act vests entire ownership and control of all petroleum under or upon any lands in the State, including land covered by water in Nigeria, under the

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27 Ibid.
28 Ojefia (n 12).
29 N Schrijver, Sovereignty over Natural Resources – Balancing Rights and Duties (CUP 2008) 399.
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territorial waters of Nigeria, or forming part of the
continental shelf. The Territorial Waters Act of 1967
confers on Nigeria sovereign jurisdiction of the open
sea within twelve nautical mines and declares it as
territorial waters of Nigeria. In the case of Fagunwa
v. Adibi, the Supreme Court defined ownership as:

Ownership generally connotes the totality of or
the bundle of the rights of the owner over and
above every other person on a thing. It connotes
a complete and total right over property. The
property begins with the owner and also ends
with him. Unless he transfers his ownership of
the property to a third party he remains the
allodial owner.

The constitutional power conferred to the Federal
Government to own and control the mineral resource
in Nigeria, which is rather absolute, has not been received
well in some parts of the country. Furthermore, Section 44
(3) of the Constitution vests within the Federal Government
of Nigeria overriding powers of control of the nation’s natural
resource revenue. It enacts:

Notwithstanding the foregoing provisions of this
section, the entire property in and control of all
minerals, mineral oils and natural gas in under or
upon any land in Nigeria or in, under or upon
the territorial waters and the Exclusive Economic

30 Section 1 Petroleum Act 1969, Cap P10, Laws of Federation of
31 Section 1(3) Territorial Waters Act, Cap T5 Laws of Federation
Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.\textsuperscript{33}

Over a decade ago, some state governors (precisely, governors of the south-south littoral states of Nigeria) proposed a revenue-allocation agreement in which they would be in a position to pay a certain percentage of revenue to the Federal Government. To require the Federal Government to relinquish control as the south-south governors indicated, would be to require a constitutional amendment of the above section to grant a measure of control to the state government. Apart from the agitation of the south-south governors, there have been other calls for and quests to control the vast mineral wealth of the south-south region of the country. The Kaiama Declaration by Ijaw Youths of the Niger Delta on 11 December 1998 purported to grant ownership of all land and natural resources within the Ijaw territories to the Ijaw Communities.\textsuperscript{34} In addition to such bold attempts, ethnic militias clamouring for self-determination have also arisen; notably the Bakassi Boys, Odua People’s Congress, and the Movement for the Emancipation of the Niger Delta.

Another pressing issue was the problem of the determination of the seaward boundary of a littoral state for the purpose of determining what constitutes the constitutionally guaranteed minimum of 13\% derivation. In 2001, the then Honourable Attorney General of the Federation, late chief Bola Ige, filed a

\textsuperscript{33} Section 44(3) of the 1999 Constitution.

lawsuit requesting the Supreme Court to determine the seaward boundary of a littoral state within the federal republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that state, pursuant to Section 162 (2) of the Constitution of the Federal Republic of Nigeria, 1999. The Section enacts that:

The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density.

The plaintiff argued persistently that the boundary ends at and does not extend beyond the low water mark of the sea, and that accordingly, the area of the sea up to 12 nautical miles from the low-water mark, denominated as territorial sea with its bed and sub-soil, is not part of Nigeria’s territory. This Section further enacts a proviso:

[P]rovided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.

36 Section 162(2) of the 1999 Constitution (n 21).
37 Ibid.
The principle of derivation, as contained in the above portion of the Nigerian Constitution, places the strict constitutional minimum at 13%, leaving the maximum allocation at the discretion of the National Assembly. Furthermore, the revenue accruing from the Federation Account comprises revenue from natural resources, including petroleum resources, whether exploited on-shore or off-shore; the governors had contended that the revenue from off-shore petroleum resources have not been included by the federal government, which ought not to be so seeing as it forms part of their respective states. The Supreme Court, in a lead judgement by Ogundare JSC (as he then was) of blessed memory, rejected the position taken by the eight littoral states – Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Lagos, Ondo, and Rivers, whilst affirming the contention of the Federal Government.

Acceptance of the territorial sea as part of Nigeria’s territory presented a dilemma for the Federal Government and the Supreme Court, as it would have meant accepting that it is also part of the territory of the littoral states and thus conceding their claim to 13% of the oil revenue derived from it on the principle of derivation as provided under Section 162(2) of the Constitution. The littoral state had contended that, ‘Nigeria consists of the aggregate of the territories of all 36 states of the federation and the FCT and that Nigeria cannot as such constitutionally have any other territory outside this aggregate.’

Their contention is sound and irrefutable. The only way to defeat the claim of the littoral states to a 13% share of the off-shore oil revenue and extricate the Federal Government and

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38 AG Federation v AG Abia State & 35 Ors, 713.
the Supreme Court from the dilemma was to deny the territorial sea, with its bed and subsoil, as part of the territory of Nigeria and, *ipso facto*, of the littoral states.\(^{39}\) However, having held that the territorial sea is not part of the territory of Nigeria, and consequently, of the littoral states, and that littoral states are not entitled to any share of oil revenue derived therefrom, it should also follow that Nigeria as a federation is not entitled to such revenue either.\(^{40}\) This created another dilemma for the Federal Government and the Supreme Court, from which they sought an escape route. The Court had to rely on a plethora of past and current legislations including the Nigeria (Constitution) Order-in-Council of 1951, the colonial Northern Region, Western region and Eastern Region (Definition of Boundaries) Proclamation of 1954, and the Constitutions of the Federal Republic of Nigeria 1960 and 1963 respectively. The Court found a weak and unconvincing route of escape in the sovereignty conferred on Nigeria by Article 1 of the U.N Convention on the law of the sea 1982, which provides that:

> ‘The sovereignty of a state extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea..., up to 12 nautical miles from the low-water mark with its bed and subsoil.’\(^{41}\)

This provision of Article 1 has been given effect in Nigeria’s municipal law by three statutes: the Territorial Waters Act, Exclusive Economic Zone Act, and Sea Fisheries Act.

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\(^{39}\) Nwabueze (n 35) 9.

\(^{40}\) Ibid.

Based on the provision of Article 1 of the Convention and the local statutes giving effect to the convention in Nigerian municipal law, the Supreme Court upheld the government’s claim to sovereignty over the territorial sea and the oil revenue derived from its bed. By this decision, the Supreme Court contradicted itself; it affirmed Nigeria’s sovereignty over the territorial sea and at the same time declared that the territorial sea does not form part of the territory of Nigeria. Nwabueze posits that even on the erroneous premise that the seaward boundary of Nigeria is the low-water mark of the sea, the littoral states remain entitled to the prescribed 13% of revenue from off-shore oil revenue upon a purposive interpretation of the ‘principle of derivation’ under the proviso to Section 162 (2) of the Constitution.42

As it is, the proviso is clumsy and leaves open for argument whether the ‘principle of derivation’ applies solely to revenue from natural resources located within the territory of a state or whether it applies only to revenue from natural resources located in the seabed and subsoil contiguous to the land territory of a state. Thus, in failing to make any reference to the physical location of the natural resources to which the ‘principle of derivation’ is applied, the proviso creates a problem of interpretation.43

Apparently taking it for granted that, beyond dispute, ‘derivation’ could only refer to revenue from natural resources located within the land territory of a state, the judgement of the Supreme Court proceeded on the basis that it was to determine the boundary of the littoral states, and that this would in turn provide the answer to the matter in dispute. The Supreme Court therefore erred in treating the

42 Nwabueze (n 35).
43 Ibid.
case as one for the determination of boundary, as was expected by the Federal Government, rather than one for the interpretation of Section 162(2), which, when properly and purposively construed does not require the determination of boundary. Similarly, it has been expressed that while on its surface the determination sought by the Federal Government appears to be restricted to merely resolving the seaward boundary of the littoral states, the actual dispute concerned the ownership of the offshore as between the littoral states and the Federal Government.

Nwabueze further notes that the Court worsened a problem it could have easily solved. The Court’s decision exposed the yawning gap created by the absence of a revenue allocation formula pursuant to the Constitution. Shortly after this decision, the Federal Government initiated the On-Shore Off-Shore Dichotomy Abolition Bill at the National Assembly. In the heat of realising the erroneous position and the doubtful reason behind the Court’s decision, based on what it termed a ‘political solution’ to the crisis emanating from the judgment, the President appointed a Presidential Committee to find such a solution. The Committee recommended a legislative intervention in the form of an enactment by the National Assembly, that the natural resources found offshore be deemed to have been found within the territory of the adjacent littoral states for the purpose of the application of the derivation principle.

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45 Nwabueze (n 35).
Pursuant to this recommendation, the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004, which represents a reversal of the mistake of the Court’s position, was enacted. It enacts the following in its only section:

1 (1) As from the commencement of this Act, the two hundred metre water depth Isobath contiguous to a State of the Federation shall be deemed to be a part of that State for the purposes of computing the revenue accruing to the Federation Account from the State pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 or any other enactment.

(2) Accordingly, for the purposes of the application of the Principle of Derivation, it shall be immaterial whether the revenue accruing to the Federation Account from a State is derived from natural resources located onshore or offshore.46

The decision of the Apex Court has delimited Nigeria’s seaward boundary at low-water mark, but not without consequences. The rule in customary international law entrenched by Article 3 of the United Nations Convention on the Law of the Sea 1982, is that ‘the sovereignty of a state extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea..., up to 12 nautical miles from the low-water mark with its bed and subsoil.’47 To ameliorate the damaging effect of

the SC’s decision to the territorial sovereignty of Nigeria, Nwabueze recommends that a new subsection be added to Section 3 of the Constitution, to read as follows:

‘It is hereby declared that the territorial sea, with its bed and subsoil, is part of Nigeria’s territory.’

