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Critical Feminist Law-Making: Imitative Spaces and Improvised Coalitions

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ABSTRACT

Feminists working in the law may experience tension between mainstreaming feminist ideas to make the everyday life of women better and maintaining a critical feminist method of law-making. Some (including myself) might at times feel pessimistic for the present, and future of, critical approaches to law. Mainstreaming feminist demands can be a powerful and effective method, potentially monopolising feminist engagements with law. In this article, I take this concern seriously by exploring the hope and possibility of an improvised coalition between mainstream and critical feminist approaches. To show this, I use the jurisprudence of the European Court of Human Rights, specifically its finding that gender-based violence constitutes a form of torture, as a methodical example of law-making. The result of this is an identification of an imitative space in which critical feminist law-making could maintain its possibility. I argue that the imitation embedded in both mainstream and critical feminist approaches to law, and the Court's autopoietic method, could create this imitative space to safeguard feminist critical engagements with law. My analysis shows how feminist demands, mainstream or critical, carry the potential to activate an imitative space, where subversion becomes a possibility.

1. Introduction

Owing to its interpretation methods, the European Court of Human Rights (ECtHR) became a space for the expansion of rights categories. In *Opuz v Turkey*,[1] the ECtHR recognised that gender-based violence could violate Article 3 (Prohibition of Torture) of the European Convention of Human Rights (the Convention).[2] By doing so, the Court mainstreamed the feminist demand about accommodating women's experiences of torture in the

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[1] *Opuz v Turkey* App no 33401/02 09 (ECHR, September 2009).

[2] European Convention of Human Rights 1950 (as amended by protocols 11, 14, 15; supplemented by protocols 1, 4, 6, 7, 12, 13 and 16) (ECHR).

private sphere within the Court's protection regime.[3] The Court's integration of socio-political and cultural demands into the legal realm is an act of mainstreaming.[4] In feminist legal theory, there is an identified tension between 'mainstream feminism' and 'critical feminist approaches to law'.[5] While the former aims to reform, the latter pursues subversion. They are deemed irreconcilable. For the purposes of this article, 'critical feminist approaches' to law can be understood as consisting of two steps: the deconstruction of patriarchal structures, followed by a subversive reconstruction of them.[6] A critical feminist approach to law not only points out what needs to change; it also expects subversive feminist methodologies to inform the endless processes of rearticulation. On the other hand, one important feature of mainstream feminism, or as some call it, 'legal reformism', is that it does not go beyond the inclusion of feminist demands into the already existing legal structures.[7] A feminist demand is the identification of patriarchal structures, rules, and policies that need to be changed. Mainstream and critical feminisms propose different methods of change. In this sense, feminist engagements with law reveal the tension between mainstream and critical approaches to law. Mainstreaming only aims for an accommodation of women's experiences into the patriarchal structures via patriarchal methodologies. Consequently, mainstream feminism puts less emphasis on the methodology of change. The result is often that feminist demands are realised by non-feminist methods.[8] Mainstream feminism only points out what needs to be changed, and expects the Court to change it with the Court's own methodology. The mainstream feminism complies with the Court's logic. In turn, they pursue conformity with the Court's pre-existing doctrines and structures. The tension between mainstream and critical feminist approaches to law is not only ideological but also methodological. In this article, I argue that there is still a potential for the two approaches to law to achieve an improvised methodical coalition. That is, the article concentrates on a shared denominator between the following: the Court's method, mainstream

[3]Alice Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19(2) Leiden Journal of International Law 349; Jeanne Sarson and Linda MacDonald, 'Having Non-State Torture Recognized by the UN and Member States as an Infringement of Women's Human Rights Is Imperative' (2018) 33(1–2) Canadian Women Studies 143.

[4]Alice Edwards, 'From the Margins to the Mainstream and Back Again: Problems and Paradoxes of Feminist Engagement in Global and Local Justice: Reflections on Nesiah, Kouvo, Andersson, and Thomas' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing 2014) 133–36; Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 140.

[5]Walter S DeKeseredy, 'Bringing Feminist Sociological Analyses of Patriarchy Back to the Forefront of the Study of Woman Abuse' (2021) 27(5) Violence Against Women 621.

[6]Hilary Charlesworth, 'Feminists Critiques of International Law and Their Critics' (1994–1995) 13(1) Third World Legal Studies 1; Drucilla Cornell, 'The Philosophy of the Limit: Systems Theory and Feminist Legal Reform' (1991–1992) 26 New England Law Review 783; Elena Louzidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007) 19.

[7]Smart (n 4) 149; Cornell (n 6).

[8]Gina Heathcote, *Feminist Dialogues on International Law* (Oxford University Press 2019).

feminist, and critical feminist approaches to legal change. I call this denominator 'imitation'. By 'imitation' I mean reiteration of a structure with an aim of producing something new. Imitation performs different roles in different areas of scholarship. 'Autopoietic imitation' compels the subject to repeat previous structures in an attempt to become recognisable within a scene of constraint.[9] In this version of recognition, imitation is limited within a closed system. This also leads to a possible curtailing of the agency of the subject by delimiting it to pre-existing ways of being recognised. This means that if the subject desires recognition, they must imitate the structures that already exist – in the example of ECtHR, the listed rights categories.[10] The Court's interpretation focuses on the conceptualisation of the originally listed rights, and it can stifle other alternatives. Costas Douzinas sees this repetitive cycle as a mechanism through which the structures are heightened as rights and an illusion of future possibility is reinforced.[11]

The duty ascribed to imitation within the critical feminist methodologies, however, is the opposite. Imitation performs a subversive role, tasked with breaking the limitations of the pre-existing structures it reiterates by making them unstable.[12] The instability emerges when structures, for the purposes of this article, rights categories, are constantly being rearticulated. When a court considers a feminist demand, whether mainstream or critical, it is compelled to imitate one of the listed rights categories to create a new protection that aligns with the pre-existing structures. Despite functioning in different ways, the common denominator of imitation creates an imitative space with the potential to subvert those very structures.[13] It makes it possible for subversive approaches to law to intervene into these imitative spaces created by new demands coming from various feminist approaches to law. To borrow from Butler, it is 'participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them'.[14] Therefore, imitation triggered by demands and governed by various different feminisms, ultimately safeguards the possibility of critical feminist law-making. Imitation compels the Court to continuously redefine the thresholds of protection for gender-based violence, and destabilises the

[9]Vicki Bell, 'On Speech, Race and Melancholia: An Interview with Judith Butler' (1999) 16(2) Theory Culture Society 170.
[10]Judith Butler, *Undoing Gender* (Routledge 2004) 1.
[11]Costas Douzinas, 'Seven Theses on Human Rights' (*Critical Legal Thinking*, 3 June 2013) <http://criticallegalthinking.com/2013/06/03/seven-theses-on-human-rights-6-desire> accessed 21 November 2022.
[12]Butler, *Undoing Gender* (n 10) 1; Judith Butler, *Bodies That Matter* (Routledge 1993) 170–73, 220; Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 129; Moya Lloyd, *Judith Butler From Norms to Politics* (Polity Press 2007) 61; Judith Butler, 'Performative Agency' (2010) 3(2) Journal of Cultural Economy 147; Stephen Moebius, 'Imitation, Repetition and Iterability' (2004) 5(2) Distinktion: Scandinavian Journal of Social Theory 55; Sara Ahmed, *The Judith Butler Reader* (Blackwell Publishing 2004) 91.
[13]Judith Butler, *Gender Trouble* (1st edn 1990, Routledge 2007) 190.
[14]ibid 200.

formation of the concept, keeping it in a constant cycle of rearticulation. As a result, feminist demands – mainstream or critical – carry the potential to activate an imitative space, where subversion becomes a possibility.

To show this, my analysis identifies an 'improvised coalition' between mainstream and critical approaches to law.[15] This coalition takes place at the methodical level, creating an imitative space, where imitation enabled by the Court/mainstream feminism, allows for the accommodation of feminist demands. At the same time, critical feminist approaches to law can intervene in the rearticulations of pre-existing structures of human rights with a view to subverting them. I will use the ECtHR as an example of autopoietic imitation. Feminist demands are persistently brought before the Court. In the autopoietic style of the Court, feminist demands trigger an imitation of previous structures.[16] For instance, in *Opuz v Turkey* the ECtHR determined that gender-based violence could violate both Article 3 (on Prohibition of Torture) and Article 14 (on Prohibition of Discrimination) of the Convention.[17] I suggest that this could be considered the point at which the prominent feminist argument that gender-based violence is a form of torture is legally recognised.[18] In my analysis, I show that the *Opuz v Turkey* decision is the result of two processes. On the one hand, a series of imitations of pre-existing structures of torture and ill-treatment, and on the other, the outcome of developments emerging from the 'private/public' dimension in international law. State protection of human rights abuses by private actors was pioneered by the Inter-American Court of Human Rights with *Velasquez Rodriguez v Honduras* in 1988.[19] The 'doctrine of *protect*' later meant that gender-based violence that took place in private could be found to violate international law.[20] Although the ECtHR was not the first international institution that expanded the scope of prohibition of torture and ill-treatment to encompass non-state actors, the ECtHR's jurisprudence on gender-based violence as non-state torture is now well-established and developing steadily via new case law.[21] The ECtHR, following a similar rationale to other international

[15]For further discussion on this, see Tracey McMullen, 'The Improvisative' in George E Lewis and Benjamin Piekut (eds), *The Oxford Handbook of Critical Improvisation Studies, Volume 1* (Oxford University Press 2016).

