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Transnational legal feminist approaches to the honour crimes provision in the Istanbul Convention*

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ABSTRACT

The Istanbul Convention is an important Council of Europe treaty aimed at preventing violence against women. Article 42 of the Istanbul Convention prohibits the use of 'culture, custom, religion, or tradition' in trials of defendants accused of violence against women. This article examines Article 42 from a transnational legal feminist perspective. As a treaty that applies to a wide range of countries, it should appreciate the significantly varying societal contexts across countries within the Council of Europe. It is argued here that the language of Article 42 does not go far enough to recognise this transnational diversity.

KEYWORDS Istanbul Convention; transnational legal feminism; violence against women; honour crimes; postcolonial feminism

1. Introduction

Domestic violence (DV) is a significant barrier to women's equality around the world.¹ It was not until 1994 that the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women was adopted as the first regional instrument addressing DV.² The Council of Europe Convention on Combatting Violence Against Women and Domestic Violence ('Istanbul Convention') is the first European Convention devoted specifically to the issue of DV was adopted in 2011.³ The Istanbul Convention is important, particularly because it is the first legally binding instrument in Europe to prevent and tackle violence against women

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*All websites accessed on 01 March 2021.

¹ Ronagh J A McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge, 1st edn 2017) 2.

² S Laurel Weldon and Mala Htun, 'Feminist Mobilization and Progressive Policy Change: Why Governments take Action to Combat Violence Against Women' (2013) 21(2) *Gender and Development* 231, 243.

³ Shazia Choudhry, 'Towards a Transformative Conceptualization of Violence against Women - A Critical Frame Analysis of Council of Europe Discourse on Violence against Women' (2016) 79(3) *Modern Law Review* 406, 408.

(VAW) and DV.⁴ It addresses an important problem in our world today and it is the first to do so in Europe. Countries with diverse societal histories and cultures are party to the Istanbul Convention. It is also innovative in many ways. For example, it recognises that DV is one of the various forms in which VAW occurs in society.⁵ Although over 35 countries have ratified the Istanbul Convention, Turkey withdrew from it in 2021.⁶ In light of Turkey's withdrawal, it is even more urgent to adopt a transnational lens that recognises the diversity within and across countries that are party to the treaty. A transnational legal feminist ("TLF") perspective is attuned to the horizontal and vertical diversity among and within nation-states that are party to the treaty. This article evaluates whether Article 42 of the Istanbul Convention adequately reflects the diversity across and within the countries that are party to the Istanbul Convention.

Article 42 generally prohibits the 'use of culture, custom, religion, or tradition' to justify an act of violence. The article specifically identifies 'honour' as an example of a prohibited justification for a crime. A crime committed in the name of honour is one where a family member attacks or kills another member of his family with the goal of restoring the family honour.⁷ Examples of actions by women thought to implicate family honour include engaging in sexual practices when she is unmarried or outside her marriage,⁸ refusing to enter into an arranged marriage, continuing her education, or for other reasons.⁹

Using a TLF lens, this article argues that Article 42 of the Istanbul Convention, which we refer to as the 'honour crimes' provision, is not attentive enough to the transnational diversity of the nations that are party to it (both across the nation-states and within the nation-states). First, the provision focuses on a justification historically used in certain Muslim-majority countries to exonerate violence yet fails to focus on traditional defences used by men in Western countries to justify harming women. This observation overlaps with critiques by postcolonial feminists who point out that the West only sees violence in 'other' cultures as problematic and fails to recognise problems within their own societies.

A second critique of the 'honour crimes' provision relates to its absolute prohibition in criminal trials on the 'use of culture, custom, religion or tradition' to

⁴ *Ibid*, 418.

⁵ Sara De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European Legal System' (2017) 9 *European Journal of Legal Studies* 69, 75.

⁶ Ayse Gunes and Caglar Ezikoglu, 'Legal and Political Challenges of Gender Equality and Crimes Against Women in Turkey: The Question of Istanbul Convention' (2022) *Women & Criminal Justice* 1.

⁷ Lama Abu-Odeh Lama, 'Comparatively Speaking: The Honor of the East and the Passion of the West' (1997) *Utah Law Review* 287.

⁸ *Ibid*.

⁹ DW Staff, *Europe Grapples with 'Honor Killings'* (June 2004), online: www.dw.com/en/europe-grapples-with-honour-killings/a-1244406.

'justify' crimes. In criminal law in many countries, justification typically releases the defendant of all liability. Article 42 is, in all likelihood, meant to prohibit both the use of 'culture, custom, religion, or tradition' to reduce a sentence rather than to only exonerate a defendant completely. In addition, because Article 42 does not permit the use of such information at all, nation-states are likely to interpret Article 42 to prohibit a defendant from admitting 'culture custom, religion, or tradition' in a trial for any reason. This article argues that a blanket prohibition on the use of 'culture, custom, religion, or tradition' can be a disadvantage to certain classes of people, namely immigrants who are standing trial in a country by judges and/or juries that are not familiar with their culture or religion. Allowing immigrant-defendants to introduce information about their 'culture, custom, religion, or tradition' would serve to place them in the same position as non-immigrants.

Part II presents a background on the Istanbul Convention. Part III describes Article 42 of the Istanbul Convention. Part IV articulates some key features of transnational legal feminism. In Part V, an elaboration of the critique of the honour crimes provision of the Istanbul Convention is provided, from a TLF perspective. Part VI presents the conclusion.

2. Background of the Istanbul Convention

In December 2008, an expert group was initiated by the Committee of Ministers of the Council of Europe with the objective of preparing a draft convention.¹⁰ In a period of two years, the Ad Hoc Committee for preventing and combatting VAW and DV prepared a draft text, which was finalised in December 2010.¹¹ The Istanbul Convention was formally adopted by the Council of Europe Committee of Ministers on 7 April 2011, whereafter it came into force on 1 August 2014.¹²

In addition to Council of Europe Member States, the Istanbul Convention can be ratified by any state in the European Union and is open for accession by any State in the world.¹³ Ratifying states must follow comprehensive, legally binding standards for the prevention of gender-based violence, protection of victims, and for the punishment of perpetrators.¹⁴ As of April 2022, thirty-five countries have signed and ratified the treaty, while eleven additional nation-states have signed the treaty but have not yet ratified

¹⁰ Council of Europe, *Istanbul Convention Action Against Violence Against Women and Domestic Violence: Historical Background*, online: www.coe.int/en/web/istanbul-convention/historical-background.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ World Future Council, *Istanbul Convention: Check How your Country is Doing in our Map* (May 2016), online: www.worldfuturecouncil.org/istanbul-convention-check-country-map/.