This recommendation is laudable given the reality that the abolition of on-shore/off-shore dichotomy does not salvage the damage done to Nigeria’s territorial sovereignty, rather, it seeks only to take the revenue from the off-shore resources out of the reach of the governor of the littoral states, whilst accruing such revenue to the Federal Government of Nigeria despite the Court’s judgment operates to disentitle Nigerian State to such resources. While the Court’s decision and the 2004 Act provide short-term relief, long-term damage subsists at the international level.

With the dichotomy between on-shore and off-shore mineral resources abolished, as it concerns allocation of revenue from the Federation Account, it would seem that the disgruntled voices have been silenced. However, the almost perpetual uprisings in the Niger Delta region tell otherwise. It is on this note that Jega recommends Nigeria must go beyond the Supreme Court decision in AG Federation v. AG Abia and Ors. to seek a political solution to the problem of resource-control, by establishing an acceptable balance between derivation, equity, and national interest. He propounds at least 40% of the revenue accrued from petroleum-related activities should go to the oil-producing states. This would not only ensure the development of these areas, which is commensurate with

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48 Nwabueze (n 35) 21.
49 Jega (n 3).
the negative effects of oil exploration and exploitation, but
would also raise competition in non-oil producing states such
that no natural resource is left fallow. Nigeria has numerous
viable mineral resources, and Section 162 of the Constitution
specifically uses the phrase ‘from any natural resource.’\textsuperscript{50} This
opens the door to full exploitation of Nigeria’s other natural
resources besides oil and gas. Nigeria’s viable mineral
resources include: coal, lignite, tin, columbite, wolfram,
uranium, mica, gold, rutile, barite, lead-zinc, graphite, talc,
asbestos, diatomite, fireclay, kaolin, iron ore, limestone,
bitumen, marble, phosphate, thorium, gypsum, glass sand,
Kaolin, manganese, barites, and salt.\textsuperscript{51}

\textbf{Conclusion and Recommendations}

A crucial aim which resource control must achieve is
guaranteeing the equitable and judicious use of aggregate
revenues accruable to each level of government towards
economically developing the Nigerian population. If nothing
can be done with little, certainly much can be done with
more. It appears the ownership and control of natural
resources is constitutionally vested in the state, because it
stands as a custodian and in a position to seek the common
good of its citizenry. Therefore, ensuring that the wealth
accrued from natural resources improves the quality of life of
the people must become a priority for the government.

\textsuperscript{50} Section 162 of the 1999 Constitution (n 21).
\textsuperscript{51} Business Day, \textit{Solid Minerals and Nigeria’s Economic
Development} (2009)
accessed on 18 April 2018.
What becomes of Nigeria when the country’s oil becomes insignificant in the international market? As Sheikh Ahmed Zaki Yamani, the former Saudi Oil Minister, famously said in June 2000:

‘The Stone Age came to an end not for a lack of stones and the Oil Age will end, but not for a lack of oil.’

It is apt to state that the amount of revenue is not as paramount as how it is used. Resource allocation becomes as important as resource utility if economic and social transformations must be achieved by way of wealth accruing from resources. Stiglitz goes with this view when he notes that the second task facing developing countries is the use of wealth accruing from resources well after the first challenge, which is ensuring the public gets much of the value of the resources that lie beneath its land as possible.

The National Assembly cannot afford to play the sitting duck when issues of territorial sovereignty are at stake. Ten years following the decision, the legislature have failed to revisit the delimitation of Nigeria’s territorial and natural resource boundaries by the decision, either by way of amending the constitution or the Abolition of Dichotomy Act. In terms of the delimitation, it is recommended that there should not only be a stipulated minimum but there should also be a constitutional maximum, such that the maximum is not left to the discretion of the Federal Government. This can be achieved via a constitutional amendment or a credible revenue-sharing legislation, wherein the modalities for sharing federally generated revenue among states are explicit.

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52 Fagegan (n 2).
53 Stiglitz (n 1).
The Supreme Court should also revisit this decision; seeing as it has created irreconcilable conflicts with a plethora of legislations. A clarification of the derivation principle to include on-shore and off-shore natural resources is imperative. Further, had the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 read ‘I (1) As from the commencement of this Act, the two hundred metre water depth Isobath contiguous to a State of the Federation shall be deemed to be a part of that State’, it would have salvaged the damage done by the decision of the Supreme Court.54 However, the second part of the section, which reads: ‘for the purposes of computing the revenue accruing to the Federation Account from the State pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 or any other enactment,’ failed to utilise the opportunity to bring clarity to the situation.55 Therefore, it would be a better option to equally amend the Act.

Nigeria’s other viable resources should be equally exploited to create income for their host-states. This flows from the potential of the proviso to Section 162 (2), and the effect of such exploitation, would generate more income for the states and the country as a whole.

54 Section 1(1) Allocation of Revenue Act 2004 (n 46).
55 Ibid Section 1(2).
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The Turkish Revolution of 1926:
The Transition Process of Family Law from
Ottoman Legal Heritage to Turkish Civil
Law

Irfan Cicekli*

The legal revolution of 1926 in Turkey, marked by the promulgation of the new Civil Code, has been seen as a different and even special instance by some scholars. The main reason lying behind that assumption is the fact that it was a voluntary adaptation as opposed to the majority of instances where legal diffusion occurred through colonisation. It was also seen as revolutionary since it brought marginal changes in the area of family law and it will be discussed to what extent this revolution has been characterised as completely liberating and a certain cut-off from the Ottoman legal history. This paper will critically examine the validity of such claims, by analysing the changes that have occurred since the Ottoman period until very recently. The methods used in an attempt to bring Turkey in line with other modernised states, along with the implications to society, will be scrutinised.
Introduction

In a highly famous speech, Mustafa Kemal Ataturk stated that the correct path for the newly formed Turkish Republic is the road of civilisation. It is a common perception among many Turks that the Kemalist revolution of 1926 was, in fact, the ultimate tool for such a civilisation and led to a complete and clear break from the Islamic Ottoman past. However, when the socio-legal analogy is analysed, it is seen that the Turkish legal transplantation is far from a decisive easy-going process as it has been advertised. This paper will analyse the Turkish experience in order to test the validity of the perception that the Turkish legal revolution was a complete cut-off from the past Islamic and cultural norms. The first chapter will look at the theoretical background behind the Turkish legal transplantation and explain why Turkey has been seen as a special instance and why the focus in the area of family law. The second chapter will analyse the modernisation and secularisation efforts in the Ottoman period to demonstrate that the 1926 revolution was not the first modernisation effort in Turkish history. The third chapter will look at the power dynamics at work in the Code’s transplantation and the extent to which it eliminated the norms and rules that were deemed outdated by the founders of the Republic. The fourth chapter will analyse the implications of the revolution from the early days of the Republic until the end of the 20th century to see the reaction of the normative orderings embedded in the society towards change, and whether there was any resistance to official law. The fifth chapter looks at the new Civil Code of 2002 and analyses whether the effects of Ottoman-Islamic legal heritage can still be found despite numerous reforms in areas such as gender equality and marriage. Throughout the course of the discussion, it will be shown that the lines between the past and present, old and new, and the realities of change
before and after the revolution are neither as clear nor as
definite as the hegemonic narratives may suggest.1

1. Theories and Background

A legal adaptation can take place in a number of different
ways. It can be imposed, planned, unplanned, a deliberate
effort, or a result of convergence or divergence.2 Turkey’s
case of adopting the Swiss Civil Code was surely not a case of
an unplanned or an enforced one. As stated by the Minister
of Justice, Mahmud Esat Bozkurt, the intention was not a
simple reform but rather a revolution of law.3 Legal reform
was the central mechanism of the Kemalist Revolution and
codification was the main method of legal reform.4 By 1926,
an entirely secular legal system was put in place and it is
argued that the law was aimed at changing behaviour in the
hope that attitudes would follow.5 The aim was to build a
new national identity and the chosen mode was legal
transplantation.

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1 Seval Yildirim, ‘Aftermath of A Revolution: A Case Study of
2 David Nelken and Johannes Feest, Adapting Legal Cultures (1st
3 Bozkurt ME, *Turk Medeni Kanunu Nasil Hazirlandi?* [1944] in
  Bozkurt G (tr), ‘The Reception of Western European Law in
  Turkey (From the Tanzimat to the Turkish Republic, 1839-1939’
4 Yildirim (n 1) 356.
5 Elise Boulding, ‘Foreword’ in Nermin Abadan-Unat (ed),
  *Women in the Developing World: Evidence from Turkey*
  (University of Denver 1986).
1.1 Legal Transplants

The nature and the very possibility of legal transplants have long been subject to much attention from comparative scholars. Watson⁶ argues that transplanting is, in fact, the most fertile source of development; thus, the majority of changes made to legal systems result largely from borrowing from one source to another. According to Watson such transplants are socially easy and have been common during the course of history in becoming part of its ‘receiving body’.⁷ Legrand⁸ on the other hand, criticises Watson, stipulating that no such transplants are actually feasible and every legal rule and doctrine is inextricable from its original embedded interpretive fields. Legrand goes as far as to say that the rules cannot travel, thus insinuating that legal transplants are impossible.⁹ Both positions are problematic, as the former tends to present entire codes as detachable from their operational milieu, whereas the latter seeks to fasten even the most marginal and easily isolatable legal rules to the sociolinguistic systems from which they first emerged.¹⁰ If one were to analyse the Turkish legal experience from both ends of the spectrum, it seems that the Kemalist ideology behind the Republic would not oppose Watson’s definition, as their aim was to achieve a complete break from the