[16]Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter 1987); Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) Law and Society Review 18(2) 291; see Niklas Luhmann, *Rechtssoziologie* (2nd edn 1983) (English translation, *A Sociological Theory of Law*, Elizabeth King-Utz and Martin Albrow trans. 2nd edn 1985); Niklas Luhmann, 'Law as a Social System' (1988–1989) 83 Northwestern University Law Review 136.

[17]*Opuz v Turkey* (n 1); European Convention of Human Rights (n 2) art 3 and 14.

[18]Paulina Garcia-Del Moral and Megan Alexandra Dersnah, 'A Feminist Challenge to Gendered Politics of Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2014) 18(6–7) Citizenship Studies 661.

[19]*Velasquez Rodriguez v. Honduras* (Inter-American Court of Human Rights, Series C: Decisions and Judgments, no. 04, 29 July 1988).

[20]Garcia-Del Moral and Dersnah (n 18).

[21]On this see generally, Ronagh McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence' (2020) 4 European Human Rights Law Review 394.

courts,[22] recognises a state obligation to exercise due diligence to prevent, investigate, punish and remedy gender-based violence.[23] Although gender-based violence could amount to a breach of Article 3 of the Convention, which is an absolute right category, the state obligation to carry out due diligence regarding gender-based violence is not an absolute one. States are expected to take reasonable measures to comply, without creating an impossible burden for themselves.[24]

The ECtHR recognises new categories and deems the Convention a 'living instrument'.[25] When a new right category is considered, the Court uses its interpretation methods to recognise or decline it.[26] The Court reads the object and purpose of the Convention in a dynamic way that includes protecting human beings, maintaining and promoting democracy, and ensuring rights and freedoms are practical and effective as opposed to theoretical and illusory.[27] These doctrines, including taking the Convention as a living instrument, together with the Court's interpretation methods, form the Court's methodology. The Court creates a logic by reinterpreting its pre-existing structures, so that it can protection for concepts that go beyond the text of the right categories listed in the Convention. Although this method can facilitate new categories of protection, the Court also uses this method to control the scope of these new categories and limit the protection to its own internal logic.[28] I show, using Niklas Luhmann's autopoietic systems theory, how the Convention grants protection only if a new concept conforms to, and reinforces, the Court's pre-existing structures.[29] Autopoietic laws develop through recursively imitating their pre-existing structures.[30] In this autopoietic right-making style, legal recognition of a new right occurs, repeating the previous legal structures.[31] I analyse how

[22] See for example, *González et al v Mexico* (Inter-American Court of Human Rights, Series C: Decisions and Judgments, No 205, 16 November 2009); *Maria Da Penha Maia Fernandes v Brazil* (Inter-American Commission of Human Rights, Report No 54/01,OEA/Ser.L/V/II.111 doc 20 rev, 16 April 2001); *AT v Hungary,* CEDAW Communication 2/2003, UN Doc CEDAW/C/32/D/2/2003.

[23] *Opuz v Turkey* (n 1).

[24] *Osman v The UK* App no 23452/94 (ECHR, September 1998) para 116; Vladislava Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' 33(3) Leiden Journal of International Law 601.

[25] *Tyrer v The UK* App no 5856/72 (ECHR, 25 April 1978); Maris Burgergs, 'How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in Which New Rights are Born' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2013).

[26] Jeremy McBride, *The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights* (Council of Europe Publishing 2021).

[27] *Soering v The UK* App no. Series A No 161 (ECHR, 7 July 1989) para 87; *Magyar Helsinki Bizottság v Hungary* App no. 18030/11 (ECHR, 8 November 2016) para 155.

[28] George Letzas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' (14 March 2012, <https://ssrn.com/abstract=2021836> or <https://doi.org/10.2139/ssrn.2021836>; Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5(1) Human Rights Law Review 57; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2014) 105.

[29] See n 16.

[30] Richard O Lempert, 'Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System' (1997–1998) 49(2) Hastings Law Journal 343.

[31] Teubner, 'Introduction to Autopoietic Law' (n 16); Luhmann, 'Law as a Social System' (n 16).

imitation in the service of creating the 'new' brings about different outcomes depending on which theory it is informed by. Imitation in autopoietic law-making creates a predictable 'new' that is limited to pre-existing structures. In this closed system, the new is permitted provided that it reconsolidates the old. For example, when gender-based violence as a form of torture was recognised as a new protection ground, feminist demands were realised in adherence to patriarchal dichotomies, for example public private division. This turns gender-based violence into a procedural legal phenomenon whereby protection for non-state torture is reduced to a due-diligence, risk-assessment process.[32] This risks trivialising feminist demands regardless of whether they come from mainstream or critical feminisms, because feminist demands are not being realised through feminist methods.[33] In autopoietic law-making feminist demands are hence instrumental to the expansion of the Court's pre-existing doctrines.[34]

Despite these risks and the reproduction of patriarchal dichotomies, the presence of imitation can also act to safeguard critical feminist methodology. If we focus on the methods of the Court, especially the acts of imitation it uses to reproduce a judgment, a shared space for critical and mainstream feminism arises. This article envisages the tension between mainstream feminism and critical feminism as a space of 'improvised coalition' and of possibility. The improvised coalition, borrowing from Sara Ramshaw's *Justice and Improvision*, is a call for the unexpected, where unanticipated subversion is possible; it is a coalition that 'both affirms the law as it is and as it can be otherwise'.[35]

I show the possibility of 'the unexpected' by focusing on the methods used by the ECtHR to recognise gender-based violence as a form of torture. The main reason for using non-state torture jurisprudence is to demonstrate the procedural development of law in this area. The focus will be on the method of law-making, which provides a procedural overlap of different feminisms and the Court's own method of law-making. It examines this shared space as a realm of hope while at the same time looking at the exposed patriarchal limits of the protection afforded by non-state torture jurisprudence in terms of gender-based violence. The article, by finding overlaps in method, seeks to bridge the demand and method split in feminist engagement using the example of the ECtHR. This 'split' is the result of mainstream feminism putting forward feminist demands to the Court and accepting realisation

[32]Vladislava Stoyanova, 'Due Diligence Versus Positive Obligations' in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020).
[33]Heathcote (n 8).
[34]ibid.
[35]Sara Ramshaw, *Justice as Improvisation*: *The Law of the Extempore* (Routledge 2013) 128–30. See generally, Sara Ramshaw, 'Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event' (2006) 2(1) Critical Studies in Improvisation 1.

of these demands through the Court's own methodology.[36] This brings about recognition of feminist demands by non-feminist methodologies, thereby causing a demand–method dichotomy. The space of imitation is explored as a way of enabling critical feminist engagement with law, to remedy the demand–method split, perhaps not through a coalition of ideologies but via an improvised coalition of methodologies.

To make this argument, the article begins by laying out the theoretical discussion surrounding feminist law-making methodologies and the tension between mainstream and critical feminist approaches to law. The article continues with a theoretical discussion of the ECtHR's autopoietic law-making and how it enables an improvised coalition between various feminist demands and potentially destabilises its own structures. Although autopoietic development of law is not unique to the ECtHR, its own technique of interpretation makes the Court a striking methodical example of autopoietic law-making. The article then evaluates the emergence of non-state torture jurisprudence within the ECtHR and examines the various imitations embedded within the construction of it. Lastly, it considers the possibility of critical feminist law-making within the same law-making process. This article concludes that the feminist demands, whether arising from mainstream or critical sources, trigger imitation due to the Court's autopoietic law-making. The Court needs to examine its pre-existing structures and imitate those that have the potential to accommodate that feminist demand. This imitation creates an occasion for subversive reconstruction, thereby keeping the Court's jurisprudence open to redefining the protection of rights and simultaneously exposing its patriarchal limits.

2. Feminist Law-Making: From 'Critical Versus Mainstream' to an 'Improvised Coalition'

Although there is not one single feminist law-making theory,[37] a number of critical feminist legal scholars share a common understanding of how to challenge patriarchal legal structures and, more importantly, a critical legal methodology for feminist law-making.[38] This shared methodology of feminist

[36] See generally, Gina Heathcote, 'On Feminist Legal Methodologies: Split, Plural and Speaking Subjects' (2018) 8(2) feminists@law <https://doi.org/10.22024/UniKent/03/fal.667> accessed 12 November 2022.