¹⁴ European Parliament, *Istanbul Convention: All Member States must Ratify it Without Delay, Say MEPs* (November 2019), online: www.europarl.europa.eu/news/en/press-room/20191121IPR67113/istanbul-convention-all-member-states-must-ratify-it-without-delay-say-meps.

it.¹⁵ The countries that have signed and/or ratified the Istanbul Convention vary significantly in terms of their cultural make-up, (dominating) religions, further traditions, as well as in their rates of immigration into the country. The Istanbul Convention is important because it is the first legally binding instrument in Europe to address VAW.¹⁶ It acknowledges that VAW is both a reason for and a result of gendered power relations,¹⁷ and suggests a holistic approach to ending VAW and for the attainment of gender equality.¹⁸

The preamble of the Istanbul Convention recognises that VAW is structural in nature.¹⁹ Article 1(b) of the Istanbul Convention sets out the purpose of the Istanbul Convention, which is to include ‘the promotion of substantive equality between women and men’.²⁰ The Istanbul Convention includes legally binding definitions of VAW,²¹ gender-based violence²² and DV.²³ Article 3(d) of the Istanbul Convention defines gender-based violence appropriately broadly as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.²⁴ Article 3(b) defines DV as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.²⁵ Article 5 sets out the measures relating to state obligations and due diligence.²⁶ Multiple articles further require States to declare conduct, such as forced marriage,²⁷ female genital mutilation (‘FGM’),²⁸ forced abortion,²⁹ and sexual harassment as criminal offences.³⁰ The Convention further obligates States to initiate the necessary legislative measures or other means in order to ensure that the offences established in the Istanbul

¹⁵ Council of Europe, *Chart of Treaty and Signatures of Convention 210* (November 2011), online: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

¹⁶ Shazia Choudhry, ‘Towards a Transformative Conceptualisation of Violence against Women - A Critical Frame Analysis of Council of Europe Discourse on Violence against Women’ (2016) 79 *Modern Law Review* 406, 434–5.

¹⁷ Gill Allwood, ‘Gender-based Violence against Women in Contemporary France: Domestic Violence and Forced Marriage Policy since the Istanbul Convention’ (2016) 24:4 *Modern and Contemporary France* 377, 379.

¹⁸ *Ibid.*

¹⁹ *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, 11 May 2011, CETS No. 210 (Entered into force 12 May 2011) [Istanbul Convention] preamble.

²⁰ *Ibid.*, Article 1 (b).

²¹ *Ibid.*, Article 3 (a).

²² *Ibid.*, Article 3 (d).

²³ *Ibid.*, Article 3 (b).

²⁴ *Ibid.*, Article 3(d).

²⁵ *Ibid.*, Article 3(b).

²⁶ *Ibid.*, Article 5.

²⁷ *Ibid.*, Article 37.

²⁸ *Ibid.*, Article 38.

²⁹ *Ibid.*, Article 39.

³⁰ *Ibid.*, Article 40.

Convention are punishable by effective, proportionate, and dissuasive sanctions.³¹

Furthermore, under the Convention, States are obligated to promote ‘changes in the social and cultural patterns of behaviour of women and men with a view to eradicating customs, traditions, and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men’.³² States must also provide general support services for victims of violence to facilitate their recovery,³³ specialist support services to victims,³⁴ appropriate, easily accessible shelter homes in sufficient numbers,³⁵ and state-wide round-the-clock telephone helplines free of charge.³⁶ In order to fulfil these and other obligations under the Istanbul Convention and to support the activities carried out by non-governmental organisations and civil society, States are required to allocate ‘appropriate financial and human resources’.³⁷

To assess the compliance of State parties with the provisions of the Istanbul Convention, a Committee of the parties and an independent expert body, the Group of Experts on Action against VAW and DV was established by the Istanbul Convention.³⁸ The expert body has the power to publish reports which evaluate the legislative and other measures that states undertake in order to fulfil their commitment to the Istanbul Convention.³⁹ The expert body can also adopt general recommendations for the proper implementation of the Istanbul Convention.⁴⁰ The following part introduces the ‘honour crimes’ provision of the Istanbul Convention.

3. The honour crimes provision of the Istanbul Convention

Article 42(1) of the Istanbul Convention states, in the relevant part:

Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called ‘honour’ shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.⁴¹

³¹ *Ibid*, Article 45.

³² *Ibid*, Article 12.1.

³³ *Ibid*, Article 20.1.

³⁴ *Ibid*, Article 22.

³⁵ *Ibid*, Article 23.

³⁶ *Ibid*, Article 24.

³⁷ *Ibid*, Article 8.

³⁸ Vido (n 5) 78.

³⁹ Istanbul Convention, Article 68.11.

⁴⁰ *Ibid*, Article 69.

⁴¹ *Ibid*, Article 42.1.

Honour crimes are conventionally understood to include crimes that range from physical abuse to murder.⁴² These acts of violence are typically committed by a family member (often a brother or a father) against a woman or girl in the family that has acted in a way that contravenes what is believed to be the honour of the family.⁴³ As a woman, having romantic relationships with other people or having married someone not approved of by your family are examples of behaviour that has been seen to contravene the honour of a family.⁴⁴ One way for a family to regain their honour would be to kill the woman or girl—giving rise to the term ‘honour murder’.⁴⁵ Although most crimes are carried out by the male members of the family, elderly female relatives are known to be involved in plotting the crimes.⁴⁶

The modern use of ‘honour crimes’ typically refers to acts that occur in non-Western countries, notably those in the Middle East or South Asia. Even though in almost every country in the world, murder is a criminal offence punishable by a long imprisonment or possibly death, in some countries if a perpetrator is acting to preserve honour, it might reduce his criminal penalty or absolve him of punishment all together. In some cases, the perpetrators may never be brought to trial; if the perpetrators appear before judges, their cases might be dismissed, because their actions are thought to be justified. In other cases, even where murder charges are brought against the defendant, the type of crime or sentence might eventually be reduced.