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⁷ Nelken and Feest (n 2) 22.
⁹ Ibid 62.
Ottoman-Islamic legal tradition by transplanting the Swiss Civil Code. It is indeed that sense which Orucu uses to describe the Turkish experience as ‘a historical episode’, since the new legal system was legislatively created and history was made irrelevant in the face of the legal system. Thus, it was a wholly unique example of the complete passage from one legal family to another in which the bases of the old legal system were completely displaced.12

1.2 Turkish Experience

The promulgation of the Turkish Civil Code of 1926 has long been celebrated as an exceptionally impeccable instance of legal transplantation.13 However, social engineering through law is not simple but rather a contentious matter and one cannot easily ignore that alternative normative orderings in society and resistance to official law are always issues at stake.14 Legal instrumentalism has been heavily debated and one can look at Moore’s semi-autonomous theory in which

she explained why new laws do not necessarily effectuate as direct a change as anticipated. According to Moore, social reality is a peculiar mix of action congruent with rules and other actions that are discretionary and manipulative. Although unofficial law does not always exist in direct opposition to official law, it is argued that the official state law alone cannot deal with social problems and has a limited capacity to enforce social change. However, a state can undertake a process of legal importation in an attempt to establish a clean legal sheet. As it was in the case of Turkey, the elite of a country may decide to transplant a law or a legal system entirely to procure the social transformation of the society. However, as emphasised, the existence of other norms competing against the state law, such as Shari’a, is quite natural. Bearing in mind that the radical aim of the Turkish elite was to transfer the society as a whole, it is only natural that there would be some resistance from religious precepts and ethical imperatives that influence both the official and unofficial law. Therefore, it would rather be overly simplistic to see the Swiss Code’s reception as another direct way of transfer from an advanced parent system to a less developed one, which has made a clear break with the past. One must closely analyse the struggle between Ottoman Islamic and Swiss Legal traditions as well as their interaction in the area of family law, which reveal the most intriguing debates.

16 Ibid 3.
17 Yilmaz (n 14) 14.
19 Yilmaz n (14) 29.
1.3 Family Law

The reason why the Kemalist reception in Turkey has been seen as exceptional is because it included marriage and other important areas of personal law.\textsuperscript{21} Although Twining agrees that there is some value in these distinctions, he states that they need to be treated with caution.\textsuperscript{22} Not surprisingly, family law has attracted much attention, as the adaptation of the Swiss Civil code was an extreme example of differences in culture and conditions between the exporters and importers of personal law.\textsuperscript{23} Those who look favourably on the Republican Turkish adaptation usually refer specifically to the adaptation of the chapter on Family law from the Swiss Civil Code.\textsuperscript{24} It was indeed “the Family law, they say, which Ataturk truly revolutionized” and it was family law that wrenched Turkish society away from its established essential roots and which was greatly responsible for turning Turkey into a vassal of Europe by detaching the Republic from its Ottoman past.\textsuperscript{25} Yilmaz,\textsuperscript{26} notes that the transformation of society starts with the smallest unit of family and the radical reforms in the area of family law were therefore introduced for such purposes. Toprak,\textsuperscript{27} notes that such an attempt was perceived vital by the Kemalists because of the importance of

\textsuperscript{22} Ibid 29.
\textsuperscript{24} R Miller, ‘The Ottoman and Islamic Substratum of Turkey’s Swiss Civil Code’ (2000) 11 Journal of Islamic Studies 344.
\textsuperscript{25} Ibid 344-345.
\textsuperscript{26} Yilmaz (n 14) 97.
\textsuperscript{27} Binnaz Toprak, Islam and Political Development in Turkey (Leiden EJ Brill 1981) 54.
family in passing dominant cultural values to the upcoming generations and the aim was to culturally transform the society. The purposeful action of supplanting Muslim family law with secular law was taken in order to form an egalitarian relationship within the domestic household. As one of the last bastions of Islamic law, family law is the most resistant area to secularisation. There are two key perspectives that attributed to the success of the Turkish promulgation of the Swiss Civil Code. Both sides derive support for their arguments specifically from family law. Those who see the Turkish experience as a successful instance, that brought the country in line with the ‘civilised European states’, may praise the adaptation of a secular family law system. Conversely, those who see the Turkish experience as a failure in completely eradicating the past may argue that the legal revolution has fallen short in the area of family law. It is not this writer’s aim to argue whether the Turkish experience was a complete success or a failure, as that would be a narrow way of approaching the issue. Such perceptions and sentiments have the consequence of overlooking the power dynamics at work in the Turkish Civil Code’s drafting and introduction. One must also analyse the Code’s interpretation and application, as well as tracing the reforms back to the late Ottoman period. It is only then, I believe, that one can appreciate the Turkish promulgation in a more comprehensive manner as the modernisation efforts neither began nor ended in 1926.

2. Ottoman Period

29 Ozu (n 10) 1.
One can see Western law’s influence in Turkey for a period of about one hundred and fifty years before the establishment of the Republic. It must first be noted that the Ottoman law was based on the principles of Islamic law and the principles of fiqh. The Ottoman Empire had a dual legal system, which was comprised of Shari’a, or Islamic law, and the Kanun (rule) as the state law. Shari’a is a divine law embedded in the Qur’an (Islamic Holy Book) and Sunna (the acts of the Prophet) and there are no set laws of Shari’a, rather, a body of texts providing an authoritative basis for Islamic legal thought and practice. Moreover, Fiqh is the human understanding and interpretation of the Shari’a in space-time. Although Shari’a covered most areas of personal relations, there was a need for more expansive and detailed laws encompassing other areas of life. Thus, the Ottoman state created another kind of law, which was the Kanun, mainly for agrarian and criminal regulations where the Shari’a was silent or impractical.

2.1. Positive Law

Kanun, as a secular law, was an independent category of law derived directly from the sovereign will of the ruler.
Although Kanun was unmistakably a positive law, it must be noted that it could not contradict Islamic principles.\textsuperscript{36} Although the concept of a positive law was revolutionary to some extent, it had a limited effect as it had to be consistent with Islamic principles.\textsuperscript{37} Furthermore, Gerber\textsuperscript{38} notes that the penalties derived from the relevant Kanun were rarely, if ever, applied. Nevertheless, if one were to look at the substance of Kanun, the very existence of some sort of positive law not deriving directly from Shari‘a was vital for the further reforms in the period following the mid-nineteenth century.\textsuperscript{39} It is also noted from the study of fatawa and the Ottoman law that many points of law were interpreted by the Turkish juris consults (muftis) in accordance with secular necessities rather than with the doctrinal principles of the fiqh.\textsuperscript{40} Therefore, it seems there was a certain level of familiarity, albeit limited, even within the Ottoman legal system towards secular originated and positive rules from its own legal history. This existence was very important for reforms in the period following the mid-nineteenth century.\textsuperscript{41} Geber notes that the early nineteenth century was the last historical moment in the late Ottoman period when the traditional Islamic legal system may be said to have still been undiluted by Western culture.\textsuperscript{42} As Ottoman intellectuals began to engage with Western ideas of

\textit{Modernization in Japan and Turkey} (Princeton University Press 1964) 57.
\textsuperscript{36} Turgut Akpinar, \textit{Turkler’in Din ve Hukuk Tarihi (The History of Religion and Law of Turkey)} (Istanbul Iletisim Yayinlari 1999) 184.
\textsuperscript{37} Yildirim (n 1) 351.
\textsuperscript{38} Haim Gerber, \textit{Islamic Law and Culture: 1600-1840} (Vol. 9 Brill 1999) 18.
\textsuperscript{39} Yildirim (n 1) 352.
\textsuperscript{40} Yilmaz (n 14) 90.
\textsuperscript{41} Yildirim (n 1) 352.
\textsuperscript{42} Gerber (n 38) 1.
democracy and secularism, the realisation of the need for reforms has led to the permeation of Western-influenced reforms into Ottoman law during the Tanzimat Period.43

2.2. Tanzimat Period and Majalla

The main instrument of the Tanzimat reforms was the Gulhane Charter, which was a written text applicable to all subjects of the Empire, and this equality in application perspective was exactly the reason why the Charter was seen as revolutionary.44 It was then replaced by the Hatti Humayun of 1856. The significance of these is derived from their codified nature, as it is argued that the act of codifying involves a process of selection and eradication of laws and as such the codification process increases and highlights the positive nature of the new codified law.45 One must treat such evaluations carefully as codification alone would not necessarily lead to such positive results and codification might not always be considered a secular act. However, as noted by Berkes, it can be said that the Tanzimat era efforts of codification involved a certain level of secularism.46 The Tanzimat or the Great Reform period was inaugurated in 1839 by Sultan Abdulmecid’s proclamation of the Hatti Sharif of Gulhane, stipulating basic equality for all Ottoman subjects regardless of religion or ethnicity.47 During the entire Tanzimat period, the Majalla (Ottoman Civil Code) was one of