[37] Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6); Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10(1) Melbourne Journal of International Law 11; Corinne Blalock, 'Neoliberalism and the Crisis of Legal Theory' (2014) 77 (4) Law and Contemporary Problems 71; Edwards, 'From the Margins to the Mainstream and Back Again' (n 4); Heathcote (n 8); Beth Goldblatt, 'Violence Against Women and Social and Economic Rights: Deepening the Connections' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019); DeKeseredy (n 5).

[38] Cornell (n 6); Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6); Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 Australian Year Book of International Law 1; Hilary Charlesworth and Christine

law-making could be plainly formulated as the deconstruction of patriarchal structures followed by a subversive reconstruction of them.

The first stage is a deconstruction of patriarchal laws that are made based on male experience, and the second is a subversive reconstruction of the law that has been deconstructed.[39] In the first stage, the male-centric nature of law is exposed.[40] Alice Edwards describes this first stage as criticism of the existing laws rather than a proposal of what the feminist law should be.[41] Charlesworth explains the second stage as where 'subversive reconstructing' happens by making it clear that this does not simply mean an integration of women's experiences into the existing structures, but that it also includes the transformative potential of subverting those very structures.[42] This subversion enables feminist law-making to go beyond the limitations posed by pre-existing male structures, which were deconstructed in the first stage. Hope Olson breaks down the stages of feminist deconstruction into three steps: (1) identifying binaries; (2) reversing/displacing the dependent term from its negative position to a place that locates it as the very condition of the positive term; and (3) creating a more fluid and less coercive conceptual organisation of the terms which transcends a binary logic by simultaneously being both and neither of the binary terms.[43]

Another way to augment our understanding of subversive reconstruction as a feminist law-making technique would be to read Judith Butler's dual deployment of law together with the feminist methodology provided by Charlesworth. Using Butler's lens, what becomes visible is that the law has at least two aspects: the first is the normative power, intrinsic in law-making; and the second is the possibility of subversion embedded within the same law-making process.[44] On the one hand, law is a manifestation of patriarchal power relations; on the other, it has the potential to transform them.[45]

In *Gender Trouble*, Judith Butler delineates strategies for subversive rearticulation as 'participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them'.[46]

Chinkin, *The Boundaries of International Law* (Manchester University Press 2000) 49–50; Butler, *Undoing Gender* (n 10); Otto, 'The Exile of Inclusion' (n 37); Dianne Otto, 'Power and Danger: Feminist Engagement with International Law Through the UN Security Council' (2010) 32(1) Australian Feminist Law Journal 97.

[39]Charlesworth and Chinkin, *The Boundaries of International Law* (n 38); Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6).

[40]Charlesworth and Chinkin, The Boundaries of International Law (n 38); Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6).

[41]Edwards, 'From the Margins to the Mainstream and Back Again' (n 4).

[42]Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6).

[43]Hope Olsen, 'Patriarchal Structures of Subject Access and Subversive Techniques for Change' (2001) 26 (2–3) Canadian Journal of Information and Library Science 1.

[44]Butler, *Gender Trouble* (n 13) 108.

[45]Karen Zivi, 'Rights and the Politics of Performativity' in Terrell Carver and Samuel A Chambers (eds), *Judith Butler's Precarious Politics: Critical Encounters* (Routledge 2008).

[46]Butler, *Gender Trouble* (n 13) 200.

This underpins Butler's inclination to speak the language of rights, which is in the service of international human rights that are always in the process of 'rearticulating the ontology of human'.[47] Butler is interested in the discursive occasion that arises in every single repetition, as that which rearticulates the human by breaking the historical continuity of citation and/or the imitation chain of being human.[48] Following this logic, subversive reconstruction of prohibition of torture in a feminist fashion would mean rearticulating the human who is eligible for protection, to include the human who has been subjected to gender-based violence by a private actor. This could be done by entering the autopoietic processes of the Court, ensuring that the threshold of protection is constantly encountering its patriarchal limits. According to Butler, the occasion for subversion is embedded within the chain of imitation. It can be understood that repetition of a legal structure embodies the potential to subvert those very structures.[49]

Drucilla Cornell's the 'philosophy of the limit' also corresponds to the same methodology. In an article where she reviews Luhmann's autopoietic law in relation to feminist law reform, she states:

> [f]eminists need both an analysis of the repetition compulsion that in the political and legal arena I have called restoration as well as the assurance that legal and political reform will nevertheless not be completely foreclosed.[50]

In Cornell's approach, imitation occurring as a result of autopoietic law-making safeguards the ability for feminist demands to keep circulating within the legal realm. In this way, the Court is compelled to redefine the protection of rights constantly, and thus feminist law-making maintains its future possibilities.

The case law stemming from regional human rights courts that recognise feminist demands is generally classified as gender mainstreaming.[51] Due to the dominance of mainstream feminism, any law that brings about at least some recognition is considered to be a step towards actualising feminist demands.[52] Charlesworth observes that feminist engagement with international law fluctuates between resistance and compliance.[53] She points out the tension between a critical feminist approach and working with the law to improve the day-to-day experience of women. This leads to the separation

[47] Butler, *Undoing Gender* (n 10) 32–33.
[48] Judith Butler, *Bodies That Matter* (Routledge 1993) xxiv; Angela McRobbie, 'Feminism and the Socialist Tradition … Undone?' (2004) 18(4) Cultural Studies 503.
[49] Butler, *Bodies That Matter* (n 48) 185.
[50] Cornell (n 6).
[51] Otto, 'The Exile of Inclusion' (n 42); Catherine O'Rourke, 'Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions' (2017) 28(4) EJIL 1019.
[52] DeKeseredy (n 5).
[53] Hilary Charlesworth, 'Talking to Ourselves?' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing 2014).

of feminist demands from feminist methods.[54] Because if we break mainstreaming down into its elements, it involves bringing feminist demands to the courts and achieving legal recognition according to the court's own methodology. In the case of the ECtHR, the Court's own methodology is autopoietic, meaning that the Court imitates its previous structures in order to process new demands. When imitation is considered as a common ground between the Court and critical feminist methodology, then the tension between mainstream feminism and a critical feminist approach to law-making could be seen as a phase of the latter's methodology. Where feminism and international law are concerned, the paradox of gender mainstreaming lies in a simultaneous failure and possibility.[55] It can be considered a failure due to its focus on pragmatic gains, and the maintenance of patriarchal dichotomies. It can be considered a possibility due to the repetition it triggers within the Court's own law-making process.[56] Each time a feminist demand is mainstreamed, the ECtHR, functioning via an exemplar autopoietic system, imitates a pre-existing structure to produce legal recognition. Every time an imitation happens, an occasion for subversive reconstruction emerges. Autopoietic reiteration is the first and necessary step towards a feminist law-making. Subsequently, feminist mainstreaming and the ECtHR's autopoietic law-making may perpetuate the possibilities for feminist subversion by ensuring the continuous imitation of legal structures. The repetition process within autopoietic law-making ensures that international law-making is not completely foreclosed to feminist subversion. Given this picture, the ECtHR's autopoietic legal recognition and the feminist-law making method do overlap when it comes to imitation. In other words, the possibility of feminist law-making emerges whenever a patriarchal structure is reiterated and redefined by the Court. This intersection has been identified by Charlesworth as follows:

> Deconstruction of the explicit and implicit values of the international legal system means challenging their claim to objectivity and rationality because of the limited base on which they are built … A more difficult project is that of reconstruction of a truly human system of international law. How do we change the conceptual foundations of international law? … We have no historical experience of power on which to draw in our reconstruction. Deconstruction has transformative potential because it reduces the imaginative grip of the traditional theories. In this sense, all feminist theories are subversive strategies.[57]

[54]Charlesworth, 'Talking to Ourselves?' (n 53); Yoriko Otomo, 'Searching for Virtue in International Law' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing 2014).

[55]Butler, *Gender Trouble* (n 13) 200; Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6); Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016); Ratna Kapur and Brenda Cossman, 'Subversive Sites 20 Years Later: Rethinking Feminist Engagements with Law (2018) 44(2) Australian Feminist Law Journal 265; Heathcote (n 36).

[56]Louzidou (n 6) 19.

[57]Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6).

Charlesworth sees subversive potential in the deconstruction process, where feminist demands are pointing out the exclusionary nature of the law, thereby recognising all feminist theories as subversive strategies owing to this potential. O'Rouke observes that feminist engagement with international law, despite coming from diverse ideologies, is placing an emphasis on shared feminist values rather than on differences.[58] There are a number of differences within feminisms. This article does not propose to ignore these ideological differences. It rather focuses on the methodological overlaps, which could open gateways for diverse feminist approaches, especially the least welcomed ones such as queer, decolonial and anti-racist feminisms,[59] to ensure their place in the processes of international law-making. Shared values in methodology often lie in identifying male-centric rules and practices, whereas the difference ought to be focused on how to change such rules and practices. Mainstream feminism is concerned with being accommodated within the law; however, critical feminism is ultimately interested in subversively reconstructing the law.