Article 42, unlike other provisions in the Istanbul Convention, does not call upon nation-states to criminalise new forms of behaviour considered to be VAW, but instead prohibits the use of evidence of ‘culture, custom, religion or tradition’ in criminal trials to exonerate or reduce sentences of people who have committed VAW. The reason that Article 42 of the Istanbul Convention is framed as negating a defence to a crime rather than criminalising behaviour is because the acts committed in the name of honour are already prohibited in most countries through other legal provisions. For example, acts such as murder or maiming are known to have been committed in the name of ‘culture, custom, religion, or tradition’ and those are likely to already be outlawed in criminal law codes of most (if not all) countries.⁴⁷

⁴² Geraldine A. Gregory, Jayne Fox and Bal Kaur Howard, ‘Honour – based Violence: Awareness and Recognition’ (2020) 30 *Pediatrics and Child Health* 365.

⁴³ Mark Cooney, ‘Death by Family: Honor Violence as Punishment’ (2014) 16 *Punishment and Society* 406, 407.

⁴⁴ Brooklynn A Welden, ‘Restoring Lost “Honor”: Retrieving Face and Identity, Removing Shame, and Controlling the Familial Cultural Environment Through “Honor” Murder’ (2010) 2 *Journal of Alternative Perspectives in the Social Sciences* 380, 382.

⁴⁵ *Ibid.*

⁴⁶ Council of Europe, *Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO)* (May 2009), online: <https://rm.coe.int/16805938a2> 33.

⁴⁷ Organization of American States, *Regional Tools to Fight Violence against Women* (February 2014), online: www.oas.org/en/mesecvi/docs/MESECVI-CoE-CSWPub-EN.pdf 102.

Although the drafters of the Istanbul Convention were in favour of introducing a separate criminal offence of so-called ‘honour crimes,’ upon further analysis of honour crimes and based on their findings, the drafters of the Istanbul Convention moved away from their original idea. Their analysis revealed that the crimes committed in the name of honour are not new crimes but have in fact been a part of the criminal law landscape of the Council of Europe member states for quite some time.⁴⁸

4. What is transnational legal feminism?

Transnational legal feminism is an emerging field that aims to build on the insights of numerous bodies of scholarly thought, particularly transnational feminism, transnational law, as well as postcolonial feminism. Transnational feminism and post-colonial feminism are situated within gender studies while transnational law is a strain of legal scholarship. Transnational legal feminism is an effort to build bridges between legal disciplinary traditions and gender studies.

Transnational feminism is often associated with Grewal and Kaplan. In their seminal text *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (1994), they raise significant questions for scholars whose work transcends cultures, nations, and locations. They suggest that if we consider that the world is currently structured by transnational economic links and cultural asymmetries, it becomes essential to locate feminist practices within these structures. ‘Transnational’, as defined by Grewal and Kaplan, is used ‘to problematise a purely locational politics of global-local or center-periphery in favour of (...) the lines cutting across them.’⁴⁹ Grewal and Kaplan argue that transnational cultural flows are of particular significance for feminist movements to gain an understanding of the material conditions that contribute towards structuring women’s lives in diverse locations. They further argue that if feminist movements fail to acknowledge and understand the dynamics created by global economic and cultural hegemonies, they will continue to remain isolated and will tend to reproduce universalising gestures of dominant western cultures’.⁵⁰

Transnational legal feminism also takes inspiration from transnational law. A vast literature under the rubric of ‘transnational law’ has developed since Philip Jessup conceptualised the term in 1956.⁵¹ Carrie Menkel-

⁴⁸ Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence: Crimes Committed in the Name of So-Called Honour*, online: <https://rm.coe.int/honor-crimes-web-a5/1680925835> 3.

⁴⁹ Inderpal Grewal and Caren Kaplan, ‘Introduction’ in Inderpal Grewal and Caren Kaplan (eds), *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (University of Minnesota Press, 1994) 13.

⁵⁰ *Ibid*, 17.

⁵¹ See generally Peer Zumbansen, ‘Transnational Law’ in Jan Smits (ed), *Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2006) 738–54.

Meadow describes ‘transnational law’ as the study of legal phenomena, including law-making, rules, and legal institutions that affect or have the power to affect behaviours beyond a single border.⁵² Transnational law is sometimes described as the ‘interaction between domestic laws in the increasingly global web of connections among people, corporations, goods, services, and knowledge’.⁵³ Transnational law is distinct from international law.⁵⁴ While international law focuses on the relationship between nation-states, transnational law de-emphasises the nation-state and recognises how the policies of one country may impact people in other countries and private actors have an increasingly important role to play in the global economy.⁵⁵

Transnational legal feminism, like transnational law, involves non-state actors. Ann-Marie Slaughter also observes the proliferation of non-state actors globally.⁵⁶ She argues that non-state actors are increasingly responsible for the migration of legal norms, including non-governmental organisations, transnational network of experts, and transnational corporations.⁵⁷ Julie Mertus also points out that much of this transplantation of legal norms is carried out by transnational civil society, represented by non-governmental organisations.⁵⁸ Today, women’s rights advocates are actively working across borders or at the international level. Other women’s rights advocates are proposing domestic policies and legislation based on ideas and legal solutions borrowed from other countries. People increasingly engage in private transactions, such as surrogacy across borders, that raise concerns for women’s equality. Thus, given the numerous contexts that are relevant, transnational law serves as a useful lens to understand feminist questions both locally and globally.

Finally, another body of literature, postcolonial feminism, is highly relevant to transnational legal feminism. Post-colonial feminism developed in response to the experiences of people in former colonies and in non-Western countries generally. Developed in the 1980s, postcolonial feminism critiques mainstream feminist theories for universalising ideas in ways that might be inapplicable to developing countries. Chandra Mohanty, whose

⁵² Carrie Menkel-Meadow, ‘Why and How to Study Transnational Law’ (2011) 1 *UC Irvine Law Review* 97, 104.

⁵³ Sital Kalantry, ‘Transnational Legal Feminisms: Challenges and Opportunities’ (2019) 52 *Cornell International Law Journal* 171, 172.

⁵⁴ John Azumah, *My Neighbour’s Faith: Islam Explained for African Christians* (Cana Publishing, 2008) 41.

⁵⁵ *Ibid.*, 41–2.

⁵⁶ Anne-Marie Slaughter, ‘Breaking Out: The Proliferation of Actors in the International System’ in Yves Dezalay and Bryant G. Garth (eds), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (University of Michigan Press, 2002) 13.