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43 Serif Mardin, The Genesis of Young Ottoman Thought: A Study in the Modernization of Turkish Political Ideas (Syracuse University Press 2000) 8.
45 Yildirim (n 1) 353.
46 Berkes (n 44) 168.
47 Magnarella (n 31) 284.
the most characteristic achievements.\textsuperscript{48} It was an important development because: “Majalla can be seen as the first but yet inadequate Civil Code of the Ottoman Empire.”\textsuperscript{49} Ulusan has described Majalla as inadequate because it was drafted in accordance with the principles of the Hanafi School rather than being based on the European constitutionalism at that time.\textsuperscript{50} On the other hand, Ostrorog\textsuperscript{51} argues that the Majalla was European in form despite being purely Islamic in content because it is a joint venture between conservatism and reformism, exemplifying the negotiation and compromise between the proponents of both camps. It was the first time in Muslim history when Islamic law was codified in which the laws on transactions, contracts, and obligations were codified from the Hanafi fiqh, leaving none other than family law out.\textsuperscript{52} Despite the secularisation in several fields of law after the Tanzimat, the law regarding family rights continued under the millet system in which there were separate procedures for personal laws depending on the confessional communities, which were mainly Islam, Christianity, and Judaism. Because of this, the Majalla was meant to express law common to all Ottoman subjects regardless of the religion; to achieve that, it left out family law, laws of inheritance and wills, and laws of foundations, as the separate non-Muslim communities had different and autonomous laws under the millet system.\textsuperscript{53} That is not to say that most courts and law codes of the Ottoman Empire had not been modified either in structure or substance by 1915, but it was only family law that remained intact during the

\textsuperscript{48} Yilmaz (n 14) 91.
\textsuperscript{49} Ulusan (n 30) 156.
\textsuperscript{50} Ibid.
\textsuperscript{51} Léon Ostrorog, \textit{The Angora Reform} (University of London Press 1927) 79.
\textsuperscript{52} Yilmaz (n 14) 91.
\textsuperscript{53} Ostrorog (n 51) 79.
Ottoman reforms until then. No codification was attempted in the field of family law and inheritance until considerably later in 1917 and the jurisdiction of the religious courts continued over such disputes.55

2.3 The Ottoman Law of Family Rights (Hukuk-u Aile Kararnamesi)

The new family law did not come into existence until 1917 due to disagreements over whether family law could be codified and whether such an attempt would be against the core of the Ottoman Empire.56 As the first ever instance of codification of Muslim family law in history, this was seen revolutionary in the sense that: “it eclectically reflected and amalgamated the views of different juristic schools of Islam.”57 As the Law of Family Rights was enacted in addition to the Majalla, it brought significant changes in the field since the absolute rights of divorce and polygamy for the male partner were curtailed.58 The law tried to give marriage a more official character and granted a wife two new grounds for divorce as well as setting an age limit for marriage for the first time.59 Moreover, religious courts were placed under the authority of the Ministry of Justice.60 Although the law grouped the rules related to family rights

56 Yildirim (n 1) 354.
57 Yilmaz (n 14) 93.
59 Yilmaz (n 14) 93.
60 Starr (n 28) 40.
separately for Muslims, Jews, and Christians, it granted authority to the *Shari’a* Courts to handle cases related to marriage and divorce for all religions, which led to harsh criticisms.\(^\text{61}\) This, along with other objections, led to the abrogation of the provisions applying to non-Muslims in 1919 after the British occupation. However, it is undeniable that the developments in family law following the formation of the Republic were prefigured in these earlier measures, such as the Law of Family Rights of 1917, which was a late Ottoman effort to codify family law in a move towards secularisation.\(^\text{62}\) Therefore, one can see this as a failed experiment, which most likely affected the reformist attitude towards codification of family law in 1926. However, it can also provide evidence for the lacking will of the society to even accept a limited change and reform in family law despite the fact that it was codified in accordance with Islamic principles. Thus, it should come as no surprise that normative ordering in Turkish society would resist a more far-reaching revolution only 9 years later. Although it is not the aim of this writer to compare the reforms during the Ottoman Period and the 1926 revolution, it is highly important to note that the 1926 Revolution was not the first experience of the Turkish nation with regards to legal reforms.

### 3. Legal Revolution of 1926

Despite the unsystematic Ottoman reforms, which were considered a tool to conciliate foreign criticisms, Kemalist reforms were rather systematic with the ultimate aim of the

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\(^{61}\) Bozkurt (n 3) 293.

Europeanisation of Turkey’s legal system.\textsuperscript{63} To achieve that modernisation of civil law, the Swiss Civil Code was chosen as it was regarded as adapted to the multitude of cantonal customs and more easily translatable as opposed to its French and German counterparts.\textsuperscript{64} It was also deemed to be less ambiguous and more practical and certain leading legal personalities, such as the Minister of Justice of Turkey at that time, had been educated in Switzerland.\textsuperscript{65} This step was revolutionary considering the new Turkish Code did not only regulate contracts and torts but also the laws of family relationship, marriage, divorce and inheritance.\textsuperscript{66} Despite the opposition to the wholesale adoption of an utterly foreign way of civil life, that dissent faded away when the committee of 26 completed the translation after almost two years of work.\textsuperscript{67} The question that immediately leaps to mind is why the dissent perished and: “… why would it take a committee of 26 educated people at least a year and a half to translate a document of little more than 175 pages”?\textsuperscript{68} One must closely examine the way the Turkish Code was translated to answer that.

3.1 Translation

Reception and translation were the main vehicles for the sole method of law reform when the decision was made to move outside the framework of endogenous system of laws rather

\textsuperscript{64} Esin Orucu, ‘A Legal System Based on Translation: The Turkish Experience’ (2013) 6 Journal of Civil Law Studies 446.
\textsuperscript{65} Ibid.
\textsuperscript{66} Liebesny (n 55) 135.
\textsuperscript{67} Bernard Lewis, The Emergence of Modern Turkey (Oxford University Press 1968) 272.
\textsuperscript{68} Miller (n 24) 336.
than integrate and modernise the existing system. Orucu argues that major translation work was the sole basis of the evolution and that the Turkish legal system is one based on wide scale translations alone. Although the translation work put in by the Committee was undeniably the basis of the 1926 Civil Code, seeing the entire basis of Turkish Civil Code as a literal translation would be a rather simplistic point of view. When one compares the 1907 Swiss Civil Law with its 1926 Turkish translation, it is inevitable to realise that the translation is loose. As a matter of fact, out of 115 clauses in the Turkish Civil Code regarding personality, marriage and divorce alone, at least 35 percent of the equivalent provisions from the Swiss Civil Code are either missing, altered, or added in the Turkish version. As observed by Glanert, the introduction of a newly created legal terminology causes a semantic earthquake in every national legal language. It is of course possible that there were some terms that had no direct translations and that there might have been technical errors in the translation work. However, from the evidence that will be provided later, it is a certain conclusion to reach that these were not the only reasons for the difference in content. When looking at the sections on fiancés and marriage, only 33 percent differ between the Swiss and Turkish Codes, whereas in the section in the actual act and publication of marriage, as much as 73 percent of the clauses differ from the Swiss Code. Even with that fact alone, there is an obvious doubt for the possibility of the Committee’s tendency to interfere to a lesser extent with the daily lives of people by leaving the

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69 Orucu (n 64) 446.
70 Orucu (n 64) 447.
71 Miller (n 24) 336.
72 Ibid.
74 Miller (n 24) 358.
Ottoman-Islamic norms that were embedded in society for centuries untouched to such a significant extent. It is not the aim of this writer to engage on whether an indissoluble bond between law, language and culture exists. But it is rather, to point out that the Turkish Civil Code was not a monotonous translation and the difference does not solely lie in the errors in translation or the legal and lingual inadequacies of the translators. As such, one must look at the specific differences between the Swiss and Turkish Civil Codes.

3.2. Marriage

Under the official law, only civil marriages performed by authorised marriage officers are permitted and recognised, and this is safeguarded by the Constitution.\textsuperscript{75} The marriage procedures were subject to a significant transformation, such as the new obstacles to marriage, which made completing a marriage union far more difficult than it had been.\textsuperscript{76} However, it must be noted that a significant amount of borrowing in the subject of marriage was not different at all from the Ottoman practice.\textsuperscript{77} Registration and permission for marriage had been in practice in the Ottoman Empire after 1881 and authorities had demanded notification of marriage with witnesses’ names and professions, religion, ages, and parents’ names of the couple from an active imam (religious authority).\textsuperscript{78} Despite that, it is still possible to see some level of discrepancy between the Turkish and the Swiss Code,

\begin{itemize}
\item[75] Yilmaz (n 14) 105.
\item[76] Miller (n 24) 345.
\item[77] Ibid.
\item[78] J Frumkin, ‘The Legal Position of Women in Turkey Under the Old and New Regime, And in Egypt’ (1928) 10 Journal of Comparative Legislation and International Law 197.
\end{itemize}
which suggests that there was an aim of creating a hybrid version for marriage. For instance, The Turkish Code places the Swiss concept of reparation to either injured party in a more Ottoman context with the deletion of six words from the relevant article concerning the available reparations after breaking off an engagement.\textsuperscript{79} The Swiss Code denies the possibility of a faultless breakup of engagement, whereas the translated Turkish clause states there indeed is such a possibility in which neither party was at fault, and the determining point almost becomes entirely financial instead of being emotional.\textsuperscript{80} This emphasis on financial determinant is derived from the Ottoman Law of Family Rights of 1917 which states that if one of the fiancés eludes the marriage or dies, restitution can be made without any fault.\textsuperscript{81} Therefore it can be seen from this example that certain concepts have originated directly from the Ottoman law of 1917 and found their place completely intact within the context of the promulgated Swiss Civil Code. Although this may seem like a small alteration, there are several more such as the provisions on personality, alimony, and waiting period after marriage that this study would not be able to analyse entirely. If those small changes are all taken together, it seems clear that the legal sensibilities and norms of the Ottoman Islamic history have somehow found their way into the Turkish Civil Code of 1926 despite not originating from the translated Swiss Code of 1907.