It is worth restating that the main differences rest within the methodology of law-making between feminist reformism and the critical feminist method of law-making. Feminist reformism attains inclusion of feminist demands through repeating existing patriarchal structures as an end goal, whereas feminist law-making is interested in the possibility of a subversive reconstruction occurring in each act of imitation. While feminist reformism or mainstreaming might also result in keeping patriarchal structures at the repetition stage, this is a pre-requisite for a subversive reconstruction to occur. In this repetition stage, the Court encounters and exposes the boundaries of its patriarchal protection and is forced to redefine the threshold of protection. Although there is no shared common approach that is led by a single feminist 'authority', O'Rourke's contextualising of strategy suggests that there is a consistent international feminist strategy that, despite being dissonant, makes a constant request for recognition of various feminist demands.[60]

3. The ECtHR Operates via Autopoiesis

The term autopoietic stems from a biological theory that has been adapted to law by a German sociologist, Niklas Luhmann.[61] According to Luhmann's

[58]O'Rourke (n 51).
[59]Hannah Down, *The Penguin Book of Feminist Writing* (Penguin Classics 2021); Vanessa E Munro and Margaret Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2019); Nicole Watson, *Aboriginal Women, Law and Critical Race Theory* (Palgrave Macmillan 2022); Louzidou (n 6).
[60]O'Rouke (n 51). See also, Down (n 59); Munro and Margaret Davies (n 59); Watson (n 59); Louzidou (n 6).
[61]Luhmann, 'Law as a Social System' (n 16).

theory, law is an autonomous system that 'produces and reproduces its own elements by interaction of its own elements'.[62] Following this definition, law operates like a closed circuit, which produces and reproduces new laws in accordance with pre-existing legal structures. This closed system autonomously redefines its scope through self-referentiality, by observing the changes within its surrounding environment. This means that autopoietic laws are not entirely closed to external factors. Although autopoietic law is operationally closed, it is cognitively and indirectly influenced by external factors. Yet despite being cognitively open to outside influence, the autopoietic system's internal logic determines what qualifies to be taken into the system.[63] Autopoietic laws 'are operationally closed because they select and adapt information coming from outside according to the internal logic of the system'.[64]

The ECtHR is described as having dynamic interpretation methods.[65] These methods keep the Convention up to date with the social realities of the present time; it is famously framed as a 'living instrument'.[66] In order for it to adapt to present-day conditions, and to provide effective and practical protection, it evolves dynamically by virtue of jurisprudence.[67] The dynamic interpretation enables the Court to expand the protection that ensures the Convention continues to be a living instrument, and this protection 'guarantee[s] not rights that are theoretical or illusory but rights that are practical and effective'.[68] Although the ECtHR is not the only court that follows autopoietic style, its methods make it a vivid showcase of autopoietic law-making. When a new claim is made, the Court reads the Convention text using its interpretation methods. It discovers new enumerated rights embedded in the text if they are in line with the Court's pre-existing doctrines and structures.[69] It has been asserted that this can bring about an interpretation methodology that goes beyond the textual meaning of the Convention, thus resulting in the Court

[62]Teubner, 'Introduction to Autopoietic Law' (n 16) 3; Luhmann, 'Law as a Social System' (n 16).
[63]Aleksandar Jovanoski and Agron Rustemi, 'The Controversy Between Niklas Luhmann and Jürgen Habermas Related to Sociological Approach to Law' (2021) 16(1) SEEU Review.
[64]John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 New York University Journal of International Law and Politics 657.
[65]George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007).
[66]Jared Wessel, 'Relational Contract Theory and Treaty Interpretation: End-Game Treaties v Dynamic Interpretation' (2004) 60 Annual Survey of American Law 149; Maris Burgergs, 'How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in Which New Rights are Born' in Eva Brems, Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2013); Stefan Theil, 'Is the "Living Instrument" Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) 23(3) European Public Law 587; Masa Marochini, 'The Interpretation of the European Convention on Human Rights' (2014) 51 Zb Radova 63.
[67]*Tyrer v the UK*, para 183.
[68]*Airey v Ireland* App no 6289/73 (ECHR, 9 March 1977) para 24.29.
[69]Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 65).

exceeding its mandate.[70] *Golder v UK* was a turning point in terms of the recognition of categories of new rights that were not explicitly stated in the Convention text.[71] For the first time in the Court's history, it recognised the existence of rights that could be discovered by interpretation methods. *Golder* is important for the recognition of new rights as it opened a gateway for rearticulation of the text of the Convention.[72] Since *Golder* it has been possible to demand recognition of new rights categories as long as they are considered suitable to the Court's own methodology. It is a pronounced manifestation of the autopoietic method.[73] The Court's development of its jurisprudence 'autopoietically' means that it recognises new concepts if they conform to its pre-existing legal structures. This, on the one hand, expands protection to new categories, but on the other hand it diminishes the potential for this right to establish itself as a new category independent from those pre-existing legal structures. New decisions are made by imitating structures of pre-existing laws/rights. New demands to the Court can only be successful (i.e. qualify as valid/legal) if they are presented in a way that is self-referential to the Court's existing internal logic. One of the main features of autopoietic law is that 'it formulates rules and decisions with reference to an internal legal representation of social reality'.[74]

As mentioned earlier, autopoietic law develops through endless self-reference, with the aim of distinguishing between what is legal and what is illegal. The jurisprudence of the Court deals with this by relying on the binary code of violation/non-violation. The demands that correspond with the existing legal structures are recognised as valid, and those that do not conform to those structures are not recognised, thus are dismissed as invalid. Recent research involving a prediction of the Court's judgment by machine learning confirms the autopoietic nature of the internal logic of the Court's decision-making process.[75] The Court's internal logic is manifested via a binary code of

[70]The jurisprudence of the Court received critique for exceeding its mandate. I will not delve into the discussions around the legitimacy of the Court in recognising new right categories. For scholarly work on the Court's interpretation methods and legitimacy see, Jukka Viljanen, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' (2011) 62–63 Cuadernos Constitutucionales de la Catedra Fadrique Furio Ceriol 249; Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42 Fordham International Law Journal 765; George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe* (Cambridge University Press 2013).

[71]*Golder v The United Kingdom* App no 4451/70 (ECHR, 21 February 1975) para 32.

[72]ibid.

[73]ibid.

[74]Teubner, 'Autopoiesis in Law and Society' (n 16) 297.

[75]Nikolaos Aletras, Dimitrios Tsarapatsanis, Daniel Preoțiuc-Pietro and Vasileios Lampo, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) 10 PeerJ Computer Science 2 <https://peerj.com/articles/cs-93/> accessed 21 November 2022; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 67.

legal/non-violation versus illegal/violation.[76] The computer algorithms were able to learn the pattern of pre-existing judgments and predict future judgments with a 78% success rate.[77]

Another important aspect of autopoietic law-making is that it is 'operationally closed because they select and adapt information coming from outside according to the internal logic of the system'.[78] If we take feminist demands as information that is not internal to the ECtHR's logic, it can be designated as information coming from outside. This cognitive information will not be allowed into the scope of the Convention until and unless it is submitted in accordance with a structure that is in conformity with the pre-existing legal structures. In sum, the Court filters the incoming demands with a view to identifying them as either violation or non-violation. In that way, normative demands for recognition occur in a structural vacuum, where the new is indeed a reproduction of the old structure. As a result, the Court's internal logic shapes and delimits the content and scope of a potential new category, and protection cannot be achieved independent from the pre-existing legal structures of the Court. Recognition of gender-based violence as non-state torture could not happen without presenting the violence in conformance with these pre-existing legal structures. The non-state torture is, then, an amalgam of several pre-existing legal structures, namely torture, discrimination, gender-based violence and the obligation to protect individuals from criminal acts of others. As ironic as it may sound, a potential for feminist law-making is also embedded in the very example of non-state torture as gender-based violence. If we look at this law-making process with mainstreaming and critical feminist methodology in mind, then it might become clearer how this paradox takes place. The first stage would be bringing a feminist demand to the Court (deconstruction of male-centric laws). This first stage could also be identified as the improvised coalition, where feminist demands are taken to the Court by various sources. These sources do not necessarily share the same feminist ideologies, but may overlap in terms of asking the Court to change a patriarchal norm. This overlap happens without a structure or harmonised agreement as to how to change the law, and therefore it is a spontaneous, improvised intersection. It could be called a spontaneous coalition since diverse understandings of feminism identify and agree that a legal structure is patriarchal and needs to change. The second stage would be the Court's recognition of this demand by reiterating its previous structures during which the feminist demands are tailored in conformance with pre-existing structures of the Court. In this process,