⁵⁷ *Ibid.*, 12.

⁵⁸ See generally: Julie Mertus, ‘From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society’ (2011) 14 *American University International Law Review* 1335, 1365–88. Mertus argues that ‘transnational civil society’ has a substantial impact on the development of international human rights norms around the world.

work has been seminal to both transnational feminism and postcolonial feminism, has argued that Western feminists imagine ‘Third World women’ as a composite and singular construction that is arbitrary and limiting.⁵⁹ Other theorists, such as Ratna Kapur, have argued that responses of the West to human rights problems tend to paint women in developing countries as the ‘victims’, lacking any agency.⁶⁰ Uma Narayan has pointed out that violence in developing countries is framed as culture and seen in a different light than the everyday violence prevalent in Western countries.⁶¹ Transnational legal feminism then should also account for Global South critiques of feminism.

The use of transnational law to examine issues of feminist concern focuses attention on the importance of contextualisation. In *Women’s Human Rights and Migration: Sex-Selective Abortion Bans in the United States and India*, one of the authors, Kalantry, examines the development of legal solutions in one country context to practices that have been brought by immigrants from another country context.⁶² In examining the legislative trend in various states in the United States to ban sex-selective abortion, Kalantry argues that legislators have wrongly used information from the practice of sex-selective abortion in India to justify the need for similar bans in the United States. In India, feminists view the widespread abortion of female foetuses as detrimental to women and girls. Traditional American legal feminist theories as well as international human rights perspectives have taken universal approaches to women’s rights. The universalist perspective holds the view that when a violation of human rights is identified in one geographic context, it must be understood as also violating human rights when it emerges in another geographic context. Yet, this approach fails to recognise that differing nature of practices and the consequences of such practices in the migrant-receiving countries as compared to migrant-sending countries. Arguing that sex-selection is rare in the United States, does not have the same societal impact, nor creates the same dignitary harms as it does in India, Kalantry argues that it must be understood differently when it emerges in the United States among immigrants than as it plays out in India. Any domestic legal solutions in the United States should also take account of this nuance.⁶³

⁵⁹ Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1984) 12/13 *Boundary 2* 333, 334–5.

⁶⁰ Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/ Postcolonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal* 1, 24–5.

⁶¹ Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (Routledge, 1997) 84.

⁶² See generally: Sital Kalantry, *Women’s Human Rights Migration: Sex-Selective Abortion Laws in United States and India* (University of Pennsylvania Press, 2017).

⁶³ See generally: *Ibid.*

In Farnush Ghadery's recent article, she also called for greater contextualisation in transnational legal practice.⁶⁴ In examining the UN Women, Peace, and Security Agenda in post-conflict societies, she points out that an international hegemonic framework that is not attuned to local contexts prevails.⁶⁵ For example, in the case of Afghanistan, she argues that international actors had not sufficiently engaged with Islamic feminism, which was a useful way to bring communities together in Afghanistan at that time.⁶⁶ She goes beyond arguing that international law and norms should be localised and argues instead that post-conflict societies should develop their own methods from the bottom-up.⁶⁷ In contrast to the concept of vernacularisation, which accepts a top-down approach to the adoption of international law in local communities, Ghadery proposes the idea of 'contextualization' to support a 'bottom-up approach'.⁶⁸ In addition, she argues that while transnational law is already attuned to the importance of context, it should borrow from feminist methods to enhance its focus on context.⁶⁹

While Ghadery's work focuses on the interaction of international norms in local communities, Kalantry has focused on the interaction of norms and practices that migrate from one country to another. Often these cross-border practices are brought from one country by migrants, but the practice could also emerge among non-migrant communities (such as veiling in France which is seen in both immigrant and non-immigrant communities).⁷⁰ In understanding cross-border practice and legal norms, Kalantry has argued that advocates, scholars, judges, and legislators inappropriately limit their views to only one context—either the context of the country of origin of the practice or the country of its destination.⁷¹ On the other hand, Kalantry has argued that in order to develop appropriate legal responses, they must analyse and compare both geographic contexts—the country from where the practice migrated and the country where it emerges.⁷² For example, to understand sex-selective abortion among Indian-American communities in the United States, one cannot just look only to the magnitude, significance and consequences of the practice in India, but must also examine it within the United States context.⁷³ Similarly, Kalantry has also argued that in

⁶⁴ Farnush Ghadery, 'Contextualization as a (Feminist) Method for Transnational Legal Practice' in Peer Zumbansen (eds), *The Oxford Handbook of Transnational Law* (Oxford University Press, 2021) 1.

⁶⁵ *Ibid.*, 2.

⁶⁶ *Ibid.*, 8–10.

⁶⁷ *Ibid.*, 13–14.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 1–2.

⁷⁰ Sital Kalantry, 'The French Veil Ban: A Transnational Legal Feminist Approach Kalantry' (2017) 46 *University of Baltimore Law Review* 201, 218.

⁷¹ Sital Kalantry, 'Reverse Legal Transplants' (2020) 99 *North Carolina Law Review* 49, 86–7

⁷² *Ibid.*, 88.

⁷³ *Ibid.*

understanding veiling in Europe and particularly France, legislators must understand both its emergence in France as well as its prevalence, its impact and motivation behind veiling in certain Middle Eastern countries.⁷⁴

In evaluating whether a migrant-receiving country should prohibit a practice that is considered a human rights violation in a migrant-sending country, Kalantry suggested that legislators and advocates must undertake a deep comparative analysis of both geographic contexts. In particular, factors that should be investigated include the prevalence of both practices in multiple contexts, the consequences of the practice in the societal context in question and the reasons the practice is undertaken.⁷⁵

Transnational law provides a useful home to situate discussions about practices and norms that migrate from one country to another, as transnational law accounts for the migration of laws from one country to another in addition to from the international level to the domestic level. In developing domestic law, policymakers have not typically focused on examining other geographic contexts, but a transnational legal perspective to domestic policymaking would call for an analysis of other geographic contexts. This comparative analysis should be robust and should examine not just law or practice in question, but also social, cultural, economic, and political context that gives meaning to the practice and law.