\textsuperscript{79} Miller (n 24) 346.
\textsuperscript{80} Miller (n 24) 46.
3.3. Divorce

Compared to nullity or marriage, divorce strikes many more emotional chords and that seems to explain the differences in nine clauses between the Swiss and Turkish Codes in this section.\(^{82}\) If one takes the provisions concerning abandonment for one of the six preconditions of divorce, the Swiss provision begins by stating that a judge may warn the spouse in question to return within a six month period.\(^{83}\) The Turkish Code on the other hand, states that ‘if husband or wife leaves with intention of not executing undertaken duties for marriage, or if without good reason, does not return to the house and the separation lasts at least three months without ending,...’\(^{84}\) This shows that in the Turkish Code abandonment does not solely indicate the act of leaving, but also failure to complete the so called duties of marriage which is a notion that is completely absent in the Swiss Code.\(^{85}\) The notion is undoubtedly used as a euphemism for having sexual relations by analogy with the prohibition against taking oaths to refuse sexual relations in which the period of abstinence stipulated in the oath exceeds four months.\(^{86}\) Thus the four month stipulation, which derives from the combination of three-month waiting period and the judge’s month-long warning, directly originates from Islamic law.\(^{87}\) Velidedeoglu\(^{88}\) referred to this difference as a necessary

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\(^{82}\) Miller (n 24) 350.

\(^{83}\) Ozsu (n 10) 70.


\(^{85}\) Miller (n 24) 352.

\(^{86}\) Ibid.

\(^{87}\) Ozsu (n 10) 70.
modification deriving from the religious, social, and economic differences between Turkey and Switzerland. However, the importance of such differences has been undermined by the Swiss jurist, George Sauser Hall, who described this difference as not offering any evidence that the Turkish Code derogated from the spirit and the essential points of the Swiss Code.\textsuperscript{89} However, the fact that the time period for abandonment was curtailed to such an extent clearly indicates that one of the fundamental responsibilities of a marriage could not be grafted onto Turkish society with nothing more than a new set of laws and that it had to be modified in order to fit into the Turkish way of life thereby creating a hybrid form.\textsuperscript{90} This is not to say that the Turkish Civil Code did not duplicate the structural edifice of its Swiss parent, but one can observe many examples as the ones that are mentioned above that clearly suggest that the drafting committee often went out of its way in order to adapt the Swiss original to prevailing Ottoman Islamic legal norms.\textsuperscript{91}

Therefore, it seems like the Turkish Civil Code was crafted in a way that aimed to interfere with the daily lives of the Muslim population as minimally as possible. Such a motive becomes more obvious with the fact that the Committee had felt the need to modify the original Swiss Code, which was regarded as the most perfect civil code in existence at that time by the pioneers of the Republic. This is not to say that the Turkish Civil Code was not revolutionary. It indeed brought some revolutionary changes even in the area of

\textsuperscript{88} Hifzi V Velidedeoglu, ‘De Certains Problemes Provenant de la Reception du Code Civil Suisse en Turquie’ (1956) 5 Annales de la Faculte de Droit D’Istanbul 99, 110.
\textsuperscript{89} G Sausser-Hall, Introduction a L’etude du Nouveau Droit Civil en Turquie (Conferences Faites a L’Universite de Stamboul 1927) 33.
\textsuperscript{90} Miller (n 24) 352.
\textsuperscript{91} Ozsu (n 10) 70.
family law, such as increasing age of consent for marriage, the abrogation of polygamy, and the equal and mutual entitlement to divorce.\textsuperscript{92} However, the official rhetoric that the 1926 Code was a complete break with the Islamic past failed to match the substance of the law.\textsuperscript{93} Although the Turkish Civil Code is not completely Islamic, the changes in substance were made deliberately and with previous Islamic norms in mind.\textsuperscript{94} Thus the promulgation of the Turkish Civil Code of 1926 was not a mere translation which caused a complete cut off from the Ottoman legal history, but it was rather a flexible adaptation which sought to change the definitional structure of the Turkish society whilst trying to minimise any social dissent.

4. Implications and Interpretation

A natural conflict arose after the Turkish Civil Code became effective with regards to all the changes the 1926 Code brought regarding the area of family law. Family law in Turkey was now governed by non-Islamic secular laws for the first time in its history whilst the citizens were almost entirely Muslims.\textsuperscript{95} The new legal system conflicted with the societal order of things as regards to family relations that exposed both the new legal order and society to strains and stresses, ultimately raising the problem of whether the Civil Code or society was to prevail in the end.\textsuperscript{96} One must consider the outstanding number of differences between the newly adopted secular laws of Turkey and the local Muslim

\textsuperscript{92} Yildirim (n 1) 357-358.
\textsuperscript{93} Yildirim (n 1) 359.
\textsuperscript{94} Miller (n 24) 360.
\textsuperscript{95} Yilmaz (n 14) 99.
\textsuperscript{96} Kurt Lipstein, ‘The Reception of Foreign Law in Turkey: Conclusions’ (1957) 9 International Social Science Journal 70, 73.
laws and norms, which the society was used to practicing for centuries. There was an inherent confusion between the no longer recognised Muslim law and the official state law. Such dilemmas and conflicts are visible in some of the most basic changes the new Civil Code brought to the core practices of family law.

4.1. Religious Marriages

Under the official law, only civil marriages conducted by officers are allowed and recognised in the eyes of the state and this is safeguarded by the Constitution. The customary \textit{dini nikah} (religious marriage ceremony) had ceased being a legally sanctioned method for a couple to marry. Article 108 of the Civil Code made the performing of a marriage by an authorised government official necessary, whereas Article 237 of the Criminal Code made it an offence for any imam to celebrate a marriage without the civil ceremony being performed first. Magnarella argues that these were the provisions that: “\textit{created more social and legal problems than any other provisions of the Turkish Civil code.}” That is because many Turkish citizens still preferred the consensual, informal and religious \textit{imam nikah}. A study conducted by Timur in 1972 shows that 15 percent of all the marriages in Turkey at that time were only religious and thus carried no official legal legitimacy in the eyes of the official state law. Without the civil marriage, a wife would not obtain the rights to sue for divorce and her children would be illegitimate. The question that comes to mind is: why then did people

\footnotesize{97 Yilmaz (n 14) 105.
98 Magnarella (n 31) 295.
99 Ibid.
100 A Zevkliler, \textit{Medeni Hukuk} (Civil Code) (Savas 1995) 705.
101 Serim Timur, \textit{Turkiye’de Aile Yapisi} (Family Structure in Turkey) (Hacettepe University Publications 1972) 92.}
continue to perform religious marriages only, which should have been a criminal offence? Kruger\textsuperscript{102} notes that despite all the legal measurements, the authorities will not be aware of such an incident unless a dispute arises and that there is almost no record of punishment for any Imam who conducted religious marriages unofficially.

Furthermore, many Turkish citizens still preferred the religious ceremony to the civil one for religious and cultural reasons as the \textit{dini nikah} sanctions a marriage in the eyes of Allah and of the community.\textsuperscript{103} On the other hand, Stirling\textsuperscript{104} noted in 1965 that no (Turkish) girl would ever feel at all abashed to admit that her marriage is not registered with the State. That explains why 49.2 per cent of marriages in 1972 were mixed, meaning that they were first conducted in the presence of civil authorities and later by an imam.\textsuperscript{105} The most comprehensive data on this issue derived from the 1968 Population Survey which displayed that the percentage of religious only marriages averaged over 5 percent in towns and cities but rose to 21.3 percent in rural areas.\textsuperscript{106} Although the importance of religious marriages has remained, the Turkish population have learned to combine the unofficial and official marriage as 84.9 percent of the marriages were mixed whereas only 4.89 were only religious by 1992.\textsuperscript{107} There was a clear opposition between the state’s desire for uniformed legal standards and cultural diversities and as it

\textsuperscript{102} Hilmar Kruger, ‘Aile Hukuku Sorunları Osmanlı İslam Gelenegi’ in Dikecligil B, Cigdem A (eds) and Giritoğlu N (tr), \textit{Aile Yazıları} (TCB Aile Arastirma Kurumu Baskanlığı 1991) 209.

\textsuperscript{103} Magnarella (n 31) 296.

\textsuperscript{104} Paul Stirling, \textit{Turkish Village} (Weidenfeld and Nicolson 1965) 29.

\textsuperscript{105} Timur (n 101) 92.

\textsuperscript{106} Magnarella (n 31) 298.