[76] Aletras and others (n 75).
[77] ibid.
[78] Gillespie (n 64) 680.

due to the limitation of previous structures, the Court offers a patriarchal accommodation of feminist demands. In the example of non-state torture, it recognises non-state torture as a procedural as opposed to substantive breach, whereby protection offered to non-state torture and state torture is not equal to the protection provided to torture. This also restricts the protection to a due-diligence, risk-assessment process. In addition, feminist demands become instrumental for the expansion of the Court's pre-existing doctrines, reinforcing the trivialisation of gender-based violence. Repetition could lead the Courts to contest its patriarchal contextualising of torture and to expand its parameters to respond to feminist demands. Every time the Court structurally widens the thresholds of protection, despite trivialising gender-based violence compared with state torture, the conventional framework of state torture becomes destabilised and kept open to rearticulation. Paradoxically, at the same time, the potential for subversive reconstruction co-exists alongside a reinforcement of patriarchal structures. When the Court repeats its previous structures to produce a new judgment, it also exposes the limits of its patriarchal framework of protection. In the example of non-state torture, the Court imitated various doctrines and concepts (e.g. the Convention a living instrument, positive obligations, public/private dichotomy, vulnerable individuals, prohibition of discrimination, and Article 3) to redefine torture in order to accommodate gender-based violence. Imitation of these pre-existing doctrines and concepts exposes its patriarchal failures but at the same time opens up the potential for subversion by not allowing the Court to stabilise rights categories. Repetition challenges the categorisation of the nature of the torture through the kinds it excludes. Inevitably, different rearticulations of torture occur. This maintains the hope that critical feminist approaches to law can keep the Convention open to future articulations.

4. The ECtHR and Non-State Torture-Domestic Violence

Prohibition of torture is identified as a rule of customary international law, meaning it is prohibited by the laws of nations.[79] Torture, cruel, inhuman and degrading treatment is prohibited by international human rights instruments, including the Universal Declaration of Human Rights (1948),[80] the European Convention on Human Rights (1950),[81] the International Covenant on Civil and Political Rights (1966)[82] and the Convention Against Torture

[79]Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' (2004) European Journal of International Law 15, 97–12.
[80]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[81]European Convention of Human Rights 1950 (as amended by protocols 11, 14, 15; supplemented by protocols 1, 4, 6, 7, 12, 13 and 16) (ECHR).
[82]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

(CAT) (1985).[83] It has been accepted as a peremptory norm, jus cogens, with the highest status in public international law, indicating that the 'torturer has become like the pirate and the slave trader before him *hostis humani generis*, an enemy of all mankind'.[84]

The jurisprudence of the Human Rights Committee, and especially ECtHR, has played a significant role in defining the limits of torture as well as distinguishing it from other forms of ill-treatment. It is argued that the Declaration against Torture (1975) was built upon the interpretation specifically developed by ECtHR, whereby torture is considered an aggravating form of inhuman and degrading treatment.[85] The ECHR prohibits torture, inhuman and degrading treatment or punishment under Article 3 as a blanket provision. CAT, on the other hand, has employed a different approach, explicitly regulating cruel, inhuman and degrading treatment and torture under different articles,[86] departing from the ECtHR's blanket prohibition of ill-treatment under a single article.

Distinguishing torture from other forms of ill-treatment is important in terms of accommodating gender-based violence as a form of ill-treatment. Nigel Rodley, a former UN Special Rapporteur on torture, provided three elements for defining and distinguishing torture from other forms of ill-treatment: first, severity of pain; second, the purpose for its infliction; and third, the status of the perpetrator as a state agent.[87] However, Manfred Nowak, again former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, argues that the criteria for distinguishing torture from cruel, inhuman and degrading treatment should be the purpose of the conduct and the powerlessness of the victim, finding the severity of the pain irrelevant.[88] In an article Nowak co-authored with Elizabeth McArthur, they argued that any kind of ill-treatment involves severe pain, therefore they are not distinguishable based on the amount of pain caused; therefore, the purpose of the treatment could function as a more

[83]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) General Assembly resolution 39/46 (CAT).

[84]*Filartiga v Pena-Irala*, 630 F. 2d 876, 2d Cir.1980; ICTY Judgment of 10 December 1998, Prosecutor v Furundzija, IT-95-17/1-T, No 147, page 19.

[85]*The Greek Case* App No 00003321-3/67 (ECHR, 5 November 1969); De Wet (n 79); Nigel S Rodley, 'The Prohibition of Torture: Absolute Means Absolute' (2006) 4 Denver Journal of International Law and Policy 145; Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15(1) Human Rights Quarterly 63.

[86]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) General Assembly resolution 39/46 (CAT) art 1 and art 16.

[87]Nigel S Rodley, 'The Definition(s) of Torture in International Law' (2002) 55(1) Current Legal Problems 467.

[88]CAT, General Comment No 2 on implementation of article 2 by States parties, UN Doc CAT/C/GC/2 (24 January 2008) para 1.

appropriate yardstick.[89] The purpose approach limits the scope of torture to such 'purposes as obtaining from him or a third person information or a confession' as prescribed by CAT Article 1.[90] This limited understanding of torture stems from the purpose-based approach and cannot accommodate gender-based violence since the purpose of gender-based violence is not to obtain information and/or confession. It rather originates from patriarchal power and inequality in society. In this sense, the severity of the treatment approach allows for a broader interpretation of torture and shows a potential to include gender-based violence. According to the severity approach, regardless of the purpose of the treatment, infliction of severe pain is sufficient for treatment to amount to torture.

The ECtHR's jurisprudence deployed a combined approach which covered both severity and purpose approaches in its framework of prohibition of torture, inhuman and degrading treatment and punishment.[91] This dynamic approach made the ECtHR a convenient forum for the development of non-state torture jurisprudence. As I discussed above, the reiteration of several doctrines and concepts have allowed for the recognition of non-state torture.

The Court imposes positive obligations upon Member States to protect the rights of individuals within their jurisdictions. This means that states are not only under a negative duty to refrain from breaching rights through State agents, but they are also under an obligation to offer protection when these breaches occur between two private persons.[92] Positive obligations also require a state to intervene in the private sphere to protect the rights of the individual from criminal acts of others.[93]

The jurisprudence on gender-based violence as a form of torture evolved from judgments that found the gender of the victim a significant factor in torture by state officials. Before *Aydin v Turkey*,[94] the gender aspect of state torture had not been recognised by the Court. This means that expansion of conventional torture at the hands of state authorities paved the way for the recognition of gender-based violence as a form of torture by private actors. One of the pioneering jurisprudence cases regarding gender-based violence was

[89]Report of the Special Rapporteur, Manfred Nowak. E/CN.4/2006/6; Manfred Nowak and Elizabeth McArthur, 'The Distinction between Torture and Cruel, Inhuman or Degrading Treatment' (2006) 16 Torture 147.

[90]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) General Assembly resolution 39/46 (CAT) art 1.

[91]*Ireland v United Kingdom* App no 5310/71 (ECHR, 18 January 1978) para 162; *The Greek Case*; *Chahal v The United Kingdom* App no 22414/93 (ECHR, 15 November 1996) paras 79–80.

[92]Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012).

[93]*Airey* n (68) paras 24, 29.

[94]*Aydin v Turkey* App no 23178/94 (ECHR, 25 September 1997).

Kontrová v Slovakia,[95] in which the Court found violation of Article 2. Prior to gender-based violence cases, it was considered, in *A v UK* in 1998,[96] that domestic violence against children constituted a breach of Article 3.

The Court identified its precursor framework for non-state torture by determining that states must ensure that ill-treatment is not inflicted on especially vulnerable individuals such as children by private actors within its jurisdiction.[97] In *Kontrová v Slovakia*,[98] although the violation was of right to life, the judgment laid down the foundations for protection against gender-based violence, which later informed the jurisprudence in terms of non-state torture.[99] In *Kontrová*, the Court expressed the conditions under which positive obligations upon the state would emerge in terms of gender-based violence as follows:

> [I]t must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[100]

This was the first time the Court had articulated that the *Osman* test would determine whether gender-based violence in the hands of private actors qualified for protection. The Osman case was ground-breaking, as it was also the first time that the Court recognised states' positive obligations to protect individuals in their private relations. The *Osman* test later became the standard applied to violations caused by private actors, covering a wide range of harm, including domestic violence. The test consists of several questions, namely: whether the state has a legal framework in place, whether the state took reasonable measures to prevent a real and immediate risk which it knew of, or ought to, have known about, and whether it conducted an effective investigation.[101] When it is applied to non-state torture cases, an additional question is asked: whether the ill-treatment is beyond the minimum severity threshold. If these questions are answered positively then even if harm is caused, the state is discharged from its responsibility.