Considering that foreign contexts can be relevant to adjudication of domestic legal issues, judges of criminal trials involving immigrants ought to understand the cultural and societal context of the country of origin of the immigrant defendant. Indeed, such information would serve to place the immigrant in a similar position to the non-immigrant. However, a plain reading of the text of Article 42 of the Istanbul Convention suggests that it does not account for this nuance and instead, would bar the use of ‘cultural, custom, religion, or tradition’ in all cases involving VAW. Legislators and others involved in the drafting of transnational treaties ought, therefore, to take into account the diversity within and between the nations that will (likely) become party to the treaty.

5. The Istanbul Convention and the transnational legal feminist perspective

In this part, the Istanbul Convention is evaluated from the TLF perspective as developed above. A TLF perspective would posit that a treaty that is open to ratification by countries with vastly different cultural traditions, both inter- and intra- nationally, should take into account this vertical and horizontal

⁷⁴ Kalantry (n 70) at 232.

⁷⁵ *Ibid*, 232–3 (Kalantry argues that transnational feminist methodology should be used by international courts when they are adjudicating bans on cross-border practices).

transnational diversity. First, it is argued that Article 42 of the Istanbul Convention fails to recognise the transnational diversity of nation-states that are members of the Council of Europe by identifying only a justification used for violence in non-Western countries and failing to identify justifications for VAW used in Western countries (namely ‘passion’).

Second, Article 42 can be read to prohibit the inclusion of information relating to any ‘culture, religion, custom, or tradition’ for any reason in a trial even if it were not meant to explicitly exonerate or reduce the sentence of a defendant. The failure to explicitly allow this information (at least in certain circumstances) places the immigrant in a disadvantageous position as compared to the non-immigrant. Non-immigrants who are from the mainstream society and do not need to include any information about their ‘culture, religion, custom or tradition’ in a trial typically because the decision-makers in their case are likely to be already familiar with it.

5.1. Article 42 of the Istanbul Convention does not identify justifications for crimes that are common in Western countries

In illustrating what constitutes defences based on ‘culture, custom, religion, or tradition,’ Article 42 specifically uses ‘honour’ as an example of a justification. The drafters did not need to give an illustrative example, they could have simply stated that ‘culture, custom, religion, or tradition’ should not be used to justify a crime. However, by including ‘honour’ in the provision, the drafters of the Istanbul Convention identified a justification that has emerged historically in non-Western societies. Moreover, given that the drafters identified one type of justification used for VAW, they should have also identified other forms of justifications, including those present in Western societies.

Lourdes Peroni argues that the Istanbul Convention does not escape a fundamental trap identified by postcolonial feminists, namely that it sees ‘some forms of violence through a potentially stigmatizing culturalist lens’.⁷⁶ Peroni argues that listing ‘honour’ as the sole illustration for the reasons for which crimes cannot be justified, ‘signals a kind of culturalist framing that would trouble postcolonial feminists’.⁷⁷ She cites a number of other provisions of the Istanbul Convention and the drafters’ explanatory notes to demonstrate the outsized focus the text places on crimes such as ‘honour crimes’ and FGM, which are often associated with non-Western cultures.⁷⁸

⁷⁶ Lourdes Peroni, ‘Violence against Migrant Women: The Istanbul Convention through a Postcolonial Feminist Lens’ (2016) 24 *Feminist Legal Studies* 49, 51.

⁷⁷ *Ibid.*, 60.

⁷⁸ *Ibid.*

Thus, by identifying ‘honour’ as a specific reason why a crime may be committed, Article 42 overemphasises certain types of violence associated with non-Western cultures. Notably, the drafters of the Istanbul Convention could have accomplished the same ends without specifically using honour as an illustration. Crimes committed in the name of honour would also be covered by ‘culture, custom, religion, or tradition’. It is particularly odd that drafters of the Istanbul Convention identified honour crimes given that the Parliamentary Assembly, which was closely connected to the negotiation and drafting of the Istanbul Convention,⁷⁹ noted that there is a lack of data that honour crimes occur in European Council countries.⁸⁰

While Peroni’s critique of Article 42 is limited to the fact that it unduly focuses on justifications for VAW that arise in non-Western countries, it is argued here that Article 42 is problematic because it neglects to specifically identify known justifications for VAW that are present in Western countries. For example, many courts in Western countries have reduced or absolved men of killing women when the men have found them in intimate situations with other people. Those courts have reasoned that temporary insanity or provocation justifies a reduction in the sentence when crimes are committed as a result of ‘passion’.⁸¹ Article 42, however, does not specifically identify ‘passion’ as a prohibited justification, but rather only states that people should not be able to justify violence on the basis of ‘so-called honour’.

There is evidence that passion has been used to justify crimes in Council of Europe countries. For example, in the UK, William Cranston stabbed Kay Morton, his partner and Paul Wilkins, his best friend, to death, when he found out that the two were having an affair. In 2009, the Reading Crown Court in Berkshire, UK cleared William Cranston of murder, but convicted him of manslaughter by reason of provocation. He was sentenced to 12 years of jail.⁸² In another case in the UK, Jon-Jacques Clinton attacked his wife, Dawn, with a lump of wood and strangled her with a rope for sexual infidelity. Mr Clinton was found guilty of murdering his wife. The judge reduced Mr Clinton’s sentence from the charge of murder to that of

⁷⁹ Council of Europe, *The Istanbul Convention – A Powerful Tool to End Gender Based Violence: A Handbook for Parliamentarians on the Council of Europe Convention on Prevention and Combating Violence against Women and Domestic Violence*, online: www.assembly.coe.int/LifeRay/EGA/WomenFFViolence/2019/2019-HandbookIstanbulConvention-EN.pdf 10.

⁸⁰ Council of Europe (n 48).

⁸¹ In a study comparing ‘honour crimes’ in Arab countries with ‘crimes of passion’ in the United States, one author found that while in Arab countries men kill daughters and sisters, in the United States men kill wives and girlfriends. The author concludes that there is a difference between the ideas on which honour is based as compared to passion. Honour is based on ideas of ‘kin, status, honour, and collectivity,’ while passion is based on ideas of ‘individualism, romantic fusion, and sexual jealousy’. See generally: Lama Abu-Odeh Lama, ‘Comparatively Speaking: The Honor of the East and the Passion of the West’ (1997) *Utah Law Review* 287, 293–4, 306.