\textsuperscript{107} Yılmaz (n 14) 107.
can be seen, this was even more evident in rural areas. As empirical research indicates, social reality has not responded fully to the desires of the secular official state law.\textsuperscript{108} People have realised the disadvantages of marrying only religiously, whereas marrying secularly in addition to the religious marriage provides substantial benefits.\textsuperscript{109} However, that does not change the fact that there are still some who prefer religious marriage only. That derives from the need to sanctify marriages in the eyes of religion and society, and sometimes the formalities of official marriage seem difficult to handle or even impossible, as in the cases of early marriage.\textsuperscript{110}

4.2. Underage Marriages

There is no minimum age requirement in Islamic law for marriage. Although the Ottoman Law of Family Rights of 1917 prescribed a minimum age of 9 for women and 10 for men, the age of marriage was taken over from the Swiss Code as being 18 for men and 17 for women in the Turkish Civil Code. However, this was incompatible with the geographical and customary realities of Turkey. After realising the incompatibility, the government lowered the minimum age standards in 1938 to 17 (15 with permission from the judge) for men and 15 (14 with permission from the judge) for

\textsuperscript{108} Yilmaz (n 14) 109.


women. According to a population survey, 14 percent of women entered marriage between the ages of ten and sixteen and Ozgen states that at least 14 percent of all first marriages in recent decades before 1985 involved underage women. According to Starr and Pool, these adjustments have been adopted to make the new Civil Code and the customs of villagers more harmonious with each other. However, this adjustment did not solely derive from rural social resistance to law with regards to the age requirement. According to research conducted in 1972, the rate of underage marriage was almost the same in urban and rural areas with 13 percent for the former and 14.5 for the latter. Yildirak notes that this figure might be even higher in rural areas since there is a tradition of first marrying with the religious ceremony and then to register the marriage after a few years when the spouses legally can do so under official law. The reality of underage marriages can even be observed in rather recent official statistics published by the State Institute of Statistics, in which the ratio of marriages in the age group 12-14 was 0.54 percent for females and 0.88 for males. It must be emphasised though, with any empirical evidence on such matters, that the figures are probably not reflective of the true proportion of experience since it is quite possible that people are not that eager to report such illegal marriages to civil servants both with the solemnisation and

112 E Ozgen, Early Marriage, Brideprice and Abduction of Women, in Family in Turkish Society (Turkish Social Science Association 1985) 315.
114 Yilmaz (n 14) 111.
115 Yildirak (n 110) 21.
116 Yilmaz (n 14) 112.
age of marriage. Although reported underage marriages are rarer than they used to be, they clearly have remained a part of the normative reality of Turkey and demonstrate an example that the new republic has been sensitive to the response to its new legal venture.117

4.3. Polygamy

As stated, the 1926 Turkish Civil Code embraced revolutionary changes. The abrogation of polygamy stands out as one of the most significant articles of the Code. There is an obvious conflict in this between traditional Muslim law, whereby a man is assumed to be permitted to marry up to four wives at any one time, and the official state law. Hence, when polygamy was abolished with the Civil Code of 1926, the religious custom justifying polygamous marriages became officially null and void.118 Articles 92, 113, 114, and 115 of the Civil Code of 1926 provide that a person shall not marry unless he proves that the previous marriage has been dissolved by death or divorce or by a decree of nullity, and that a second marriage should otherwise be declared invalid by the court.119 On the basis of his study of 17th century records in Bursa, Gerber notes that in over 2,000 records of males he examined, in no more than twenty cases did a man have more than one wife, which sums up to less than 10 per cent.120 And according to available Istanbul records for 1885 only 2.51 percent of men were in polygamous marriages,

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117 Starr and Pool (n 113) 535.
119 Yilmaz (n 14) 113.
whereas this figure was 2.16 in 1907.\textsuperscript{121} Therefore, it is fair to note that polygamous marriages were exceptional and Turkish society has been generally monogamous even from the Ottoman times. Even though the new Code has rendered polygamous marriages a punishable crime, it is argued that the polygamous local tradition is still rife in the same low proportion in which it existed in the past Ottoman period.\textsuperscript{122} The polygamy rates in rural Turkey ranged from 2 percent to 19 during the early Republican era according to the estimates.\textsuperscript{123} Stirling reports that polygamy was a socially accepted reality but rarely practiced in two central Anatolian villages in 1949.\textsuperscript{124}

It is of course natural, that the rates would vary from region to region and it is possible to find contradicting figures due to such discrepancy. Yasa\textsuperscript{125} for instance, claimed that the influence of the new civil code had completely eradicated the practice in a village outside of Ankara. However, the empirical evidence shows that polygamous marriages have not been totally eradicated in Turkey.\textsuperscript{126} According to the Population Survey of 1968, the figure for polygamous married women was 0.5 percent for Turkey’s largest 3 cities (Istanbul, Ankara and Izmir) whereas it rose to a high of 5 percent in remote Eastern Anatolia.\textsuperscript{127} However, it must be

\begin{thebibliography}{99}
\bibitem{121} Magnarella (n 31) 292.
\bibitem{122} Guriz (n 118) 4.
\bibitem{123} Lipstein (n 96) 78.
\bibitem{124} Stirling (n 104) 197.
\bibitem{125} Ibrahim M Yasa, \textit{Hasanoglan Socio-economic Structure of a Turkish Village} (Public Administration Institute for Turkey and The Middle East 1957) 231.
\bibitem{127} Magnarella (n 31) 293.
\end{thebibliography}
noted that polygamy and survival of local law is not a rural phenomenon and polygamous marriages are not only confined in the eastern parts of Turkey.\(^{128}\) Polygamy still remains socially acceptable and it is more of a customary practice than it is a religious one.\(^{129}\) As Hooker\(^{130}\) points out, local law may as well not contain Islamic elements and with the case of polygamy, religion is used for socially justifying the practices of polygamous marriages. Therefore, it is not just the Islamic elements of the law that showed resistance to the newly adapted family law, but social norms and cultural customary practices which remained embedded in the society as seen with the case of polygamy. Even though its prohibition was a revolutionary step, this was not a huge change since polygamous marriages were already rare as well in the Ottoman period. This minimal ratio has continued to exist despite all legal actions against it and the example of polygamy provides yet another example of the extent of the Turkish Civil Code’s extent of success in eradicating not only the Ottoman-Islamic history but also the customary practices and accepted social norms.

### 4.4. Decisions of Judges

Although the empirical evidence highlights the impact of the Turkish Civil Code on the Turkish population, one must also observe how judges interpreted the Code in light of their decisions on the aforementioned areas of marriage and polygamy. This is highly vital since “the success of any reform is dependent upon two main factors: the attitude of the public

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\(^{128}\) Kumbetoglu (1997) 123.

\(^{129}\) Yilmaz (n 14) 115.

\(^{130}\) Hooker (n 109) 366.
towards it; and the interpretation given to it by judges.” As discussed above, the majority of the perpetrators of the alleged crimes remain unpunished since people are naturally not eager to report such instances. However, another trend that can be observed is that even in the cases that go to court, judges were tolerant to those convicted of polygamous, religious only and underage marriages. In one case, the lower court had granted permission to a girl aged 11 to marry but the Courts of Cassation (the highest court) overruled the decision on appeal. In another case, a 15 year-old boy got permission from the local court to marry but the Court of Cassation overruled this decision in the same manner. One can observe such manners in cases that were heard in the Court of Cassation, in which the Court strictly applied the letter of law by overruling the permissions for underage marriages. However, there are presumably several unreported cases of a similar nature that never made their way to the Court of Cassation and were therefore not overruled. The tolerant approach of the judges to underage marriage can also be observed with religious only marriages and polygamy, and that is the reason why Oztemiz accused Turkish judges of being tolerant to fundamentalist trends and behavior. In some cases, courts recognised the existence of a second wife as it can be seen in a case in which the judge granted a share to the second wife from the compensation of

134 Yilmaz (n 14) 121.
135 M Oztemiz, Cumhuriyet Doneminde Devletin Din Politikalari (State Policies on Religion in the Republican Period) (Pencere 1997) 125.
the husband’s death. The decisions in the lower courts especially display the sympathy of judges for the demands of local unofficial laws. Starr points out that due to legal postulates, Turkish judges are tolerant and sympathetic in the cases of underage marriages and polygamy. Although the Turkish state tried to make a clear break from the Ottoman-Islamic legal history, the evidence, albeit limited, shows that Turkish society has not abandoned local, unofficial and Islamic laws. One can see the examples of the tension between secular and Islamic customary rules in the areas of marriage and polygamy, where religion or customs did not suddenly cease to be important in daily lives of the Republican Society simply because of the newly adapted secular state law.

5. The Civil Code of 2002

The 1926 Code was amended fifteen times after its enactment that led to the abrogation of six of its provisions such as Article 159, which required the wife to get permission from her husband in order to work outside the home. The new Civil Code of 2002 aimed to consolidate these changes to bring suitable solutions for the problems and needs that derived from the inefficiencies of the 1926 Code after it had been in force for 75 years.

5.1. Gender Equality

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137 Yilmaz (n 14) 121.
138 Starr (n 28) 169.
The new 2002 Code preserved the revolutionary spirit of the 1926 Code and it can be argued that it is an illustration of the advancements in the field of human rights and for an enhanced democracy. The framework, which has been established through voluntary and flexible adaptations, has been based on a strong desire to become Western and contemporary. In that regard, the legal revolution of 1926 has played a significant role in the legal developments that carried the same desire of becoming more modern and Western in the decades to follow. Rapid law reforms have been made in order to fulfil the requirements of the European Union in hopes of becoming a member state. Therefore, one can see the declaration of the Turkish Civil Code of 2002 in the light of such hopes and trends that originated from the same revolutionary spirit of 1926. The new code introduced significant changes towards gender equality in marriage along with individual freedom, which were argued to be the main concerns of the drafters. An example of such a concern can be seen with the abolition of the patriarchal family structure, thereby establishing that both parties in the marriages are equals as per Article 186 of the Turkish Civil Code of 2002. Under the new Code, it is established that both spouses have equal rights over the financial assets but assets acquired before marriage or passed through an inheritance and assets for personal use are left out of that shared spectrum. Although this has been subject to criticism as the determination of such assets might lead to some difficulties, the new Code was revolutionary in the sense that it also made alterations for the age of marriage, responsibilities of

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140 Ulusan (n 30) 171.
141 Orucu (n 64) 261.
142 Orucu (n 64) 261.
143 Yildirim (n 1) 350.
144 Ulusan (n 30) 164.
the spouses, choosing of a family home, parental rights over the child and equal representation rights for the marriage for both spouses. More specifically the age of consent for marriage was raised to 17 for both men and women; women earned equal status with men in their decision-making capacity and responsibility.