A year later, in *Bevacqua & S v Bulgaria*,[102] the Court revealed a broader perspective on gender-based violence cases, again with reference to the *Osman* test,[103] pointing out the positive obligations that might potentially

[95] *Kontrová v Slovakia* App No 7510/04 (ECHR, 31 May 2007).
[96] *A v The United Kingdom* App No 100/1997/884/1096 (ECHR, 23 September 1998).
[97] ibid.
[98] *Kontrová* (n 95).
[99] *A* (n 96).
[100] *Kontrová* (n 95) para 84.
[101] *Opuz* (n 1) para 116.
[102] *Bevacqua & S v Bulgaria* App No 71127/01 (ECHR, 12 September 2008).
[103] ibid para 65.

arise from Articles 2, 3 and 8 of the Convention.[104] Taken together with the vulnerability of domestic violence victims, this would require states to intervene in the private sphere, which ought to be protected from state interference.[105] In an earlier case, *MC v Bulgaria*, the Court had signalled the direction of its growing jurisprudence, asserting that positive obligations are embedded in Articles 3 and 8 and applicable to cases of ill-treatment by a non-state, private person.[106] The *Opuz v Turkey* judgment was delivered two years after *Kontrová v Slovakia*,[107] following a similar logic, and this time, in addition to a breach of Article 2, it found violation of Article 3, which meant the Court recognised gender-based violence as a form of non-state torture.[108] The *Opuz* case is ground-breaking in the sense that it was the first judgment that classified domestic violence against women as amounting to a breach of the prohibition of torture provision, observing that domestic violence mainly affects women and that states' judicial passivity is discriminatory against women.[109] The Court applied a step-by-step evaluation to determine whether Turkey had breached Article 3. The first step involved establishing domestic violence victims as vulnerable individuals, referring to *A v the UK*;[110] second, it confirmed that the pain suffered by the applicant was 'sufficiently serious to amount to ill-treatment within the meaning of Article 3'.[111] In the third stage, the Court looked at whether the state, in this case Turkey, had fulfilled its positive obligation to protect the victim from criminal acts by a private individual.[112] It is noteworthy that when the Court examined the Article 3 violation of the Convention in *Opuz*, it did not directly refer to the *Osman* test, nor did it specify which limb of Article 3 had been violated.

After the ground-breaking *Opuz* judgment, the Court further developed its jurisprudence on gender-based violence and domestic violence in relation to non-state torture. It went on to look for the presence of certain conditions in order to place gender-based violence in the hands of private actors to amount to a breach of Article 3. We can observe this well-established set of conditions in a relatively recent judgment.[113] The Court starts with describing the domestic violence and remarks on the special vulnerability of domestic violence victims who require active behaviour on the part of the state to prevent this violence, with reference to other international instruments.[114]

[104]ibid.
[105]ibid.
[106]*MC v Bulgaria* App No 39272/98 (ECHR, 04 March 2004) paras 151–53.
[107]*Kontrová* (n 95).
[108]*Opuz* (n 1).
[109]ibid.
[110]*A* (n 96).
[111]*Opuz* (n 1) para 161.
[112]*Opuz* (n 1).
[113]*Volodina v Russia* App No 41261/17 (ECHR, 09 July 2019).
[114]ibid.

By emphasising the active involvement of the state, the Court stresses that states are under a positive obligation to protect victims from domestic gender-based violence. After setting the scene, the Court lays out the conditions under which gender-based violence constitute a breach of Article 3. The first stage is whether the applicant was subjected to treatment contravening Article 3.[115] To determine this, the Court looks for a minimum level of severity.[116] If the severity of the treatment falls within the scope of Article 3,[117] in the second stage the Court examines whether the authorities discharged their obligations under Article 3.[118] In this stage, it discloses the positive obligations of the state in relation to Article 3: (a) the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals; (b) the obligation to take the reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known; and (c) the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised.[119] This is accompanied by the Article 14 discrimination clause if there is evidence to indicate a discriminatory passivity of the judicial system that gives rise to impunity enjoyed by the perpetrators of gender-based violence.

This framework is now an established test for non-state torture. However, the non-state torture test is applied only if the nature of the treatment passes the minimum severity threshold.[120] The Court determines the minimum severity threshold, taking several factors into account, not only 'the nature and context of the treatment, its duration, and its physical and mental effects, but also the sex of the victim and the relationship between the victim and the author of the treatment'.[121] Only if the severity of the treatment is within the ambit of Article 3 does the Court move to examine the second stage. At this stage, the Court finds a violation when any of the positive obligations have been breached. The first positive obligation the Court examines is whether the state had implemented an adequate legal framework to prevent domestic violence and to protect victims from private actors. This could be laws that prohibit domestic violence and criminalisation of this as a special stand-alone crime. The second positive obligation arising from Article 3 is the obligation to take reasonable measures that might have been expected to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known. This is the *Osman* test, which has been used for a wide range of cases in relation to Articles 2 and 3. The *Osman* test has been designed to set the limits of police

[115] ibid.
[116] ibid.
[117] If the severity is below the threshold of Article 3 then the Court might examine the case under Article 8.
[118] *Volodina* (n 113).
[119] *Volodina* (n 113) para 77.
[120] *Volodina* (n 113) para 73.
[121] ibid.

protection for human rights violations taking place at the hands of private actors. The last obligation is whether the state effectively investigated alleged ill-treatment claims. These obligations are also called procedural obligations.

5. Imitation: Exposing the Patriarchal Limits of Protection

International law treats public and private spheres differently, which brings about unequal protection for these spheres. Despite the same harm, the same torture and/or the same violence having been inflicted, the emphasis of the jurisprudence is on who administered it. This signifies that the jurisprudence does not equate torture/ill-treatment with non-state torture and leads to a number of conclusions.[122] The first is that the classification of this jurisprudence as non-state torture creates a misunderstanding and is a misnomer.[123] That state torture takes place within the public realm, and gender-based violence takes place in private reinforces the historical public/private division based on patriarchal structures. The Court applies different criteria and tests for gender-based violence to be recognised as a form of torture. Moreover, the Court has not found the existence of torture in gender-based violence cases. In some significant cases, ambiguity remained, as the Court did not mention which limb of Article 3 was violated, for example, in *Opuz v Turkey*.

Charlesworth and Chinkin argued that these norms (of international law) have been designed to trivialise harm suffered by women. In their words, 'the manner in which the norms have been constructed obscures the most pervasive harm done to women'[124] because the Court's emphasis is on who inflicted the harm rather than to whom the harm was caused. The conclusions and methodology of the Court changes depending on who applied the torture. If the perpetrator is a state agent, the severity of harm is adequate for a violation; however, if the perpetrator is a private actor, as in gender-based violence cases, then additional conditions are laid out, and the *Osman* test is used. The *Osman* test was first created to address the general positive duties that arise under Article 2.

It relies heavily on the public–private division that structures both international law and the relationship between genders.[125] The test does not determine the necessary scope of protection by looking at women's needs

[122]*Opuz* (n 1); *Volodina* (n 113); *Talpis v Italy* App No 41237/14 (ECHR, 18 July 2017); *Kurt v Austria* App No 62903/15 (ECHR, 15 June 2021).

[123]Nicole Bürli, 'Grand Chamber Limits the Scope of Article 3 for Non-state Ill Treatment' (*Strasbourg Observers*, 3 September 2019) <https://strasbourgobservers.com/2019/09/03/grand-chamber-limits-the-scope-of-article-3-for-non-state-ill-treatment/> accessed 2 August 2021; Elizabeth A Sheehy, 'Criminalising Private Torture as Feminist Strategy' in Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch and Jane Maree Maher (eds), *Intimate Partner Violence, Risk and Security* (Routledge 2018).

[124]Charlesworth and Chinkin, 'The Gender of Jus Cogens' (n 85) 70.

[125]Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6).

and harm suffered. The extent of protection is dictated by the available resources of the state and the difficulties inherent in policing modern societies.[126] The state's duty to protect, as manifested in the *Osman* test, is not measured by way of a standard of result but by a standard of conduct.[127]

Consistent with other international jurisprudence, the protection afforded to non-state torture by the Court is a due-diligence standard, focusing on states' conduct, not the harm caused by the non-state torture. The idea behind due diligence is to bring into existence a state's accountability when it was not the state who harmed the individual, that is, the harm has taken place in the private sphere. This different treatment of harm depending on where it happened relies on the gendered public-versus-private division. This makes the protection afforded to non-state torture, namely due diligence, the product of a gendered separation of spheres.