⁸² Katie Hodge, ‘12 Years for Man Who Killed Partner and Lover’ *The Independent* (London, 23 October 2011).

manslaughter. In doing so, he observed that sexual infidelity leading to a 'loss of control' was considered acceptable as a defence.⁸³

Given that there are cases in Council of Europe countries where sentences of defendants have been reduced when they used 'passion' as a justification for harming women, the drafters of the Istanbul Convention should have either (1) not identified any specific defences used, or (2) if they chose to identify by name specific defences in the text of Article 42, then they should have identified not just defences used to justify VAW in non-Western countries (namely 'honour'), but also included by name justifications used in Western countries. To be clear, even passion or any other similar defence is likely also disallowed by Article 42, even if they are not specifically identified. However, a failure to only identify justifications in Western societies suggests an inattentiveness to the VAW present in those countries and simultaneously emphasises VAW in non-Western societies.

5.2. The language and interpretation of Article 42 unfairly impacts immigrants as compared to non-immigrants

The Vienna Convention on the Law of Treaties suggests that treaties should be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁸⁴ Article 42 of the Istanbul Convention prohibits criminal defendants from justifying their crimes on the basis of 'culture, custom, religion, tradition,' which is referred to herein as 'cultural information'.⁸⁵ The text of the treaty specifically excludes all cultural information without any exception. Thus, nation-states interpreting Article 42 in accordance with its ordinary meaning are likely to exclude all cultural information in cases of VAW. In addition, Article 42 uses the word 'justification,' which typically serves to fully exonerate a defendant in some countries. Given the object and purpose of the Istanbul Convention to prevent VAW, presumably, however, the drafters also intended that Article 42 should be interpreted as excluding cultural information even if it were used for the purpose of reducing a sentence (not just to exonerate a defendant). After discussing the global scholarly literature on cultural information in criminal trials, several hypothetical cases are presented to illustrate how immigrants as compared

⁸³ Tom Whitehead and Andrew Houghe, 'Murder Can be Crime of Passion Says Top Judge' *The Telegraph* (London, 18 January 2012).

⁸⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679, Article 31, online: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁸⁵ Although the Istanbul Convention does not define 'justification' under criminal law, when a criminal offence is found to be justified, the defendant is typically acquitted of all charges. But information about culture could be used not just to fully exonerate a person of a crime but it could also be used to reduce the sentence. Even though the drafters used the word 'justification,' we assume that they also meant to exclude information about culture even if it were being used to only reduce the sentence rather than fully exonerate the defendant.

to non-immigrants are disadvantaged by a complete ban on cultural information in trials. This subsection concludes with proposals and examples of how the admittance of cultural information could impact criminal trials.

5.2.1. Scholarly literature on cultural information in criminal trials

Debates about whether cultural information should be included in trials emerged among feminists in the 1990s in the United States. Although the Istanbul Convention is a European legal instrument, those debates are still relevant here in order to (among other things) expose the differing feminist views on the issue. Two cases in particular, where immigrants were tried for committing VAW, gave rise to the questions about whether or when it is appropriate for an immigrant to marshal information about their culture when they are facing a court system in a country that might not be familiar with their cultural and societal context.

In one such case, a Hmong from Laos was charged with false imprisonment for following a customary practice of marriage known as *zij poj niam*. In Hmong society, if a man is courting a woman and she is returning her interest, she will eventually be taken to his home and the union is consummated. The woman must protest to show her virtue. In an area in California where many Hmong settled, a man thought a woman had consented to this procedure while the woman believed she did not. As a result, he was charged with false imprisonment. The judge might have taken cultural information into account and reduced the sentence to ninety days in jail.⁸⁶

In another case, a woman of Japanese descent drowned her children in California and attempted to drown herself but was rescued by a surfer. She had recently learned that her husband had a mistress. She wanted to rid herself of the shame and humiliation. She was attempting *oya-ko shinju*, parent-child suicide. Parents who take their children's lives also do so apparently to save them from humiliation and disgrace. In Japan, the practice is illegal and a parent who survives is charged with homicide, but usually receives a reduced sentence. In Japan, the decision-makers trying the defendant would be aware of the cultural norms and there would be no need to have a special provision allowing or disallowing cultural information into the trial because it would be something everyone is familiar with. In the case in the United States, perhaps taking into account cultural information, the judge found that the mother lacked sanity during the commission of the acts and was sentenced to one year in jail and to a probation of five-years.⁸⁷

⁸⁶ Carolyn Choi, 'Application of a Cultural Defense in Criminal Proceedings' (1990) 8 *UCLA Pacific Basin Law Journal* 80, 84.

⁸⁷ *Ibid*, 82–3.

Some scholars oppose the introduction of cultural information in trials of immigrants in the United States for a number of reasons. Doriane Coleman, for example, contended that the behaviour of immigrants in the United States should be judged against American standards and not by the standards of the immigrant's country of origin.⁸⁸ Leti Volpp, on the other hand, argued that while it is a problem for feminists if men use 'culture' as an excuse for causing physical or mental harm to women, immigrant women may also want to introduce evidence of their culture to explain their behaviour.⁸⁹

A more recent scholarly intervention into this debate is developed by Professors Knop, Michael, and Riles. Although they focus on an example of a civil case rather than a criminal case, they offer a framework for when cultural information should be admitted in trials. They give an example of a father in Japan and a daughter living in California. The father transfers shares of a California subsidiary of a Japanese corporation to the daughter, but his intention is not to actually transfer control but to transfer the stock in 'name only' which is a common practice in Japan to prevent disputes among siblings.⁹⁰ The scholars seem to believe that a decision-maker in the United States would benefit from learning about the normative system in another culture for purposes of resolving disputes in the United States.⁹¹ This approach to allow cultural information (which allows it to be admitted in certain circumstances) is in line with our critique of Article 42's implicit exclusion of all cultural information.

5.2.2. Hypothetical cases illustrating the relevance of cultural information

As discussed above, a TLF approach would focus attention on multiple geographic contexts. Treaties like the Istanbul Convention include countries with divergent historical, political, and social experiences. As a result, treaty-drafters should ensure that they account for these multiple contexts when constructing treaties. Many countries that are party to the Istanbul Convention have large immigrant populations, while others do not. In some countries that are party to the Istanbul Convention, 'honour-based' crimes might have historical roots, while in other countries such acts are more likely to be associated with immigrants. In Germany, for example, defendants accused of honour crimes have been minority immigrants who have attempted to introduce cultural information.⁹² On the other hand, in

⁸⁸ Kalantry (n 62) 27–8.

⁸⁹ *Ibid.*, 28.