5.2. Shades of 1926

Having observed the level of gender equality that the new Code brought to marriage, one would expect that all the provisions, which derived from the Ottoman Islamic legal heritage (that has found its way in the 1926 Code) would have been abolished or altered. However, despite the significant move towards more egalitarian family law, some of the most obvious vestiges of Islamic law found in the 1926 Code nevertheless survived in the 2002 Code. More specifically, the waiting period for the divorced women can be observed in Article 132 of the 1926 Code which states that when a marriage ends, a pregnant women cannot legally marry for three hundred days once the marriage is dissolved but this prohibition is defeasible either when she gives birth or upon finding that the woman in question is not pregnant. Article 154 of the new Civil Code states similarly that if a woman remarries despite being prohibited within the time limit, the remarriage would be void. The articles on establishing or disputing paternity survive with no substantive changes at all. Article 287 of the new Code states that a child born at least 180 days after the solemnisation of marriage and 300 days after the divorce at most, is deemed to have entered the womb within the

145 Oguz (n 138) 205.
146 Yildirim (n 1) 364.
147 Yildirim (n 1) 366.
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marriage thus making the husband at the time the legal father unless proven otherwise. One can trace this from Articles 241 and 243 of the 1926 Code and then from the Ottoman-Islamic legal heritage as a concept originally deriving from Islamic law. Therefore, even under the new regime it is possible to observe the survival of Islamic and customary concepts which the 1926 Code chose to carry along. Especially in this age of technological advancement, where paternity can easily be determined by such practical tools and tests, setting such time restraints for a women’s ability to remarry indicates that there are still deep underlying socio-legal discomforts between official and local law. While this prohibition is recognised in the eyes of the law, there is no penalty when there is a violation. This illustrates the female sexuality as a still questionable and a possibly disruptive concept in which the vast changes that happened after the revolution have failed to even challenge as a basic notion.148

Therefore, the effect of the Ottoman-Islamic legal history can even be felt today with the most recent Civil Code of Turkey which has mainly focused on bringing more gender equality in marital relations. As established in the previous chapters, not only have such Islamic or customary concepts found their way in the 1926 Code, but they have also been part of the Turkish society in due course and prevalent in the most recent Civil Code of Turkey. Although one must not underestimate the transformation and the modernisation process that the Turkish society went through, survival and resistance of Islamic customary concepts in family law in the most recent Government Acts, is yet another indicator that shows how the Turkish legal revolution was not a complete break from the Ottoman legal history.

148 Yildirim (n 1) 370.
Conclusion

The aim of this study has neither been to celebrate Turkey’s transplantation in which the old legal system has been destroyed in such an ahistorical manner, nor has it been to see the Turkish promulgation as a failure from its very outset. Rather, the aim was to observe the power dynamics and the techniques lying behind the revolution, and analyse the extent to which it was a complete cut off from the Ottoman-Islamic legal history. Modernisation and secularisation attempts were not exclusive to the newly formed Republic as one can trace such efforts back to the Ottoman period. In that regard the existence of positive laws, the Tanzimat period, Majalla and the Law of Family rights of 1917 are developments that had an effect on the revolutions that the newly reformed Republic tried to bring in. Although such reforms from the Ottoman times were no way near as wide and systematic as the Kemalist reforms of 1920’s, it still indicates that the Turkish promulgation of the Swiss Code was not the first attempt of reform even in the area of family law. The Turkish Civil Code of 1926 was not 100 percent Swiss as it was advertised, since the method that was used in its promulgation was not a literal translation but a rather flexible adaptation. Such alterations were made deliberately as the drafters were aiming to interfere as little as possible with the aspects of daily life while restructuring the definitional structure of the society. In fact, the presence of Islamic and customary norms that derive from the Ottoman past can even be observed in the new Civil Code of 2002 despite all the reform attempts that took effect after 1926 with regards to bringing more gender equality in marital relations. Moreover, despite the Turkish state’s effort in abolishing the Islamic customary norms and practices in core practices of family law such as marriage and polygamy, society did not entirely abandon such unofficial, customary and religious
practices. The revolution was not so much revolutionary in certain aspects, as traces of belief, norms and laws of the past have continued to lurk among Turkish people despite the significant changes the Kemalist Revolution brought.\footnote{Yildirim (n 1) 349.} Unofficial religious laws have been reconstructed particularly in marriage practices, manifestly indicating that state law has limits in shaping the society. It should not strike as a surprise to see such resistance from the unofficial Islamic laws towards the states attempt at secularisation, but it would strike as a surprise if it continues to advertise the Turkish Revolution of 1926 as a complete liberation that made a complete break from the Ottoman legal history.
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This paper deals with the question of whether an individual should ever be dismissed from their workplace for conduct outside the workplace and working hours, with specific reference to religious workplaces. It explores the notion of whether there is anything that sets religious workplaces apart from other places of employment, allowing for a greater degree of control over the behaviour of its employees. It is argued that there is no special duty of loyalty attributable to religious workplaces and, given that individuals find their right to express their religion curtailed by the courts regularly, the autonomy granted to religious institutions goes against the fundamental concept of human rights.

Introduction

This paper will consider the question of whether an employer should ever be able to lawfully dismiss a worker because of his/her activities outside the workplace and working time. This paper is restricted to the issues arising from the dismissal of employees for their conduct outside the workplace and working hours. I argue that this should not be a lawful cause for dismissal in the religious workplace, with
the only exception being where the conduct is in breach of an essential qualification of work of the employee.

Religious freedom has been granted under Article 9 of the European Convention of Human Rights (“ECHR”) and is applicable to the individual as well as to collective freedom of religion. However, in its implementation, the European Court of Human Rights (“ECtHR”) has been far more liberal in determining collective freedoms, rather than individual freedoms. I believe the latter should guide their decisions. While religious institutions are granted increasing autonomy to determine their freedom, the same is far from true for individuals exercising religious freedom. My paper is a critique of this tendency of the ECtHR, specifically focusing on the dismissal of employees for their conduct outside work, vis-à-vis religious workplaces.

The first section considers whether certain views of employees in religious institutions can be considered ‘disloyal’ to the employer, and whether dismissal on those grounds is lawful. The second section assesses the argument of autonomy granted to religious institutions to make independent decisions. The third tackles the assumption that there is something special or unique about religious workplaces, which creates a higher duty of loyalty than others. Fourthly, I contend that the threshold for dismissing an employee on the basis of their conduct outside work should be based on ‘necessary qualification’, which is to say that an employee should only be dismissed if their conduct outside work interferes with the performance of their duties or quality of work produced. Finally, I will conclude by summarising my arguments and reiterating my view that employees should not ordinarily be dismissed for their conduct outside of work, save for when such conduct breaches the ‘necessary qualification’ criterion.
I. Duty of an Employee towards the Workplace

In decisions relating to religious workplaces, the argument has often been made that an employee who expresses views or conducts herself in a way that is not in accordance with the views of the employer, potentially betrays her duty of loyalty. In Rommelfanger v Germany1 a doctor employed at a Roman Catholic affiliated hospital was dismissed for holding views on abortion that were contrary to the “opinion of the church concerning the killing of unborn human beings”2. The European Commission of Human Rights (“EHRR”) held that it was not unreasonable for the church to demand that all its employees should agree with the so-called Christian principles on which the church functioned. This case demonstrated that when a hospital was run in accordance with ‘Christian principles’, not observing these principles in entirety would be a violation of loyalty, even if the quality of work is unaffected.

Interestingly, when a similar question arose in the matter of loyalty to the state in Vogt v Germany3, the applicant was held not to have breached her duty of loyalty by the ECtHR. Here, a secondary school teacher was dismissed from her position at a school for having been a member of the German Communist Party (“DKP”). Although her work was

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2 Ibid.
3 Vogt v Germany App no 17851/91 (ECtHR, 26 September 1995).
considered satisfactory, she was held in high regard by her colleagues as well as the pupils and their parents prior to her dismissal.4

The ECtHR held that the dismissal was a severe measure, and had the effect of causing the applicant to lose her livelihood. Further, the harm caused to her reputation and the difficulty she would face in finding another post as a teacher were also relevant to the majority decision.5 The majority was also of the opinion that it was well-established that there was no improper conduct by the applicant in the performance of her duties, and no criticism was levelled against her.6

An argument in Vogt was made by the regional council that a civil servant has a special relationship of trust with the State, and cannot “deliberately support a party whose aims are incompatible with the free democratic constitutional system”.7 Despite this argument, the ECtHR held that Mrs. Vogt’s dismissal was disproportionate to the legitimate aim pursued.

Comparing the decisions in these two cases, it is unassailable that religious workplaces are given a special place to impose their principles on their employees, a privilege that is not even available to the state. The question could have been asked in Rommelfanger, whether a doctor would be disloyal to his or her Hippocratic oath by allowing the church to espouse and publicise views on abortion that are medically unsound, but the Commission was unwilling to undertake any

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5 Ibid, para 60.
6 Ibid.
7 Ibid, para 16.
introspection, content to allow ‘Christian principles’ to guide its decision.

This question of ‘loyalty’ to a workplace lends itself easily to extremes. Would a supermarket cashier be disloyal if he shopped at a competing store? Would a journalist be disloyal if she preferred other publications? Surely not. It remains to be explored how the religious workplace is then so distinct from other employers in this context.

II. Autonomy of Religious Institutions

The privilege granted to religious workplaces often stems from the reasoning that religious institutions have autonomous principles, and it ought not to be the place of the courts to substitute its judgment as to the substantive value of these principles. However, it is not correct to assume that this religious autonomy of organisations is absolute. Procedural protection of the right to freedom of religion has been recognised as limitation to religious autonomy.