In addition to its already gendered construction stemming from the public–private division, the due-diligence concept is a well-established commercial law concept. It is therefore also an example of a market-modelled responsibility. Corinne Blalock argues that '[u]nder neoliberalism the measures and values of the market are used to index the success of the State and its citizens'.[128] The adaptation of due diligence to non-state torture means that states are not responsible for the harm that occurs as a result of the non-state torture per se but the state could still be in violation of Article 3 for failing to carry out certain conduct regardless of its success in preventing the non-state torture. It is useful to examine the scope of commercial due diligence to achieve a comparative perspective. Due diligence is described as follows: 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation'.[129] Some have viewed this in strictly transactional terms – what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense:

> a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.[130]

[126] *Osman* (n 24).
[127] Human Rights Council, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, A/HRC/11/13 (22 April 2009) para 14.
[128] Blalock (n 37) 72; Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019); Claerwen O'Hara and others, 'World-Making Through Market Morality: A Conversation About Human Rights, Neoliberalism and Political Struggle' (2020) 46(1) Australian Feminist Law Journal 139.
[129] Black's Law Dictionary, 8th edition (2006) cited in Human Rights Council, *Business and Human Rights* (n 126) para 71.
[130] Human Rights Council, *Business and Human Rights* (n 126) para 71; Menno T Kamminga, 'Due Diligence: A Useful Tool to Combat Violence Against Women?' in Ingrid Westendorp (ed), *The Women's Convention Turned 40* (Insentia 2020) (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?

One feature of neoliberalism is the incorporation of market rationality into law.[131] In this neoliberal model of responsibility, the state essentially mitigates risk and intervenes to protect if 'priorities' and 'resources' allow, and if this 'does not impose a disproportionate burden on the authorities'.[132] The state's responsibility becomes a risk assessment, a box-ticking exercise regarding non-state torture.[133] There will no violation of the Convention despite the harm that has occurred.[134] This divorces international responsibility from the harm caused and restricts it to the behaviour of a State. Due diligence does not bring about harm prevention but places a risk-assessment duty on the states, thus making it a tool to limit the state's responsibility. The most important aspect of this process, which gives it its neoliberal character, is *how* this responsibility is limited, and which yardsticks are used. Below, we will return to the *Opuz* judgment.

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of this positive obligation must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[135]

The required degree of due diligence expected from states in terms of non-state torture is predicated on two main principles: first, difficulties in policing; and second, refraining from placing a disproportionate burden on states. Either way, whether the Court uses a special due diligence or *Osman* due diligence (the discussions in the recent judgments about 'special diligence in the context of the authorities' positive obligations under the *Osman* test' *in Kurt v Austria, Volodina v Russia, Talpis v Italy* suggest that the Court may move towards a gender-friendly reading of *Osman*),[136] it is clearly limiting the protection to a set of state conduct and continues to rely on the doctrine of due diligence, which places importance on state conduct rather than the harm and the result. The Court is driven by a reluctance to impose a disproportionate burden on states, meaning that protection is defined in accordance with the resources of a state, not prevention of harm.

Interestingly, Lambooy argues that the doctrine of due diligence in international human rights law stems from corporate law. The concept first

abstract_id=1831045> accessed 22 November 2022; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021).

[131]Whyte (n 128).

[132]*Talpis* (n 122) para 122; *Kurt v Austria* (n 122) para164.

[133]Kamminga (n 130).

[134]*Opuz* (n 1) para 73.

[135]ibid para 129.

[136]*Kurt* (n 122) para 20; *Volodina* (n 113) para 92; *Talpis* (n 122) para 118.

emerged as a custom called *lex mercatoria*, to offer security to consumers, especially when national laws were not in harmony.[137] This approach was later implanted into international law, initially in terms of how to treat foreigners, aiming to bring about common standards of reasonable care.[138] Later, it became a risk-assessment instrument for corporations and it is now an established concept in corporate law whereby a company can escape liability if they can show that they performed due diligence despite the harm caused by them.[139] This model of responsibility created the bases of human rights obligations of the state in the private. Due diligence is a lower standard compared to 'respect duty' which arises when state actors violate the human rights of individuals. A duty to protect regarding the actions of non-state actors does not in fact aim for protection, contrary to what the term suggests; rather it is a list of conduct that, if exercised, means the state will escape responsibility. In order to discharge a state's duty to protect, it needs to show that it has done whatever it could to protect within reason and the resources available.[140] Due diligence is the doctrinal position, with regards to non-state torture, of the ECtHR, CEDAW Article 4(c) and the Istanbul Convention Article 5(2).[141] The extent of protection is defined according to the available resources of the state.

Another way in which torture and non-state torture are treated unequally can be found within the Court's higher standards for positive obligations compared to the negative duties placed upon states. International law is based on state accountability. It is a state-centric system that is predicated on the public–private dichotomy.[142] International human rights law does not have a horizontal effect, meaning that it is concerned with state-versus-individual relations. The doctrine of positive obligation is a well-established doctrine of the ECtHR, and offers a way to hold states accountable for the private acts of individuals under international human rights law.[143] While the Court examines the action of a state that may violate the Convention in terms of negative obligations, it also looks for inaction on the part of the state

[137]Tineke Lambooy, 'Corporate Due Diligence as a Tool to Respect Human Rights' (2010) 28(3) Netherlands Quarterly of Human Rights 404; Ralph G Steinhardt, 'Corporate Responsibility and the International Human Rights: The *New Lex Mercatoria*' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005).
[138]Monnheimer (n 130).
[139]ibid.
[140]Vladislava Stoyanova, 'Due Diligence Versus Positive Obligations' in Johanna Niemi, Lourdes Peroni and Vladsilava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020).
[141]The Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence Istanbul Convention Article 5(2) CEDAW Article 4(c).
[142]Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Laurens Lavrysen, *Human Rights in a Positive State Rethinking the Relationship Between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2017); Xenos (n 92).
[143]Mowbray (n 142); Lavrysen (n 142); Xenos (n 92). For early critiques of international law and violence against women, see Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (n 85).

regarding positive obligations. This raises the question as to whether these duties are treated equally under the Court's system. Relatively new research by Laurens Lavrysen examines the differences between negative and positive obligations within the methodology of the Court.[144] He argues that the Court prioritises negative over positive obligations.[145] His explanation is as follows:

> A first notable way in which the Court favours negative over positive obligations is by constructing the former type as archetypical human rights obligations and the latter as more exceptional ones.[146]

That the positive obligations were exceptional had also been observed by John G. Merrills in 1993, when the doctrine was relatively young.[147] The example he provides is from *Pretty v Ireland* and *Hristozov and Others v Bulgaria*, where the Court ruled regarding Article 3 that it 'may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction'.[148] This expression, as Lavrysen rightly highlights, suggests that negative obligations are principal and essential duties of the state. Although in terms of Article 3, due to its absolute character, positive obligations are stronger than the positive duties stemming from non-absolute articles, this does not change the fact that positive obligations are subordinate to negative obligations in the general methodology of the Court when compared to the negative version protected by the same article. The procedural/substantive distinction made by the Court further supports Lavrysen's argument. The Court labels breach of negative duties a substantive violation, whereas the breach of positive obligations is called a procedural violation.[149] This language is in line with the argument that negative duties are the principal ones, as the term 'substantive' suggests.

This approach to gender-based violence indicates that this jurisprudence is an expansion of the positive obligations doctrine. In addition to the *Osman* duty, Article 14's discrimination clause must also be breached, in order for an act of gender-based violence to violate the prohibition of torture. These developing doctrines of the Court are mixed altogether to establish the legal structure behind assessing gender-based violence as a form of non-state torture. Therefore, the legal structures that define state torture and non-state torture are different. The Court does not apply the same principles to state torture as it does to non-state torture. This difference

[144]Lavrysen (n 142) 214.
[145]ibid.
[146]ibid.
[147]John G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 102–03.
[148]*Pretty v the United Kingdom* App No 2346/02 (ECHR, 29 April 2002) para 50. More recently, see *Hristozov and Others v Bulgaria* App No 47039/11 and 358/12 (ECHR, 13 November 2012) para 111.
[149]Lavrysen (n 142).

is based on a patriarchal dichotomy, namely the public–private division. Although there are feminist elements in the development of this non-state torture jurisprudence, the non-state torture protection is an inferior version of state torture, which unfortunately adheres to the patriarchal structures that prioritise public over private. Although the expansion of the positive obligation doctrine has brought about some positive outcomes in terms of the protection of women, by enabling protection within the private sphere in international law, it is built on one of the oldest and most criticised patriarchal dichotomies: public versus private. This resonates with Heathcote's analysis: '[t]he types of feminist developments within law have instead mirrored the types of larger developments within the discipline of law itself'.[150]