⁹⁰ Karen Knop, Ralf Michaels and Annelise Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' (2012) 64 *Stanford Law Review* 589, 610.

⁹¹ *Ibid.*, 617.

⁹² Daniel Krosiak, *The Cultural Defense in Germany* (October 9, 2011), online: <https://doi.org/10.2139/ssrn.1941334> 1, 9–10.

countries such as Turkey,⁹³ where honour has been historically seen as a motive for VAW, defendants that are motivated by honour are most likely from the majority community. A context-based approach might allow for different approaches to cultural information in these two situations—one where an immigrant is being tried for VAW vs when a non-immigrant is being tried for it. The following four examples are used to illustrate this argument that a prohibition on cultural information places the immigrant in a more disadvantageous position than the non-immigrant:

Case #1: A non-immigrant man harms his wife because she had an affair with someone else (this is sometimes referred to as a ‘crime of passion’). Article 42 would most likely bar the introduction of cultural information in this case even though Article 42 does not explicitly identify ‘passion’ as a prohibited justification. However, when facing trial in a Western society, this person goes before a judge (and jury where applicable) that understands his motives because the judge is likely share similar cultural contexts with the defendant. Thus, Article 42’s prohibition has effectively no impact on the defendant. The cultural information does not need to be included in the trial, because the decision-maker is already aware that passion can be a motive for a man to harm his adulterous wife and would understand why that man acting with anger. The judge may implicitly award a lower sentence because the defendant’s crime fits within a cultural narrative that she understands. If the judge did not understand the cultural context for why a man might harm his wife for infidelity, she might have heightened the sentence because the defendant’s actions are not consistent with a narrative understood by the judge.

Case #2: A non-immigrant person is being tried in a country for an ‘honour crime’ where there is a history of VAW based on the notion of honour. Assume in this country, courts have historically exonerated people who commit VAW in the name of honour. In this case, Article 42 would correctly prevent cultural information from being introduced in a trial in this situation. Much like Case #1, in this country, preventing cultural information from being introduced by the defendant will have no impact. The defendant does not need to introduce information that the judge already knows, because they live in the same society as the defendant. The judge understands the narrative and belief system of the defendant (however horrific those belief systems may be). The judge may not exonerate or reduce the sentence of this person but, more notably, might also not increase it given that the judge or jury understands the state of mind and motives of the defendant.

⁹³ Bethany A Corbin, ‘Between Saviors and Savages: The Effect of Turkey’s Revised Penal Code on the Transformation of Honor Killings into Honor Suicides and Why Community Discourse Is Necessary for Honor Crime Eradication’ (2014) 29 *Emory International Law Review* 277, 291.

Case #3: An immigrant person in a country where ‘honour crimes’ are not known to occur in the mainstream population harms a female family member. Article 42 would disallow information about the immigrant’s cultural context and the country from where they immigrated. However, in this case, it might be helpful to the judge to have information about the context of the country where the immigrant comes from and what norms are present in that society. In that country or culture, people might have traditionally thought that the behaviour of a woman impacts family honour and the defendant’s actions would be in line with societal norms he is familiar with. These are problematic norms which should change, but that is a different question from whether a judge should learn about them. By disallowing cultural information that could help explain the state of mind and motive, the defendant in this case is in a worse position than the person in Case #1 and Case #2. Without knowledge of cultural information, the judge might give an even higher sentence because the crime would not fit a narrative she understood.

Case #4: An immigrant in a society harms his wife when he sees her having an affair in a society where monogamy is not the norm. In this hypothetical culture or country, people would not feel rage or even jealousy when they found out or saw their partners engaging in sexual behaviour with other people. However, the immigrant comes from a society where people have monogamous relationships, and he was in such a relationship with his wife. Should the information about this person’s cultural and societal context be included in the trial? Article 42 would disallow such information. However, without this information, the judge would not understand why the defendant acted with such anger and passion (however horrible the behaviour is). Having this cultural information may have no impact on the eventual sentence, but without it, it is possible that defendant would have gotten a higher sentence than a defendant who commits the exact same harm to another person in that society, but for reasons that are commonly understood in that cultural context. Although this type of case is the least likely to arise, the immigrant-defendant in this hypothetical case is in a similar position to the person described in Case #3. They are both immigrants being tried by judges who do not understand their cultural contexts and as such might be harsher in sentencing them than they would have been had they understood the defendant’s cultural context.

Thus, through these four hypothetical scenarios, we observe that the immigrants in Cases #3 and #4 are disadvantaged by an exclusion of cultural information whereas such an exclusion has no impact on the non-immigrants in Cases #1 and #2. Even if cultural information is included in trials, it is likely to be used for discrete purposes rather than a total exoneration of the defendant as discussed below.

5.2.3. Use of cultural information in trials

Cultural information can help judges understand the state of mind of the defendant. In common law systems, almost every crime generally has two components: the first being physical, and referred to as *actus reus*, and the second element is mental, known as *mens rea*.⁹⁴ The *actus reus* is best defined as the ‘guilty act’ and the *mens rea* is defined as a ‘culpable state of mind or the guilty mind’.⁹⁵ Cultural information would clarify ‘the culpability of a defendant’s state of mind in committing the forbidden act’.⁹⁶ In order to determine whether the defendant had the necessary *mens rea*, ‘[a]n understanding of the defendant’s mental state is incomplete without an understanding of his or her cultural context’.⁹⁷

Even if cultural information was allowed to help provide context and a narrative to the judge, it does not mean that the defendant would be exonerated or that his sentence would be reduced. In two cases from the UK that precede the Istanbul Convention, cultural information was included and led to differing outcomes. In the case of Faqir Mohammed, the evidence of cultural background does not appear to have impacted the final sentence. Mr Mohammed killed Shaida, his twenty-four-year-old daughter, with a knife, following his discovery of her fully-clothed boyfriend in her bedroom. In this case, Mohammed submitted a plea of provocation and claimed that ‘provocation’ revolved around his religious beliefs. Jury members were ‘instructed to take into account Mohammed’s depression and his strongly held religious and cultural beliefs’ as they considered his plea. The jury instruction shows that the judge accepted that, ‘Mohammed could legitimately cite his belief that a daughter should not have a boyfriend without his consent, and his strong conviction that sex outside marriage was a grave sin, as possible causes of his loss of self-control’. However, jury members were also instructed that ‘(a) man may not rely on his own violent disposition, by way of excuse’. They had to weigh Mohammed’s depression and religious beliefs against evidence from six of his surviving children that he had a tendency to be violent towards his wife and children, greater than what was considered to be ‘reasonably normal’. In this case, the jury concluded that Mohammed, was in fact guilty of murder, thus he was awarded a sentence of life imprisonment.⁹⁸

⁹⁴ Malek-Mithra Sheybani, ‘Cultural Defense: One Person’s Culture is Another’s Crime’(1987) 9 *Loyola of Los Angeles International and Comparative Law Review* 751, 752.