Evans and Hood further argue that the decisions in Obst and Schuth and Siebenhaar place substantive limitations on

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8 Lombardi Vallauri v Italy App no 39128/05 (ECtHR, 20 October 2009); European Court of Human Rights Press Release, ‘Catholic University of Milan should have given reasons for refusing to employ a lecturer who had not been approved by the ecclesiastical authorities’, no 778, 20 October 2009.
9 Obst v Germany App no 425/03; Schuth v Germany App no 1620/03 (ECtHR, 23 September 2010).
10 Siebenhaar v Germany App no 18136/02 (ECtHR, 3 February 2011); European Court of Human Rights Press Release, ‘Dismissal of kindergarten teacher by Protestant Church for
religious autonomy.\textsuperscript{11} The effect of these cases is that termination of employment even by religious employers cannot be based entirely on their own principles, and must be balanced against other rights of the employees. Not just the religious institution, but also the courts have to consider these rights while making a final determination of the case.\textsuperscript{12}

The argument of absolute autonomy is also unsound when we consider that courts, including the EHRR and later the ECtHR, have justified the substitution of their own judgment in place of that of individuals seeking a protection of their religious rights in many cases, and have made value judgments regarding the beliefs of individuals. McCrea\textsuperscript{13} rightly observes while discussing \textit{Valsamis v Greece}\textsuperscript{14},

\begin{quote}
"[T]he Court simply substituted its view for that of the Jehovah's Witness applicants who felt that being required to take part in a Greek national day parade violated their pacifist beliefs, deciding that the parade was not military in character."\textsuperscript{15}
\end{quote}

It is objectionable that greater privilege should be afforded to institutions than to individuals, especially where human rights are concerned. It seems unacceptable to me that

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\textsuperscript{12} Ibid, 102.


\textsuperscript{14} \textit{Valsamis v Greece App No 74/1995/580/666} (ECtHR, 18 December 1996).

\textsuperscript{15} McCrea (n 13) 126.
individual freedoms are curtailed by the ECtHR in the name of ‘balancing’ these freedoms, but religious institutions (which are much less deserving of these freedoms) should not be subject to the same scrutiny.

The ECtHR has demonstrated its willingness to restrict individual freedoms to manifest religious belief in a number of cases, whether it be through limitations to the wearing of Islamic dress to maintain ‘secularism’\(^\text{16}\) or to “prevent state primary school teachers from wearing the Islamic headscarf on the basis that it was legitimate for the state to attempt to ensure the neutrality of the educational system.”\(^\text{17}\) As recently as 2014, in the case of \textit{SAS v France}\(^\text{18}\), the ECtHR upheld a ban on full face veils in public places on the basis of the principle of ‘living together’. Therefore, the ECtHR has demonstrated repeatedly that it can and does restrict the rights of individuals to manifest their religious beliefs for various reasons, but it is hesitant to show the same perspicacity while dealing with a religious employer’s collective right.

### III. The ‘Specialness’ of Religious Workplaces

Dealing with the question of loyalty to a religious workplace and what makes it so special – one aspect is the fact that a religious workplace has a mission or an ideology, and its employees are expected to represent that ideology in a way manner that would not be expected of a supermarket cashier.

So, for instance, where a public relations representative of the Mormon Church was found to have had an affair, his dismissal by the church for violating its principles was

\(^{16}\) Ibid 128.  
\(^{17}\) McCrea (n 13) 124.  
\(^{18}\) \textit{SAS v France} App no 43835/11 (ECtHR, 1 July 2014).
upheld by the ECtHR\textsuperscript{19}. This case illustrates the idea that where an employee is in a position to represent the views of the church, as a PR representative would be, said employee is accountable to the church for private conduct. Contrast this with a case where the employee is in a position where they are not representing the church at all, a position such as a janitor, a security guard, or in the case of \textit{Schuth v Germany}\textsuperscript{20}, an organist in a Catholic parish who had moved in with a new partner after his divorce.

A pertinent objection to this concept of ideology is that it can sometimes interfere with the other fundamental rights of an employee. For instance, Article 8 of the ECHR protects the private life of an individual, which includes the sexual orientation of the individuals. In \textit{Smith and Grady v UK}\textsuperscript{21}, the issue at hand was the dismissal of employees of the armed forces on the grounds of their homosexuality. The argument that there were sufficient ideological reasons for the dismissal since the presence of homosexuals in the armed forces had a “substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces”\textsuperscript{22} was not accepted as a sufficient ground for dismissal.

In the context of private life, a church or religious institution may require celibacy from its employees, which certainly qualifies as an interference with their family life under Article 8, whether or not it is considered legitimate. When the issue of ‘optional celibacy’ arose in the dismissal of a Catholic religious teacher, the ECtHR considered his dismissal lawful,

\textsuperscript{19} Obst (n 9).
\textsuperscript{20} Schuth (n 9).
\textsuperscript{21} \textit{Smith and Grady v UK} App no 33986/96 (ECtHR, 27 September 1999).
\textsuperscript{22} \textit{Ibid}, para 95.
despite there being no actual complaints regarding his conduct, and him having received a dispensation to be married. In this case, Fernandez Martinez v Spain23, the dissenting opinions of Judge Dedov and Judge Sajo require careful consideration. Judge Dedov has been criticised24 in many quarters for having opined that churches should not be allowed to impose totalitarian celibacy requirements on their priests. While the autonomy of the church is an extremely important principle, it should not be forgotten that the autonomy of the church to be its own legislator25 has also allowed it to perpetrate child abuse26 at a large scale without being held accountable. Celibacy might be a deeply held belief of the Church, where child abuse is an “enormous mistake”27 covered up by institutions across the globe “to

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23 Fernandez Martinez v Spain App no 56030/07 (ECtHR, 12 June 2014).
protect the institution, the community of the church, from shame”\textsuperscript{28}, but it is undeniable that autonomy without any limitations creates a danger of abuse.

More relevant still is the dissent of Judge Sajo, who argued that “the right to live with one’s family without the threat of being dismissed for that reason go to the heart of the right to respect for private life”\textsuperscript{29}. Sajo held that the ‘risk of scandal’ was not a sufficient reason for his dismissal.\textsuperscript{30} This goes to show that when the right to religious autonomy of a workplace is placed against a fundamental human right of an employee, the latter needs to be given very careful consideration, and I believe ordinarily, the latter should succeed.

\textbf{IV. The ‘Necessary Qualification’ Exception}

Coming now to possible exceptions to the general principle that out of work conduct is irrelevant to the workplace, I propose that where the outside work conduct interferes with the quality of work or breaches an essential qualification of work, it becomes a lawful reason for dismissal. For instance, in order to be a lawyer, one must have the requisite state certification as an essential qualification. Similarly, if a lawyer is intoxicated while working, their dismissal for their consumption of intoxicants outside work is relevant as it is understood to interfere with their performance of their duty. This same notion is applicable to a religious institution.

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\textsuperscript{28} Ibid.
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\textsuperscript{29} \textit{Martinez} (n 23) 57, para 1.
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\begin{flushright}
\textsuperscript{30} Ibid.
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In the context of the religious workplace, if a Catholic teacher is also a member of a Mormon Church and teaches in that capacity at a Mormon school, perhaps her conduct as a teacher would be affected by her membership in two religious organisations. However, I would argue that in order to dismiss an employee for personal conduct, the ‘risk’ of adverse effect is not sufficient ground. In Siebenhaar v Germany31, a teacher who was a caretaker at the Protestant parish day care as well as a primary teacher at the Universal Church of Humanity, was dismissed by the protestant church for being a member of an organisation whose ideology was contrary to that of her employer.

On the face of it, this is a case where the ‘necessary qualification’ criteria may have been met, but it is also relevant that no complaints existed as to her standard of work, and “no arguments of proselytizing behaviour by the applicant were put forward by the Protestant church”.32 However, the ECtHR did not require any arguments of proselytism to determine that the dismissal of Ms. Siebenhaar was “necessary to preserve the Church’s credibility, which outweighed her interest in keeping her job.”33 The criterion therefore is that when making a decision regarding dismissal, whether the actual quality of work has suffered because of the out of work conduct, must be considered.

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31 Siebenhaar (n 10).
33 Siebenhaar (n 10) 3.
Conclusion

The privileges accorded to religious workplaces are far greater than any other workplace, when it comes to the question of ‘loyalty’ or the promotion of a specific ideology. This becomes even more questionable when the ECtHR has not allowed loyalty or ideology to be arguments in favour of state34 or armed forces35 as employers, who inarguably have more at risk by a ‘disloyal’ employee than a religious institution does. Another criticism of this privilege stems from the ECtHR’s blatant interference with individual rights when they pertain to manifestation of religious freedom36, while affording complete autonomy to religious institutions.

Further, it has been argued that the autonomy of religious workplaces often comes into conflict with Convention rights of individuals, such as the right to a private life37, and in such situations, the latter deserve greater protection. I propose an exception where the personal conduct outside working hours and the workplace is a sufficient ground for dismissal: if it violates a necessary qualification of work, or interferes with the work performance of the employee. The assessment of this exception is to be on the basis of actual adverse effect due to the breach, and not merely the risk or threat of adverse effect.

The religious workplace is not deserving of the very significant privilege that it receives from the ECtHR, and the primary purpose of Article 9 ought to be the protection of

34 Vogt (n 3).
35 Smith and Grady (n 21).
36 Dahlab v Switzerland (dec.) ECHR 2001-V 447; Dogru v France App no 27058/05 (ECtHR, 4 December 2008); Leyla Sahin v Turkey App no 44774/98 (ECtHR, 10 November 2005); SAS (n 18).
37 Martinez (n 23).
individual freedoms rather than collective rights. The current judicial trend, in my opinion, has not done nearly enough to achieve this purpose, and has a long way to go.
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