Maintaining the public–private division brings about different treatment of these realms, which disadvantages harm occurring within the private realm. The Court applies the *Osman* test to distinguish what kind of state inaction is acceptable from that which is not. It is important to note that the *Osman* test is only applicable to positive duties, and was not created for cases of gender-based violence.[151] In conformance with the Court's autopoietic nature by which its doctrines are developed, gender-based violence as non-state torture jurisprudence has been created based on pre-existing doctrines of the Court. The Court autopoietically reproduced its structures. The *Osman* test, which, as stated above, is not originally a test designed for gender-based claims. The Court repeatedly highlighted that it is important to interpret the *Osman* test in relation to the context of domestic violence (*Talpis v Italy*, *Kurt v Austria*).[152] This has, however, been criticised by both scholars and some of the judges of the Court.[153] The Court had an opportunity to reflect on these critics in its recent *Kurt v Austria*[154] Grand Chamber judgment. This recent ruling reiterated the distinct nature of domestic violence, that prompt and special diligence is required and immediate, and that real risk should be understood in accordance with the Istanbul Convention. It underlines the fact that domestic violence risk assessment differs from the general *Osman*-type assessments, yet the Court applies the *Osman* test regardless. The Court uses the 'impossible burden or disproportionate burden' threshold to determine the scope of positive obligations.[155] It is important to note that Lavrysen's research found that the 'impossible

[150]Heathcote, 'On Feminist Legal Methodologies' (n 36) 13. See also, Heathcote, *Feminist Dialogues on International Law* (n 8).
[151]McQuigg (n 21).
[152]*Talpis* (n 122) *para* 122; *Kurt* (n 122) para 164.
[153]McQuigg (n 21); Franz Christian Ebert and Romina I Sijniensky, 'Preventing Violations of the Right to Life in the European and Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 Human Rights Law Review 343, 362.
[154]*Kurt* (n 122).
[155]Lavrysen (n 142) 226. See also, Monnheimer (n 130) 75.

burden' standard does not apply to negative obligations, thus is not a condition for the public torture.

As mentioned earlier, it is state inaction that brings about potential violation of its positive duties. The *Osman* test establishes the threshold for legally permissible inaction of the state in relation to domestic violence. It sets limits based on resources and priorities. In addition, a wider margin of appreciation is employed for positive obligations, which again demonstrates the disparity between the two obligations. This means that the state's responsibility towards individuals in terms of non-state torture is limited to its resources, whereas the state is fully responsible for torture in its traditional sense, regardless of its resources. The *Osman* test is a useful reminder of the type of state that is endorsed by the Court. In *Talpis v Italy*,[156] Judge Spano, the current president of the Court, began his dissenting opinion with these opening remarks:

> 1. The law has its limits, even human rights law … The judicial resolution of such disputes, arising as they do from tragic events, thus requires that a delicate balance be struck between these two conflicting interests based on the objective and dispassionate application of clear and foreseeable legal standards.[157]

The *Osman* test allows for a prioritising of the state's resources and can take into account the burden on police, despite the fact that some judges are trying to bring in a gender-sensitive reading of it.[158] McQuigg also questions its suitability in relation to gender-based violence against women.[159] One example is that the terminology of 'immediacy' in the *Osman* test does not work well in the context of domestic violence.[160]

This body of jurisprudence reveals the patriarchal limits of the protection. It also exposes the weaknesses of the protection provided against gender-based violence. This constant revelation triggered by various feminist sources creates an occasion for subversion or in Charlesworth's words 'a form of guerrilla warfare'.[161]

6. Imitation: Maintaining the Possibility of Feminist Methodology

Throughout, my analysis has shown how despite all the risks that the ECtHR's jurisprudence brings about, it ensures that the Court is not closed to feminist subversive reconstruction. The reasons for this are twofold. First the ECtHR's autopoietic law-making is based upon imitation of pre-existing legal

[156] *Talpis* (n 122).
[157] *Talpis* (n 122) (Spano dissenting opinion) para 1.
[158] *Talpis* (n 122) (Judge Pinto de Albuquerque and Judge Dedov's separate opinions) para 12.
[159] McQuigg (n 21).
[160] *Talpis* (n 122) (Judge Pinto de Albuquerque and Judge Dedov's separate opinions) para 12.
[161] Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 6) 4.

structures. When imitation is enforced by feminist demands, a possibility of subversion occurs. This simultaneously reveals the patriarchal structures of protection and keeps those very structures open to a future subversion. The dual task of critical feminist law-making is to trigger a reiteration of a structure in order to shatter its boundaries and expose its failures, maintaining the possibility of subversion.

As illustrated above, non-state torture jurisprudence constantly exposes the patriarchal elements of the repeated structures. This action of bringing the limits and exclusionary character of an established lexicon happens when those excluded from the rubric of the human rights protection, in this case, victims of non-state torture, speak the language of rights, despite being excluded from the schema of rights that govern who qualifies to be protected from torture.[162] I argue that, through this practice, subversive reconstruction becomes a possibility. Following Butler's insight, this method could also be called the 'return of the excluded'.[163] A repetition triggered by a feminist demand enables the excluded to interfere in the law-making process and maintain their status of possibility.

Second, there is an intersection reached by the feminist theories of law-making, all of which trigger the Court to imitate its already existing structures to recognise new feminist demands or to reproduce a judgment. When an imitation happens, an occasion for subversive reconstruction emerges. The legal protection framework can be liberated from its historically delimited patriarchal structures by subjecting them to endless repetition. Following this logic, the Court's fashion of autopoietic reiteration is the first and necessary step towards feminist law-making.

This autopoietic reiteration can be triggered by a feminist demand regardless of its feminist ideology. There is not a control over the feminist demands that are taken to the Court. The feminist interaction with the Court cannot be governed by a single feminist theory of law-making.[164] However, this uncontrollability combined with autopoietic law-making unexpectedly turns the Court into a site of possibility for critical feminist methodology. Demands from various feminist approaches flowing into the Court turn it into a junction of feminist demands that keep exposing the limits of the patriarchal structures through imitation and keep the protection open for intervention. These demands create instability in the patriarchal structures by constantly triggering imitation, and this leads to an overlap where various feminist approaches of law-making eventually contribute to subversive feminist strategy. An improvised, spontaneous coalition across feminist demands could make a critical feminist intervention in international law a possibility.

[162]Judith Butler, 'Restaging the Universal' in Judith Butler, Ernesto Laclau and Slavoj Zizek (eds), *Contingency, Hegemony, Universality* (Verso 2000).
[163]ibid 11.
[164]O'Rourke (n 51).

7. Conclusion

Feminist demands arising from various understandings of feminism stream into the ECtHR. Even the demands that solely want to assimilate into the Court's structures, in the end carry the potential to be subversive by triggering a repetition, in the service of producing a new judgment. Paradoxically, mainstreaming feminist ideas into the legal realm could maintain possibility of critical feminist approaches to law. Conflict between methodologies is one of the reasons that mainstream feminism and critical legal feminism are in tension with one another.

Imitation is given a role in critical feminist law-making via the process of exposing the limits of patriarchal legal protection and then reconstructing the legal protection subversively by way of endless imitation.[165] Feminist demands, whether critical or not, compel the Court's autopoietic logic to imitate its previous structures in order to produce a new judgment. An imitative space occurs where the historic chain of repetition could be subversively broken. For this to be a possibility an imitative law-making should be started by a demand. An example of imitative law-making, as discussed in this article, is the recognition of gender-based violence as a form of torture by the ECtHR.[166] Although this body of jurisprudence can lead to a number of pitfalls, it also exposes patriarchal limits and weaknesses of the protection in question, in this case, the legal protection afforded to gender-based violence. For example, it replaces feminist methodology with the Court's autopoietic logic. The separation of feminist demands from feminist methodology obscures the protection by tolerating patriarchal dichotomies and structures. It degrades gender-based violence, to a procedural legal phenomenon. The protection is reduced to a due-diligence, risk-assessment process that is limited to the resources of states. The disparity between the protection afforded to torture and non-state torture brings about trivialisation of gender-based violence. Despite these downfalls, ironically an imitative space also emerges during the process of this law-making. This space makes it possible for critical feminist approaches to law to intervene through the act of imitation.

This article has argued that the act of imitation embedded within autopoietic law-making of the Court, unexpectedly, puts mainstreaming in a coalition with critical feminist law-making methodology. When a feminist demand is mainstreamed into the Court, it enters into a process of autopoietic imitation, which may present an occasion for subversive reconstruction. The repetition process keeps those very failures of the protection in a constant cycle of redefinition. The Court keeps changing the threshold of what

[165]See n 38.
[166]Natalie Alkiviadou and Andrea Manoli, 'The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation' (2021) 11(1) Goettingen Journal of International Law 191.

amounts to torture and ill-treatment and expanding obligations in the private sphere. The patriarchal binaries of the Convention are destabilised by various feminist demands. This never-ending reiteration maintains that the Court is not closed to future articulations, thereby providing a convenient occasion for subversive reconstruction to emerge at any point in the imitation process. While various feminist demands, acting spontaneously as a coalition, oblige the Court to imitate its previous protection structures, in each imitation an occasion of subversion emerges. The improvised coalition takes place in the technique of law-making. This means that critical feminist ideologies might seem invisible, but they are present as a possibility within these law-making processes. Thus, critical feminist law-making may emerge and shine subversively from any repetition triggered by a new feminist demand.

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