⁹⁵ *Ibid*, 753.

⁹⁶ Choi (n 86) 85–6.

⁹⁷ Nancy S Kim, ‘Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants’ (2006) 17 *University of Florida Journal of Law and Public Policy* 199, 203; Alexis L Davis, ‘In Defense of Cultural Insanity: Using Insanity as a Proxy for Culture in Criminal Cases’ (2016) 49 *Columbia Journal of Law and Social Problems* 387, 389.

⁹⁸ Anne Phillips, ‘When Culture Means Gender: Issues of Cultural Defence in the English Courts’ (2003) 66 *Modern Law Review* 510, 526.

However, in another case in the United Kingdom, evidence of cultural background appears to have made a difference. In one such case, in 1995 in the United Kingdom, Shabir Hussain was convicted of murdering his sister-in-law, Tasleem Begum, by driving into her while she waited on a pavement for her lover and then reversing the car over her body. At the initial trial, Hussain had denied his involvement in the murder of his sister-in-law. However, the court found him guilty of murder and he was sentenced to life imprisonment. Thereafter, he successfully appealed against this conviction on the basis of false identification. In 1998, at his retrial, he introduced a plea of 'guilty to manslaughter by reason of provocation'. The provocation argument would not have stood if not for cultural factors. All that Tasleem Begum had done was reject the marriage arranged for her in Pakistan when she was sixteen. Moreover, she had refused to sign the documents that would have allowed her husband to get a UK entry visa. Later on, she had an affair with a married man. However, in this case, the judge acknowledged that Tasleem's illicit affair 'would be deeply offensive to someone with her background and her religious beliefs', and sentenced Hussain 'on the basis that something blew up in his head that caused him a complete and sudden loss of self-control'. As a result, Hussain's original life sentence was reduced to six and a half years.⁹⁹

Finally, it is important to point out that sometimes cultural information is not used to exonerate or reduce his or her sentence, it can sometimes be used to help build the case against him or her. One of the authors has testified as an expert witness in a criminal trial in New York state on behalf of the prosecution who sought to explain the behaviour of the victim. Both perpetrator and victim were from India, where acid attacks are a way to control women's behaviour and punish them. Without knowledge of the context of India, a jury in New York might not understand why the victim simply did not escape the apartment after he threatened to throw acid on her. He kidnapped her and raped her. She feared he would kill or permanently disfigure her with acid if she did not comply. In that case, the context of the violence of acid attacks in India was relevant for an American jury to understand both the perpetrator and victim's behaviour. That information would not have relieved the defendant of responsibility, but rather was aimed at achieving a conviction.¹⁰⁰ Indeed, no feminist perspective on Article 42 would likely object to the use of cultural information if it is for the purpose of convicting a person who commits VAW.

⁹⁹ *Ibid*, 526–7.

¹⁰⁰ Although this discussion involves the use of cultural information in the context of criminal trials, some authors have argued that it could be relevant in civil cases. Prakash Shah has proposed that judges in the United Kingdom use certain norms (such as Sharia law) when adjudicating cases involving immigrants such as a dispute involving a business or inheritance. See Prakash Shah, 'Globalisation and the Challenge of Asian Legal Transplants in Europe' (2005) *Singapore Journal of Legal Studies* 348, 359–61.

The Istanbul Convention is a treaty that applies across multiple diverse countries, and the countries are internally very diverse as well. In contexts where immigrants are being tried, it might be appropriate to inform the decision-makers about the motivations or reasons behind the crimes that the defendant committed. This might help the decision-makers understand why the defendant might have acted with rage in a situation where people from the majority culture might not act in a similar way. A non-immigrant, on the other hand, that commits an act of violence on the basis of their culture need not include any information explaining why he was enraged or was in a certain state of mind as the judge would already be familiar with that. None of this is to condone any behaviour of violence and nor do we believe that allowing cultural information will necessarily be dispositive of the outcome of any one case. It may possibly serve to reduce a sentence, but it may also prevent a judge from heightening a sentence which she might otherwise do had she not understood the cultural context of the defendant.

6. Conclusion

This article examined Article 42(1) of the Istanbul Convention, which disallows cultural information from being used in trials where criminal defendants are accused of committing VAW.¹⁰¹ This article then developed a context-based TLF perspective and evaluated Article 42 from that point of view. A TLF approach would suggest that policymakers who are drafting treaties should take into account diversity between and within nation-states who are intended to be treaty-parties. The Istanbul Convention was largely expected to be signed and ratified by members of the Council of Europe, yet countries that are party to a treaty include those with and without large immigrant populations. Different reasons have been used to justify crimes historically. In some countries like Turkey honour has been used as a reason to justify violence, whereas in countries like the UK passion has been given as a reason to justify violence. Article 42 of the Istanbul Convention fails to appreciate the transnational diversity within and between Council of Europe countries.

First, it identifies by name only ‘honour’ as a reason that has been used to justify violence, but fails to identify ‘passion’ which has been a reason used in Western countries to justify VAW. Second, Article 42 does not allow the use of cultural information by a criminal defendant under any circumstances. Failing to allow cultural information, even for limited purposes, disadvantages the immigrant as compared to the non-immigrant. A non-immigrant individual gains nothing from admitting cultural information, because a

¹⁰¹ Istanbul Convention, Article 42.1.

judge already is aware of the reasons that might have motivated his or her behaviour. Conversely, an immigrant could potentially better explain their behaviour if they can use cultural information. Admitting cultural information in a trial could help inform decision-makers about the state of mind and motivations of an immigrant-defendant. Such information would not necessarily lead to a reduction in sentence or exoneration of the defendant but could prevent a judge from increasing the sentence. A TLF approach to treaty-drafting would be more attentive to vertical and horizontal diversity among intended treaty-parties, even if these are limited to Council of Europe nations, and would call for a more nuanced approach to cultural information.

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